

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v TerraCom Limited

[2025] FCA 726

File number(s): NSD 176 of 2023

Judgment of: **JACKMAN J**

Date of judgment: 4 July 2025

Catchwords: **CORPORATIONS** – whether defendants contravened s 1309(2) of the *Corporations Act 2001* (Cth) (the Act) – whether false or misleading information was given to the ASX – where alleged that ASX announcements gave rise to four ‘exoneration representations’ and three ‘no customer complaint’ representations – where each of ‘exoneration representations’ not found – where two ‘no customer complaint representations’ found – whether the two established representations were false or misleading – where one outstanding test result deemed immaterial – where enquiry made by customer does not amount to a ‘complaint’ – neither representation was false or misleading – whether the two established representations were false or misleading by way of omissions – where matters raised by customers (as defined) were expressly included in announcement – held only two alleged representations established and neither false or misleading

CORPORATIONS – whether defendants contravened s 180(1) of the Act – whether directors’ conduct constituted alleged contravention of s 1309(2) must fail – whether directors failed to take certain steps, namely making certain further enquiries following the PwC Report and ALS Announcements – where witness’s account of ALS and ACIRL’s communication with TerraCom is limited – where unproven on balance of probabilities that TerraCom did not make enquiries of ALS – where TerraCom’s decision not to allow investigator to speak with external party was understandable in circumstances – where non-executive chairman’s admission was incomplete as to steps taken – where evidence of communication between TerraCom and ALS following ALS Announcements – where TerraCom’s former general manager declined to participate in investigation – where submitted that CEO and CFO should themselves have made enquiries – allegation that further enquiries should have been made must be rejected – whether non-executive chairman’s failure to read

investigation report was a contravention of s 180(1) – duty did not arise in the circumstances – case of contravention of s 180(1) dismissed

Legislation:	<i>Corporations Act 2001</i> (Cth) <i>Federal Court Rules 2011</i> (Cth)
Cases cited:	<i>Anderson v Canaccord Genuity Financial Ltd</i> [2023] NSWCA 294; (2023) 113 NSWLR 151 <i>Australian Securities and Investments Commission v GetSwift Ltd (Liability Hearing)</i> [2021] FCA 1384 <i>Australian Securities and Investments Commission v Holista Colltech Ltd</i> [2024] FCA 244 <i>Australian Securities and Investments Commission v iSignthis Ltd</i> [2024] FCA 669 <i>Australian Securities and Investments Commission v Noumi Limited (No 4)</i> [2024] FCA 1192 <i>Equity 8 Pty Ltd v Shaw Stockbroking Ltd</i> [2007] NSWSC 413 <i>Everest Capital Ltd v Trust Company Ltd</i> [2010] NSWSC 231; (2010) 77 ASCR 371 <i>International Harvester Company of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Company</i> (1958) 100 CLR 644
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	129
Date of last submission/s:	26 June 2025
Date of hearing:	16 June – 26 June 2025
Counsel for Plaintiff:	Mr M Borsky KC with Ms N Moncrief and Mr R Kruse
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Counsel for Third and Fourth Defendants: Mr J Giles SC with Mr C Mitchell

Solicitors for Third and Fourth Defendants: Horton Rhodes Lawyers

Counsel for Fifth Defendant: Mr D Studdy SC with Ms A Smith and Ms S Bradbury

Solicitors for Fifth Defendant: Webb Henderson

Counsel for ALS Limited: Mr H Atkin

Solicitors for ALS Limited: Baker McKenzie

ORDERS

NSD 176 of 2023

BETWEEN: **AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION**
Plaintiff

AND: **TERRACOM LIMITED ACN 143 533 537**
First Defendant

DANIEL MCCARTHY
Second Defendant

NATHAN REECE TIMOTHY BOOM (and others named in the
Schedule)
Third Defendant

ORDER MADE BY: JACKMAN J

DATE OF ORDER: 4 JULY 2025

THE COURT ORDERS THAT:

1. The Amended Originating Process as against the second to fifth defendants be dismissed.
2. The second to fifth defendants file and serve any affidavits and written submissions in relation to costs by 18 July 2025.
3. The applicant file and serve any affidavits and written submissions in relation to costs by 1 August 2025.
4. The second to fifth defendants file and serve any affidavits and written submissions in reply on the question of costs by 8 August 2025.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

JACKMAN J:

Introduction

1 In these proceedings, the plaintiff (**ASIC**) and the first defendant, TerraCom Ltd (**TerraCom**), have agreed a Statement of Agreed Facts and Admissions as between themselves, and have proposed orders for a declaration and pecuniary penalty for a contravention by TerraCom of s 1317AC(1) of the *Corporations Act 2001* (Cth) (the **Act**). On 2 June 2025, I made an order pursuant to r 30.01 of the *Federal Court Rules 2011* (Cth) that ASIC's case against TerraCom be heard separately from and subsequent to its case against the second to fifth defendants. At the urging of the second to fifth defendants, I have not read the Statement of Agreed Facts and Admissions.

2 By the Amended Originating Process (**AOP**) and the Amended Statement of Claim (**ASOC**), ASIC alleges that the second to fifth defendants (being Messrs Daniel McCarthy, Nathan Boom, Craig Ransley and Wallace King AO) each contravened:

- (a) section 1309(2) of the Act by authorising the giving of information to the Australian Securities Exchange (**ASX**) in the form of market announcements relating to certain allegations made by Mr Williams, and the processes for certification and sale of TerraCom's coal, that were false or misleading; and
- (b) section 180 of the Act by failing to act with the requisite degree of care and diligence in the circumstances of TerraCom's investigation of the allegations made by Mr Williams, and the associated release or publication of the allegedly misleading announcements.

3 TerraCom is a public company listed on the ASX, which produces thermal coal. At the relevant times:

- (a) Mr McCarthy was TerraCom's Chief Executive Officer and a director of TerraCom's wholly owned subsidiary, Orion Mining Pty Ltd (**Orion**);
- (b) Mr Boom was TerraCom's Chief Financial Officer and a director of Orion but not a director of TerraCom;
- (c) Mr Ransley was an adviser to TerraCom's board and, from 21 February 2020, a director and Deputy Chairman; and

(d) Mr King was a director and Chairman of TerraCom’s board.

4 Orion owns and operates the Blair Athol coal mine in Queensland. Orion acquired the Blair Athol mine on 31 May 2017 (Mr King’s affidavit of 19 June 2025 at [20]). At the relevant times, Orion sold coal from that mine to Noble Resources International Pte Ltd (**Noble**) and others. For these sales, coal from the Blair Athol mine was carried from the mine by train to a port in Queensland and loaded onto ships. Noble in turn sold coal from the Blair Athol mine to its customers.

5 Coal quality is measured by a number of parameters, including net calorific value (**NCV**), which measures the energy (in kcal/kg) released as heat when the coal undergoes combustion. Another parameter which affects NCV is “total moisture”, which measures the total amount of moisture (expressed as a percentage) present in the coal at the time of testing. During the course of TerraCom’s coal production at Blair Athol, Messrs McCarthy, Ransley, King and Boom were aware from the Business Plan dated June 2019 for FY 2020 – FY 2022 (CB3/160–164) that the quality of the coal mined was generally decreasing, with energy levels declining (to the 5,400 NCV kcal/kg range) and total moisture content increasing as certain coal seams were exhausted and new seams were mined.

6 Agreements for the sale and purchase of TerraCom’s coal included various provisions addressing coal quality, such as that:

- (a) coal supplied by TerraCom must meet specified minimum quality standards;
- (b) the price for the coal payable under the contract is calculated referable to an identified formula, which included the NCV;
- (c) an independent laboratory must sample the coal at the loading port and analyse that sample (referred to as the outbound testing) in accordance with a specified set of standards;
- (d) either the independent laboratory or TerraCom must retain, or cause to be retained, an “umpire sample” to be made available for a specific period for testing should the end customer query the quality of the coal;
- (e) the quality of coal provided under the contract must be as determined by a certificate issued by the independent laboratory based on the outbound testing (**Certificate of Analysis**); and

(f) in the event that the measured NCV of the coal does not meet the NCV specified in the contract, either a specified pricing reduction is applied, or the customer is entitled to reject the shipment of coal.

7 In the period from May 2018 to January 2020, the independent laboratory appointed in relation to the majority of shipments of coal from Blair Athol was ALS Limited (or its subsidiary ACIRL Quality Testing Services Pty Ltd (**ACIRL**)) (together, **ALS**).

8 During the period from May 2018 to January 2020, in relation to shipments of TerraCom’s coal:

- (a) ALS tested samples of coal taken at the loading port;
- (b) ALS communicated with TerraCom and provided a preliminary “Shipping Analysis Report” which showed the results of ALS’s testing of the quality of coal (including NCV and moisture) for a particular shipment;
- (c) ALS subsequently provided a final Certificate of Analysis showing the results of ALS’s testing of coal quality using samples obtained before loading onto the vessel; and
- (d) TerraCom issued an invoice based upon the Certificate of Analysis calculating the amount payable for the coal in accordance with the applicable formula in the relevant coal sale and purchase agreement.

9 As Mr King explained in terms of his own understanding, coal can be tested at various different points in a stockpile, or at different points in time, with varying results in terms of the purity, NCV and total moisture content of the coal. Thus, Mr King understood that coal was tested on more than one occasion between the point it was extracted and the point it was delivered to a customer, and the results between those different tests would differ (Mr King’s affidavit of 19 June 2025 at [22]). Mr King understood that if a particular stockpile of coal did not meet a customer’s requirements, various options were available to TerraCom to improve the quality of the coal, such as blending or substituting the coal, allowing the coal to dry out or processing the coal through a wash site at the mine (Mr King’s affidavit of 19 June 2025 at [23]). While that evidence does not constitute expert opinion evidence, ASIC has not advanced any competing explanation for why multiple testing would be undertaken. It seems to me that one reason that multiple testing is undertaken is because the characteristics of coal can change in the course of normal processing, transportation and storage. In addition, it appears that the

preliminary testing when the coal arrives at the port (which appears in the Shipping Analysis Report) is relatively inaccurate given the time and cost of analysis (Exhibit 4, tab 18).

Credibility of Witnesses

- 10 Three witnesses were cross-examined, namely Mr Michael Pearson of ALS, Mr Philip Forrest AM of TerraCom and Mr King. All three gave credible and reliable testimony, and I accept each of them as a witness of credit. To the extent that there are divergences or inconsistencies between the evidence of Mr Forrest and Mr King, I deal with those issues below.

Salient Facts

- 11 At the relevant times until July 2019, Mr Garmeister, TerraCom's General Manager Marketing, was responsible for sales, marketing and logistics management, and was the point of contact between TerraCom and ALS in relation to the testing of TerraCom's coal. On about 9 July 2019, Mr Williams was employed as TerraCom's General Manager Commercial, replacing Mr Garmeister and taking on his responsibilities (CB3/179).

- 12 On about 7 August 2019, Mr Williams liaised with ALS in relation to a shipment of coal to be loaded onto the vessel "MV Wooyang Banders". The preliminary Shipping Analysis Report (CB3/183), and the Certificate of Analysis (CB3/184) both showed the NCV as 5,360 kcal/kg, and both were dated 7 August 2019. The invoice for the shipment (CB3/186) showed the same figure for NCV and was dated 8 August 2019. On 9 August 2019, Mr Boom sent an email to Mr Williams and others, copied to Mr McCarthy, attaching the Certificate of Analysis for the Wooyang Banders shipment together with other certificates for that shipment, and said (CB3/193):

To say I was stunned when I opened up the certificates would be an understatement ...

Can we ensure we have a discussion on this on Monday's call with a full explanation of what actually happened to this cargo.

- 13 On 13 August 2019, Mr McCarthy met with Mr Williams, and that afternoon sent Mr Williams a letter confirming that TerraCom was terminating Mr Williams' employment on notice, referring to the clause in his contract of employment of 4 July 2019 which deals with termination during the probation period (CB3/198–199).
- 14 On about 14 August 2019, TerraCom engaged the law firm, Ashurst, to lead an investigation into allegations that had been made by Mr Williams about TerraCom's coal certification process. The formal retainer is dated 22 August 2019 (Exhibit PWF-1 p 154).

PricewaterhouseCoopers (**PwC**) was in turn engaged by Ashurst to carry out the independent investigation. Mr King instigated that investigation (T166.9–12). On about 13 and 14 August 2019, Mr King said to Mr Ransley that the investigation should be managed by the Chair of the Audit Committee and non-executive director at that time, Mr Forrest, and that Mr McCarthy and Mr Boom needed to be excluded from managing and discussing the investigation (Mr King’s affidavit of 19 June 2025 at [30], [31] and [34]). Mr King regarded Mr Forrest, who was independent of management, as the most appropriate person to oversee an independent investigation in light of his qualifications, experience and good standing in the industry (at [31]). As Mr King said in cross-examination, he appointed Mr Forrest with the authority and accountability to produce the PwC Report (T168.23–24, 183.36–39). While Mr Forrest would manage the PwC investigation on behalf of TerraCom, Mr Ransley would coordinate access to information requested by PwC (Mr King’s affidavit of 19 June 2025 at [34(b)]). On about 14 August 2019, Mr Forrest told Mr King that he was comfortable in managing and directing the PwC investigation on behalf of TerraCom, with Mr Ransley coordinating access to the information requested by PwC (Mr King’s affidavit of 19 June 2025 at [35]; Mr Forrest’s affidavit of 24 June 2025 at [17]). While Mr Forrest’s evidence did not deal with the separation in functions as between himself and Mr Ransley (T155.28–30), I accept Mr King’s evidence in that regard.

- 15 On 29 August 2019, Ashurst wrote a memorandum entitled “Project Rex – Brief to PwC”, which set out the basis on which Ashurst engaged PwC to conduct the investigation into Mr Williams’ allegations (CB3/215). Under the heading “Concerns Raised”, the Ashurst memorandum said the following (at [2.1]):

An individual has raised three key concerns regarding TerraCom’s commercial dealings. These are outlined in further detail below, based on the limited information available.

Portions of the memorandum have been redacted, but the following appears under the subheading “Concern 3: Fraudulent issuance of invoices to customers”:

- 2.6 In correspondence with Ashurst, the individual has raised a further concern regarding the issuance of invoices to TerraCom’s customers. The individual has stated the following:
- *“I have evidence that... a significant number of shipment qualities were altered to both increase the invoice price and avoid shipment rejection to South Korean government owned companies. I have accumulated and documented evidence that the value of invoices fraudulently issued to customers has a combined value much greater than US\$100 Million”.*

- *“Having added up the value of the fraud to key customers I now have documentation that shows TerraCom have issued over US\$100 Million of invoices to customers based on fraudulent certificates of analysis. The real value however may well be much larger given I am yet to review all shipments. Of all shipments to JERA (TerraCom’s most important customer) that I have reviewed, everyone [sic] has been based on a fraudulent certificate of analysis and all but one was [sic] rejectable under the terms of the sales agreement with JERA.”*
- *“The same is evidence in all shipments (for which complete data exists) made to South Korea where TerraCom has been the sole shipper”.*
- *“[It] is also evident when Noble have arranged for blending of Blair Athol coal with coal from third parties. Some excel files appear to document correspondence between Noble and TerraCom about perpetrating such fraud and other excel files document the strategy and methodology TerraCom has used to determine the level of fraud it will commit.”*

2.7 The individual provided Mr Ransley with two hard copy bundles of documents in relation to these concerns – [portion redacted] and the other relating to JERA. A scanned copy of these bundles of documents can be found at **Annexure 2** and **Annexure 3** respectively.

2.8 Each bundle contains the following documents:

- an extract from the relevant contract setting out the minimum net calorific value for coal (in the case of Noble, 5,500 kcal/kg and, in the case of JERA, 5,450 kcal/kg);
- a shipping analysis report, which records the net calorific value for the coal (in the case of Noble, 5,451 kcal/kg and, in the case of JERA, 5,364 kcal/kg); and
- a copy of the invoice and certificate of analysis, which records the net calorific value that the customer was ultimately charged for (in the case of Noble, 5,526 kcal/kg and, in the case of JERA, 5,468 kcal/kg).

2.9 In addition to the bundle of documents provided to Mr Ransley, the individual has referred in correspondence to the following other documents, which we do not yet have copies of:

- “email communication [that] key TerraCom employees have engaged in”;
- “an integrity pact [which formed] part of tender submissions made to South Korean government owned power generators both TerraCom and Noble submitted”;
- “excel files [which] appear to document correspondence between Noble and TerraCom about perpetrating such fraud”;
- “other excel files [which] document the strategy and methodology TerraCom has used to determine the level of fraud it will commit”; and
- additional “documented evidence that the value of invoices fraudulently issued to customers has a combined value much greater than US\$100,000,000”.

2.10 To date, the individual who raised these concerns has not accepted Ashurst's invitation to participate in an interview to provide further information or materials regarding the concerns.

16 Annexure 3 comprised a bundle of documents relating to a shipment of coal to JERA Trading Pte Ltd (**JERA**) in July 2018 on the vessel "MV Medi Matsuura" for 61,383 metric tonnes of coal for a total invoice amount of US\$6,195,386.19 (CB4/218). The commercial invoice is dated 10 July 2018 and records the NCV as 5,468 kcal/kg, beside which is the handwritten annotation "(FRAUD)", and on the same page are the following handwritten annotations:

True = 5364
contract = 5450 MIN

On the Certificate of Sampling and Analysis dated 9 July 2018 the figure for NCV of 5468 kcal/kg has been highlighted and circled, beside which there is a handwritten annotation "vs 5364". The Shipping Analysis Report dated 9 July 2018 records NCV as 5364 kcal/kg, which has been highlighted. ASIC submits that the handwriting on the document is that of Mr Williams, and I accept that that is more likely than not to be the case. The handwriting was admitted as evidence only of the fact that those representations were made and opinions expressed.

17 On 3 September 2019, Mr Williams commenced legal proceedings against TerraCom in the Fair Work Commission (CB4/221). Mr Williams made a series of allegations to the following effect, and I emphasise that ASIC does not seek to establish in these proceedings that any of these allegations are true:

- (a) Mr Williams claimed that he was advised by his predecessor (Mr Garmeister) at TerraCom that TerraCom had Certificates of Analysis fraudulently altered by the company that produces them;
- (b) Mr Williams claimed to have told Mr McCarthy in his first three weeks of employment of the fraudulent alteration of Certificates of Analysis to inflate invoices or deprive customers of other rights they have under sales contracts, and that Mr McCarthy responded by saying that Mr Williams' predecessor had been doing it and Mr Williams needed to do it also;
- (c) Mr Williams claimed to have said that the practice went on for so long without being discovered because TerraCom's sales agent (Noble) employed a sub-agent in South Korea who paid bribes to customers not to take action on such practices;

- (d) Mr Williams claimed that Mr McCarthy instructed him that he needed to continue these practices and not be a “champion of good”, and claims that Mr McCarthy reminded him that he was on his probationary period and he could be terminated unless he continued the practice of having Certificates of Analysis fraudulently altered;
- (e) Mr Williams claimed that on 1 August 2019 at the W Hotel in Brisbane, Mr McCarthy advised him that the CEO of TerraCom’s marketing agent had requested that Mr Williams’ employment at TerraCom be short lived because of the positions he had taken to date, and that Mr Williams needed to continue past practices;
- (f) Mr Williams referred to his conduct in overseeing the issuing of correct Certificates of Analysis on 8 August 2019 for the Wooyang Banders shipment. He referred to TerraCom’s customer being invoiced based on the correct Certificates of Analysis, and claimed that in the following days, Mr McCarthy and Mr Boom were agitated about the small penalty the shipment incurred, which Mr Williams referred to as irrational because Mr McCarthy, he claimed, had given instructions by email during the preparation of the shipment that the coal quality was “too good” and that “ordinary product” should be added;
- (g) Mr Williams referred to a conversation on 13 August 2019, when he was dismissed from TerraCom, and claimed that he responded by saying that his termination was in relation to TerraCom’s “dodgy practices” and that he had proof of TerraCom’s “illegal practices”. He claimed that when Mr McCarthy and Mr Boom demanded to see inside his bag, Mr Williams refused and said that he had “evidence of their crimes”; and
- (h) Mr Williams claimed to have added up the cost of “fraudulently issued invoices by TerraCom and it [was] over US\$129 Million”, and claimed that “this fraud [had] occurred for every single shipment [he had] seen where a complete shipping file [existed] for such shipment”.

18 On 6 September 2019, Ashurst sent to PwC an extract of a further communication recently received from Mr Williams (CB4/227–228). The extract repeated much of what I have referred to in the previous paragraph as Mr Williams’ allegations made in his application to the Fair Work Commission.

19 During the course of their investigation, PwC met with Mr Ransley (on 9 September 2019: CB4/232–233), Mr McCarthy (on 11 September 2019 and 15 November 2019: CB4/234–235 and 301), and Mr Boom (on 12 September 2019 and 15 November 2019: CB4/237 and 302).

In the meeting with Mr McCarthy on 15 November 2019, Mr McCarthy was taken by way of example to a shipment of coal on a vessel called “MV The Xin Run” in May 2019, and the file note of the meeting includes the following comment:

When run through the Xin Run example he had no reason as to why the calorific value would change other than generic answers e.g. a bad test, poor sampling methods, dumb people

20 In the meeting with Mr Boom on 15 November 2019, Mr Boom is recorded as saying that he had limited knowledge of how the certification process works, that the best person to speak to would be Mr McCarthy, that he was not involved in the testing process, and that coal could have been re-tested if it was not what TerraCom expected.

21 At around the time of board meetings on 24 September 2019 and 11 October 2019, Mr Forrest gave informal updates on the progress of the PwC investigation, saying that the investigation was progressing and nothing of substance had been found to date to indicate any wrongdoing (Mr King’s affidavit of 19 June 2025 at [46]–[47]). At the board meeting on 19 November 2019, Mr McCarthy and Mr Boom were asked to leave the room so that Mr Ransley could update the board on the PwC investigation, and he reported that nothing of substance had been found by PwC to indicate any wrongdoing (Mr King’s affidavit of 19 June 2025 at [50]). Mr King had a number of telephone calls with Mr Forrest during this period, in which Mr Forrest updated Mr King on the status of the PwC investigation and said that PwC had not identified any evidence of wrongdoing to date (Mr King’s affidavit of 19 June 2025 at [51]). Mr King was satisfied that Mr Forrest was appropriately managing and directing the PwC investigation (Mr King’s affidavit of 19 June 2025 at [53]). On 9 December 2019, Mr King received an email from Mr Ransley saying that PwC’s report would be finalised imminently and that it made no findings of wrongdoing by Mr McCarthy or Mr Boom (Exhibit 3; Mr King’s affidavit of 19 June 2025 at [56]).

22 On 19 November 2019, Ashurst sent an email to PwC saying that, as requested, Ashurst had sought to arrange an interview with Mr Garmeister to discuss the coal quality testing process undertaken by ALS (CB4/303). The email refers to Mr Garmeister saying that he was aware of the nature of the allegations made by Mr Williams, which he denied, and said that he was not concerned about anything that happened during his employment at TerraCom. The email then refers to Mr Garmeister indicating that he was not willing to participate in the investigation as he was no longer employed by TerraCom and did not want to get caught up in the investigation and the allegations made by Mr Williams. Mr Garmeister declined an offer by Ashurst to pay

his reasonable legal fees up to a specified limit and indicated that he did not wish to seek any legal advice. The email also refers to PwC having asked whether an interview about the coal quality testing process could be conducted directly with someone from ALS and then states that “TerraCom is not comfortable with you speaking to any external parties unrelated to the company, given the sensitive nature of the allegations made” by Mr Williams. The email does not state who it was at TerraCom who made that statement. Mr King did not know the request by PwC for an interview had been made, or that someone at TerraCom had said that he or she was not comfortable with PwC speaking to any external parties (T182.5–13, 183.22–26). Mr Forrest did not know about the request by PwC (T156.29–34). ASIC submits, and I accept, that it is more likely than not that it was Mr Ransley on behalf of TerraCom who said that TerraCom was not comfortable with PwC speaking to any external parties, given that he was the only other person at TerraCom authorised to be involved in the conduct of the investigation. However, it should be noted that as at 19 November 2019, there had been no public disclosure of Mr Williams’ allegations, which were appropriately described as “sensitive”.

- 23 On 3 December 2019, Mr Williams commenced proceedings in the Federal Circuit Court against Mr King and other directors of TerraCom (CB5/328). Mr Williams’ application repeated his allegations concerning the alteration of Certificates of Analysis and included a table referring to 14 shipments of coal produced and sold by TerraCom or Orion (CB5/329).
- 24 On about 16 December 2019, PwC issued its report entitled “Project Rex Report” (CB5/334) (the **PwC Report**). The evidence indicates that by 20 December 2019, the PwC Report had been received by each of Mr McCarthy, Mr Boom and Mr Ransley (CB5/332, 374).
- 25 The Executive Summary of the PwC Report (at [1.1]) summarises the concerns raised by Mr Williams to TerraCom as including the following:
- 3(a) TerraCom colluded with a third-party testing provider to overstate the quality of coal (specifically Net Calorific Value (NCV)) recorded on Commercial Invoices and Certificates of Analysis relating to a significant number of coal shipments.
 - 3(b) Mr McCarthy was aware of the overstatement of coal quality and had instructed the former employee to continue this practice.
 - 3(c) The fraudulent overstatement of coal quality was partly concealed through the use of a sub-agent by Noble for the payment of bribes to conceal the purported overstatement of which TerraCom was aware.

The PwC Report then refers to PwC's scope as involving information gathering meetings with TerraCom in relation to relevant business processes, review of a sample of business records and targeted searches of email correspondence.

26 The Executive Summary of the PwC Report refers to Concern 3(a) as relating to Mr Williams' allegation that details relating to coal quality were fraudulently "altered to both increase the invoice price and avoid shipment rejection" (at [1.2.3]), with reference to documents provided by Mr Williams relating to two coal shipments which showed differences in several coal quality measures including NCV. The PwC Report then states (at [1.2.3]) that documents relating to 10 other shipments with similar inconsistencies were identified in email data. PwC state that they were advised by TerraCom that coal sampling measurements at different testing points can vary, but PwC then note that no further information was obtained regarding why there were differences in NCV and other coal quality measures between documents dated the same day and issued, in some cases, a few hours apart. Reference was made to Ashurst having invited Mr Garmeister to participate in a meeting with PwC which he declined, and said that "Further consideration could be given to inviting a representative from ALS who is responsible for testing TerraCom coal." PwC referred to the following email correspondence relating to the testing of TerraCom coal by ALS, as having been identified through searches of email data:

- An email chain in July 2018 in which Ms Kerie Miller (Ms Miller, ALS), writing to Mr Tony Garmeister (Mr Garmeister, TerraCom), states "*If they ask for Umpire – this will be interesting as your coal at 17.1% TM and the ash reported does not give that NCV [...] Fingers crossed no umpire sample is requested*". Mr Garmeister replies, "*The reality is that the only one that can ask for some umpire is Noble and they are fully aware of the ins and outs of this one.*"
- In an email in July 2018 regarding the Medi Matsuura, Ms Miller states "*I have been going thru the moisture and ash checks and have had CV checked at Mackay and Newcastle and these are the best results I can get for this cargo [...] Give me a call please when you are free*". The Shipping Analysis Report attached to this email states an NCV of 5,364 kcal/kg – a further report sent by Ms Miller less than two hours later for the same shipment states an NCV 5,468 kcal/kg.

The PwC Report refers to the total invoiced value of the 12 shipments for which inconsistencies had been identified as being \$81,181,002, and that recalculation of those invoice values based on earlier Shipping Analysis Reports gave a total value of \$80,029,593, indicating that the changes in NCV gave rise to an increase in invoice value of \$1,151,409 over the 12 shipments. The PwC Report also refers to four shipments totalling \$27,020,005 as having been liable for

rejection by the customer under their contract terms, had they been certified at the lower NCV levels shown on Shipping Analysis Reports.

27 The Executive Summary refers to Concerns 3(b) and 3(c) (at [1.2.4]), saying that Mr Williams did not provide documents to support those concerns and no further information was identified during work performed to date to support the concerns. PwC state that although some correspondence referred to the use of sub-agents in South Korea by Noble, the correspondence reviewed did not provide any indication or awareness of any bribery or corruption on the part of such sub-agents.

28 Section 2 of the PwC Report sets out the Scope and Approach adopted by PwC. PwC refer to the communications and documents provided by Mr Williams, and refer to the information gathering meetings conducted by PwC with Mr Ransley, Mr McCarthy and Mr Boom. Appendix 1 to the PwC Report is a full list of documents requested by PwC and received from TerraCom. The PwC Report states that email data was obtained by Ashurst from TerraCom's IT provider with respect to Messrs McCarthy, Boom, Williams and Garmeister for the period 1 January 2018 to 30 September 2019. Items from the email data which were responsive to targeted search terms developed by PwC in conjunction with Ashurst were provided to PwC for review. Under the heading "Scope limitations" (at [2.3]), PwC state that they conducted analysis of shipments in relation to Concern 3(a), that analysis being limited to shipments for which sufficient information and documents were available. PwC comment that they have not determined whether the limited number of shipments analysed are representative of all shipments during the period. The PwC Report states that during the engagement, PwC did not have access to Mr Williams, Mr Garmeister, TerraCom employees other than those specifically referred to, ALS representatives, and a number of other potential sources of information.

29 Section 3 of the PwC Report is headed "Findings". Section [3.1] deals with "Key processes and contextual information", beginning with the relationship between TerraCom and Noble and the coal sales and shipping processes (at [3.1.1]). The PwC Report refers to five testing events, described as follows in sections [3.1.3] and [3.1.4]:

- *Testing Event 1:* TerraCom's knowledge of its own product quality, drawn from on-site laboratory testing, informs its decision-making with respect to which tenders can be bid for.
- ...
- *Testing Event 2:* Prior to loading onto a train at the mine site, coal quality is tested by third-party service provider ACIRL Quality Testing Services Pty Ltd

(ALS). Based on this testing, further processing may be carried out to render the coal suitable for the customer specification.

...

- *Testing Event 3:* ALS take a further preliminary sample of the coal for testing on its arrival at port (the ‘inbound sample’). During the time the coal spends at the port waiting to be loaded, its measured quality characteristics may change (for example, by being sprayed with water or by virtue of being exposed to the atmosphere for an extended period).
- *Testing Event 4:* Prior to loading onto the nominated vessel, coal quality is tested again by ALS (the ‘outbound sample’). On the basis of this sample a Certificate of Analysis is issued by ALS to TerraCom which includes statements about various quality measures (including NCV). Adjustments to the coal price are made on the basis of the actual quality delivered via a mechanism set out in the Coal Supply Agreement. On some occasions at this point an ‘umpire sample’ may be taken which is retained in sealed containers if required for later testing.

...

- *Testing Event 5:* When the coal is unloaded at the receiving port, the customer may also conduct their own testing in order to assure that the quality of the coal delivered meets the specification agreed. If the customer’s testing demonstrates that the coal supplied is below and agreed threshold for acceptance, the customer may choose to reject the shipment.

Testing Event 3 corresponds to the preliminary Shipping Analysis Report, whereas Testing Event 4 corresponds to the final Certificate of Analysis.

30 Section [3.4] of the PwC Report is headed “Statements made by TerraCom regarding the quality of coal”. PwC refer to two examples in documents provided by Mr Williams concerning a shipment on a vessel known as “MV Bargara” and another on a vessel known as “Medi Matsuura”, in relation to both of which Mr Williams alleged that differences between the Shipping Analysis Report and the Certificate of Analysis were attributable to the fraudulent alteration of the Certificate of Analysis by ALS at TerraCom’s request. The PwC Report then says that PwC sought to identify whether the differences highlighted by Mr Williams in those two examples were present with respect to other shipments. PwC state that they reviewed more than 4,500 items of email correspondence and documents, containing references to at least 38 shipments, but Shipping Analysis Reports were identified for only 14 of those. PwC state that their further analysis was limited to those 14 shipments, and PwC have not determined whether these shipments are representative of all shipments during the period. PwC state that 12 of the 14 shipments showed inconsistencies between the documents, and in each of those 12 shipments PwC identified a preliminary Shipping Analysis Report in which the stated NCV was lower than the NCV on which the invoice was ultimately based. The 12 shipments included

the two examples in the documents provided by Mr Williams. PwC quantified the financial impact of the inconsistencies as \$1,151,408 in TerraCom's favour.

- 31 Section [3.4.4] of the PwC Report is headed "Key Finding – concern 3(a)", and states the following:

The concerns raised by the former employee referred to a pattern of inconsistencies in NCV between internal Shipping Analysis Reports and the Commercial Invoices issued to customers, which the former employee attributed to fraud by TerraCom. PwC have identified similar inconsistencies, in TerraCom's favour, in relation to 10 further shipments. Communications between TerraCom and testing provider ALS regarding the shipments were identified; however, the underlying reason for these inconsistencies could not be determined from the correspondence reviewed or through discussions with TerraCom. Ashurst invited Mr Garmeister (who is no longer employed by TerraCom) to participate in a meeting with PwC, which he declined. Further consideration could be given to inviting a representative from ALS who is responsible for testing TerraCom coal.

The total invoiced value of the 12 shipments for which inconsistencies have been identified is \$81,181,002. Recalculation of these invoice values based on earlier Shipping Analysis Reports gives a total value of \$80,029,593. Therefore, the changes in NCV between the earlier Shipping Analysis Reports and the later certified NCV levels give rise to an increase in invoice value of \$1,151,409 over the 12 shipments.

Four shipments totalling \$27,020,005 would have been liable for rejection by the customer under their contract terms had they been certified at the lower NCV levels shown on Shipping Analysis Reports. Any potential losses for shipment rejection have not been quantified – PwC were advised that if a shipment was rejected by the intended customer, TerraCom would have had other options to dispose of the coal product and recover some of the lost sale value.

- 32 Section [3.4.5] of the PwC Report is headed "Mr McCarthy's awareness of, and instructions relating to, the purported overstatement", and contains the following:

PwC's scope in relation to this concern has been limited to the review of email communications – as noted above PwC did not have access to the former employee to obtain further details of the conversations which they state took place. These conversations reportedly took place verbally, and PwC have not been made aware of any documentation or other evidence (either from the former employee or TerraCom) to substantiate the concerns.

Review of email communications between Mr McCarthy, Mr Boom and relevant third parties, such as ALS, using targeted search terms did not identify any indications that Mr McCarthy was responsible for any potential misstatement of coal quality. Correspondence with respect to coal testing and related practices reviewed was primarily between the former employee (and Mr Garmeister prior) and ALS and did not typically involve Mr McCarthy.

- 33 As to Mr Williams' allegation that a sub-agent of Noble had been used to pay bribes to conceal the alleged overstatement, PwC note (at [3.4.6]) that Mr Williams had not provided documents in support of those allegations. The PwC Report states that PwC were advised that: (a)

TerraCom does not use any agents or intermediaries (other than Noble as its marketing agent) in dealing with any of its customers, and does not have any contact with any such agents if they are employed by Noble; and (b) TerraCom does not have any relationship or contact with the ultimate customers for coal sold through Noble.

34 Section [3.4.7] deals with Concern 3(b) in a single sentence, stating that Mr Williams did not provide documents to support the concern and no further information was identified during the work performed to support the concern.

35 Section [3.4.8] deals with Concern 3(c), stating that Mr Williams did not provide documents to support the concern and no further information was identified during the work performed to date to support the concern. PwC said that some correspondence between TerraCom staff refers to the use of sub-agents in South Korea by Noble, however the correspondence received did not provide any indication or awareness of any bribery or corruption on the part of those sub-agents.

36 As far as Mr Forrest was aware, throughout the period of the PwC investigation, PwC was provided with all the documents and information it had requested from TerraCom (Mr Forrest's affidavit of 24 June 2025 at [32]). I accept Mr Forrest's evidence as to TerraCom meeting the various requests made by PwC for additional documents (Mr Forrest's affidavit of 24 June 2025 at [33]–[67]). I also accept Mr Forrest's evidence that at no time did anyone (including Ashurst or PwC) tell him there was information which was material or critical to PwC's investigation that had not been provided to PwC, nor did anyone tell him that there were any persons who could have provided information that was material or critical to PwC's investigation who were not made available to PwC (Mr Forrest's affidavit of 24 June 2025 at [72]). As I have indicated above, Mr Forrest was not aware until his cross-examination of PwC's unmet request to interview a representative of ALS, as referred to in Ashurst's email of 19 November 2019. After reading the final PwC Report, Mr Forrest did not consider that it raised any material issues that warranted further independent investigation of Mr Williams' allegations (Mr Forrest's affidavit of 24 June 2025 at [73]). I accept Mr Forrest's evidence that he believed at the time that the PwC Report effectively or essentially exonerated TerraCom, Mr McCarthy and Mr Boom (T143.44–144.8, 144.42–145.6, 145.36–38, 146.35–40). Mr Forrest resigned from the board of TerraCom, and ceased to be a director on 23 December 2019, for several reasons including the company's need for an overseas-based director to resign

upon TerraCom completing its takeover of Universal Coal plc (Mr Forrest's affidavit of 24 June 2025 at [74]–[79]).

- 37 On about 18 December 2019, TerraCom's board agreed that Mr McCarthy and Mr Boom could be involved in discussions concerning the PwC Report and the matters PwC had investigated, given that PwC had concluded their investigation and no evidence of wrongdoing by Mr McCarthy or Mr Boom had been found by PwC (Mr King's affidavit of 19 June 2025 at [58]).
- 38 On 13 January 2020, Mr Forrest sent an email to Mr Boom requesting him to arrange for an email enclosing the PwC report via a Microsoft SharePoint link, to be distributed to all TerraCom directors plus Mr Ransley, Mr McCarthy and himself (CB5/362). A draft of the email to the directors had already been sent by Mr Forrest to Mr Ransley for comment (CB5/358). The email to directors stated (CB5/362):

You will see that the company and the executives are essentially exonerated in the PwC report. There are some minor issues raised which were outside the company's control, and in any case were for amounts which are minor in the context of the former employee's allegations.

Mr Forrest had had a telephone conversation with Mr King around 6 January 2020 in which he told Mr King in substance what is quoted in that extract (Mr Forrest's affidavit of 24 June 2025 at [82]), including that the PwC Report had "essentially exonerated TerraCom and its people" (T157.5–22).

- 39 On 20 January 2020, Mr King received an email from Microsoft SharePoint, enclosing a document link which Mr Boom had shared on behalf of Mr Forrest. At the time, Mr King was in hospital, and upon his discharge on 22 January 2020, Mr King unsuccessfully attempted to access the PwC Report. His inability to do so was not a matter of concern for him, as he had received assurances from Mr Forrest and Mr Ransley, on which he relied, that the PwC Report made no findings of wrongdoing against Mr McCarthy or Mr Boom, and no director had raised any concerns or issues arising from the PwC Report with him (Mr King's affidavit of 19 June 2025 at [63]–[66]). Mr King did not look at the PwC Report until 2021, and did not read it fully until several days before the hearing (T163.7–12, 185.25–27). That did not concern Mr King because, as he said in cross-examination, he did not live in a vacuum and he had numerous discussions with Mr Forrest and Mr Ransley as the investigation progressed from August to November 2019, and Mr King requested that they inform him if anything of substance came to light, and when the PwC Report was finalised there were no comments from any directors about wrongdoing by Mr McCarthy or Mr Boom (T174.45–176.2, 185.35–186.8). Mr King

accepted that the assurances from Mr Forrest and Mr Ransley were only in relation to Mr McCarthy and Mr Boom not having engaged in any wrongdoing, rather than anyone else (T175.42–176.2). That is inconsistent with Mr Forrest’s evidence referred to in the previous paragraph, that he assured Mr King that the PwC Report had “essentially exonerated TerraCom and its people” or “the company and the executives are essentially exonerated”. I prefer the evidence of Mr Forrest in this respect, particularly as it is consistent with the email that he requested Mr Boom send to the directors on 13 January 2020, which said that “the company and its executives are essentially exonerated in the PwC Report”, and there is no reason why Mr Forrest would have spoken to Mr King in narrower terms than that.

40 On 3 February 2020, Mr Boom, Mr Ransley and Mr King became aware of enquiries being undertaken by a journalist at the Australian Financial Review (**AFR**) concerning Mr Williams’ allegations against TerraCom, and against its CEO and CFO (CB5/380). On 24 February 2020, an online article was published by the AFR with the headline “Fraud, bribery claims rock coal mining” (CB6/396). The article referred to “allegations of fake analysis of coal samples” which were said to “surround changes to measures of how much energy coal would generate when burned in power stations, allegedly so the coal would appear to be better quality than it was”. The article referred to court documents filed by Mr Williams accusing TerraCom and Noble of being “involved in bribery” with Chinese and Korean shipments. It reported that TerraCom’s directors told the Court they had no knowledge of any of the matters alleged by Mr Williams, and together with TerraCom “resoundingly” rejected the claims. The article reported that Ashurst said that the proceedings would be “vigorously” defended. The article also referred to an announcement by ALS that it had appointed external advisers to conduct an independent, forensic investigation into the processes applied to the certification of coal samples by staff employed in the Coal Superintending and Certification Unit within ALS.

41 On the same day, 24 February 2020, ALS released an ASX announcement, saying that they had appointed external advisers, consistently with what was said in the newspaper article (CB1/10). The ALS Announcement said that preliminary investigations had identified that a number of Certificates of Analysis issued from two laboratories within the Coal Superintending and Certification Unit in Australia were amended before issue without proper justification, and that four staff members of that unit had been suspended pending the outcome of the ongoing investigation. The announcement said that ALS had put immediate measures in place to stop the amendment of certificates without proper justification, and additional review processes

were being put in place within the Coal Superintending and Certification Unit to ensure the integrity of Certificates of Analysis.

42 On the same day, Mr John Hurst of Teneo (whom TerraCom engaged to assist with investor relations, corporate positions and media relations), sent a draft ASX announcement to Mr Boom, Mr Ransley and Mr King. Mr Hurst commented that the draft would “need to go past the lawyers given the matter is before the court and they may decide to cull it back somewhat because of the proceedings” (CB6/400). That is consistent with TerraCom’s practice to have significant public disclosures reviewed by external lawyers before publication, and in 2019 and 2020, TerraCom’s external lawyers were Ashurst (Mr King’s affidavit of 19 June 2025 at [19]). Mr Hurst added that he had not referred in the draft ASX announcement to ALS at that stage as there had been no confirmation that its investigation related to TerraCom.

43 On 24 February 2020, TerraCom made an announcement to the ASX (the **February Announcement**) as follows (CB6/412), noting that I have added paragraph numbers for ease of reference:

Australian Financial Review Article

- [1] Today, the Australian Financial Review (**AFR**) has published an article on-line stating that a former commercial general manager at TerraCom Limited (**ASX: TER**) (**TerraCom**) has alleged in court proceedings that TerraCom was involved in a scheme relating to the “fake analysis of coal samples”.
- [2] TerraCom categorically denies these allegations made by Justin Williams. TerraCom (if joined as a party) and the six directors who have been named as individual respondents will vigorously defend the proceedings that have been commenced in the Federal Circuit Court. Each of the six directors are seeking for the proceedings to be summarily dismissed on the basis that none of them had any knowledge or involvement in Mr Williams’ termination.
- [3] Mr Williams was made redundant in August 2019. This was the month after he started employment with the company and whilst he was still in his probationary period.
- [4] It was subsequent to his redundancy that Mr Williams falsely alleged that TerraCom altered reports about the quality of its coal exports.
- [5] TerraCom took Mr Williams’ allegations extremely seriously and had the conduct of its employees independently investigated.
- [6] TerraCom notes that the AFR has reported that the Australian Federal Police had confirmed having examined allegations in Mr Williams’ court material but said “*based on the material provided, there was insufficient evidence to support the allegations*”.
- [7] Coal exported from TerraCom’s Blair Athol mine in Central Queensland is subject to three stages of independent testing. The first when the coal arrives at the Dalrymple Bay Coal Export Terminal, the second when it is on board

the vessel and the third by Japanese and South Korean customers when it is landed on the dock.

- [8] Apart from believing that the allegations by Mr Williams are totally unfounded, TerraCom and each of the directors reserve their rights to take legal action against any party that publishes false or misleading information.
- [9] TerraCom recently upgraded the marketable reserves at Blair Athol to expand the life of the operation.
- [10] TerraCom's marketable reserves now stand at 23.5 million tonnes with total reserves having increased by 59 per cent since February 2018 to 28.7 million tonnes in keeping with JORC Code standards.
- [11] This announcement has been approved by the Company's Disclosure Committee for release.

44 TerraCom's Disclosure Committee, referred to at the end of the announcement, comprised Messrs McCarthy, Boom, Ransley and King. Mr King read the announcement at the time (T183.44–47). Mr King was satisfied that Ashurst had been involved in the preparation of the February Announcement and that it had been reviewed by Ashurst before being published (Mr King's affidavit of 19 June 2025 at [89]). In cross-examination, he recalled being told that "it's been legalised or legalised to death" (T170.46–T171.3, 187.13–35). Mr King relied on Mr Ransley, Ms Etccl (Company Secretary), Mr Hurst and Ashurst to ensure that the February Announcement was accurate, and does not recall reading or authorising it before its release (Mr King's affidavit of 19 June 2025 at [89]).

45 On 27 February 2020, the auditors of TerraCom, Ernst & Young (**EY**), composed an internal memorandum considering the allegations in the AFR article of 24 February 2020 (CB6/422). The memorandum considered the veracity of the allegations, and whether the allegations (if true) had any material impact on TerraCom's previous or current financial statements. As to the question of the veracity of the allegations, EY made the following observations:

- (a) There was no conclusive evidence that the samples in question were deliberately changed or changed with the intention of achieving a certain specification and all such changes were made by ALS, an independent service provider to TerraCom;
- (b) TerraCom was not the only company with a potential discrepancy. EY regarded this as an important fact in considering whether TerraCom instigated or was aware of the modifications as the more customers were involved, the less likely TerraCom could instigate such an activity of falsely modifying coal certificates;
- (c) The Australian Federal Police concluded that there was not enough support to justify further investigation;

- (d) In July 2019, TerraCom had appointed a third party (**TransCoal**) to manage its shipping and logistics process (which had previously been done internally). EY observed that had there been collusion with TerraCom it would not make sense to outsource this key relationship to another independent party;
- (e) Mr Boom had identified one instance where shipments not meeting the contractual specification requirements had been shipped. In that case, a per-tonne penalty was paid, and the buyer accepted the shipment;
- (f) The coal in question was relatively high specification coal and could (in principle) be sold to other customers or the same customer with a small penalty;
- (g) The four shipments that were potentially below specification were from 2018, which was in the early stage of the mining operation, when the geology was not as well known. Coal sold more recently had been (on average) higher quality (with an approximate NCV of 5,700), meaning there was less risk of exposure in respect of below specification coal;
- (h) Four employees at Blair Athol had received bonuses based on coal quantities shipped; none of whom had any identified links to the claims made. The CFO and CEO did receive discretionary bonuses, but these were not linked to coal sales or financial performance;
- (i) No other incentives for falsifying results were identified (for example, governance, share price motivation, or cashflow issues);
- (j) The buyer was able to test the coal sample and dispute the coal quality assessment through the independent umpire; and
- (k) Even after the AFR article was published, TerraCom continued to receive strong interest from customers in Japan and South Korea with orders continuing to be placed for March and April 2020.

46 In addition, EY had met with Mr Ransley and Mr Forrest on 25 February 2020, in the course of which EY asked them about the statement in the ALS Announcement that four staff had been suspended (Exhibit PWF-1, p 746). Mr Ransley responded that his understanding from discussions with the AFR was that the question related to 5 or 6 miners and it had not been established at this stage whether TerraCom was impacted, and said that he had no knowledge of what was going on within ALS but had no information to suggest that it was specific to or involved TerraCom.

47 Mr King’s evidence, which I accept, is that on 27 February 2020, EY asked to read the PwC Report in the presence of Ashurst, which they did over a period of 1–1½ hours. EY then returned to TerraCom’s office and said to Mr King that they would produce a clean audit report, that it was “all good” and that there were no problems (T168.41–47, 169.28–34, 176.27–31, 180.22–181.19).

48 On 28 February 2020, EY released its half-year financial report for the half-year ended 31 December 2019 (CB6/436). Mr King read that report (T176.37–40). One of the “Areas of review focus” in the report was identified as “Consideration of public allegations in the [AFR]”. EY set out the procedures which they had performed, and referred also to representations from management that management was not aware of any instances where the final Certificates of Analysis received from third parties differed from the original certificates. Another management representation referred to was that, to the best of their ability, all information requested by PwC was provided and nothing was withheld. The management representations were by Mr McCarthy and Mr Boom (T178.1–15). EY expressed the view that, based on that work, EY was satisfied that any potential exposure and financial statement impact in respect of the matter would not materially change the recognition or measurement of transactions recorded during the period nor the statement of financial position in the half-year accounts. EY also stated:

Further, in respect of the claims in relation to Noble (favourable treatment, and bribery) no evidence has been produced which verifies these claims. In addition, both PwC and the AFP concluded that the claims were without merit as insufficient evidence supporting them was provided and as such nothing has come to our attention to indicate that such matters have occurred.

49 On 28 February 2020, JERA (being one of TerraCom’s major customers), wrote to Mr Boom attaching a letter referring to JERA’s contract with TerraCom, to the article in the AFR and to ALS’s ASX announcement of 24 February 2020 (CB6/437–438). The attached letter included the following:

Please advise whether you are aware of any of the certificates of analysis for the cargoes delivered under the Agreement that may have been amongst the certificates that were amended before issuance without proper justification.

We would be grateful if you would share details following your investigations on this matter that relate to any of [JERA’s] cargoes delivered under the Agreement.

Given the matter set out in the Article and Release, which only came to our knowledge on 24 February 2020, we would like the Referee Sample for the following cargoes to be tested:

[and the letter then sets out shipments on the “Hakutaka” on 30 November 2019, the

“Corona Royal” on 25 December 2019 and the “Shoyoh” on 6 February 2020].

[JERA] nominates Bureau Veritas as the Referee Laboratory. Kindly confirm your agreement on the same and that you will proceed to instruct ALS to deliver the sample to the Referee Laboratory.

50 On 1 March 2020, Mr Boom forwarded a copy of JERA’s letter to Mr Ransley and Mr McCarthy (CB6/443). ASIC accepts that there is no evidence that Mr King was aware of this matter at the time and makes no allegations against him arising from this particular matter (T62.13–16). On the same day, Mr Boom responded to JERA’s letter (copied to Mr McCarthy) confirming TerraCom’s agreement to have the umpire samples of the requested shipments tested by Bureau Veritas, and requesting that JERA direct Bureau Veritas to invoice TerraCom for this work (CB6/445). On 6 March 2020, Bureau Veritas issued its test results for the three shipments (CB6/464). Mr Boom sent an email on 9 March 2020 to JERA, copied to Mr McCarthy, attaching a spreadsheet comparing the Certificates of Analysis issued by ALS and the test results of Bureau Veritas for the umpire samples (CB6/463 and 465). The NCV in kcal/kg of the umpire samples compared to those recorded in the ALS Certificates of Analysis were:

- **Hakuta:** umpire 5,602/ certificate 5,580
- **Corona Royal:** umpire 5,597/ certificate 5,639
- **Shoyoh:** umpire 5,414/ certificate 5,385

Accordingly, two of the three shipments showed that the NCV as measured by Bureau Veritas as the umpire was in fact higher than that measured by ALS in the Certificate of Analysis. That appears to have been the end of the matter.

51 On 26 February 2020, Mr Hurst provided a draft further ASX announcement to Mr Ransley (CB6/418). On 2 March 2020, Mr Hurst and Mr Ransley exchanged further drafts, copying Mr King (CB6/447–454). Mr King read these drafts (T165.34). The same day, Messrs McCarthy, Boom and Ransley communicated about Mr Williams via a private messaging application, with Mr Ransley stating, “I am putting a release out tomorrow that calls him a black mailer basically” (CB6/446, p 2987).

52 On 5 March 2020, a TerraCom shareholder wrote to Mr King about Mr Williams’ allegations stating, among other things (CB6/458): “TerraCom need to come clean on this. As the company chairman it is your responsibility to ensure shareholders are protected and well informed. Remove the CEO and CFO as their positions are untenable after these allegations.” The

following day, Ms Etccl, the company secretary of TerraCom, drafted a letter in response for Mr King's and Mr Ransley's approval (CB6/459–460).

- 53 On 9 March 2020, further drafts of an ASX announcement were circulated among Ms Etccl, Mr Ransley and Mr Boom (copying Mr McCarthy and Mr King) (CB6/468–485). At 10.59 pm on that day, Ms Etccl sent an email (CB6/484) to Messrs McCarthy, Boom, Ransley and King (as the Disclosure Committee) attaching a final draft to be lodged with the ASX the following morning. Mr King stated by email the following day, at 7.34 am, that he approved the final revised draft (CB6/492). In cross-examination, Mr King accepted that he did not read the final draft at the time in light of the assurances which he had received from Mr Forrest, Mr Ransley and EY (T168.10–47). The announcement provided to the ASX on 10 March 2020 (the **Proposed March Announcement**) stated (CB6/486), noting that I have added paragraph numbers for ease of reference:

Statement by Deputy Chairman on allegations made by Justin Williams

- [1] TerraCom Limited (**ASX: TER**) (**TerraCom** or **Company**) notes ongoing media reports about the unfair dismissal case commenced by Justin Williams.
- [2] TerraCom continues to categorically deny Mr Williams' allegations, which were not raised at any time during his employment but were made only after he was dismissed as part of a Company-wide redundancy program.
- [3] Mr Williams is seeking re-instatement and financial compensation in Federal Circuit Court proceedings.
- [4] TerraCom Non-Executive Director and Deputy Chairman Mr Craig Ransley said "*the Company had no intention of re-employing Mr Williams, who was commercial general manager at TerraCom for just over 5 weeks in mid-2019*".
- [5] TerraCom (if joined as a party) and the six directors who have been named as individual respondents will vigorously defend the proceeding commenced by Mr Williams under the general protections provisions of the *Fair Work Act 2009 (Cth)*.
- [6] "*TerraCom and each of the directors, reserve their rights to take legal action against any party that publishes false or misleading information*" Mr Ransley said.
- [7] "*Apart from wanting his job back, Mr Williams made several outrageous requests for a financial payment of \$5,000,000 in return for not pursuing TerraCom over his dismissal, which was a decision made as part of a cost reduction program, driven by market forces.*"
- [8] TerraCom understands that Mr Williams has been unsuccessful with similar allegations in the past about other coal mining companies for which he has worked.
- [9] "*Mr Williams initiated the proceedings in the Federal Circuit Court against six TerraCom Directors (whom [sic] have never met Mr Williams), only after*

TerraCom decided not to cave into his demands”.

[10] *“As previously stated, TerraCom took allegations that its CEO and CFO had been involved in a scheme relating to the fake analysis of coal samples seriously and an independent forensic investigation was conducted and found no evidence of wrongdoing”.*

[11] *“None of our customers have raised any quality control issues with the coal we export from our Blair Athol mine and to suggest TerraCom was involved in an international conspiracy to undertake false testing is ludicrous.”*

[12] TerraCom is also aware that SGS Australia has issued a public statement in response to media reports about coal analysis and SGS’s resulting investigation. Their review confirmed that services delivered were in complete compliance with SGS policies and procedures.

[13] This announcement has been approved by the Company’s Disclosure Committee for release.

54 Mr King believed that the Proposed March Announcement had been reviewed by TerraCom’s external lawyers, and his affidavit sets out what I regard as more than ample grounds for that belief being a reasonable one (Mr King’s affidavit of 19 June 2025 at [111]).

55 On 10 March 2020, the ASX sent an email to Ms Etccl refusing to publish the Proposed March Announcement, referring (among other things) to the subject-matter including matters that were part of Mr Williams’ legal proceedings and that market announcements should be expressed in a clear and objective manner, and that “emotive, intemperate or defamatory language should not be used” (CB6/495). Ms Etccl circulated proposed revisions for approval to Messrs Ransley, McCarthy, Boom and King, explaining that the ASX had rejected the previous version “due to potential defamatory statements” (CB6/493). Mr King asked Ms Etccl to “keep [him] in the loop” (CB6/492). Alterations to the Proposed March Announcement, which were intended to meet the ASX’s concerns, were again not accepted by the ASX, which advised that if TerraCom “feels it necessary to correct the public record in this regard, [the company is] welcome to do so on [its] company website or through a media release but not on the ASX Market Announcements Platform” (CB6/496).

56 On 10 March 2020, Ms Etccl, Mr Hurst and Mr Ransley sent emails, which were also copied to Messrs King, McCarthy and Boom, arranging for the contents of the Proposed March Announcement to be printed as an open letter in the AFR and The Australian, and further drafts were circulated (CB6/500–7/506).

57 On 12 March 2020, an article headed “Open Letter to TerraCom Shareholders” was published in the AFR and in The Australian (the **Open Letter**). The Open Letter relevantly stated (CB7/510):

2. Legal Dispute with Justin Williams

TerraCom continues to categorically deny Mr Williams' various allegations, which were not raised at any time during his employment but were only made after he was dismissed as part of a Company-wide cost reduction program, driven by market forces.

Mr Williams is seeking reinstatement and financial compensation in Federal Circuit Court proceedings.

TerraCom (if joined as a party) and the six directors who have been named as individual respondents will vigorously defend the proceedings commenced by Mr Williams.

Mr Williams, who was commercial general manager at TerraCom for just 5 weeks in mid-2019, initiated these proceedings only after TerraCom decided not to meet his demands, which apart from wanting his job back, included a request for a \$5,000,000 financial payment in return for not pursuing TerraCom over his dismissal.

TerraCom understands that Mr Williams has been unsuccessful with similar allegations in the past about other coal mining companies for which he has worked.

TerraCom has no intention of re-employing Mr Williams.

As previously stated, TerraCom took allegations that its CEO and CFO had been involved in a scheme relating to the fake analysis of coal samples seriously and an independent forensic investigation was conducted and found no evidence of wrongdoing.

TerraCom is also aware that SGS Australia has issued a public statement in response to media reports about coal analysis and SGS's resulting investigation. The review confirmed that services delivered were in complete compliance with SGS policies and procedures.

In addition, none of TerraCom's customers have raised any quality control issues with the coal TerraCom exports and for Mr Williams to suggest TerraCom was involved in an international conspiracy to undertake false testing is ludicrous.

58 On 12 March 2020, Korean East-West Power Co (**EWP**) wrote to Noble in relation to a shipment of coal on the vessel "MV Sakizaya Leader". EWP's email of 12 March 2020 stated relevantly (CB7/511):

We have requested you to check the buyer's sample.
Now we have finished the analysis.
We have found the difference of NCV (Net Calorific Value) between COA and our own analysis.
We would like to proceed umpire's sample challenge [sic].

59 The letter of 11 March 2020 by EWP to Noble states the following (CB7/512):

Regarding your term cargo of Australian Steam Coal delivered to Dangjin Power Plant by the vessel of Sakizaya Leader (B/L Quantity 79,751 MT, B/L Date 12/18/2019), we have found quality discrepancy of Net Calorific Value between your certificate of analysis and our power plant's own analysis based on Buyer sample. Whereas NCV on the invoice was 5,477 kcal/kg, the data of Buyer sample stood at 5,285 kcal/kg as received basis.

In this respect, as contracted, we would like to appoint SGS, Holland as the Independent Laboratory to decide the final quality of the umpire sample and to ask your company to send the umpire sample to this agent and to notify us the result of analysis ...

We look forward to your soonest reply and hope to figure out the above in due course.

60 On 13 March 2020, Messrs McCarthy, Boom and Ransley were made aware of, and discussed the complaint by EWP. ASIC accepts that there is no evidence that the matter came to the attention or knowledge of Mr King (T62.33). A copy of Mr McCarthy’s notebook contains an entry dated 13 March 2020 as follows (CB5/376, p 2678):

@ 0815 – Red [Ransley] & Nathan [Boom]
• EWP Umpire Sample

Mr McCarthy and Mr Boom referred to the EWP complaint in WhatsApp messages sent on 13 March 2020 (CB7/514):

McCarthy: “This EWP thing is BS”
Boom: “It sure is”
Boom: “All about the BS media articles”

61 On 7 April 2020 (that is, four days after the April Announcement, addressed below), SGS issued the results of its testing of the Sakizaya Leader umpire sample to Noble and TerraCom, copying Mr McCarthy and Mr Boom in the correspondence (CB7/573–574). The NCV of the umpire sample as measured by SGS was 5,396 kcal/kg. The NCV earlier recorded by ALS in the Certificate of Analysis and used to calculate the sale price in the invoice issued on 23 December 2019 for the Sakizaya Leader was 5,477 kcal/kg (CB5/338). On 10 June 2020, Orion refunded to Noble US\$66,990.84 for the MV Sakizaya Leader coal shipment, utilising the SGS assessment of the umpire sample to calculate the sale price (CB7/583–584). Mr McCarthy and Mr Boom were sent Noble’s correspondence relating to the price adjustment.

62 On 1 April 2020, Mr Hurst sent Mr Ransley and Mr McCarthy a suggested draft response to “the ALS Report due out tomorrow morning” (CB7/531). On 2 April 2020, ALS published an announcement to the ASX (CB7/536) which said that an independent forensic investigation had been completed into the certification of coal samples by the Coal Superintending and Certification Unit within ALS and that the investigation had identified evidence that “approximately 45–50% of the certificates of analysis were manually amended without justification in the Company’s laboratories in Newcastle, Mackay, Gladstone and Emerald since acquisition of the ACIRL business by ALS in 2007”. The announcement also stated that no evidence of bribery or other third-party payments involving ALS staff had been found or

indicated. The announcement referred to ALS's previous announcement on 24 February 2020 that the four most senior staff of the Coal Superintending and Certification Unit were suspended pending the outcome of ALS's independent investigation, and added that the employment of the General Manager Coal Services had since been terminated and the other three staff were no longer employed by the business. In addition, the announcement stated that ALS had continued to communicate with the clients of the Coal Superintending and Certification Unit (which I note included TerraCom or its subsidiary, Orion) about the progress of ALS's investigation and ALS's remedial actions. The document was admitted only as evidence of the fact that the representations were made and the opinions were expressed.

63 Following the publication of that announcement, on 2 April 2020, Mr Hurst and Mr McCarthy (copying Mr Ransley, and later Ms Etccl) exchanged numerous drafts of a further ASX announcement by Terracom. By an email at 9.25 pm on 2 April 2020, Ms Etccl sent the draft to the Disclosure Committee, saying that the "planned release [was] tomorrow AM" (CB7/559–60). Mr McCarthy, Mr Boom and Mr Ransley each approved the announcement that evening (CB7/561–563). On 3 April 2020 at 8.08 am, Ms Etccl sent Mr King a separate email attaching the draft ASX announcement, stating that it was "due to go [that] morning, just [wanting] to make sure [that he had had] a chance to look at it before it [went] up" (CB7/565). At 8.19 am, Ms Etccl sent Mr King a WhatsApp message asking whether he had had a chance to look at the draft announcement, to which Mr King replied at 8.28 am saying: "All good to go. Please call when convenient." (Mr King's affidavit of 19 June 2025 at [132]).

64 On 3 April 2020, TerraCom published the announcement to the ASX (the **April Announcement**), which stated as follows (CB7/568), noting that I have added paragraph numbers for ease of reference:

Update on Court Proceedings

- [1] TerraCom Limited (**TerraCom** or **Company**) (ASX: TER) advises that the Federal Circuit Court yesterday ordered that six TerraCom Directors be removed as respondents from the general protections application made against them by Justin Williams under the *Fair Work Act 2009* (Cth).
- [2] The Court also made an order that Mr Williams, a former TerraCom employee, pay each of the Directors' costs and disbursements of and incidental to their applications for the claims against them to be summarily dismissed, which if not agreed, are to be assessed and if necessary taxed under the Federal Court Rules.
- [3] The Court also made orders granting Mr Williams an extension of time to make a general protections application to the Court against TerraCom and for TerraCom to be substituted as the first respondent to the proceeding. Mr

Williams was also granted leave to join TerraCom Chief Executive Officer, Danny McCarthy, as the second respondent to the proceeding. Mr Williams has seven days to file and serve an amended application.

- [4] Both TerraCom and Mr McCarthy intend to continue to vigorously defend the proceedings.
- [5] TerraCom also notes that the ASX statement by ALS yesterday regarding an independent investigation into the ALS Australian Coal Superintending and Certification Unit.
- [6] As previously stated, TerraCom took the allegations by Mr Williams that its CEO and CFO had been involved in a scheme relating to the fake analysis of coal samples seriously and an independent forensic investigation was conducted. That investigation found that the allegations against them were unfounded and neither had done anything wrong.
- [7] Since those allegations were made by Mr Williams, none of TerraCom's customers have raised any concerns about the quality of supplies from TerraCom's Blair Athol mine in Central Queensland.
- [8] Some of TerraCom's customers also asked for additional coal samples to be tested, and in every instance, they found no quality control issues.
- [9] Commenting on TerraCom's coal testing procedures, CEO Danny McCarthy said: *"During my time as CEO of TerraCom there has not been an occasion whereby clients have complained about the quality of the coal as certified by the Certificate of Analysis (COA)."*
- [10] Under the COA process, each time a ship is loaded the testing Company (which can be nominated by the Buyer) carrying out the coal sampling and analysis take samples and divide them onto [sic] three lots:
 - 1. Control Sample tested for the issuance of the COA which forms the basis of the certified result for the Buyer and invoicing/payment purposes.
 - 2. Buyers Sample sent to the customer for their own internal sampling and checking (only if requested).
 - 3. Umpires Sample held in reserve under full Chain of Custody requirements and "seal" held by the testing Company for a pre-determined period and for the sole purpose of an Umpire sample should either the Seller or the Buyer require it.
- [11] *"In the one recent instance where a customer requested three shipments be "Umpire tested" at a third-party laboratory, the Umpire results aligned and were consistent with the certified (COA) results used for the basis of invoicing and payment."* Mr McCarthy said.
- [12] TerraCom is unaware of any regulatory investigation into Mr Williams allegations.
- [13] Mr Williams' allegations were made only after he was dismissed as part of a Company-wide redundancy program.
- [14] TerraCom and each of its Directors, reserve their rights to take legal action against any party that publishes false or misleading information based on Mr Williams' allegations.

[15] This announcement has been approved by the Company's Disclosure Committee for release.

65 When Mr King read the draft April Announcement and replied to Ms Etccl confirming that he was happy for it to be published, he relied on the assurances from Mr Forrest and Mr Ransley that the PwC Report made no findings of wrongdoing against Mr McCarthy or Mr Boom (which I have found extended to TerraCom itself), and his understanding that EY had not raised any issues after having had access to the PwC Report and having held discussions with Ashurst (T169.9–170.6). He also relied on the fact that the April Announcement had been drafted by Mr McCarthy and Mr Hurst, and that each of Mr McCarthy, Mr Boom and Mr Ransley had consented to its release. Mr King also relied on his knowledge that it was TerraCom's practice to have significant public disclosures reviewed by external lawyers before publication (Mr King's affidavit of 19 June 2025 at [134]).

Did the defendants contravene s 1309?

The legislative provisions

66 Section 1309 of the Act provides relevantly as follows:

- (2) An officer or employee of a corporation who makes available or gives information, or authorises or permits the making available or giving of information, to:
 - ...
 - (c) an operator of a financial market (whether the market is operated in Australia or elsewhere) or an officer of such a market;being information, whether in documentary or any other form, relating to the affairs of the corporation that:
 - (d) is false or misleading in a material particular; or
 - (e) has omitted from it a matter or thing the omission of which renders the information misleading in a material respect;without having taken reasonable steps to ensure that the information:
 - (f) was not false or misleading in a material particular; and
 - (g) did not have omitted from it a matter or thing the omission of which rendered the information misleading in a material respect;contravenes this subsection.
- (3) The references in subsections (1) and (2) to a person making available or giving, or authorising or permitting the making available or giving of, information relating to the affairs of a corporation include references to a person making available or giving, or authorising or permitting the making available or giving of, information as to the state of knowledge of that person with respect to the affairs of the corporation.

...

- (7) For the purposes of subsection (2), a person is taken to have taken reasonable steps to ensure that information was not false or misleading in a material particular if the person proves that:
- (a) the person made all inquiries (if any) that were reasonable in the circumstances; and
 - (b) after doing so, the person believed on reasonable grounds that the information was not misleading or deceptive in a material particular.
- (8) For the purposes of subsection (2), a person is taken to have taken reasonable steps to ensure that information did not have omitted from it any matter or thing the omission of which rendered the information misleading in a material respect if the person proves that:
- (a) the person made all inquiries (if any) that were reasonable in the circumstances; and
 - (b) after doing so, the person believed on reasonable grounds that there was no such omission.
- (9) For the purposes of subsection (2), a person is taken to have taken reasonable steps to ensure that information was not false or misleading in a material particular if the person proves that:
- (a) the person relied on information given to the person by:
 - (i) if the person is a body – someone other than a director, employee or agent of the body; or
 - (ii) if the person is an individual – someone other than an employee or agent of the individual; and
 - (b) the reliance placed on that information by the person was reasonable in all the circumstances.
- (10) For the purposes of subsection (2), a person is taken to have taken reasonable steps to ensure that information did not have omitted from it any matter or thing the omission of which rendered the information misleading in a material respect if the person proves that:
- (a) the person relied on information given to the person by:
 - (i) if the person is a body – someone other than a director, employee or agent of the body; or
 - (ii) if the person is an individual – someone other than an employee or agent of the individual; and
 - (b) the reliance placed on that information by the person was reasonable in all the circumstances.

...

- (12) A person contravenes this subsection if the person contravenes subsection (2).

Note: This subsection is a civil penalty provision (see section 1317E).

67 Information may be misleading for the purposes of s 1309(2) even if it is literally correct: *Australian Securities and Investments Commission v iSignthis Ltd* [2024] FCA 669 at [559] (McEvoy J); and see to the same effect in relation to s 1041H(1) of the Act: *Australian Securities and Investments Commission v GetSwift Ltd (Liability Hearing)* [2021] FCA 1384 at [2114] (Lee J). One must exercise caution, however, in applying cases dealing with the statutory phrase “likely to mislead” to s 1309(2), as the latter does not use the word “likely”.

Was false or misleading information given to the ASX?

68 The way in which ASIC pleads its case in the ASOC adopts the following steps. First, ASIC alleges what each of the February Announcement (at [67]), the Proposed March Announcement (at [90]), and the April Announcement (at [118]) stated. Second, ASIC alleges that the three announcements independently and together gave rise to one or more of seven alleged representations. Four of these are the so-called “Exoneration Representations” (at [147]), and the other three are the so-called “No Customer Complaint Representations” (at [152]). Third, it is alleged that the Exoneration Representations (at [149]) and the No Customer Complaint Representations (at [154]) comprised information that was false or misleading in a material particular, and had omitted a matter or thing that rendered the information misleading in a material respect. Accordingly, as ASIC expressly acknowledged in its opening, ASIC’s pleading does not allege that the statements in the ASX Announcement were themselves false or misleading, but rather ASIC constructs from the statements in the announcements some alleged representations which it then alleges were false or misleading (T53.17–23). I do not regard it as necessarily wrong in principle to plead a case of contravention of s 1309(2) in that manner, and ASIC has drawn my attention to a case in which the Court accepted an admission of contravention of s 1309(2) expressed in terms of information containing particular representations: *Australian Securities and Investments Commission v Holista Colltech Ltd* [2024] FCA 244 at [153]. However, that technique involves the risk that in seeking to construct representations from the information itself, the pleader is exaggerating or embellishing the information in an unwarranted manner. An approach which is more faithful to the language of s 1309(2) would be to set out the information which is alleged to have been provided, noting where the information is expressly stated and, if necessary, where the information is said to have been implied in those express statements, and then to allege directly that that information was false or misleading. That approach would focus the pleader’s mind on the matters to which s 1309(2) is directed, namely the information itself which is made available or given and

whether that information was false or misleading. It may be said that appropriate exaggeration is an aspect of the art of persuasion (just as it is in relation to art in general), but it is not a skill which is called for in the drafting of a pleading. It is an unfortunate feature of ASIC's case that most of the alleged representations which it claims were false or misleading involve an exercise in tendentiously enlarging the text of the announcements which were actually made beyond the normal and ordinary meaning of the language used in the announcements themselves.

69 The initial question which arises, given the structure of ASIC's pleaded case, is whether the alleged representations were actually made. If they were not, then to that extent the pleaded case in relation to s 1309(2) fails. Accordingly, I will take each of the seven pleaded representations in turn and analyse whether they were made in any one or more of the three announcements, whether taken individually or collectively or in any combination.

70 The first of the Exoneration Representations is that the independent investigation referred to in each of the three announcements (being the PwC Report) had rejected all of the allegations made by Mr Williams (as pleaded at [147(a)] of the ASOC).

71 As to the February Announcement, para [1] refers to Mr Williams having alleged in court proceedings that TerraCom was involved in a scheme relating to the "fake analysis of coal samples". Cross-reference is made to those allegations in paras [2], [3], [5] and [8]. ASIC accepted during its opening that the allegations referred to in those later paragraphs are the allegations referred to in para [1] (T33.3–35.15, T55.1–9). As a matter of fact, Mr Williams had made other allegations which I have set out above (in particular, those referred to in Ashurst's memorandum to PwC of 29 August 2019 and those made in the cases which he brought in the Fair Work Commission and the Federal Circuit Court), but the February Announcement refers only to his allegation that TerraCom was involved in a scheme relating to the fake analysis of coal samples. Accordingly, the February Announcement said nothing about the rejection of "all of" the allegations made by Mr Williams. For completeness, para [6] in the February Announcement deals with allegations in Mr Williams' court material, but para [6] deals with the conclusion reached by the Australian Federal Police, rather than by PwC. The balance of the paragraphs do not refer to any further allegations.

72 Further, the February Announcement does not state any conclusion which was reached by PwC or expressed by it in the PwC Report. The only reference to PwC's independent investigation is in para [5], namely that TerraCom "had the conduct of its employees independently investigated". I regard it as reasonable for the ordinary reader of the February Announcement

to infer that TerraCom and its Disclosure Committee had regard to, or took into account, the independent investigation in its denial of the allegations (in para [2]), in describing the allegations as false (in para [4]) and in expressing the belief of TerraCom and its directors that the allegations were totally unfounded (in para [8]). However, no inference beyond that would be made by the ordinary reader. The information given in the February Announcement does not include the proposition that the PwC Report had rejected the allegations (or all of the allegations) made by Mr Williams. For all the reader would have taken from the February Announcement, the independent investigation may, for example, have been qualified in some way, or may even have been inconclusive. An inference that TerraCom had taken the PwC Report into account in forming its own conclusions expressed in the February Announcement does not actually convey what conclusions (if any) PwC themselves had reached. Ironically, ASIC draws attention in its closing written submissions (at [76]) to the published version of the February Announcement having removed references to PwC in an earlier draft and having removed a sentence to the effect that PwC had completed its report and found that the allegations were completely unfounded.

73 As to the Proposed March Announcement, para [2] refers back to the allegations referred to in the February Announcement, as ASIC accepted in its opening (at T39.25–35). Paragraph [10] deals with specific allegations that the CEO and CFO had been involved in a scheme relating to the fake analysis of coal samples. That paragraph refers to the independent forensic investigation having found no evidence of wrongdoing, which the ordinary reader would understand as a reference to wrongdoing by the CEO and CFO who are specifically referred to in that sentence. There is no representation made to the effect that the PwC Report had rejected “all of” the allegations made by Mr Williams.

74 Paragraph [11] of the Proposed March Announcement states relevantly that any suggestion that TerraCom was involved in an international conspiracy to undertake false testing was “ludicrous”. The word “ludicrous” is not being used in reference to all of Mr Williams’ allegations, but in reference to the specific one referred to in para [11]. Moreover, the view expressed in para [11] is attributed to Mr Ransley (and perhaps by implication to TerraCom and its Disclosure Committee). On no sensible reading can it be attributed to PwC or the PwC Report.

75 As to the April Announcement, para [6] refers specifically to the allegations by Mr Williams that TerraCom’s CEO and CFO had been involved in a scheme relating to the fake analysis of

coal samples. The second sentence of para [6] is clearly concerned with the allegations against the CEO and CFO, as is expressly indicated by the words “them” and “neither”. By implication, the independent investigation referred to in para [6] is the investigation conducted by PwC, but the conclusion that PwC had found that the allegations were unfounded and that neither the CEO nor the CFO had done anything wrong, is confined to the allegations against the CEO and the CFO. It does not extend to all of Mr Williams’ allegations.

76 The second of the Exoneration Representations is that the independent investigation referred to in each of the three announcements (being the PwC Report) had found that the allegations made by Mr Williams were “unfounded” (as pleaded at [147(b)] of the ASOC).

77 As to the February Announcement, para [8] probably comes closest to making such a representation, noting also that para [4] refers to Mr Williams having “falsely alleged” that TerraCom altered reports about the quality of its coal exports. Neither paragraph, however, attributes anything to the PwC Report. The drafter of the ASOC has misread para [8] in an elementary and fundamental way. Paragraph [8] is a statement of belief held by TerraCom and its directors, not a belief held by the independent investigator. ASIC accepted that proposition in its opening (at T36.13–21 and T55.18–26). Paragraph [8], read in the context of the announcement as a whole, might be taken as implying that in forming that belief, TerraCom and its directors had regard to, or took into account, the independent investigation, but conveys no more than that in relation to the PwC Report.

78 As to the Proposed March Announcement, para [10] is specific to the allegations against TerraCom’s CEO and CFO, and even then it does not say that the allegations were “unfounded” but that the independent investigator found no evidence of wrongdoing. The use of the word “ludicrous” in para [11] could well be taken as conveying that the allegations referred to were “unfounded”, but, as I have indicated above, that is not a conclusion which was attributed to the PwC Report.

79 As to the April Announcement, para [6] would appear to be the primary inspiration for this alleged representation, in that it states that the independent investigation found that the allegations against the CEO and CFO (that they had been involved in a scheme relating to the fake analysis of coal samples) were “unfounded” and that neither of them had done anything wrong. However, the allegations made by Mr Williams were much broader than the allegations that TerraCom’s CEO and CFO had been involved in a scheme relating to the fake analysis of coal samples, and para [6] of the April Announcement (as well as the announcement as a whole)

did not contain information as to the views expressed in the PwC Report on any of Mr Williams' allegations other than the one specifically referred to in para [6].

80 The third of the Exoneration Representations is that the independent investigation referred to in each of the three announcements (being the PwC Report) had excluded any involvement by TerraCom, Mr McCarthy or Mr Boom and any employees or officers of TerraCom in the conduct the subject of the allegations made by Mr Williams (as pleaded at [147(c)] of the ASOC).

81 As to the February Announcement, no such representation was made. It is unnecessary to repeat the matters already addressed in respect of the first two of the Exoneration Representations.

82 As to the Proposed March Announcement, para [10] referred only to allegations against Mr McCarthy and Mr Boom (as ASIC accepted at T49.33–43), not TerraCom or the many other people referred to in the alleged representation. Further, para [10] attributes to PwC the conclusion that their investigation found no evidence of wrongdoing by Mr McCarthy and Mr Boom. In effect, that statement in para [10] conveyed that the PwC Report had excluded any involvement by Mr McCarthy and Mr Boom in the allegation that they had been involved in a scheme relating to the fake analysis of coal samples, but the alleged representation is much wider and covers a large number of other people, as well as TerraCom itself. I note also that para [11] expresses the view that any suggestion that TerraCom was involved in an international conspiracy to undertake false testing was “ludicrous”, but that view was not attributed to PwC or the PwC Report.

83 As to the April Announcement, para [6] concerns allegations against Mr McCarthy and Mr Boom but no one else. ASIC accepted that nothing in the text refers to allegations against TerraCom, as distinct from its CEO and CFO (T51.33–38), but submitted that such a reference arises by implication (T52.20–41). I reject the alleged implication. I accept that para [6] may be read as the independent investigator excluding any involvement by Mr McCarthy and Mr Boom in the allegation that they had been involved in a scheme relating to the fake analysis of coal samples, but that is not the representation which has been alleged. The alleged representation is much wider, and does not arise from the information which was contained in the announcement.

84 The fourth Exoneration Representation is that the independent investigation referred to in each of the three announcements (being the PwC Report) rejected the allegation of TerraCom's

involvement in the alteration of coal quality certificates, namely Certificates of Analysis (as pleaded at [147(d)] of the ASOC).

85 For the reasons given in relation to the third of the alleged Exoneration Representations, this alleged representation concerning TerraCom's alleged involvement does not arise from the information actually given in the three announcements.

86 Accordingly, none of the Exoneration Representations were made in any of the three announcements, being the February Announcement, the Proposed March Announcement and the April Announcement. Moreover, I am unable to see how any of the Exoneration Representations arose from those three announcements read collectively, or in any combination.

87 Turning to the so-called No Customer Complaint Representations, the first of them is that the Proposed March Announcement and the April Announcement, independently and together, gave rise to a representation that none of TerraCom's customers had enquired about or raised any quality control issues with the coal exported by TerraCom from its Blair Athol mine (as pleaded at [152(a)] of the ASOC).

88 As to the Proposed March Announcement, para [11] stated that none of TerraCom's customers had raised any quality control issues with the coal which TerraCom exports from its Blair Athol mine. That does correspond to one aspect of the alleged representation, namely the raising of quality control issues. However, that is not pleaded as the alleged representation. The representation which is alleged is that none of TerraCom's customers had enquired about or raised any quality control issues concerning that coal. Although the alleged representation refers to enquiries and the raising of issues as being alternative actions, the Proposed March Announcement must refer to both actions in order to satisfy ASIC's alleged representation, as they were not pleaded as alternative representations. The reference to none of TerraCom's customers having enquired about the coal exported by TerraCom from its Blair Athol mine was entirely unwarranted. The representation was therefore not made in the Proposed March Announcement.

89 As to the April Announcement, para [7] states that since Mr Williams made his allegations, none of TerraCom's customers had raised any concerns about the quality of supplies from TerraCom's Blair Athol mine. That differs from the alleged representation in two significant respects. First, it is confined to a specific and recent period in time, namely the period since Mr

Williams made his allegations, whereas the alleged representation is unlimited in its timeframe. Second, para [7] is expressed in terms of customers raising “concerns”, which is stronger language, suggestive of matters which have worried the customers, than the very mild language of enquiring or raising issues which is used in the alleged representation. That second matter is reinforced by paras [8] and [11] which refer to customers having asked for additional coal samples to be tested. Such a request could not be taken by the ordinary reader as indicating a “concern” about the quality of supplies, because otherwise paras [7] and [8] would be internally contradictory. One cannot logically say that no customers have raised any concerns about the quality of coal and simultaneously say that our customers have asked for additional coal samples to be tested, if the latter is an example of the former. ASIC accepts that the ordinary reader would assume that the announcement is sensible and not self-contradictory (T65.36–39). Despite ASIC’s submission to the contrary, the use of the word “also” in para [8] does not have the effect of including requests for additional coal samples to be tested in the concept of “concerns” about the quality of supplies referred to in para [7]. Accordingly, when read in its immediate context, the reference to “concerns” raised by customers does not include requests for additional samples to be tested.

90 The second of the No Customer Complaint Representations alleges that the Proposed March Announcement and the April Announcement, independently and together, gave rise to a representation that, while some of TerraCom’s customers had also asked for additional coal samples to be tested, in every instance they found no quality control issues (as pleaded at [152(b)] of the ASOC).

91 I cannot see how such a representation arose from the Proposed March Announcement. However, this alleged representation does accurately reflect what was said in para [8] of the April Announcement and reproduces the information given in para [8] almost verbatim. Accordingly, in this particular instance, the alleged representation does correspond to the information that was given in the announcement.

92 The third of the No Customer Complaint Representations is that the Proposed March Announcement and the April Announcement, independently and together, gave rise to a representation that, during Mr McCarthy’s time as CEO of TerraCom, there had not been an occasion where clients had complained about the quality of coal as certified by the Certificate of Analysis (as pleaded at [152(c)] of the ASOC).

93 As to the Proposed March Announcement, I cannot see how such a representation arose from the information that was given in that document.

94 As to the April Announcement, the alleged representation corresponds almost verbatim to para [9] of the April Announcement. Accordingly, I find that this alleged representation was made in the April Announcement. However, for the reasons given in relation to the first of the No Customer Complaint Representations, a request for additional coal samples to be tested does not amount to a complaint about the quality of the coal in the way that an ordinary reader would read the April Announcement, because otherwise there would be an internal contradiction between para [9] and the express statement in para [8] that some of TerraCom’s customers had asked for additional coal samples to be tested (a point reinforced by the particular instance referred to in para [11]).

95 Accordingly, the second and third of the No Customer Complaint Representations were made in the April Announcement. They are therefore the only representations which survive to the next stage of analysis, namely whether they were false or misleading. I will consider ASIC’s case relating to omissions after dealing with the alleged falsity or misleading nature of the two No Customer Complaint Representations which I have found to be established.

Were the two representations which have been established false or misleading?

96 As to the second of the No Customer Complaint Representations as pleaded at [152(b)], ASIC relies on the fact that as at 3 April 2020 when the April Announcement was given or provided to the ASX, one of TerraCom’s customers (namely EWP) had asked for an additional coal sample to be tested but the testing of the umpire sample had not been completed and the results of that testing were not known until 7 April 2020.

97 That submission raises two points of construction of the pleaded representation. The first issue is whether the representation in [152(b)] should be construed as referring to “every instance in which the testing of the additional coal samples had been completed” or whether it should be construed as meaning that “in every instance where additional coal samples had been asked to be tested, the result of that testing was known and no quality control issue had been found”. There is much to be said for both of those constructions, although I prefer the latter as the more literally correct of the two constructions. On that view, it would, strictly speaking, be false or misleading to say that in every instance where TerraCom’s customers had asked for additional coal samples to be tested, they found no quality control issues, if the circumstances were such that at least one of those requests for additional testing remained outstanding.

98 The second issue of construction concerns the meaning of “TerraCom’s customers”. The point is significant in relation to EWP’s request of 11 March 2020, because the evidence demonstrates that the coal shipped on the “MV Sakizaya Leader” was sold to EWP by Noble rather than by TerraCom. The evidence shows that Noble as ‘Seller’ entered into a contract with EWP as ‘Buyer’ on 5 June 2019 (CB3/159), and Noble invoiced EWP for that coal by reference to that particular contract on 24 December 2019 (CB5/343). Orion invoiced Noble for the coal in that shipment on 23 December 2019 (CB5/339), pursuant to a contract between Orion as Seller and Noble as Buyer dated 30 August 2019 (CB4/219). Each of Orion and Noble entered into those contracts respectively as principal, and Noble did not enter into its contract with EWP in the capacity of agent in the proper legal sense of “agency”, namely connoting an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties. It is true that a number of documents refer to Noble as a marketing agent of Orion or TerraCom, but as the High Court explained in *International Harvester Company of Australia Pty Ltd v Carrigan’s Hazeldene Pastoral Company* (1958) 100 CLR 644 at 652–653, the word “agent” is often used loosely in colloquial language to include merchants or distributors who are contracting in their own right, rather than as agents in the proper legal sense of the word. There was a Coal Sale and Marketing Agreement between Orion and Noble, dated 13 September 2016 (CB1/18), which provides that all contracts for the sale of coal to third parties under that agreement will be between Orion, Noble (as agent for Orion) and the third party buyer unless otherwise agreed by Orion and Noble (cl 3.1(a)). However, the contract between EWP and Noble does not purport to be with Orion or with Noble as agent for Orion, and therefore appears to have been “otherwise agreed by Orion and Noble”.

99 Accordingly, EWP’s request for testing of the umpire sample in its correspondence with Noble gives rise to a question whether the reference to “TerraCom’s customers” in the April Announcement means those who contracted with TerraCom (or Orion, being its subsidiary), or whether “TerraCom’s customers” has a broader meaning. The ordinary and natural meaning of “TerraCom’s customers” is the former. An entity is a customer of TerraCom only if it has purchased directly from TerraCom, rather than purchasing from an intermediary between TerraCom and itself. ASIC submitted that a customer, in the mind of the ordinary reader, is a person who purchases coal from TerraCom “whether as end user or as customer” (T352.29–35). That formulation does not make sense, in that it distinguishes in the mind of the ordinary reader between end users and customers but at the same time rejects the distinction. ASIC

referred to the way in which the TerraCom Business Plan for FY20–FY22 treats EWP (apparently referred to as “Kowepo”) as a customer (CB3/162 at p 1530), but that loose usage may well have been appropriate for the purposes of a business plan as distinct from other commercial documents. ASIC also drew attention to the contracts register for Blair Athol coal as at November 2018 (CB2/90–91), but that document expressly distinguishes between customers and end users, placing “Kowepo” in the latter category under contracts with Noble as the customer. In the April Announcement, there is no indication that the word “customer” does not bear its ordinary meaning as referring to the entity which contracts with, and purchases from, TerraCom or one of its subsidiaries.

100 Accordingly, the fact that EWP’s request for additional testing of the umpire sample in March 2020 had not been completed and remained outstanding as at 3 April 2020 does not render the representation alleged in [152(b)] false or misleading, because EWP was not a customer of TerraCom.

101 In any event, even if EWP had been one of TerraCom’s customers, I would not have regarded the April Announcement as false or misleading in a material particular within the meaning of s 1309(2)(d). In *Australian Securities and Investments Commission v Noumi Limited (No 4)* [2024] FCA 1192 at [31]–[33], I reviewed the authorities concerning the meaning of the term “false in a material particular” and held that the information would be false in a material particular where it is of some significance and is not inconsequential, or in other words, the false particular must be of moment or of significance, not merely trivial or inconsequential. In my view, the fact that one request for an umpire sample to be tested remained outstanding at the date of the announcement would not have rendered the statement in the April Announcement false or misleading in a material particular. That is all the more so in circumstances where there is no evidence of the number of occasions when TerraCom’s customers had asked for additional coal samples to be tested and no quality control issues had been found. There may well have been a large number of such occasions, with the consequence that a single outstanding test would be of no significance, but the evidence does not enable me to say just how many occasions there had actually been. The alleged representation is unlimited in time, and would be taken by the ordinary reader to extend back to the formation of TerraCom on 7 May 2010 (Exhibit WMK–1, p 6). ASIC relies on an email from Mr McCarthy to Mr Boom dated 1 April 2020 (CB7/529), in which Mr McCarthy said that to the best of his knowledge and up until recently within TerraCom, there had never been an occasion whereby the seller had either questioned the quality of the coal as certified or had requested an umpire

sample. However, Mr McCarthy only became the CEO of TerraCom in about December 2018. Further, while it is understandable that requests for an umpire sample to be tested would have come to Mr McCarthy's attention in the environment of heightened sensitivity after August 2019, there is no evidence that such requests would have been brought to his attention in ordinary circumstances before then. ASIC accepts that it bears the onus of proving materiality (T69.25–32), and I would have found that ASIC had failed to discharge that onus if (contrary to the view which I have expressed above) I had found that the representation alleged in [152(b)] had been false or misleading by reason of the outstanding request by EWP.

102 As to the representation pleaded in [152(c)], namely that during Mr McCarthy's time as CEO of TerraCom there had not been an occasion where clients had complained about the quality of coal as certified by the Certificate of Analysis, ASIC relies on the correspondence from JERA to TerraCom of 28 February 2020, to which I have referred above. In my view, that correspondence does not amount to a complaint. JERA made an enquiry as to whether TerraCom was aware of any of the Certificates of Analysis for the cargoes delivered under the agreement between TerraCom and JERA that may have been among the certificates that were amended before issuance without proper justification, as referred to in the AFR article and the ALS Announcement of 24 February 2020. The letter went on to request the umpire sample for three cargoes to be tested. Those requests do not amount to complaints. When the test results of 6 March 2020 became known by JERA on 9 March 2020, they showed that two out of the three shipments favoured TerraCom, and the matter does not appear to have gone any further. Similarly, in relation to EWP, the letter of 11 March 2020 merely requested testing of the umpire sample and did not make a complaint. In any event, EWP was not a client of TerraCom but was a client of Noble. Accordingly, the representation alleged in [152(c)] was not false or misleading.

Were the representations false or misleading by way of omissions?

103 ASIC alleges at [149(b)] that the Exoneration Representations comprised information that had omitted from them a matter or thing that rendered the information misleading in a material respect by reason of a number of matters stated in the PwC Report not having been included in the Exoneration Representations. That way of pleading the matter means that if the Exoneration Representations are not established, then the allegation of a false or misleading omission from the Exoneration Representations must fail. As I have found that the Exoneration Representations are not established, this contention must be rejected.

104 ASIC alleges at [154(b)] of the ASOC that the No Customer Complaint Representations comprised information that had omitted from them a matter or thing that rendered the information misleading in a material respect by reason of matters raised by Korea South-East Power Company (**KOEN**), JERA and EWP. No submission was put to me in relation to KOEN and I regard that aspect as having been abandoned. If that is wrong, then I note that the relevant communication by KOEN was made to Noble (CB4/205–6) rather than to Orion or TerraCom, and KOEN was Noble’s customer, not a customer of TerraCom. That is reinforced by the fact that there does not appear to be any evidence that TerraCom was aware of the communication from KOEN. I have already dealt with the matters raised by JERA and EWP. The enquiries raised by JERA were not omitted but were expressly referred to in the April Announcement at para [11]. I am unable to see how the omission of reference to EWP’s request for an umpire sample to be tested in relation to EWP’s contract with Noble renders misleading or deceptive in a material respect either of the two No Customer Complaint Representations which I have found to be established.

Conclusion

105 Only two of the alleged representations have been established, and neither of them was false or misleading, nor was there any omission which rendered either of them false or misleading. It is therefore unnecessary to consider whether the defendants authorised or permitted the representations to be made, or took reasonable steps to ensure that the information was not false or misleading or omitted from it a matter or thing the omission of which rendered the information misleading.

Did the defendants contravene s 180(1)?

106 Section 180(1) of the Act provides as follows:

- (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
 - (a) were a director or officer of a corporation in the corporation’s circumstances; and
 - (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

Note: This subsection is a civil penalty provision (see section 1317E).

107 ASIC’s case of contravention of s 180(1) against each of the defendants has two aspects. The first is an allegation of contravention by reason of the conduct which allegedly constitutes the

alleged contraventions of s 1309(2). As I have rejected the allegations concerning s 1309(2), this aspect of ASIC's case of contravention of s 180(1) must fail.

108 The second aspect of ASIC's pleaded case is an alleged failure to take certain steps which are pleaded in the same terms against each of the defendants at [160], [165], [170] and [175] of the ASOC, and to the extent that a defendant did not read the PwC Report, the failure to read that report. I will deal separately below with the alleged failure to read the PwC Report, which is maintained only against Mr King.

109 As to the failure to take certain pleaded steps as set out in the paragraphs I have referred to above, the pleaded allegation is that on and from the date that each defendant received the PwC Report, or alternatively the ALS Announcement of 24 February 2020, or alternatively the ALS Announcement of 2 April 2020, then in acting with care and diligence they would have:

- (d) taken diligent interest in the information available to them, including but not limited to the PwC Report, the February ALS Announcement, and the April ALS Announcement, to understand that information, and apply an enquiring mind to the responsibilities placed upon them;
- (e) taken any reasonable steps to understand and/or investigate the reasons for the PwC Findings;
- (f) taken any reasonable steps to understand and/or investigate the existence of inconsistent coal quality results;
- (g) taken any reasonable steps to investigate the PwC Matters for Inquiry;
- (h) contacted relevant witnesses, including contacting any representative of ALS responsible for testing TerraCom coal to discuss:
 - (ii) the matters raised in the PwC Report including the PwC Findings and the PwC Matters for Inquiry;
 - (iii) on and from 24 February 2020, the February ALS Announcement;
 - (iv) on and from 2 April 2020, the April ALS Announcement;
- (i) alternatively to subparagraph (h), caused the contact referred to in subparagraph (h) above to be made by an appropriate person on TerraCom's behalf, such as PwC; and
- (j) caused the Board of TerraCom to consider taking the steps pleaded in subparagraphs (e) to (i).

110 In its closing address, ASIC confined the allegation of steps which ought to have been taken by the defendants to two matters. First, ASIC contends that following the announcements by ALS on 24 February 2020 and 2 April 2020, enquiries should have been made of ALS in respect of whether the Certificates of Analysis that ALS said had been amended without proper

justification included TerraCom certificates, and, if so, whether ALS was aware of any involvement by any employee of TerraCom (T260.7–20, and T247.30–41). The second is that in light of the PwC Report, enquiries should have been made of ALS and Mr Garmeister as to the matters referred to in section [3.4.4] and the Executive Summary in relation to concern 3(a) in the PwC Report (T260.14–20 and T256.29–257.6). The balance of the allegations of steps which should have been taken as set out in (d) to (j) of the extract set out in the preceding paragraph was abandoned (T260.28–38).

111 Section 180(1)(a) directs attention to the corporation’s circumstances. In relation to an allegation that directors or officers failed to make certain enquiries, the starting-point must be to establish what information the corporation already had and what enquiries were actually made. ASIC bears the onus of proof on that matter, but has made little attempt to prove any deficiency in the information which TerraCom may have suffered from, and any absence of enquiry of ALS for information, after receiving the ALS Announcements of 24 February 2020 and 2 April 2020. The salient evidence is as follows.

112 ASIC called as a witness Mr Pearson, the General Counsel and Company Secretary of ALS. In his affidavit, he proved that following the release of the ALS Announcement of 24 February 2020, some clients and end-users sought clarification and further information about systems and processes within the ALS Group (at [25]). The new interim General Manager of Coal Services was encouraged to make contact with clients of TerraCom’s subsidiary, ACIRL, as he thought appropriate, and in some instances communication with particular clients of ACIRL in the coal sector was elevated to Mr Pearson and ALS’s Chief Risk Officer (at [25]). On the limited occasions that Mr Pearson personally had contact with those clients following that announcement, he told them that the independent investigation was ongoing, and that ALS may be in a position to provide more information once that investigation was concluded, which occurred on 2 April 2020 (at [26]–[27]). Mr Pearson says that following the ALS Announcement of 2 April 2020, some of ACIRL’s clients and some end-users requested confirmation as to whether their coal certificates had been manually amended without justification, and if so whether any of their employees had been involved in that practice, adding that Mr Pearson and the Chief Risk Officer were involved in some (only) of those communications (at [30]–[31]). Mr Pearson says that no one from TerraCom contacted him about either of the two ALS Announcements to the ASX or asked him whether certificates issued to TerraCom had been, or may have been, amended without justification, and says that he is not aware of any TerraCom representative asking anyone else at ALS or anyone at ACIRL

whether any certificates issued to TerraCom had been, or may have been, amended without justification (at [36]). Mr Pearson also says that if, after 2 April 2020, TerraCom had asked him whether the certificates issued to or for TerraCom, had been, or may have been, amended without justification and requested copies of any such certificates, or asked that question, and made that request of someone else at ALS or ACIRL and that question and request had been referred to him (as he would have expected would have occurred), then he would have taken legal advice, and any further response would have depended on that legal advice (at [37]).

113 That evidence has at least two limitations in relation to the question of what information TerraCom had obtained from ALS and what enquiries TerraCom had made of ALS. First, Mr Pearson was involved in only some of the communications with coal customers and end-users, and does not purport (entirely properly) to give evidence of what others at ALS or ACIRL may have communicated with TerraCom, whether on the initiative of ALS or ACIRL, or in response to enquiries from TerraCom. Second, Mr Pearson's expectation (namely that if TerraCom had asked someone else in ALS or ACIRL after 2 April 2020 whether the certificates to or for TerraCom had been, or may have been, amended without justification and requested copies of any such certificates then he would have expected the question and request to have been referred to him) is very weak evidence as to what would have occurred. No basis for that expectation is given, whether by reference to some instruction, or to the common practices of ALS or ACIRL, or otherwise. I am unable to infer from Mr Pearson's evidence (at [37]) that on the balance of probabilities such a question and request would in fact have been referred to him. Accordingly, Mr Pearson is not in a position to prove on the balance of probabilities that such a request had not been made by TerraCom. In any event, the absence of a request by TerraCom would be of no significance if the relevant information had already been volunteered by someone at ALS or ACIRL, which Mr Pearson's evidence leaves open.

114 ASIC relies also on the email by Ashurst to PwC of 19 November 2019, which refers to PwC having asked whether an interview about the coal quality testing process could be conducted directly with someone from ALS, to which Ashurst replied that they had raised this option but TerraCom was not comfortable with PwC speaking to any external parties unrelated to the company, given the sensitive nature of the allegations made by Mr Williams (CB4/303). As I have indicated above, that was at a time before there was public disclosure of Mr Williams' allegations, which by their nature were highly defamatory of Mr McCarthy and Mr Boom (unless they could be shown to be true) and potentially highly damaging to TerraCom's reputation and commercial standing. It is perfectly understandable that TerraCom would have

sought to keep Mr Williams’ allegations confidential to TerraCom and its professional advisers at the time. However, there is no basis to conclude that that attitude on the part of TerraCom persisted after the allegations had been disclosed publicly in February 2020.

115 ASIC also relies on the PwC Report indicating that PwC did not have access to any representative of ALS, and stated in section [3.4.4] that “Further consideration could be given to inviting a representative from ALS who is responsible for testing TerraCom coal.” That mild suggestion may well have been taken up by TerraCom in the period after 24 February 2020. ASIC has not established that it was not.

116 ASIC also relies on a passage in the cross-examination of Mr King. Mr King was asked a series of questions about his state of mind upon reading ALS’s announcement of 24 February 2020 and the AFR article on that day (T184–186). There was then the following exchange (T186.25–39):

So you must have been aware of the possibility, at least, that if ALS had identified that a number of their coal certificates were amended without proper justification, that it might have involved TerraCom. You must have understood that as a possibility? – It was a possibility.

And a possibility you understood in February 2020? – Yes

And yet you took no steps to yourself better understand or cause anyone at TerraCom to better understand and further investigate the matter so far as TerraCom was concerned; correct? – Well, I believed in the first instance that I was satisfied with the assurances. In the second instance, I was a non-executive chairman, not an executive chairman. I wasn’t an executive, and if there were steps to be taken, it should have been taken by management.

Are you agreeing with my proposition you took no steps? – I took no steps.

Mr King’s admission that he took no steps was plainly referable to February 2020, being the temporal context of the questions, and in particular the last few days of that month after Mr King had read the ALS Announcement of 24 February 2020. Mr King was not asked whether he took any steps in March 2020, or whether he took any steps after reading the ALS Announcement of 2 April 2020 which reported on the conclusions of ALS’s independent investigation. In any event, I do not accept Mr King’s admission. Mr King’s answer did not refer to his communications with EY on 27 and 28 February 2020, which I regard as a further step to better understand and investigate the matter.

117 It is clear that there were a number of lines of communication between TerraCom and ALS in relation to this matter. First, on 5 February 2020, Mr McCarthy and Mr Jason Hubbard (General Manager – Global of ALS Coal Sales) spoke about Mr Williams and the request for comment

from the AFR (CB5/388). Mr Hubbard also asked Mr McCarthy for contact details of TerraCom’s legal counsel, and provided Mr Pearson’s contact details (CB5/386).

118 Second, on 24 February 2020, there was a conversation between Mr Pearson and Mr James Clarke of Ashurst (T97.22–25). Mr Pearson could not recall whether the conversation included the subject-matter of the ALS Announcement of 24 February 2020, but did not deny that it might have done (T98.16–21). Mr Ransley’s request to Mr Clarke to contact ALS’s legal counsel “as a matter of urgency” specifically referred to the ALS Announcement, and the subject matter of the email was “ALS Release and Legal Counsel Contact” (Exhibit 2; Exhibit 4, tab 26). In my view, it is more likely than not that Mr Pearson and Mr Clarke did discuss ALS’s Announcement that day in light of Mr Ransley’s email.

119 Third, on 11 March 2020, there was an exchange of WhatsApp messages between Mr Ransley and Mr Hurst (being TerraCom’s public relations consultant), in which Mr Hurst said that he was on the phone to the testing company, and a few minutes later said to Mr Ransley:

He called to say indications to date are there are no “big” issues unearthed in the internal review.

The pronoun “he” is likely to have been a reference to Mr Alasdair Jeffrey, the public relations consultant for ALS, and Mr Pearson gave evidence that he was aware that Mr Jeffrey and Mr Hurst were speaking in March and April 2020 but did not know what the subject-matter was (T98.31–46). Mr Jeffrey is referred to at the foot of the two ALS Announcements as the relevant contact person for media enquiries.

120 Fourth, the ALS Announcement of 2 April 2020 itself refers to ALS continuing to communicate with clients of the Coal Superintending and Certification Unit about the progress of the investigation and the Company’s remedial actions. That evidence was admitted only as evidence of the fact the representations were made and opinions were expressed, but the defendants were entitled to rely on that statement in forming their own assessment as to whether ALS was communicating with TerraCom. Mr Pearson’s evidence supports the truth of that statement in the announcement of 2 April 2020.

121 In light of the numerous lines of communication between ALS (or ACIRL) and TerraCom at the time, together with the fact that TerraCom also had the benefit of the analysis conducted by EY in its half-year audit and conveyed on 27 and 28 February 2020, ASIC’s evidence falls well short of establishing that there was any deficiency in the information already available to TerraCom and any absence of enquiry by TerraCom which rendered its directors and officers

duty-bound to make further enquiries of ALS as to whether the Certificates of Analysis which ALS said had been amended without justification included TerraCom certificates.

122 The second of ASIC's contentions as to the further enquiries which it submits should have been made by the defendants faces the same problems as the first contention so far as enquiries of ALS are concerned. The second contention also includes an allegation that enquiries should have been made of Mr Garmeister. The PwC Report referred to Mr Garmeister as no longer being employed by TerraCom and having declined an invitation from Ashurst to participate in a meeting with PwC (sections [2.3] and [3.4.4]). Ashurst's email to PwC of 19 November 2019 (CB4/303) indicates that Mr Garmeister denied any allegations of misconduct or fraudulent activity, and was not concerned about anything that happened during his employment at TerraCom. However, Mr Garmeister was not willing to participate in the investigation, pointing out that he was no longer employed by TerraCom. Only the most unreasonably stubborn and persistent director or officer of TerraCom would have thought there was any point in trying to make enquiries of Mr Garmeister after reading the ALS Announcements of 24 February 2020 and 2 April 2020. The allegation that the defendants were duty-bound under s 180(1) to make such further enquiries, or cause them to be made, must be rejected.

123 One of the more extraordinary features of ASIC's case as to contravention of s 180(1) is that ASIC contends that Mr McCarthy and Mr Boom should themselves have made the enquiries which ASIC submits the defendants should have made, despite the fact that Mr McCarthy and Mr Boom were the subject of the allegations made by Mr Williams which were investigated by PwC. They were plainly in a position of conflict, with a real and sensible personal interest in the investigation or inquiries. Mr King gave evidence, which was not challenged, that he acted on the basis that Mr McCarthy and Mr Boom would need to be excluded from the investigation of Mr Williams' allegations, and from any formal or informal discussions about the investigation (Mr King's affidavit of 19 June 2025 at [30] and [34]). In my view, that was an entirely commendable and proper course for Mr King to take. On the day before Mr Borsky KC made his final address on behalf of ASIC, I sought in vain to dissuade ASIC from contending that Mr McCarthy and Mr Boom should have been involved in any further investigation of these matters after the PwC Report was delivered and the ALS Announcements of 24 February 2020 and 2 April 2020 were made (T195.26–198.40). The following day, Mr Borsky KC told me that he had taken instructions from ASIC, which accepted that it was proper for Mr McCarthy and Mr Boom not to participate in the management or the direction of the PwC investigation itself (T244.23–27). So far so good.

However, Mr Borsky KC maintained the contention that Mr McCarthy and Mr Boom contravened their duties under s 180 by failing to make enquiries (or causing enquiries to be made on behalf of TerraCom) of ALS following its announcements, and more generally to take steps or cause steps to be taken to better understand and further investigate TerraCom's position in light of the matters raised in the PwC Report after it had been delivered, although he carved out an exclusion in relation to their own alleged involvement (T244.36–245.5). ASIC's argument appears to be that Mr McCarthy and Mr Boom were or should have been allowed to inquire into their own alleged involvement, although they were not obliged to do so (T245.38–41).

124 The position taken by ASIC is plainly untenable. The proposed exclusion in the making of enquiries in respect of any alleged involvement of Mr McCarthy and Mr Boom is obviously unworkable. Mr Borsky KC sought to justify the exclusion on the basis that Mr McCarthy and Mr Boom knew what they had or had not done (T245.31). However, there was no way in which Mr McCarthy or Mr Boom could have foreseen whether someone of whom enquiries were to be made might have sought to implicate them in some allegation of wrongdoing, even if the allegation were completely unfounded. It is a regrettable feature of ordinary experience that people make unfounded allegations which could not reasonably have been anticipated by those against whom the allegations are made, despite the accused persons being fully aware of what they have actually done themselves. The point is vividly illustrated by the allegations made by ASIC itself in the present proceedings. According to ASIC, Mr McCarthy and Mr Boom were duty-bound to make enquiries of ALS, except in relation to their own alleged involvement in any wrongdoing or misconduct. However, they could not have conclusively ascertained whether the exception applied or not until the enquiries had actually been made and responses to those enquiries were given.

125 More fundamentally, ASIC's submission that Mr McCarthy and Mr Boom should have made the alleged further inquiries is clearly contrary to well-established principles of fiduciary obligation. As officers of Terracom, Mr McCarthy and Mr Boom owed fiduciary obligations to TerraCom: *Equity 8 Pty Ltd v Shaw Stockbroking Ltd* [2007] NSWSC 413 at [185] (Barrett J); and see in relation to employees generally *Anderson v Canaccord Genuity Financial Ltd* [2023] NSWCA 294; (2023) 113 NSWLR 151 at [126] and [129]–[166] (Gleeson, Leeming and White JJA). One of those obligations is that the fiduciary must not put himself or herself in a position where his or her interest and duty conflict, in the absence of any agreement to the contrary. That is not merely an obligation where there is a conflict to give priority to the

company's interests over his or her own interests, but an obligation to avoid being in a position at all where his or her interest and duty conflict or where there is a significant possibility of conflict: *Everest Capital Ltd v Trust Company Ltd* [2010] NSWSC 231; (2010) 77 ASCR 371 at [100]–[101]. Section 185 of the Act preserves the operation of that fiduciary duty. It is unworthy of the corporations regulator to have made the contention that Mr McCarthy and Mr Boom should have been involved at all in investigating these matters. That is why I sought to dissuade ASIC from maintaining its submission. ASIC actually came close to expressing the correct position in a letter of particulars dated 18 September 2023 (Exhibit A), in which ASIC's solicitors gave particulars of the allegations made in [160], [165], [170] and [175] as to the steps which the defendants should have taken to discharge their duties under s 180(1) as including:

taking steps to ensure that decision-making in relation to the Whistleblower Allegations was not affected by the conflict of interest faced by McCarthy and Boom and the fact-finding process was not overly reliant on the accounts of McCarthy and Boom so as to ensure the investigation into the Whistleblower Allegations was independent and properly conducted.

I note that the term “Whistleblower Allegations” was defined in the then Statement of Claim at [44] as including the allegations made by Mr Williams as to a practice between TerraCom and ALS, whereby coal quality results recorded in the Shipping Analysis Report for particular shipments of coal were amended without proper justification by ALS to record and report results more favourable to TerraCom in the Certificate of Analysis with respect to the same shipment, and the Certificates of Analysis with the amended results were then issued to customers and used to invoice those customers, together with allegations that the practice had been engaged in by Mr Garmeister with the knowledge of Mr McCarthy and Mr Boom. The letter of particulars was relied on by Mr McCarthy and Mr Boom in their closing addresses, but was simply ignored by ASIC in its address in reply and elsewhere.

126 As a separate matter, ASIC submits that Mr King's failure to read the PwC Report at the time was itself a contravention of s 180(1). However, that matter must be set in the context of all the circumstances of the case, which include that:

- (a) Mr King had appointed Mr Forrest, an independent director and Chairman of the Audit Committee, to manage the investigation into Mr Williams' allegations, and had no reason to doubt Mr Forrest's competence or integrity;

- (b) Mr King sought and received regular updates about the progress of the investigation and was told by Mr Forrest and Mr Ransley that PwC had not found anything of substance to indicate wrongdoing by TerraCom or its employees;
- (c) Mr Ransley sent an email on 9 December 2019 stating, in relation to the imminent PwC Report, that the report made no findings of wrongdoing by Mr McCarthy or Mr Boom (Exhibit WMK-1, p. 296);
- (d) On about 6 January 2020, Mr Forrest told Mr King in a telephone conversation that TerraCom and the executives were essentially exonerated in the PwC Report (Mr Forrest's affidavit of 24 June 2025 at [82]);
- (e) Mr King had been unable to open the SharePoint link with the final PwC Report on 22 January 2020, upon his discharge from hospital;
- (f) None of the other directors or executives ever suggested to Mr King that the PwC Report required consideration or raised concerns; and
- (g) On 27 February 2020, Mr King attended a meeting with TerraCom's auditors, who then had a separate meeting with Ashurst for 1–1½ hours for the purpose of going through the PwC Report, before returning and confirming that EY had no issue with the PwC Report and would provide a clean half-yearly report the following day, which is what occurred.

127 Accordingly, I reject ASIC's submission against Mr King for not reading the PwC Report. The two announcements by ALS do not alter that position. There is nothing in either announcement which indicates any collusion between ALS and TerraCom, and the announcement of 2 April 2020 expressly said that ALS had continued to communicate with clients about the progress of the investigation and ALS's remedial actions. In my view, neither of the ALS Announcements gave rise to a duty on the part of Mr King to read the PwC Report, which he had been told by Mr Forrest had exonerated the company and the two executives implicated by Mr Williams' allegations.

128 Accordingly, ASIC's case of contravention of s 180(1) must be rejected.

Costs

129 The Amended Originating Process is dismissed as against the second to fifth defendants, who in the ordinary course are entitled to an order for costs in their favour. However, I have not heard the parties on costs, and there is a realistic possibility that the successful defendants will

seek a special costs order, whether by way of indemnity costs or lump sum costs or both. My tentative preliminary view is that properly advised, ASIC should have known that the proceedings against the second to fifth defendants had no realistic chance of success, except perhaps in relation to some minor aspects which would not have significantly affected the amount of costs incurred by the second to fifth defendants. Accordingly, I will set a timetable for the exchange of affidavits and written submissions in relation to costs. I anticipate deciding the question of costs on the papers.

I certify that the preceding one hundred and twenty-nine (129) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackman.

Associate: 

Dated: 4 July 2025

SCHEDULE OF PARTIES

NSD 176 of 2023

Defendants

Fourth Defendant: CRAIG ANTHONY RANSLEY

Fifth Defendant: WALLACE MACARTHUR KING