

NOTICE OF FILING

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File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v
TERRACOM LIMITED ACN 143 533 537 & ORS
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

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

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

CONCISE STATEMENT



No. NSD of 2023

IN THE FEDERAL COURT OF AUSTRALIA
 DISTRICT REGISTRY: New South Wales
 DIVISION: GENERAL

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
 Plaintiff

TERRACOM LIMITED (ACN 143 533 537) AND OTHERS NAMED IN THE SCHEDULE
 Defendants

A. THE IMPORTANT FACTS GIVING RISE TO THE CLAIM

Overview

1. The First Defendant (**TerraCom**) is an ASX listed public company that, in 2020, had a market capitalisation of around \$100 million. The company was primarily a producer of thermal coal as the owner of the Blair Athol coal mine in Queensland.
2. This case concerns the conduct of TerraCom and its directors and officers between July 2019 to April 2020. It focuses on the conduct of independent directors and officers following certain whistleblower allegations and related publicly reported allegations in respect of differences and discrepancies in coal quality results reported by an independent laboratory and the findings received by TerraCom from its own independent, specialist third-party investigation into the respective allegations.
3. The quality of coal (such as that sold by TerraCom) is measured by a number of parameters, including net calorific value (**NCV**). At all relevant times, the contracts entered into between TerraCom, its subsidiaries or selling agents, and the ultimate customers of the coal included conditions as to the quality of the coal including NCV. The price to be paid for coal was based on a formula referable to, inter alia, NCV as specified in final coal quality certificates issued by a laboratory independent of TerraCom (**Certificate of Analysis**). These contracts typically included provisions for either or both of: (a) penalties to be applied as against TerraCom (or its selling agents) if the NCV of the coal as reported in the final coal quality certificates did not meet contractual specifications; or (b) rejection of the shipment of the coal altogether.
4. At all relevant times, TerraCom and/or its customers appointed a third-party laboratory, ALS Limited (**ALS**), or its subsidiaries, to test its coal and to prepare and issue the Certificate of Analysis.
5. Between July 2019 and 14 August 2019, Mr Justin Williams (**Williams**), a former employee of TerraCom, raised concerns initially with the Chief Executive Officer (the Second Defendant, Daniel **McCarthy**) and the Chief Financial Officer (the Third Defendant, Nathan **Boom**) which in substance were to the effect that there was a practice as between TerraCom and ALS where coal quality results recorded in the Shipping Analysis Report (**Shipping Analysis Report**) for particular shipments of coal were being amended by ALS to record and report more favourable results to TerraCom in the Certificate of Analysis in respect of the same shipments. Williams expressed concern that the Certificates of Analysis with the amended results were being issued to customers and used for the purposes of invoicing those customers.

Filed on behalf of (name & role of party)	Australian Securities and Investments Commission, Plaintiff		
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6. On 14 August 2019, Williams spoke to an adviser to TerraCom's Board (who subsequently became a director and Deputy Chairman of TerraCom on 21 February 2020) (the Fourth Defendant, **Craig Ransley**) where he, by reference to a sample of TerraCom and ALS documents:
 - (a) restated the allegations at paragraph 5; and
 - (b) stated that current or former employees of TerraCom, including McCarthy and Boom, was involved in or had knowledge of the amendment of coal quality results,

(Whistleblower Allegations).

The Whistleblower Conduct

7. On or about 9 July 2019, Williams commenced employment with TerraCom in the position of General Manager, Commercial.
8. Between 11 July 2019 and 14 August 2019, Williams made the Whistleblower Allegations.
9. On 13 August 2019, some five weeks after he commenced, Williams' employment with TerraCom was terminated on the alleged ground of redundancy and on 14 August 2019 Williams told Ransley that he would not return his laptop as he was planning on providing the laptop to the Australian Federal Police.
10. On or about 29 August 2019, TerraCom engaged PricewaterhouseCoopers (**PwC**) to investigate, amongst other things, the Whistleblower Allegations.
11. On 3 September 2019, Williams commenced legal proceedings against TerraCom in the Fair Work Commission in relation to his dismissal. In December 2019, Williams commenced proceedings in the Federal Circuit Court against various TerraCom directors and officers and TerraCom later became a defendant to this proceeding. In May 2020, Williams commenced proceedings against TerraCom and various TerraCom directors and officers in the Federal Circuit Court. In February 2020, Williams disclosed the Whistleblower Allegations to ASIC.

The PwC Report

12. On 16 December 2019, PwC delivered its report to TerraCom (**PwC Report**). By 20 January 2020, each of McCarthy, Boom, Ransley and TerraCom's Chairman (the Fifth Defendant, **Wallace King**) received the PwC Report.
13. The PwC Report stated, relevantly, that:
 - (a) its investigation methodology was limited and no contact was made with ALS or its employees or officers;
 - (b) by reference to a sample review of documents, there were inconsistencies in reported NCV between Shipping Analysis Reports and the commercial invoices issued to customers, similar to the pattern of inconsistencies identified by Williams but that "the underlying reason for these inconsistencies could not be determined from the correspondence reviewed or through discussions with TerraCom";
 - (c) TerraCom had advised PwC that coal sampling measurements at different points can vary, but had provided no other information regarding why there were differences in NCV between documents dated the same day and issued, in some cases, a few hours apart;
 - (d) of 14 shipments reviewed, 12 showed inconsistencies between the value of the NCV stated on the initial Shipping Analysis Report and the subsequent Certificate of Analysis or commercial invoice, and all 12 inconsistencies were favourable to TerraCom;
 - (e) the total value of the 12 shipments for which inconsistencies had been identified was approximately \$81 million and recalculation based on the earlier Shipping Analysis Reports demonstrated that the increase in the NCV in the later Certificates of Analysis gave rise to an increase in invoice value of \$1,151,409 over those 12 shipments alone;

- (f) in FY2019, four shipments totalling approximately \$27 million (representing 8% of TerraCom's annual revenue) would have been liable for rejection by TerraCom's customer under the applicable contractual terms had they been certified at the lower NCV levels shown on the initial (unaltered) Shipping Analysis Reports;
 - (g) there was evidence to indicate that there were discussions between TerraCom and ALS between the time of the issue of the initial Shipping Analysis Reports and the subsequent issue of the final Certificates of Analysis; and
 - (h) review of "email communications" between McCarthy, Boom and relevant third parties such as ALS, "using targeted searched terms did not identify any indications" that Mr McCarthy was responsible for any potential misstatement of coal quality and that correspondence with respect to coal testing and related practices reviewed was primarily between Garmeister and ALS and "typically did not involve Mr McCarthy".
14. The PwC Report did *not* find that the Whistleblower Allegations were "unfounded", nor did it find that the allegations of a scheme involving the production of improperly altered certificates of analysis were "unfounded", nor did it find that McCarthy and Boom or TerraCom or any of its employees were "exonerated". The matters in paragraph 13 above and this paragraph 14 are referred to, together, as the "**PwC Findings**".
15. The PwC Report also stated that:
- (a) the concerns raised by Williams referred to a pattern of inconsistencies in NCV between internal Shipping Analysis Reports and the commercial invoices issued to customers, which Williams attributed to improper alteration at the instance or request of TerraCom;
 - (b) PwC identified similar inconsistencies, in TerraCom's favour, in relation to 10 further shipments and that the underlying reason for these inconsistencies could not be determined; and
 - (c) further consideration could be given to inviting a representative from ALS who is responsible for testing TerraCom coal to discuss the PwC Findings (together the **PwC Matters for Inquiry**).

The First ASX Announcement

16. On 24 February 2020, *The Australian Financial Review (AFR)* published an article in which it referred to the Whistleblower Allegations and the legal proceedings issued by Williams.
17. On 24 February 2020, ALS released an ASX announcement stating: "*Preliminary investigations have identified that a number of certificates of analysis issued from two laboratories within the coal superintending unit in Australia were amended without proper justification. Four staff members of the coal superintending unit have been suspended pending the outcome of the ongoing investigation*" (**February ALS Announcement**).
18. On 24 February 2020, TerraCom gave to the ASX, and the ASX released to the market, an announcement (**February Announcement**) which, inter alia, denied the Whistleblower Allegations and stated that it believed them to be unfounded and that it had had the matter independently investigated.

Customer Enquiries and Complaints

19. On 28 February 2020, one of TerraCom's customers, JERA Global Markets Pte Ltd (**JERA**) wrote to Boom in relation to the Whistleblower Allegations, asking whether TerraCom was aware if any of the Certificates of Analysis for cargoes delivered under agreements with JERA may have been amended without proper justification and for the details of TerraCom's investigations to be shared in relation to such cargoes. Boom forwarded JERA's email to McCarthy and Ransley on 1 March 2020.

20. On 12 March 2020, TerraCom's marketing agent, Noble Resources International Pte Ltd received a letter dated 11 March 2020 from Korea East-West Power Co (**EWP**), an ultimate customer of TerraCom, raising a "quality discrepancy of Net Calorific Value" (**EWP Complaint**). McCarthy and Boom became aware of the EWP Complaint on the same date and Ransley by 13 March 2020. The matters in paragraphs 19 and 20 are referred to, together, as the "**Customer Enquiry and Complaint Information**".

Subsequent ASX Announcements and Open Letter to Shareholders

21. On 10 March 2020, TerraCom gave an announcement to the ASX (**Proposed March Announcement**). TerraCom denied the Whistleblower Allegations and referred to, inter alia, a request of \$5,000,000 from Williams in return for not pursuing TerraCom over his dismissal, Williams being unsuccessful with similar allegations in the past, an absence of customer quality control issues, the allegations that its CEO and CFO had been involved in a scheme relating to the fake analysis of coal samples, and stated that an independent forensic investigation found no evidence of wrongdoing.
22. The ASX refused to release the Proposed March Announcement to the market and, on 12 March 2020, TerraCom published the substance of the Proposed March Announcement in the AFR and *The Australian* newspapers as an 'Open Letter to TerraCom Shareholders' (**Open Letter**).
23. On 2 April 2020, ALS released an ASX announcement stating: "*The investigation has 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 the acquisition of the ACIRL business by ALS in 2007. No evidence of bribery or other third-party payments involving ALS staff has been found or indicated*" (**April ALS Announcement**).
24. On 3 April 2020, TerraCom gave to the ASX, and the ASX released to the market, an announcement (**April Announcement**) which, inter alia, stated that Mr Williams' allegations were made only after he was dismissed, referred to the February ASX Announcement, stated that it took the 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 found that 'neither had done anything wrong', and that there were no customer concerns about quality.
25. Each of the February Announcement, the Proposed March Announcement and the April Announcement stated that they had been "approved" by TerraCom's Disclosure Committee for release. At all relevant times, the Disclosure Committee comprised McCarthy, Boom, Ransley and King.

B. THE RELIEF SOUGHT FROM THE COURT

26. ASIC seeks declarations of contravention, pecuniary penalties, disqualification orders and costs against TerraCom, McCarthy, Boom, Ransley and King as set out in its Originating Process dated 28 February 2023.

C. THE PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

Misleading information provided to the ASX: s 1309(2) of the Corporations Act

27. ASIC contends that each of McCarthy, Boom, Ransley and King contravened s 1309(2) of the Act for the following reasons.
28. The February Announcement, the Proposed March Announcement and the April Announcement, independently and together, gave rise to one or more of the following representations, namely that the "independent investigation" referred to in each announcement (being the PwC Report) had:
- (a) rejected all of Williams' allegations;
 - (b) found that the Whistleblower Allegations were "unfounded";

- (c) excluded any involvement by TerraCom and/or McCarthy, Boom and any other employees or officers of TerraCom in relation to the Whistleblower Allegations; and/or
 - (d) rejected the allegation of TerraCom's involvement in the alteration of coal quality certificates (ie Certificates of Analysis) (together, the **Exoneration Representations**).
29. The Proposed March Announcement and the April Announcement, independently and together, gave rise to one or more of the following representations, namely that:
- (a) 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;
 - (b) while some of TerraCom's customers also asked for additional coal samples to be tested, in every instance, they found no quality control issues; and
 - (c) 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 (together, the **No Customer Complaint Representations**).
30. The Exoneration Representations comprised information that relates to the affairs of TerraCom and that was false or misleading in a material particular, and further or alternatively omitted from it a matter or thing the omission of which rendered the information misleading in a material respect because it omitted the PwC Findings and/or the PwC Matters for Inquiry.
31. The No Customer Complaint Representations comprised information that relates to the affairs of TerraCom and that was false or misleading in a material particular, and further or alternatively omitted from it a matter or thing the omission of which rendered the information misleading in a material respect because it omitted the Customer Enquiry and Complaint Information.
32. Each of McCarthy, Boom, Ransley and King was an officer or employee of a corporation who authorised or permitted the making available or the giving of the information comprising the Exoneration Representations to the ASX. Each of McCarthy, Boom and Ransley was an officer or employee of a corporation who authorised or permitted the making available or the giving of the information comprising the No Customer Complaint Representations to the ASX.
33. Each of McCarthy, Boom, Ransley and King failed to take reasonable steps to ensure that the Exoneration Representations and, in the case of McCarthy, Boom and Ransley, the No Customer Complaint Representations information was not false or misleading in a material particular and did not have omitted from it a matter or thing the omission of which rendered the information misleading in a material respect. In particular:
- (a) with respect to the Exoneration Representations, each of McCarthy, Boom, Ransley and King failed to take any reasonable step to understand and/or investigate the PwC Findings and PwC Matters for Inquiry, or speak to relevant witnesses (including by failing to contact any representative of ALS to discuss the Whistleblower Allegations, the matters raised in the PwC Report or the matters raised in the February ALS Announcement and the April ALS Announcement) and to ensure that the February Announcement, the Proposed March Announcement and the April Announcement was amended so that it accurately reflected the PwC Findings and PwC Matters for Inquiry; and
 - (b) with respect to the No Customer Complaint Representations, each of McCarthy, Boom and Ransley failed take any reasonable step to investigate the Customer Enquiry and Complaint Information or to ensure that the Proposed March Announcement and the April Announcement was amended so that it accurately reflected the Customer Enquiry and Complaint Information.

Breach of officer's duties: s 180(1) of the Corporations Act

34. ASIC contends that each of McCarthy, Boom, Ransley and King contravened s 180(1) of the Act for the following reasons.

35. On and from the date each of them received the PwC Report, or alternatively from the date of the February ALS Announcement or April ALS Announcement, each of McCarthy, Boom, Ransley and King failed to exercise reasonable care and skill in their discharge of their duties as directors and officers of TerraCom by failing to take a diligent and intelligent interest in the information available to each of them to understand that information, and apply an enquiring mind to the responsibilities placed upon them including by failing to:
- (a) take any reasonable step to understand and/or investigate the reasons for the PwC Findings, especially the existence of inconsistent coal quality results; and
 - (b) take any reasonable step to investigate the PwC Matters for Inquiry;
 - (c) contact any representative of ALS responsible for testing TerraCom coal to discuss the matters raised by the PwC Findings, the PwC Matters for Inquiry, the February ALS Announcement and the April ALS Announcement.
36. Alternatively to paragraph 35 above, if one or more of McCarthy, Boom, Ransley or King did not read the PwC Report, then each such person who did not read the PwC Report failed to exercise reasonable care and skill in his discharge of his duties as a director or officer of TerraCom by failing to read the PwC Report in circumstances where:
- (a) the PwC Report had been specifically commissioned on instruction from the TerraCom Board; and
 - (b) each was a member of the Disclosure Committee, received copies of each draft announcement, and authorised or permitted the release of each announcement to the ASX, or at least knew that they were to be published, and knew that TerraCom's ASX announcements typically expressly stated that they had been authorised for release by the Disclosure Committee.

Whistleblower Protection: s 1317AC of the Corporations Act

37. ASIC contends that TerraCom contravened s 1317AC(1) and that each of McCarthy, Boom and Ransley were involved in the contraventions contrary to s 1317AC(3) for the following reasons.
38. Williams was at all relevant times an "eligible whistleblower" in relation to TerraCom, within the meaning of s 1317AAA of the Act. Williams:
- (a) in fact made "qualifying disclosures" within the meaning of ss 1317AA(1) and (2) to:
 - (i) McCarthy and Boom as set out at paragraphs 5 and 8 above at a time when McCarthy and Boom were eligible recipients within the meaning of s1317AA(2)(b);
 - (ii) Ransley on 14 August 2019 as set out at paragraphs 6 and 8 above when Ransley was an eligible recipient either on the basis that he was a 'shadow' "director" within the meaning of s 9(b) of the Corporations Act or alternatively that he was an agent of the board of directors who had been sent to speak with Williams and receive information from Williams on its behalf;
 - (iii) ASIC in February 2020, being an eligible recipient under 1317(1)(b)(i) of the Act; and
 - (b) in any event may have made, or proposed to make, a "qualifying disclosure" within the meaning of s 1317AA(1) and (2) to any one or more officers of TerraCom, ASIC or both, having reasonable grounds to suspect that information he had concerned misconduct, or an improper state of affairs or circumstances in relation to TerraCom within the meaning of ss 1317AA(1)(c), 2(c) and (4) of the Act.
39. By publishing the false, misleading and otherwise harmful contents of the February Announcement, the Open Letter and the April Announcement (including by omitting information from those public announcements) TerraCom engaged in conduct that caused detriment to Williams' reputation, earning capacity and psychological and emotional state (**Public Announcement Conduct**).

40. Each of McCarthy, Boom and Ransley read and/or authorised the release and publication of each of the February Announcements, the Open Letter and the April Announcement at a time when each believed or suspected that Williams may have made, may make or proposed to make a qualifying disclosure.
41. The reason or part of the reason for the Public Announcement Conduct was that McCarthy, Boom and/or Ransley believed or suspected that Williams may have made, may make or proposed to make a qualifying disclosure.
42. In the premises, TerraCom engaged in conduct contrary to s 1317AC(1) and each of McCarthy, Boom and/or Ransley were involved in TerraCom's contravention within the meaning of s 1317AC(3).

D. HARM SUFFERED

43. Section 1309(2) was introduced as a civil penalty provision in March 2019 as part of a package of amendments aimed at combatting misconduct and improving community confidence in the corporate and financial sectors. The conduct of TerraCom, McCarthy, Boom, Ransley and King impaired those objectives.
44. The result of the contravening conduct is also that:
 - (a) investors were trading in TerraCom shares on an uninformed basis from around 16 December 2019 (the date the PwC Report was released);
 - (b) TerraCom was exposed to harm by being in a position where it did not know whether its coal quality testing process was accurate or reliable, whether it had been impacted by ALS' admissions to the market that some of its laboratories had altered coal testing certificates without justification, and was thereby exposed to the financial risk of shipment rejection, harm of complaint from customers and reputational harm;
 - (c) TerraCom has been exposed to the further harm of legal proceedings and the risk of pecuniary penalties and costs; and
 - (d) a former employee and whistleblower has been subjected to actual detriment.

This Concise Statement was prepared by Yaseen Shariff SC, Nina Moncrief and Matthew Kalyk.

Certificate of lawyer

I, Rebecca Caroline Jaffe, certify to the Court that, in relation to the concise statement filed on behalf of the Plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 28 February 2023



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Signed by Rebecca Caroline Jaffe

Solicitor for the Australian Securities and Investments Commission

SCHEDULE

No. NSD of 2023

**IN THE FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: New South Wales
DIVISION: GENERAL**

Second Defendant: DANIEL MCCARTHY
Third Defendant: NATHAN REECE TIMOTHY BOOM
Fourth Defendant: CRAIG ANTHONY RANSLEY
Fifth Defendant: WALLACE MACARTHUR KING

Date: 28 February 2023