FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v TerraCom Ltd (No 3)

[2025] FCA 1017

File number(s):	NSD 176 of 2023
Judgment of:	**JACKMAN J**
Date of judgment:	26 August 2025
Catchwords:	**CORPORATIONS** – declaration of contravention and pecuniary penalty orders – where parties agree on statement of facts and admissions – where company admits to one contravention of s 1317AC(1) of the *Corporations Act 2001* (Cth) – where three market announcements made by company – where eligible whistleblower – where qualifying disclosure – where detriment caused to whistleblower – legal principles of proposed penalties by agreement considered – legal principles on pecuniary penalties considered – orders made in accordance with parties' proposed orders
Legislation:	*Corporations Act 2001* (Cth) *Fair Work Act 2009* (Cth) *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018* (Cth)
Cases cited:	*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3; (2018) 262 CLR 157 *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 274 CLR 450 *Australian Competition and Consumer Commission v Master Wealth Control Pty Ltd (Penalty)* [2024] FCA 795 *Australian Competition and Consumer Commission v Mercedes-Benz Australia/Pacific Pty Ltd* [2022] FCA 1059; (2022) 163 ACSR 645 *Australian Competition and Consumer Commission v Samsung Electronics Australia Pty Ltd* [2022] FCA 875 *Australian Securities and Investments Commission v Chemeq Ltd* [2006] FCA 936; (2006) 234 ALR 511 *Australian Securities and Investments Commission v*

Citrofresh International Ltd (No 3) [2010] FCA 292; (2010) 268 ALR 303

Australian Securities and Investments Commission v Holista Colltech Ltd (No 2) [2024] FCA 516

Australian Securities and Investments Commission v LGSS Pty Ltd (No 3) [2025] FCA 205

Australian Securities and Investments Commission v TerraCom Ltd [2025] FCA 726

Commonwealth v Director, *Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482

Flight Centre Ltd v Australian Competition and Consumer Commission (No 2) [2018] FCAFC 53; (2018) 260 FCR 68

Glencore International AG v Federal Commissioner of Taxation [2019] HCA 26; (2019) 265 CLR 646

McDonald v Australian Building and Construction Commissioner [2011] FCAFC 29; (2011) 202 IR 467

NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission [1996] FCA 1134; (1996) 71 FCR 285

Singtel Optus Pty Ltd v Australian Competition and Consumer Commission [2012] FCAFC 20; (2012) 287 ALR 249

TerraCom Ltd v Australian Securities and Investments Commission [2022] FCA 208; (2022) 401 ALR 143

TerraCom Ltd v Australian Securities and Investments Commission [2022] FCAFC 151

The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission [2002] HCA 49; (2002) 213 CLR 543

Trade Practices Commission v CSR Ltd [1990] FCA 762; [1991] ATPR 41-076

Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission [2021] FCAFC 49; (2021) 151 ACSR 407

Watson v Greenwoods & Herbert Smith Freehills Pty Ltd [2023] FCAFC 132; (2013) 413 ALR 227

Division:	General Division
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Date of hearing:	Determined on the papers
Counsel for the Plaintiff:	Mr M Borsky KC with Ms N Moncrief
Solicitors for the Plaintiff:	HWL Ebsworth
Counsel for the First Defendant:	Mr M Elliott SC with Ms V Brigden
Solicitors for the First Defendant:	Arnold Bloch Leibler

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: **26 AUGUST 2025**

THE COURT:

1. Adopts the following defined terms in the paragraphs which follow:
   (a) "Act" means the *Corporations Act 2001* (Cth).
   (b) "Whistleblower Allegations" has the meaning given to it in para [37] of the SAFA.
2. Pursuant to s 1317E(1) of the Act, the Court declares that between 24 February 2020 and 3 April 2020, the First Defendant (**TerraCom**) contravened s 1317AC(1) of the Act by publishing or causing to be published:
   (a) an ASX announcement dated 24 February 2020;
   (b) an "Open Letter to TerraCom Shareholders" published in the Australian Financial Review and The Australian on 12 March 2020; and
   (c) an ASX announcement dated 3 April 2020

(**Announcements**)

in circumstances where:

(d) Mr Justin Williams (**Mr Williams**) was an eligible whistleblower in relation to TerraCom under s 1317AAA of the Act;

(e) Mr Williams had reasonable grounds to suspect that the Whistleblower Allegations concerned an improper state of affairs or circumstances in relation to TerraCom, pursuant to s 1317AA(4) of the Act, and his communication of the Whistleblower Allegations to TerraCom was thus a qualifying disclosure within the meaning of s 1317AA of the Act;

(f) TerraCom believed or suspected that Mr Williams may have made a qualifying disclosure;

(g) the tone and content of the Announcements caused detriment to Mr Williams in the form of hurt, humiliation, distress and embarrassment, and damage to reputation; and

(h) TerraCom's belief or suspicion that a qualifying disclosure may have been made by Mr Williams was part of the reason for publishing or causing to be published the Announcements.

3. Orders that pursuant to s 1317G of the Act, the First Defendant pay to the Commonwealth of Australia a pecuniary penalty in the amount of $7,500,000 in respect of the contravention of s 1317AC(1) of the Act referred to in para 2 above, with $4,000,000 to be paid within 28 days of the entry of these orders and $3,500,000 to be paid on or before 30 June 2026.

4. Orders that the First Defendant pay the Plaintiff's costs of the proceedings in the amount of $1,000,000 within 28 days of the entry of these orders.

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 this proceeding, the Plaintiff (**ASIC**) alleges the First Defendant (**TerraCom**) contravened s 1317AC(3) of the *Corporations Act 2001* (Cth) (**Act**). In a Statement of Agreed Facts and Admissions dated 26 May 2025 (**SAFA**), TerraCom admits that it engaged in one contravention of s 1317AC(3) of the Act. It should be noted at the outset that ASIC's case against TerraCom concerns contravention of a different provision of the Act from those relied on by ASIC in its unsuccessful proceedings against the second to fifth defendants, in which ASIC alleged contraventions of ss 180(1) and 1309(2): *Australian Securities and Investments Commission v TerraCom Ltd* [2025] FCA 726.

2 The terms of the admitted contravention are set out in the declaration in the proposed orders contained at Annexure A to the SAFA (**Proposed Orders**), which is in the same terms as the declaration which I have made in para 2 of the orders made today. TerraCom admits that the contravention occurred, and consents to a declaration being made in the terms set out in the Proposed Orders.

3 ASIC and TerraCom jointly submit, and I accept, that a total penalty of $7.5 million is appropriate, with $4 million to be paid within 28 days of the entry of relevant orders and $3.5 million to be paid on or before 30 June 2026.

4 TerraCom also agrees to pay $1 million in respect of ASIC's costs of this proceeding, within 28 days of the entry of the relevant orders.

Agreed facts

5 For the purposes of this proceeding, ASIC and TerraCom have agreed that the relevant facts are as set out in the SAFA. TerraCom also relies on the affidavit of Ms Megan Gai Etcell affirmed on 28 July 2025 (**Etcell Affidavit**), to which ASIC does not object. The facts set out below are as agreed in the SAFA and as proved by the Etcell Affidavit.

6 At all material times, TerraCom was a public company listed on the ASX and owned the Blair Athol Coal Mine in Queensland, through its wholly owned subsidiary, Orion Mining Pty Ltd (**Orion**).

7 ALS Limited and its relevant operating subsidiaries (**ALS**) were appointed by TerraCom as the independent laboratory to sample the majority of shipments of coal from Blair Athol. During the

period from May 2018 to August 2019, TerraCom received shipping analysis reports (**Shipping Analysis Reports**) which showed the results of ALS's coal quality testing for particular shipments including the net calorific value (**NCV**) results (**Shipments**). TerraCom and ALS communicated in connection with the Shipments, ALS sent TerraCom Certificates of Analysis for the Shipments, which showed NCV results, and TerraCom issued a final commercial invoice to its customer for the Shipments, which recorded the amount owing based on the NCV.

8 On or about 9 July 2019, Mr Justin Williams commenced employment with TerraCom as General Manager, Commercial. His employment was terminated on 13 August 2019.

9 On 13 August 2019, Mr Williams informed Mr McCarthy (TerraCom's CEO) and Mr Boom (TerraCom's CFO) that he was concerned about a practice he had observed between TerraCom and ALS which involved coal quality results recorded in the Shipping Analysis Report for particular shipments of coal being 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 Certificates of Analysis with amended results being issued to customers and used to invoice those customers.

10 On 14 August 2019, Mr Williams met with Mr Ransley, who was at that time an adviser to TerraCom's board of directors and had been authorised to meet with Mr Williams as an agent of TerraCom's board of directors. At that meeting, Mr Williams alleged that Certificates of Analysis prepared by ALS had been manipulated by ALS to record and report results more favourably to TerraCom and Noble Resources International Pte Ltd (**Noble**), Orion's sales and marketing agent, and provided Mr Ransley with documents which Mr Williams said supported his allegations.

11 On 29 August 2019, TerraCom's solicitors, Ashurst, engaged PricewaterhouseCoopers (**PwC**) to investigate Mr Williams' allegations (defined as the "Whistleblower Allegations" in the SAFA at [37]). PwC provided a report on 16 December 2019 (the **PwC Report**) which identified inconsistencies in the reported NCV between Shipping Analysis Reports and the commercial invoices issued to customers, similar to the pattern of inconsistencies identified by Mr Williams, the underlying reason for which could not be determined from the correspondence reviewed or discussions with TerraCom. The PwC Report did not exclude any involvement by TerraCom or any of its employees or officers in the conduct the subject of the Whistleblower Allegations. The PwC Report also did not reject all of the Whistleblower Allegations nor find that the Whistleblower Allegations were "unfounded".

12 Mr Williams commenced legal proceedings against various TerraCom directors and officers under the *Fair Work Act 2009* (Cth) in December 2019.

13 On or about 12 February 2020, Mr Williams disclosed to ASIC the concerns he had raised with Mr McCarthy and Mr Boom on 13 August 2019.

14 Following a release to the Australian Securities Exchange (**ASX**) by ALS and the publication of an article by the *Australian Financial Review* (**AFR**) on 24 February 2020, TerraCom lodged the February Announcement (as defined at SAFA [50]) with the ASX on that same day. The February Announcement relevantly stated that:

(a) Mr Williams had alleged in court proceedings that TerraCom was involved in a scheme relating to the "fake analysis of coal samples";

(b) TerraCom categorically denied the allegations made by Mr Williams;

(c) Mr Williams was made redundant in August 2019;

(d) it was subsequent to his redundancy that Mr Williams falsely alleged that TerraCom altered reports about the quality of its coal exports;

(e) Mr Williams' allegations were false;

(f) TerraCom had the conduct of its employees independently investigated; and

(g) TerraCom believed that the allegations made by Mr Williams were totally unfounded.

15 On 12 March 2020, following multiple failed attempts to have the ASX publish an announcement to the market, TerraCom caused the AFR and *The Australian* to publish the Open Letter (as defined at SAFA [57]). The Open Letter relevantly stated, in relation to Mr Williams, that:

(a) TerraCom continued to categorically deny the allegations made by Mr Williams;

(b) Mr Williams initiated 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; and

(c) TerraCom understood that Mr Williams had been unsuccessful with similar allegations in the past about other coal mining companies for which he had worked;

(d) TerraCom took the allegations that its CEO and CFO had been involved in a scheme relating to the fake analysis of coal samples seriously and had an independent investigation conducted which found no evidence of wrongdoing; and

(e) none of TerraCom's customers had raised quality control issues with the coal exported by TerraCom.

16 On 2 April 2020, following an announcement released by ALS to the ASX which stated, among other matters, that its independent investigation had identified evidence that approximately 45-50% of the Certificates of Analysis were manually amended without justification in certain of

ALS's laboratories since 2007, TerraCom lodged the April Announcement (as defined at SAFA [63]) with the ASX. The April Announcement relevantly stated that:

(a) 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;

(b) the investigation found that the allegations against them were unfounded and neither had done anything wrong;

(c) some of TerraCom's customers also asked for additional coal samples to be tested, and in every instance, they found no quality control issues;

(d) Mr McCarthy had said that, during his time as CEO, "there has not been an occasion whereby clients have complained about the quality of the coal as certified by the Certificate of Analysis (COA)" and that "[i]n the one recent instance where a customer requested three shipments be 'Umpire tested' … the Umpire results aligned with and were consistent with the certified (COA) results used for the basis of invoicing and payment"; and

(e) Mr Williams' allegations were made only after he was dismissed as part of a Company-wide redundancy program.

Statutory framework and legislative history

17 The whistleblower provisions of the Act were amended by the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018* (Cth). The scope of the amendments was summarised in *Watson v Greenwoods & Herbert Smith Freehills Pty Ltd* [2023] FCAFC 132; (2013) 413 ALR 227 at [15] (Moshinsky, Abraham and Raper JJ) as follows:

> These new provisions effected material changes which included, without being exhaustive: (1) the widening of the scope of what disclosures qualify for protection: s 1317AA; (2) orders for compensation can now be made without any contravention of the offence provision being established: s 1317AD; (3) it is now sufficient to establish that detrimental conduct occurred because the wrongdoer "believes or suspects" that the whistleblower or any other person "made, may have made, proposes to make or could make a disclosure", rather than needing to establish that the conduct occurred because of the disclosure: s 1317AC(1)(c); accordingly, the whistleblower need not have made a disclosure before the detrimental conduct occurred, but rather the detrimental conduct may have occurred because the wrongdoer believes or suspects the whistleblower "may have made, proposes to make or could make" a disclosure; (4) the burden of proof applicable to compensation orders has been modified such that the whistleblower need only adduce evidence that suggests a "reasonable possibility" that the detrimental conduct occurred, at which point the wrongdoer assumes an onus to negative the claim: s 1317AD(2B); and (5) failure to comply with s 1312AC gives rise to civil penalties where previously non-compliance constituted an offence (see s 1311(1)) (as it still does) but did not give rise to a civil penalty.

18 The Revised Explanatory Memorandum (**REM**) provided the following context for the Bill:

> 1.3 Often [corporate] wrongdoing only comes to light because of individuals who are prepared to disclose it, sometimes at great personal and financial risk.
>
> 1.4 To reduce these risks and encourage disclosure of wrongdoing, Australia and many other countries have statutory whistleblower regimes with legally enforceable protections for people who make disclosures. These regimes recognise the critical role whistleblowing can play in the early detection and prosecution of misconduct in businesses... The existence of strong statutory protections to encourage whistleblowing can improve compliance with the law and promote a more ethical culture because individuals know there is a higher likelihood that misconduct will be reported.

19 The REM described the purpose of the amendments as being "so that a single, strengthened whistleblower protection regime covers the corporate, financial and credit sectors". At [1.7], the REM described the existing regime as "a confusing web for whistleblowers to navigate" and referred at [1.9] to the prospect that "[w]hile existing protections remain inadequate or unclear, it is likely that whistleblowers will continue to be discouraged from disclosing information about wrongdoing". In relation to the increased penalties, the REM at [2.104] noted that "These penalties reflect the seriousness of conduct that victimises a whistleblower".

20 Section 1317AC(1) of the Act provides as follows:

> **1317AC Victimisation prohibited**
>
> *Actually causing detriment to another person*
>
> (1) A person (the ***first person***) contravenes this subsection if:
>
> (a) the first person engages in conduct; and
>
> (b) the first person's conduct causes any detriment to another person (the ***second person***); and
>
> (c) when the first person engages in the conduct, the first person believes or suspects that the second person or any other person made, may have made, proposes to make or could make a disclosure that qualifies for protection under this Part; and
>
> (d) the belief or suspicion referred to in paragraph (c) is the reason, or part of the reason, for the conduct.

21 A disclosure qualifies for protection under Part 9.4AAA of the Act in the circumstances set out in s 1317AA of the Act. That section relevantly provides as follows:

> **1317AA Disclosures qualifying for protection under this Part**
>
> *Disclosure to ASIC, APRA or prescribed body*
>
> (1) A disclosure of information by an individual (the ***discloser***) qualifies for protection under this Part if:
>
> (a) the discloser is an eligible whistleblower in relation to a regulated entity; and
>
> (b) the disclosure is made to any of the following:

(i) ASIC;

… ; and

(c) subsection (4) or (5) applies to the disclosure.

Disclosure to eligible recipients

(2) A disclosure of information by an individual (the ***discloser***) qualifies for protection under this Part if:

(a) the discloser is an eligible whistleblower in relation to a regulated entity; and

(b) the disclosure is made to an eligible recipient in relation to the regulated entity; and

(c) subsection (4) or (5) applies to the disclosure.

…

Disclosable matters

(4) This subsection applies to a disclosure of information if the discloser has reasonable grounds to suspect that the information concerns misconduct, or an improper state of affairs or circumstances, in relation to:

(a) the regulated entity; or

(b) if the regulated entity is a body corporate – a related body corporate of the regulated entity.

(5) Without limiting subsection (4), this subsection applies to a disclosure of information if the discloser has reasonable grounds to suspect that the information indicates that any of the following:

(a) the regulated entity, or an officer or employee of the regulated entity;

(b) if the regulated entity is a body corporate—a related body corporate of the regulated entity, or an officer or employee of a related body corporate of the regulated entity;

has engaged in conduct that:

(c) constitutes an offence against, or a contravention of, a provision of any of the following:

(i) this Act;

(ii) the ASIC Act;

…

(d) constitutes an offence against any other law of the Commonwealth that is punishable by imprisonment for a period of 12 months or more; or

(e) represents a danger to the public or the financial system; or

(f) is prescribed by the regulations for the purposes of this paragraph.

22 Section 1317AAC defines "eligible recipient" relevantly as follows:

(1) Each of the following is an *eligible recipient* in relation to a regulated entity that is a body corporate:

(a) an officer or senior manager of the body corporate or a related body corporate;

…

(d) a person authorised by the body corporate to receive disclosures that may qualify for protection under this Part.

The admitted contravention

23 TerraCom admits that its publication of the Announcements (defined as the February Announcement, the Open Letter and the April Announcement at SAFA [65]) in the circumstances set out in the SAFA at [66] to [70] amounted to one contravention of s 1317AC(1) of the Act.

24 TerraCom admits that Mr Williams was an eligible whistleblower in relation to TerraCom under s 1317AAA of the Act: SAFA at [66].

25 TerraCom admits that Mr Williams had reasonable grounds to suspect that allegations of the kind communicated to Mr Ransley concerned an improper state of affairs or circumstances in relation to TerraCom, pursuant to s 1317AA(4), and that the information was thus a "qualifying disclosure" within the meaning of s 1317AA of the Act: SAFA at [67].

26 TerraCom admits (SAFA at [69]) that the tone and content of the Announcements caused detriment to Mr Williams in the form of hurt, humiliation, distress and embarrassment, and damage to reputation, because the Announcements represented him:

(a) as someone who had been made redundant, when he believed he had been terminated for whistleblowing;

(b) as someone willing to make unfounded accusations of serious wrongdoing for personal gain in circumstances where, contrary to what was published in the Announcements, the findings of the PwC Report at least partially supported Mr Williams' allegations and did not conclude that his allegations were "unfounded"; and

(c) (in the case of the Open Letter) as someone who had initiated proceedings only after TerraCom decided not to meet his demands to be reinstated to his role at TerraCom and to be paid $5,000,000, when the reference to $5,000,000 had been made in a confidential and privileged mediation conducted after he had filed a Fair Work Commission conciliation application.

27 It is noted that these admitted representations are not the same as those which were the subject of *Australian Securities and Investments Commission v TerraCom Ltd* [2025] FCA 726, and those which were relied upon by ASIC in respect of its original whistleblowing case against TerraCom.

28 TerraCom admits that throughout the period between 24 February 2020 and 3 April 2020, it believed or suspected that Mr Williams may have made a qualifying disclosure to Mr McCarthy

and Mr Boom, at a time when they were "eligible recipients" within the meaning of s 1317AA(2)(b) and s 1317AAC(1)(a) of the Act, and to Mr Ransley at a time when Mr Ransley was an "eligible recipient" within the meaning of s 1317AA(2)(b) and s 1317AAC(1)(d) of the Act, and to ASIC: SAFA at [68]. It also admits that this belief or suspicion was part of the reason for publishing, or causing to be published, the Announcements: SAFA at [70].

Approach to proposed penalties by agreement

29 The proper approach to making declarations and orders proposed by consent in a civil penalty proceeding, and the public interest in doing so, was explained in *Commonwealth v Director*, *Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482 (***FWBII***) at [58], where the High Court said that subject to the court being sufficiently persuaded of the accuracy of the parties' agreement as to facts and consequences, and that the penalty which the parties propose is *an* appropriate remedy in the circumstances thus revealed, it is consistent with principle and highly desirable in practice for the court to accept the parties' proposal and therefore impose the proposed penalty.

30 The principles that apply where the parties to a civil penalty proceeding have settled that proceeding and agreed and jointly proposed a penalty to the Court were outlined by the Full Court in *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49; (2021) 151 ACSR 407 at [125]-[127] and [129] (Wigney, Beach and O'Bryan JJ) as follows (and applied in *Australian Competition and Consumer Commission v Mercedes-Benz Australia/Pacific Pty Ltd* [2022] FCA 1059; (2022) 163 ACSR 645 at [4] (Middleton J); *Australian Competition and Consumer Commission v Samsung Electronics Australia Pty Ltd* [2022] FCA 875 at [74] (Murphy J)):

> [125] First, the Court must be persuaded that the penalty proposed by the parties is appropriate…
>
> [126] Second, if the Court is persuaded of the accuracy of the parties' agreement as to facts and consequences, and that the agreed penalty jointly proposed is an appropriate remedy in all the circumstances, it would be highly desirable in practice for the Court to accept the parties' proposal and therefore impose the proposed penalty…
>
> [127] Third, in considering whether the agreed and jointly proposed penalty is an appropriate penalty, it is necessary to bear in mind that there is no single appropriate penalty. Rather, there is a permissible range of penalties within which no particular figure can necessarily be said to be more appropriate than another. The permissible range is determined by all the relevant facts and consequences of the contravention and the contravener's circumstances. An agreed and jointly proposed penalty may be considered to be "an" appropriate penalty if it falls within that permissible range… It is unlikely to be considered an appropriate penalty if it falls outside that range.
>
> …
>
> [129] Fourth, in considering whether the proposed agreed penalty is an appropriate penalty, the Court should generally recognise that the agreed penalty is most likely the result of compromise and pragmatism on the part of the regulator, and to reflect, amongst

> other things, the regulator's considered estimation of the penalty necessary to achieve deterrence and the risks and expense of the litigation had it not been settled… The fact that the agreed penalty is likely to be the product of compromise and pragmatism also informs the Court's task when faced with a proposed agreed penalty. The regulator's submissions, or joint submissions, must be assessed on their merits, and the Court must be wary of the possibility that the agreed penalty may be the product of the regulator having been too pragmatic in reaching the settlement…

Declaratory Relief

31 Section 1317E of the Act relevantly provides as follows:

> **1317E Declaration of contravention of a civil penalty provision**
>
> *Declaration of contravention*
>
> (1) If a Court is satisfied that a person has contravened a civil penalty provision, the Court must make a declaration of contravention.
>
> (2) The declaration must specify the following:
>
> (a) the Court that made the declaration;
>
> (b) the civil penalty provision that was contravened;
>
> (c) the person who contravened the provision;
>
> (d) the conduct that constituted the contravention;
>
> …

32 The declaration proposed by ASIC and TerraCom (set out in the Proposed Orders) specifies each of the matters required by s 1317E(2) of the Act.

33 In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68 at [93] (Dowsett, Greenwood and Wigney JJ), the Full Court stated:

> Declarations relating to contraventions of legislative provisions are likely to be appropriate where they serve to record the Court's disapproval of the contravening conduct, vindicate the regulator's claim that the respondent contravened the provisions, assist the regulator to carry out its duties, and deter other persons from contravening the provisions…

Pecuniary penalties

34 The Court has the power to impose a penalty on TerraCom by virtue of s 1317G of the Act, which relevantly provides as follows:

> **1317G Pecuniary penalty orders**
>
> *Court may order person to pay pecuniary penalty*
>
> (1) A Court may order a person to pay to the Commonwealth a pecuniary penalty in relation to the contravention of a civil penalty provision if:
>
> (a) a declaration of contravention of the civil penalty provision by the person has been made under section 1317E;

…

Maximum pecuniary penalty

(2) The pecuniary penalty must not exceed the pecuniary penalty applicable to the contravention of the civil penalty provision.

…

Pecuniary penalty applicable to the contravention of a civil penalty provision – by a body corporate

(4) The ***pecuniary penalty applicable*** to the contravention of a civil penalty provision by a body corporate is the greatest of:

(a) 50,000 penalty units; and

(b) if the Court can determine the benefit derived and detriment avoided because of the contravention – that amount multiplied by 3; and

(c) either:

(i) 10% of the annual turnover of the body corporate for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision; or

(ii) if the amount worked out under subparagraph (i) is greater than an amount equal to 2.5 million penalty units – 2.5 million penalty units.

…

Determining pecuniary penalty

(6) In determining the pecuniary penalty, the Court must take into account all relevant matters, including:

(a) the nature and extent of the contravention; and

(b) the nature and extent of any loss or damage suffered because of the contravention; and

(c) the circumstances in which the contravention took place; and

(d) whether the person has previously been found by a court (including a court in a foreign country) to have engaged in similar conduct; …

35 It is not possible to determine the benefit derived and detriment avoided because of the contravention, accordingly s 1317G(4)(b) does not apply.

36 The value of 50,000 penalty units as at February to April 2020 was $10.5 million.

37 TerraCom's annual turnover for the 12 month period ending in February 2020 was $244,873,192: Etcell Affidavit at [18]. The applicable figure for the maximum penalty is therefore approximately $24.49m, being 10% of TerraCom's annual turnover for the 12 month period ending February 2020.

38 The purpose of a civil penalty regime is primarily, if not solely, the promotion of the public interest in compliance with the provisions of the relevant Act by the deterrence, specific and general, of

further contraventions: *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 274 CLR 450 (***Pattinson***) at [9], [15] and [31] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3; (2018) 262 CLR 157 at [87] (***ABCC***) (Keane, Nettle and Gordon JJ).

39 The specific and general deterrent effect is achieved by attempting "to put a price on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene the Act": *FWBII* at [55]. In *ABCC* (at [116]), Keane, Nettle and Gordon JJ described that price as the "sting or burden" of the penalty.

40 The penalty "must be fixed with a view to ensuring that the penalty is not such as to be regarded by [the] offender or others as an acceptable cost of doing business" and "those engaged in trade and commerce must be deterred from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from contravention": *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249 at [62]-[63] (Keane CJ, Finn and Gilmour JJ).

41 A penalty is not to be fixed by reference to its proportionality to the seriousness of the contravening conduct, because that reflects an objective of retribution that has no place in a civil penalty regime. Rather, the Court should ensure that the penalty imposed is proportionate in the sense that it strikes a reasonable balance between deterrence and oppressive severity in the particular case: *Pattinson* at [10], [40] to [43] and [46].

42 The maximum penalty is but one yardstick that ordinarily must be applied, among other factors: *Pattinson* at [53] to [54]. What is required is a "reasonable relationship between the theoretical maximum and the final penalty imposed": *Pattinson* at [10]. That relationship is established where the maximum penalty does not exceed what is reasonably necessary for specific and general deterrence of future contraventions of a like kind by the contravener and by others: *Pattinson* at [10]. This may be established by reference to the circumstances of the contravener and the contravening conduct: *Pattinson* at [55]. The matters relevant to determining the appropriate penalty go to the objective nature and seriousness of the contravening conduct, and the particular circumstances of the contravener, including the following non-exhaustive factors identified by French J in *Trade Practices Commission v CSR Ltd* [1990] FCA 762; [1991] ATPR 41-076 at 52,152 to 52,153, which overlap with the statutory factors set out above; described in *Pattinson* by the majority as not constituting a rigid catalogue of matters for attention at [19]:

(a) the nature and extent of the contravening conduct;

(b) the amount of loss or damage caused;

(c) the circumstances in which the conduct took place;

(d) the size of the contravening company;

(e) the degree of power it has, as evidenced by its market share and ease of entry into the market;

(f) the deliberateness of the contravention and the period over which it extended;

(g) whether the contravention arose out of the conduct of senior management or at a lower level;

(h) whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention; and

(i) whether the company has shown a disposition to cooperate with the relevant regulator in relation to the contravention.

43 The Full Court has repeatedly emphasised that, although similar contraventions should incur similar penalties, the differing circumstances of individual cases mean that a penalty in one case cannot dictate the penalty in a later case. As a result, comparisons with previous penalties will rarely be useful: *Flight Centre Ltd v Australian Competition and Consumer Commission (No 2)* [2018] FCAFC 53; (2018) 260 FCR 68 at [69] (Allsop CJ, Davies and Wigney JJ); *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; (1996) 71 FCR 285 at 295-296 (Burchett, Carr and Kiefel JJ). The purpose of any comparison with other cases is consistent application of principle, not numerical consistency: *McDonald v Australian Building and Construction Commissioner* [2011] FCAFC 29; (2011) 202 IR 467 at [23]-[25] (North, McKerracher and Jagot JJ).

44 Having regard to the following relevant matters, I am satisfied that the penalty agreed by the parties is an appropriate one in all of the circumstances, albeit at very much the higher end of the range of appropriate penalties.

Nature and extent of the contravening conduct

45 The REM which introduced the current whistleblower provisions so as to strengthen the provisions they superseded expressly recognised "the seriousness of conduct that victimises a whistleblower" (at [2.104]).TerraCom's contravening conduct was objectively serious given the admissions made, but I note that it was not alleged or admitted, and there is no evidence to support a finding, that the publication of the Announcements was motivated entirely by TerraCom's belief or suspicion that Mr Williams made a qualifying disclosure.

46 The conduct spanned a period of two months in which three separate announcements were released.

Amount of loss or damage caused

47 The tone and content of the Announcements caused detriment to Mr Williams in the form of hurt, humiliation, distress and embarrassment and damage to reputation: SAFA at [69]. This is within the concept of detriment as defined in s 1317ADA of the Act, and thus being among the kinds of harm which the whistleblower protection provisions are directed at preventing. There is no evidence that TerraCom derived any financial or other benefit from the contraventions, or that it intended to cause Mr Williams this detriment.

Circumstances in which the conduct took place

48 The conduct took place in the aftermath of the termination of Mr Williams' employment by TerraCom and after PwC had provided the PwC Report to TerraCom. It occurred while proceedings brought by Mr Williams against various TerraCom officers were on foot in the then Federal Circuit Court of Australia (**FCCA**).

49 The February Announcement was issued on the same day as an article published in the AFR which reported on ALS's ASX announcement in which ALS stated that preliminary investigations had identified that a number of Certificates of Analysis issued from two laboratories within the coal superintending unit in Australia were amended before issue without proper justification, and that ALS had started an investigation and had suspended four staff at its coal testing unit. The AFR article stated, amongst other matters, that Mr Williams alleged being threatened with sacking for refusing to make ALS alter analysis results. It also reported on the fact that Mr Williams had brought proceedings against directors of TerraCom in the FCCA.

50 The Open Letter was issued in circumstances where, as set out in the letter, TerraCom's wholly owned subsidiary, TCIG Resources Pte Ltd, made a takeover offer for Universal Coal Plc, a publicly listed company in England. However, it is recognised by the parties that the Open Letter was only published in the AFR after the ASX had refused to release a proposed announcement for reasons that included its view that the proposed announcement contained "emotive, intemperate or defamatory language".

51 While the February Announcement and the Open Letter were published in response to the matters published by ALS and the AFR, the effect of the Announcements was to make the admitted representations. TerraCom admits that its belief or suspicion that a qualifying disclosure may have been made by Mr Williams (in the form of the Whistleblower Allegations) was part of the reason for publishing the Announcements.

Whether TerraCom has previously been found by a court to have engaged in similar conduct

52 TerraCom has not previously been found by a court to have engaged in conduct of the nature that it has admitted to in the SAFA.

Size of TerraCom and its degree of power

53 As at 25 July 2025, TerraCom has approximately 250 direct employees in Australia and market capitalisation of approximately $72.9 million: Etcell Affidavit at [25]. While TerraCom had revenue of $316.9 million in the 2020 financial year (being the year in which the contraventions took place), it made a net loss after tax of $147.1 million: SAFA at [74]. Since then, TerraCom has made full year net returns as follows: $94.6 million loss (2021), $249.1 million profit (2022), $262.5 million profit (2023) and $25 million profit (2024): SAFA at [75]–[78].

Deliberateness of the contravention

54 TerraCom accepts that the conduct must be regarded as deliberate. As noted above, the conduct occurred on three separate occasions in the period from February to April 2020.

Whether the contravention arose out of the conduct of senior management or arose at a lower level

55 The contravention arose out of the conduct of senior management, including the CEO and CFO.

Whether TerraCom has a corporate culture conducive to compliance

56 The steps taken by a wrongdoer to identify the causes of the contravening conduct and further steps taken to avoid its repetition are relevant considerations to the imposition of a penalty: *Australian Securities and Investments Commission v Chemeq Ltd* [2006] FCA 936; (2006) 234 ALR 511 at [97] (French J); *Australian Securities and Investments Commission v LGSS Pty Ltd (No 3)* [2025] FCA 205 at [114] (O'Callaghan J).

57 Section 1317AI of the Act provides that a public company must have a whistleblower policy that set outs the matters referred to in s 1317AI(5). Since 2021, TerraCom's Board has reviewed its whistleblowing policy annually as part of its annual corporate governance review. In May 2025, TerraCom engaged K&L Gates to review its whistleblowing policy and prepare training for TerraCom staff and Board members. The evidence of Ms Etcell includes a copy of TerraCom's revised whistleblowing policy following that review (**Policy**).

58 The Policy includes contact details for the Company Secretary, currently Ms Etcell, as a recipient of concerns by eligible whistleblowers and contains alternative persons to whom protected disclosures may be made. It also informs whistleblowers of the ability to make protected disclosures to third parties including regulators such as ASIC and the Australian Prudential

Regulation Authority (**APRA**). It also includes a procedure for the handling of disclosures, and includes statements of its support for whistleblowers at cl 4, including that TerraCom is committed to ensuring that all personnel feel supported and able to raise issues which relate to any misconduct or improper state of affairs or circumstances within TerraCom, and that TerraCom will not tolerate any reprisals or threats of reprisals made against whistleblowers and will take appropriate steps to protect whistleblowers from retaliation. The Policy further provides at cl 5 for the legal protections applicable to whistleblowers, including protection against victimisation. The Policy further provides that it is a condition of any employment by TerraCom that all employees comply with the Policy at all times, and that breach of the Policy by an employee of TerraCom may be regarded as misconduct and may lead to disciplinary action up to and including termination of employment.

59 Formal whistleblowing training was provided face-to-face to key leaders in the TerraCom business on 19 May 2025 and via videoconference to Board members on 29 May 2025, after the SAFA was executed. A copy of the PowerPoint presentation setting out that training is included in the Etcell Affidavit.

Whether TerraCom showed a disposition to co-operate with ASIC in relation to the contravention

60 On 28 February 2023, ASIC commenced proceedings in the Federal Court against TerraCom and others. At that time, TerraCom publicly announced that it would vigorously defend the proceedings. TerraCom continued to defend the proceeding until execution of the SAFA on 26 May 2025.

61 While TerraCom denied that it contravened s 1317AC(1) in its defence, following the service by ASIC of all of its evidence and the production of 14 volumes of documents it indicated it proposed to rely upon, and the assessment of that material by TerraCom's lawyers, it co-operated with ASIC in this proceeding by participating in a mediation that was productive of the present agreed position, agreeing the SAFA, and sparing the Court and the regulator the expense of a contested hearing on liability. The fact that it did not enter into a SAFA at an earlier stage is not a matter which should count against TerraCom when determining the appropriate penalty to be imposed, as a company or person alleged to have contravened a civil penalty provision is entitled to defend themselves without thereby attracting the risk of the imposition of a penalty more serious than would otherwise be imposed (although an admission of contravention, like a plea of guilty, is ordinarily a matter to be taken into account in mitigation), as I said in *Australian Competition and Consumer Commission v Master Wealth Control Pty Ltd (Penalty)* [2024] FCA 795 at [53], citing *Australian Securities and Investments Commission v Citrofresh International Ltd (No 3)* [2010] FCA 292; (2010) 268 ALR 303 at [23]-[27] (Goldberg J). ASIC and TerraCom agree that the jointly proposed penalty reflects the mitigating effect of TerraCom's admission of contravention.

62 The joint written submissions of the parties refer also to TerraCom having resisted production to ASIC of the PwC Report on the ground of legal professional privilege in the course of ASIC's investigations. This led to TerraCom commencing proceedings on 6 August 2021 seeking a declaration that legal professional privilege attached to the PwC Report such that TerraCom was not obliged to produce it to ASIC. On 11 March 2022, Stewart J dismissed TerraCom's application with costs, finding that privilege had been waived over the whole report by the Open Letter and the April Announcement: *TerraCom Ltd v Australian Securities and Investments Commission* [2022] FCA 208; (2022) 401 ALR 143. An appeal by TerraCom was only partially successful, in that TerraCom was held to be entitled to redact portions of the PwC Report, and TerraCom was ordered to pay ASIC's costs of the appeal: *TerraCom Ltd v Australian Securities and Investments Commission* [2022] FCAFC 151 (O'Callaghan, Jackson and Halley JJ).

63 I do not regard the position taken by TerraCom in relation to its claim for privilege over the PwC Report as relevant to the question of the appropriate penalty. Legal professional privilege is an important common law immunity: *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49; (2002) 213 CLR 543 at [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Glencore International AG v Federal Commissioner of Taxation* [2019] HCA 26; (2019) 265 CLR 646 at [12] and [21]–[26] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). As the latter decision affirmed (at [27]), the rationale for the privilege is to promote the public interest and the rule of law in assisting and enhancing the administration of justice by facilitating full and frank communications between lawyers and their clients. The fact that a party may have made a bona fide but erroneous claim for legal professional privilege in civil penalty proceedings should not be regarded as evidencing a relevant lack of cooperation with the regulator, and should not lead to any adverse consequences for the party beyond an order for costs of the disputed claim for privilege.

Need for specific and general deterrence

64 The proposed penalty of $7.5 million is 30% of the statutory maximum and meets the primary objectives of specific and general deterrence. It has the necessary "sting" and is not an amount that is likely to be viewed as a cost of doing business.

Payment in two instalments

65 The Court can order payment of penalties by instalments where there is sufficient financial material before the Court to justify the instalment arrangements: *Australian Securities and Investments Commission v Holista Colltech Ltd (No 2)* [2024] FCA 516 (***Holista***) at [4]–[10]

(Sarah C Derrington J). In accepting any instalment plan, the deterrent effect of the relevant penalty must be preserved: ***Holista*** at [8].

66 According to TerraCom's report for the quarter ended 31 March 2025, cash at bank is $3.3 million with an additional $61.3 million of restricted cash: Etcell Affidavit at [28]. In the Etcell Affidavit, Ms Etcell, who is also TerraCom's current Chief Financial Officer, explains that the restricted cash amount is set aside to cover TerraCom's rehabilitation obligations and is not available for other use: Etcell Affidavit at [30]. Ms Etcell states that, having regard to TerraCom's cashflow situation, she considers it necessary to defer payment of the full pecuniary penalty, with the second tranche of $3.5 million to be paid on or before 30 June 2026: Etcell Affidavit at [31].

67 The parties jointly submit, and I accept, that the financial material before the Court justifies the payment of the proposed penalty by way of two instalments: $4 million to be paid within 28 days of the entry of the relevant orders and $3.5 million to be paid on or before 30 June 2026.

I certify that the preceding sixty-seven (67) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackman.

Associate: 

Dated: 26 August 2025

SCHEDULE OF PARTIES

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