

ALL OR NOTHING - AUSTRALIAN COURT RULES PARTIAL DISCLOSURE OF PRIVATE REPORT WAIVES PRIVILEGE

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Legal Briefings - By **Andrew Rich and Katerina Jovanovska**

The Federal Court decided TerraCom lost privilege over a PwC probe by telling shareholders the investigation absolved executives

The Federal Court in *TerraCom Ltd v ASIC* [2022] FCA 208 found that a company waived the legal professional privilege attaching to a report prepared by PwC in letters to shareholders and an ASX announcement which conveyed the proposed conclusion of the subject matter of the report. The decision is a reminder of the difficulties that can arise when balancing the need to keep shareholders informed against the desire to avoid waiving legal professional privilege.

IN BRIEF

- TerraCom Limited (**TerraCom**) claimed legal professional privilege over a report prepared by PwC. The report was seized by an ASIC warrant (in the context of an investigation of suspected *Corporations Act 2001* (Cth) breaches by TerraCom and its current and former officers and employees).
- The PwC report was prepared for the purposes of TerraCom being provided with legal advice by a law firm (the **Law Firm**) in relation to the issues arising from the allegations of misconduct made by a commercial general manager, and in relation to proceedings that were expected to be brought by him.
- The Court found that privilege “obviously” attached to the PwC report, but that a letter sent by TerraCom to shareholders and an ASX announcement which conveyed the

purported conclusion of the investigation waived the legal professional privilege over the report. The Court found that reliance by TerraCom on the finding in the PwC report of no wrongdoing by its CEO and CFO “is inconsistent with the maintenance of the privilege that otherwise attaches to the report”.

BACKGROUND

TerraCom was subject to an ASIC investigation for suspected contraventions of the *Corporations Act 2001* (Cth) by TerraCom Ltd and its current and former officers and employees in relation to the testing, certification and sale of coal during a period from late 2016 to early 2020.

As part of the investigation, ASIC executed a warrant which caused a particular document, a “Project Rex Report” by PwC dated 16 December 2019 (the **PwC report**), to be seized by ASIC.

TerraCom claimed legal professional privilege over the PwC report. ASIC disputed that claim.

TerraCom sought a declaration from the Federal Court that legal professional privilege attached to the PwC report such that TerraCom was not obliged to produce it to ASIC, and ASIC was not entitled to inspect it.

THE BACKGROUND TO THE PWC REPORT

- **13 August 2019:** TerraCom terminated the employment of a commercial general manager, Justin Williams, in circumstances in which he had made serious allegations against the company and its officers and employees with regard to the falsification of certificates of analysis of coal exported by TerraCom.
- TerraCom instructed the Law Firm to act for it, and to provide legal advice to it, on the issues arising in relation to the allegations of misconduct Mr Williams had made. For that purpose, the Law Firm engaged PwC to provide forensic support in locating, identifying and providing a report to the Law Firm on potentially relevant materials and information so that the Law Firm could consider the report and provide their advice having regard to its contents.
- **3 September 2019:** Mr Williams commenced a general protections application against TerraCom in the Fair Work Commission. Mr Williams made various allegations including that TerraCom procured that certificates of analysis used as the basis for its commercial invoices to customers were fraudulently altered by the superintending company that produces such certificates of analysis. He alleged that he had detailed discussions with TerraCom’s CEO about that conduct but that the CEO had instructed him to continue doing it.

- **11 October 2019:** TerraCom appointed a communications advisory firm (the **Communications Advisory Firm**) to advise it on a communications strategy and to liaise with the media.
- **16 December 2019:** the PwC report was produced.
- **26 February 2020:** The Communications Advisory Firm emailed a first draft of a statement to TerraCom, which included the wording: *“[a] forensic investigation found that the allegations were completely unfounded and that none of our employees did anything wrong”*.
- **9 March 2020:** An article was published in the *Australian Financial Review* (the **AFR**). It reported that Mr Williams had made allegations of TerraCom’s coal analysis being faked with major laboratories’ help. It reported that TerraCom had highlighted its “independent forensic investigation” had found no wrongdoing.
- **12 March 2020:** TerraCom published an open letter to shareholders in the AFR. The letter refers to the dispute with Mr Williams concerning the termination of his employment, and states the following:

“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.

... for Mr Williams to suggest TerraCom was involved in an international conspiracy to undertake false testing is ludicrous.”

- **2 April 2020:** The Communications Advisory Firm emailed TerraCom with a draft media statement, which included the words:

“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.”

The statement was published the following day as an ASX announcement.

THE COURT'S FINDINGS

THE PWC REPORT WAS PRIVILEGED

The Court found that the PwC report was “obviously” privileged on the basis that the purpose of the preparation of the report was for it to be given to the Law Firm as a basis for the Law Firm to give legal advice.

TERRACOM WAIVED PRIVILEGE

The Court restated that the test for waiver is whether there has been an inconsistency between what a client has done and retention of the privilege.

ASIC relied on three independent categories of disclosure of the substance, gist or conclusion of part or all of the PwC report outside of the privileged lawyer-client relationship as amounting to waiver of the privilege over the report: first, to the Communications Advisory Firm; second, in the open letter to shareholders; and third, in the ASX announcement on 3 April 2020.

DISCLOSURE TO THE COMMUNICATIONS ADVISORY FIRM DID NOT CONSTITUTE A WAIVER OF PRIVILEGE

Prior to the report being finalised, TerraCom’s Executive Chairman said some things to the Communications Advisory Firm about what he expected the report to say or to find for the purpose of preparing a draft press release. The Court inferred that the Communications Advisory Firm was bound to retain confidence in any information provided to it by TerraCom, save that which it had authority to disclose publicly, as is the ordinary incidence of a relationship with a communications advisor.

In those circumstances, the Court found that disclosure by TerraCom to the Communications Advisory Firm of facts related to the PwC report for inclusion in the draft press release in anticipation of future events but which were not subsequently disclosed publicly was not inconsistent with maintenance of the privilege, nor would maintenance of the privilege lead to any unfairness.

LETTER TO SHAREHOLDERS AND ASX ANNOUNCEMENTS DID CONSTITUTE A WAIVER OF PRIVILEGE

The Court held that reliance by TerraCom on the finding in the PwC report of no wrongdoing by its CEO and CFO is inconsistent with the maintenance of the privilege that otherwise attaches to the report. The Court said:

“TerraCom’s statements about the report’s findings were not casually made; they were consciously and deliberately made in an open letter to shareholders and to the market by way of formal ASX announcement. No doubt the intention was to put the minds of shareholders, the market and its regulators at ease. It would operate a tangible unfairness if TerraCom could, in effect, hide behind its statements as to the conclusion of the report whilst at the same time maintaining privilege over the report and thereby keep it beyond being tested by ASIC. Although ASIC can itself investigate the underlying facts and, in that sense, whether or not the reported conclusion of the PwC report is correct, it cannot test whether TerraCom’s exculpatory statement that is said to be based on the report is a fair reflection of what the report concluded without itself having access to the report. Without access to the report, ASIC cannot test whether TerraCom’s statements to shareholders and to the market are false or misleading in circumstances where it knows from the letter to it by EY that there are reasonable grounds to suspect that there was wrongdoing. That is the unfairness.”

The Court said the voluntary disclosure of the gist or conclusion of legal advice amounted to waiver in respect of the whole of the advice to which reference was made including the reasons for the conclusion.

Accordingly, TerraCom waived legal professional privilege over the PwC report, at least to the extent of the subject-matter of allegations that its CEO and CFO had been involved in a scheme relating to the fake analysis of coal samples.

HOW MUCH OF THE PRIVILEGED DOCUMENT WAS WAIVED?

Without disclosing the full nature of the report, the Court summarised that the “relatively narrow” disclosure made by TerraCom necessarily lead to at least the waiver of certain sections of the report.

However, in the Court’s view, even to excise those sections of the report would leave them incomplete and liable to be misunderstood because of the way in which the report is structured and the manner in which the different concerns interrelate.

Accordingly, in the circumstances, the partial disclosure of the contents of the report led in this case to waiver of legal professional privilege in respect of the whole report.

COMMENTARY

This decision is a timely reminder for companies which are (or whose officers are) the subject of a regulatory investigation or other court proceedings that great care needs to be taken when making public statements about the investigation or proceedings. There can be a natural temptation to use such reports for a commercial advantage; that is, to seek to maintain the company’s (or its officers’) good standing (or reputation) and the company’s share price. However, this temptation needs to be balanced against the risk of a waiver of legal professional privilege.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



ANDREW RICH
PARTNER, SYDNEY

+61 2 9225 5707
andrew.rich@hsf.com



KATERINA JOVANOVSKA
SOLICITOR, SYDNEY

+61 2 9225 5324
katerina.jovanovska@hsf.com

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