NEWCREST MINING LIMITED

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To: **Company Announcements Office**

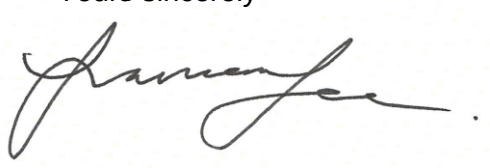
From: **Francesca Lee**

Date: 18 June 2014

Subject: **Market Release**

Please see the attached for immediate release to the market.

Yours sincerely



Francesca Lee
Company Secretary

Market Release

Newcrest Mining

18 June 2014

Newcrest reaches settlement with ASIC

Newcrest has reached a settlement with the Australian Securities and Investments Commission (ASIC) following the conclusion of ASIC's investigation into Newcrest's conduct leading up to its ASX announcement of 7 June 2013.[1]

ASIC this morning applied to the Federal Court seeking a declaration of two contraventions of the continuous disclosure provisions of the Corporations Act and aggregate civil penalties of $1.2 million. Under the settlement, Newcrest will agree to the two civil contraventions and the proposed penalties.

The contraventions arose from a loss of confidentiality in relation to Newcrest management's expectations concerning Financial Year 2014 (FY 14) gold production and capital expenditure following disclosure of that information to investors and analysts between 28 May and 5 June 2013,[2] and a failure by Newcrest immediately to make disclosure of that information to ASX following that loss of confidentiality.

It is not alleged by ASIC that Newcrest knowingly or intentionally contravened its continuous disclosure obligations.

The settlement with ASIC does not involve any action being taken by ASIC against individual officers or employees of Newcrest.

Newcrest Chairman, Peter Hay said:

"Newcrest takes its disclosure obligations very seriously and sincerely regrets the contraventions. Newcrest has cooperated fully with ASIC in its investigation of these matters. In addition, Newcrest commissioned an independent review of the Company's disclosure and investor relations practices. The full results of the review were released to the ASX in September last year and Newcrest has since made changes to enhance its investor relations policies and procedures following the recommendations of the review."

Accompanying this release is a copy of the Settlement Deed with ASIC (schedules omitted) and the Agreed Statement of Facts and Admissions and the Joint Submissions by the parties for the purposes of the Court proceedings.

The matter is due to come before the Federal Court shortly.

For further information, please contact:

Enquiries
Kerrina Watson
T: +61 3 9522 5593
E: kerrina.watson@newcrest.com.au

This information is available on our website at www.newcrest.com.au

[1] Newcrest's 7th June 2013 announcement related to the completion by Newcrest of a business and budget review and included, among other things, production and capital expenditure guidance in relation to Newcrest's 2014 financial year.
[2] With respect to the FY14 production information, the contravention occurred on and from 12.05 p.m. on 28 May until 9:19 a.m. on 7 June 2013. With respect to the FY14 capital expenditure information, the contravention occurred on and from 5 June until 9:19 a.m. on 7 June 2013.

Newcrest Mining Limited

Australian Securities and Investments Commission

Settlement Deed

Contents

Settlement Deed

This Deed is made on 18 June 2014

Parties

1 **NEWCREST MINING LIMITED** (ABN 20 005 683 625) registered in Victoria, of Level 8, 600 St Kilda Road, Melbourne VIC 3004 (***Newcrest***).

2 **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (ABN 86 768 265 615) of Level 7, 120 Collins Street, Melbourne VIC 3000 (***ASIC***).

Recitals

A ASIC has been conducting an investigation that includes suspected contraventions of s 674 of the *Corporations Act 2001* (Cth) by reason of a failure by Newcrest to disclose certain information to the ASX prior to 7 June 2013 (***Investigation***).

B ASIC has alleged that Newcrest committed contraventions of s 674(2) of the *Corporations Act 2001* (Cth):

(i) in the period 28 May to 7 June 2013, by failing to notify the ASX that Newcrest management expected total gold production for the financial year 2014 to be approximately 2.2 to 2.3 Moz; and

(ii) in the period 5 to 7 June 2013, by failing to notify the ASX that Newcrest management expected Newcrest's capital expenditure for financial year 2014 to be approximately AU$1 billion

(***Allegations***).

C ASIC has commenced the Federal Court Proceeding.

D ASIC and Newcrest hereby agree to settle the Federal Court Proceeding on the basis set out in this Deed.

E In light of the evidence obtained in the course of the Investigation, ASIC does not propose to take action against any of Newcrest's past or present officers or employees in relation to matters the subject of this Deed.

It is agreed as follows.

1 Definitions and Interpretation

1.1 Definitions

The following definitions apply unless the context requires otherwise.

Agreed Penalties means:

(a) $800,000 in relation to the First Contravention; and

(b) $400,000 in relation to the Second Contravention.

Agreed Statement of Facts and Admissions means the statement of facts and admissions set out in Schedule 3.

Allegations means the allegations referred to in Recital B above.

Appeal means the exercise of any and all available rights of appeal and includes as applicable an application for special leave to appeal to the High Court of Australia and the rehearing of a matter that has been remitted on appeal.

Application means the application to be brought by ASIC and Newcrest in accordance with clause 2.1.

Claim includes any claim or liability of any kind (including one which is prospective or contingent and one the amount of which is not ascertained) and costs (whether or not the subject of a court order) but does not include criminal proceedings.

Federal Court Proceeding means the proceeding commenced by ASIC against Newcrest in the Federal Court of Australia in which ASIC has made the Allegations.

First Contravention means the first contravention set out in the Proposed Orders.

Joint Submissions of ASIC and Newcrest means the submissions set out in Schedule 4.

Listing Rules means the Listing Rules of the ASX in operation as at the date of this Deed.

Newcrest Disclosure Issue means any issue as to whether Newcrest or a Newcrest Related Entity has contravened or been involved in a contravention of Newcrest's disclosure obligations under the *Corporations Act 2001* (Cth) and the Listing Rules in connection with:

(i) information which was contained in or related to Newcrest's market release dated 7 June 2013 entitled 'Newcrest Completes Business Review – Update on Outcomes, Impacts and Outlook'; or

(ii) prior to 7 June 2013, information regarding Newcrest's existing or future financial or operational condition or performance.

Newcrest Related Entity means any past or present officer or employee of Newcrest.

Proposed Orders means the proposed declarations and civil penalty orders set out in Schedule 5.

Second Contravention means the second contravention set out in the Proposed Orders.

1.2 Interpretation

(a) Headings are for convenience only and do not affect interpretation.

(b) Mentioning anything after includes, including, for example, or similar expressions, does not limit what else might be included.

(c) Nothing in this Deed is to be interpreted against a party solely on the ground that the party put forward this Deed or a relevant part of it.

The following rules apply unless the context requires otherwise.

(d) The singular includes the plural, and the converse also applies.

(e) If a word or phrase is defined, its other grammatical forms have a corresponding meaning.

(f) A reference to a clause, or schedule is a reference to a clause of, or schedule to, this Deed.

(g) A reference to an agreement or document (including a reference to this Deed) is to the agreement or document as amended, supplemented, novated or replaced, except to the extent prohibited by this Deed or that other agreement or document, and includes the recitals and schedules to that agreement or document.

(h) A reference to writing includes any method of representing or reproducing words, figures, drawings or symbols in a visible and tangible form.

(i) A reference to a party to this Deed or another agreement or document includes the party's successors, permitted substitutes and permitted assigns (and, where applicable, the party's legal personal representatives).

(j) A reference to legislation or to a provision of legislation includes a modification or re-enactment of it, a legislative provision substituted for it and a regulation or statutory instrument issued under it.

(k) A reference to a *right* or *obligation* of any two or more people comprising a single party confers that right, or imposes that obligation, as the case may be, on each of them severally and each two or more of them jointly. A reference to that party is a reference to each of those people separately (so that, for example, a representation or warranty by that party is given by each of them separately).

(l) All references to time are to Australian time.

2 Federal Court Proceeding

2.1 Application

As soon as practicable after the execution of this Deed, ASIC and Newcrest will file an application in the Federal Court Proceeding in the form attached as **Schedule 1**. The parties will also file an affidavit of an officer of ASIC in the form attached as **Schedule 2** which will exhibit the Agreed Statement of Facts and Admissions (**Schedule 3**); the Joint Submissions of ASIC and Newcrest (**Schedule 4**); and the Proposed Orders (**Schedule 5**).

2.2 Hearing of the Application

ASIC and Newcrest will appear at the hearing of the Application and support the making of the declarations set out in the Proposed Orders and the making of civil penalty orders reflecting the Agreed Penalties.

2.3 Appeals

(a) If on the Application the Federal Court does not make orders substantially in terms of the declarations set out in the Proposed Orders and/or does not order the Agreed Penalties, either party may pursue an Appeal in relation to the Federal Court Proceeding.

(b) A party that pursues an Appeal under paragraph (a) must do so solely for the purposes of seeking declarations substantially in terms of the declarations in the Proposed Orders and/or seeking civil penalty orders in the amount of the Agreed Penalties (as applicable).

(c) On any Appeal, the respondent to the Appeal will support the making of declarations substantially in terms of the declarations set out in the Proposed Orders and/or the making of civil penalty orders reflecting the Agreed Penalties (as applicable).

2.4 Costs

(a) Newcrest will pay ASIC's party and party costs in relation to:

(i) the Federal Court Proceeding; and

(ii) any Appeal by Newcrest in accordance with clause 2.3.

(b) If ASIC pursues an Appeal in accordance with clause 2.3, each party will bear its own costs in relation to ASIC's Appeal.

2.5 No admissions by Newcrest

(a) Unless and until documents in the form of the Agreed Statement of Facts and Admissions, the Joint Submissions of ASIC and Newcrest and the Proposed Orders are filed in accordance with clause 2.1, Newcrest:

(i) does not admit any contravention by Newcrest of any law in relation to the Allegations;

(ii) does not agree not to dispute any fact set out in the Agreed Statement of Facts and Admissions; and

(iii) does not waive any right Newcrest has to claim immunity or privilege (including without limitation legal professional privilege, without prejudice privilege or equitable confidence) in relation to the Agreed Statement of Facts and Admissions, the Joint Submissions of ASIC and Newcrest and the Proposed Orders.

(b) With effect from the time when documents in the form of the Agreed Statement of Facts and Admissions, the Joint Submissions of ASIC and Newcrest, and the Proposed Orders are filed in accordance with clause 2.1, Newcrest:

(i) does not admit any contravention by Newcrest of any law in relation to a Newcrest Disclosure Issue except for the contraventions set out in the Proposed Orders;

(ii) admits the contraventions set out in the Proposed Orders solely for the purposes of the Federal Court Proceeding and any Appeal; and

(iii) agrees not to dispute the facts set out in the Agreed Statement of Facts and Admissions solely for the purposes of the Federal Court Proceeding and any Appeal.

3 Release and covenant by ASIC

3.1 Release

Except for the Federal Court Proceeding and any Appeal by ASIC in accordance with clause 2.3, and subject to clause 3.3, on and from the time when documents in the form of the Agreed Statement of Facts and Admissions, the Joint Submissions of ASIC and Newcrest, and the Proposed Orders are filed in accordance with clause 2.1, ASIC releases Newcrest and each Newcrest Related Entity from any Claim that ASIC has or may have against Newcrest or the Newcrest Related Entity (as applicable) which arises from a Newcrest Disclosure Issue.

3.2 Covenant by ASIC

Subject to clause 3.3, ASIC agrees not to:

(a) (except for the Federal Court Proceeding and any Appeal by ASIC in accordance with clause 2.3) take any civil or administrative action against Newcrest or any Newcrest Related Entity which arises from a Newcrest Disclosure Issue; or

(b) refer to the Commonwealth Director of Public Prosecutions any allegation against Newcrest and/or any Newcrest Related Entity which arises from a Newcrest Disclosure Issue.

3.3 ASIC Future Regulatory Actions

Nothing in this Deed prevents ASIC from exercising its statutory powers to investigate or take enforcement action against Newcrest and/or any Newcrest Related Entity which arises from a Newcrest Disclosure Issue if ASIC has reason to suspect that a contravention of a law may have been committed and ASIC could not reasonably have identified the possible contravention based on the information obtained by ASIC in the course of the Investigation as at the time of execution of this Deed.

4 Provisions of documents or information to third parties

ASIC agrees to give Newcrest 7 days' written notice before it provides any documents or confidential information received by ASIC in relation to a Newcrest Disclosure Issue to a third party (unless ASIC is required by law to provide such documents or information in a lesser period of time, in which case ASIC will give Newcrest as much notice as it is reasonably able to give consistent with those legal requirements).

5 Media releases

ASIC and Newcrest will each issue media releases forthwith after the execution of this Deed in the form of **Schedule 6** and **Schedule 7** respectively.

6 Newcrest Related Entities

(a) The release in clause 3.1 and covenants in clause 3.2 are given to Newcrest for itself and as trustee for each Newcrest Related Entity.

(b) It is not intended that any Newcrest Related Entity will execute this Deed.

(c) A Newcrest Related Entity may enforce this Deed as if the Newcrest Related Entity were a party to the Deed.

(d) Newcrest need not act but may act as it sees fit in the best interests of each Newcrest Related Entity in respect of this Deed.

(e) Newcrest may agree to an amendment of this Deed. An amendment agreed to by Newcrest binds all Newcrest Related Entities.

(f) Newcrest is not responsible to Newcrest Related Entities for, and is not liable to any of them (whether in negligence or on any other ground whatever) in respect of, Newcrest's conduct relating to this Deed.

7 No Waiver

A failure to exercise or a delay in exercising any right, power or remedy under this Deed does not operate as a waiver. A single or partial exercise or waiver of the exercise of any right, power or remedy does not preclude any other or further exercise of that or any other right, power or remedy. A waiver is not valid or binding on the party granting that waiver unless made in writing.

8 Further Assurances

Each party must do anything necessary (including executing agreements and documents) to give full effect to this Deed. Without limiting the foregoing, the parties will progress the Application and any Appeal with all reasonable expedition.

9 Costs and Stamp Duty

(a) Subject to clause 2.4, each party must bear its own costs arising out of the negotiation, preparation and execution of this Deed.

(b) All stamp duty (including fines, penalties and interest) payable on or in connection with this Deed and any instrument executed under or any transaction evidenced by this Deed must be borne by Newcrest.

10 Governing Law and Jurisdiction

This Deed is governed by the laws of Victoria. In relation to it and related non-contractual matters each party irrevocably submits to the non-exclusive jurisdiction of courts with jurisdiction there.

11 Notices

Any notice to be given by ASIC to Newcrest under this Deed shall be sent by email and by normal post as follows:

Level 8

600 St Kilda Road

Melbourne VIC 3004

Att: Francesca Lee, Company Secretary and General Counsel

Email: Francesca.Lee@newcrest.com.au

Any notice to be given by Newcrest to ASIC under this Deed shall be sent by email and by normal post as follows:

Level 7

120 Collins Street

Melbourne 3000

Attention: Andrew Stecher, Senior Manager

Email: andrew.stecher@asic.gov.au

12 Counterparts

This Deed may be executed in any number of counterparts. All counterparts together will be taken to constitute one instrument.

Executed and delivered as a Deed in Melbourne.

Each attorney executing this Deed states that he or she has no notice of revocation or suspension of his or her power of attorney.

Signed Sealed and Delivered for **Newcrest Mining Limited** by its attorney in the presence of:

Witness Signature	Attorney Signature
Print Name	Print Name

Signed Sealed and Delivered for and on behalf of the **Australian Securities and Investments Commission** by in the presence of:

Witness Signature	Signature
Print Name	Print Name

Federal Court of Australia No. ____ of 2014

District Registry: Victoria

Division: General

IN THE MATTER OF NEWCREST MINING LIMITED (ABN 20 005 683 625)

BETWEEN

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

and

NEWCREST MINING LIMITED (ABN 20 005 683 625)

Defendant

AGREED STATEMENT OF FACTS AND ADMISSIONS

For the purposes of this proceeding, this Agreed Statement of Facts and Admissions is made jointly by the Applicant (**ASIC**) and the Respondent (**Newcrest**).

I PARTIES

1 ASIC is a body corporate:

(a) established by s 7 of the *Australian Securities Commissions Act 1989* (Cth);

(b) continued by s 261 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**); and

(c) able to sue in its corporate name by reason of s 8 of the ASIC Act.

2 Newcrest is:

(a) an Australian corporation listed on the financial market known as 'ASX' operated by ASX Limited (**ASX**);

(b) a "listed disclosing entity" subject to the provisions of the ASX Listing Rules requiring Newcrest to notify the ASX of "information about specified events or matters as they

arise" within the meaning of s 674(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**); and

(c) a gold mining company carrying on the business of the exploration, development, mining and sale of gold and gold-copper concentrate.

3 Newcrest's financial year (**FY**) ends on 30 June.

4 Newcrest's management during the relevant period included:

(a) Greg Robinson (**Robinson**), Chief Executive Officer and Managing Director;

(b) Gerard Bond (**Bond**), Chief Financial Officer and Finance Director;

(c) Steven Warner (**Warner**), General Manager Investor Relations; and

(d) Spencer Cole (**Cole**), Manager Investor Relations.

5 As Manager Investor Relations, Cole reported to Warner, the General Manager Investor Relations. Warner was one of Bond's direct reports. Warner ran the day-to-day operations of Investor Relations, and was located in New York up to mid June 2013. Cole was located in Melbourne.

II NEWCREST DISCLOSURES AND ANALYST FORECASTS PRIOR TO THE CONTRAVENTIONS

Newcrest disclosures prior to the contraventions

6 From time to time Newcrest made statements concerning various matters including its future gold production and capital expenditure. In the relevant period leading up to the contraventions, those statements relevant to future gold production and capital expenditure were as set out below.

7 On 13 August 2012, Newcrest released to ASX its financial results for FY12, including a presentation by Robinson and Bond titled "Full Year Results: 2011-2012". The presentation included the following statements or information to the following effect (as applicable):

(a) FY12 actual gold production of 2.29 million ounces (**Moz**);

(b) "FY13 guidance …gold production range = 2.3 to 2.5 Moz … Up to 9% increase on FY12" -;

(c) "Five year outlook … Gold production growth over 5 year period: FY17 production projected to be 35-55% higher than FY12";

(d) "Five year outlook … CAGR [Compound Annual Growth Rate] of 5-10%";

(e) "Five year outlook … Gold: 5 year production growth of 35% to 50%";

(f) within the five year outlook section, FY17 gold production of 3.1-3.5 Moz;

(g) FY13 capital expenditure guidance of $1.8 to $2 billion; and

(h) within the five year outlook section, a chart showing declining capital expenditure from FY12 to FY17.

8 On 2 October 2012, Newcrest held an Investor Day Conference in Sydney, where senior executives presented on the company to analysts and investors. At this conference, Bond gave a presentation titled "Performance, position and possibilities" (**2 October Presentation**) which included the following statements or information:

(a) gold production guidance for FY13 of 2.3 to 2.5 Moz;

(b) a gold production outlook for FY17 of 3.1 to 3.5Moz;

(c) an outlook of "5-year production growth of 35% to 50% … CAGR = 5 to 10% per annum"; and

(d) a chart illustrating Newcrest's capital expenditure over the period FY12 to FY17 declining while production rose, which chart showed, among other things, FY14 capital expenditure of approximately $1.5 billion (including a separately identified contingent capital amount of approximately $215 million in relation to Newcrest's Wafi Golpu project in the pre-feasibility stage).

The presentation slides were posted on Newcrest's website.

9 On 17 October 2012, Newcrest released to ASX its September Quarterly Report and a presentation titled "September 2012 Quarterly Results". The Report stated: "Financial year 2012/2013 guidance ranges for production, costs and capital expenditure remains unchanged". Similarly, the presentation stated "Full year production, cost and capital guidance maintained".

10 On 25 October 2012, Newcrest held its Annual General Meeting (**AGM**). At this AGM, Robinson gave a presentation titled "Annual General Meeting", which included two slides materially identical to the slides in the 2 October Presentation. The relevant slides included the following statements or information:

(a) gold production guidance for FY13 of 2.3 to 2.5 Moz;

(b) a gold production outlook for FY17 of 3.1 to 3.5 Moz;

(c) an outlook of "5-year production growth of 35% to 50% … CAGR = 5 to 10% per annum";

(d) a chart illustrating Newcrest's capital expenditure over the period FY12 to FY17 declining while production rose, which chart showed , among other things, FY14 capital expenditure of approximately $1.5 billion (including a separately identified contingent capital amount of approximately $215 million in relation to Newcrest's Wafi Golpu project in the pre-feasibility stage).

The presentation slides were released to ASX prior to the AGM.

11 On 7 November 2012, Bond presented at the Bank of America Merrill Lynch China Conference. This presentation again included two slides materially identical to the slides in the 2 October Presentation. The relevant slides included the following statements or information:

(a) gold production guidance for FY13 of 2.3 to 2.5 Moz;

(b) a gold production outlook for FY17 of 3.1 to 3.5 Moz;

(c) an outlook of "5-year production growth of 35% to 50% … CAGR = 5 to 10% per annum";

(d) a chart illustrating Newcrest's capital expenditure over the period FY12 to FY17 declining while production rose, which chart showed, among other things, FY14 capital expenditure of approximately $1.5 billion (including a separately identified contingent capital amount of approximately $215 million in relation to Newcrest's Wafi Golpu project which was in the pre-feasibility stage).

12 On 28 March 2013, Newcrest released to ASX an announcement, which:

(a) stated that Newcrest had "reduced financial year 2012/13 gold production guidance to 2.00 to 2.15 million ounces";

(b) stated that this reduction was due primarily to:

(i) the Lihir operation "currently running at reduced production capacity following a shutdown of autoclave 1. … Newcrest has taken the decision to undertake a complete and permanent repair … It is currently anticipated this repair work will take between 5 to 7 weeks to complete; and

(ii) Newcrest needing to "regain access to the high grade ore" at Gosowong and "[w]hilst ground conditions have continued to be difficult and access to high grade face positions has been below our expectations, Newcrest is now mining from high grade face positions";

(c) stated that "Full year capital guidance remains unchanged"; and

(d) did not include any quantitative guidance for gold production or capital expenditure beyond FY13.

13 On 23 April 2013, Newcrest released to ASX its March Quarterly Report (**MQR**) and a presentation by Robinson titled "March 2013 Quarterly Results" (**MQP**), which:

(a) stated that "Quarterly production was adversely impacted at both Lihir and Gosowong, as discussed in the 28 March 2013 release. At Lihir the repair of Autoclave 1 is now complete and at Gosowong access to the higher grade ore zones has been re-established" (MQR);

(b) stated in relation to Lihir Autoclave 1: "Repair complete; back into service" (MQP);

(c) stated in relation to Gosowong: "Access to higher grade ore zones has now been re-established" (MQP); and

(d) did not include any quantitative guidance as to gold production or capital expenditure beyond FY13.

14 The MQR and MQP included the following statements:

(a) "Operating and capital costs overall continue to be high in the global gold mining industry. Also, the recent decline in commodity prices has not been accompanied by a reduction in the strength of the Australian Dollar and Papua New Guinean Kina. With its major projects ramping up and the more challenging environment, Newcrest continues to review all of its business activities, particularly those related to higher cost current or future production. As previously stated, the Company is focused on creating a strong return from major investments in expanded lower cost production sources and generating free cash flow." (MQR)

(b) "Key points

…

- Cadia East and new Lihir plant (previously MOPU) production performance in line with expectations

…

- Focus on free cash flow and generating higher returns
- Actions to simplify and reduce activity and costs across the business …" (MQR)

(c) "• Actions taken in response to performance and external environment

– Organisational changes to reduce and simplify off-site activity

– Paused studies on some projects with a longer term payback

– Assessing all capital investment in higher cost production ounces

– Continuing to renegotiate costs and activity with key suppliers

- Continued strong focus on free cash flow generation" (MQP)

(d) "Lihir Operating Strategy

- Rebasing of cost structure

  – Need to simplify the operation

  – Process more stockpiled ore

  – Improve return on investment

- Lower future capital investment

  – Complete flotation project

  – Complete reliability program

  – Minimise capital, optimise plant, reduce material movement" (MQP)

(e) "Summary

- Company imperative to deliver production
- Major projects ramping up in line with expectations

…

- Actions due to performance and external conditions:

…

  - Focus on low cost ore sources

  …

  - Objective for all sites to be cash flow positive

- Stronger orientation to generate free cash flow" (MQP)

15 On that same day, 23 April 2013 at 11.00 am, Robinson presented Newcrest's quarterly results and participated in a Q&A via webcast. Any person could participate in the webcast by registering through Newcrest's website, or listen to it at a later time, with webcast access available on Newcrest's website for an extended period thereafter. Newcrest obtained a transcript of the webcast which records statements by Robinson including the following:

(a) "Going forward, we'll not be investing large capital and effort in high cost marginal ounces. This year we're looking very closely at all sites and at each ore block within those sites to ensure ongoing cash positive margins…So we are going to be very rigorous in that. To repeat, we are going to be stingy with capital as we really look to invest in the business."

(b) "The focus for the Lihir team is to minimise costly material movement, optimise the significant investment in the plant and ensure high cash flows to Newcrest. The stockpiles are an area that we're going to do a lot of focus on in the short term. They do represent a very valuable opportunity for us. They have mining costs which are already sunk. Therefore their cash per ounce to us is high. The balancing factor for us versus mine movement is the grades are obviously slightly lower. We're looking very closely at the value equation of material movement versus grade, and particularly as our plant performance has started to improve significantly…..Cash flow is clearly a dominant driver in this assessment."

(c) “We have a clear focus on delivering our production”

(d) [in response to a question about whether there had been a change in plan in relation to material movement capacity (ie the number of tonnes of ore that could be moved) at Lihir] “No … the choices we've got going forward, really, in material movement come down to how much we mine and how much we process through the stockpile … So, again, at the moment, for next year's plan, we're looking in the 50 million to 60 million tonne material movement, and that is a mixture of mine and stockpile movement with the progressive ramp up of the plant reaching that 75,000 to 85,000 ounce type level.”

(e) [in response to the query "should we be assuming that the CapEx, your five year CapEx profile will be coming down and you'll update us on that later in the year?"] "We'll certainly give you an update later in the year. Our objective is obviously to bring that down."

(f) [in response to a question about Newcrest’s future production profile] “On the production range… [w]e did give a range … We did talk about 3.1 million to 3.5 million. That included some expansions around probably some more expensive ounces within the Group. If we look at that five year range going forward we will be talking about that in August but again

it will be around optimising cash flow for the Group. … So again, I think across all our assets we are in good shape on the five year plan."

Analyst forecasts prior to the contraventions

16 The most recent Australian analysts' reports published before 28 May 2013 contained forecasts reflecting on average:

(a) Newcrest FY14 total gold production of approximately 2.6 Moz; and

(b) Newcrest FY14 capital expenditure of approximately $1.4 billion.

17 The following table sets out forecasts for Newcrest FY14 total gold production and FY14 capital expenditure contained in a number of Australian analysts' reports published before 28 May 2013:

Analyst	**Date of Report**	**Gold production (Moz)**	**Capex ($b)**
Bank of America Merrill Lynch	23 April 2013	2.628	1.496
CBA	18 May 2013	2.522	1.379
Citigroup	30 April 2013	2.865	1.519
Credit Suisse	23 April 2013	N/A	1.417
Deutsche Bank	13 May 2013	2.743	1.294
Goldman Sachs	23 April 2013	2.580	1.501
JP Morgan	23 April 2013	2.587	1.502
Macquarie	23 April 2013	2.598	1.312
Morgan Stanley	23 April 2013	2.681	1.513
RBC	20 May 2013	2.490	1.439
CIMB (RBS)	23 April 2013	2.579	1.582
UBS	22 May 2013	2.619	1.326
Average		**2.626**	**1.44**

III ADDITIONAL CONTEXT

The gold price and the gold sector

18 In late 2012, gold was coming off 11 years of year-on-year price increases which had culminated in a high in October 2012 of US$1796.05 per ounce (~A$1753.17 per ounce), reaching a low of US$1180.50 per ounce (~A$1279.21 per ounce) in June 2013.

19 On two consecutive trading days in April 2013, the gold price experienced the most dramatic fall in 30 years – dropping from over US$1580 per ounce to US$1360 per ounce. The gold price remained volatile throughout the remainder of calendar 2013, and there was considerable and widespread uncertainty about the likely short to medium term price for gold.

20 As a large, unhedged gold producer, Newcrest's share price was sensitive to a range of factors, including global market sentiment regarding the resources sector generally and, in particular, the gold price.

Newcrest's budgeting process

21 Newcrest undertakes an annual planning and budgeting process that runs for approximately six months and culminates, in the period April to June each year, in the preparation and presentation to the Newcrest Board of a detailed business and operating budget for the next financial year. The budget remains in draft until it is formally considered and approved by the Board.

22 The budget includes, among other things, the detailed forecast of physical and financial activity for the forward looking year and actions required to enable planned operations and business activities in subsequent years, and includes material assumptions regarding a variety of relevant factors including the gold price, the copper price, foreign currency exchange rates and the cost of labour, energy and other production inputs.

23 Newcrest's annual planning cycle, including the development of the budget, is complex. The collapse in the gold price and associated uncertainty regarding the future gold price meant that the FY14 budget process, with the imperative of delivering a budget that was at least free cash flow positive, was even more complex and demanding than usual.

24 The FY14 budget was a continually evolving document. A number of material iterations of the FY14 budget were prepared during the course of May 2013, and the FY14 budget eventually submitted to the Newcrest Board for in principle approval in early June 2013 remained in draft with a number of key areas still being work in progress. The FY14 gold production and capital expenditure figures in the draft FY14 budget did not change materially during the second half of May 2013.

Senior management focus during May and early June 2013

25 During May and June 2013 there were significant demands on Newcrest senior management, in particular Robinson and Bond. As noted in paragraphs 21 to 24, the FY14 budgeting and planning process was being conducted in a difficult operating and commodity price environment and the implementation of the draft budget would involve significant change management impacting on governments and communities and contractor and employee numbers, as well as the potential closure of Newcrest's Brisbane office. The scheduled June Board and Committee meetings leading up to the financial year end were significant meetings in the corporate calendar with full agendas requiring the personal involvement of senior management. A key agenda item for the Audit and Risk Committee, requiring the active involvement of Bond and Robinson was the review of the carrying values of Newcrest's assets for the purposes of asset impairment testing. Major commercial negotiations also took place at the end of May and required the personal attendance of Robinson.

IV NEWCREST AWARENESS OF INFORMATION

26 As at 28 May 2013, Newcrest was aware that Newcrest management expected total gold production for FY14 to be approximately 2.2 to 2.3 Moz (**total production information**). Management's expectation was reflected in drafts of the budget:

(a) On 16 May 2013, Bond forwarded a draft FY14 budget to the other members of the Newcrest Executive Committee (**EXCO**) showing 2.235 Moz total gold production for FY14. The members of EXCO included Robinson (and Bond).

(b) On 28 May 2013, EXCO received a revised draft FY14 budget showing 2.217 Moz total gold production for FY14.

27 On 31 May 2013, the draft FY14 budget was distributed to the Newcrest Board, showing 2.217 Moz total gold production for FY14.

28 As at 5 June 2013, Newcrest was aware that Newcrest management expected Newcrest's capital expenditure figure for FY14 to be approximately $1 billion (**capex information**). Management's expectation was reflected in drafts of the budget:

(a) On 28 May 2013, EXCO received a revised draft FY14 budget showing total capital expenditure of $979 million in FY14.

(b) On 31 May 2013, a draft FY14 budget was distributed to the Newcrest Board, showing total capital expenditure of $983 million in FY14.

V INFORMATION NOT GENERALLY AVAILABLE (UNTIL 7 JUNE 2013)

29 Prior to 7 June 2013, the total production information was not generally available within the meaning of s 674(2)(c)(i) and s 676 of the Corporations Act.

30 Prior to 7 June 2013, the capex information was not generally available within the meaning of s 674(2)(c)(i) and s 676 of the Corporations Act.

VI MATERIALITY

31 The total production information was information that a reasonable person would have expected, if it had been generally available, to have had a material effect on Newcrest's share price within the meaning of s 674(2)(c)(ii) and s 677 of the Corporations Act.

32 The capex information was information that a reasonable person would have expected, if it had been generally available, to have had a material effect on Newcrest's share price within the meaning of s 674(2)(c)(ii) and s 677 of the Corporations Act.

VII CIRCUMSTANCES GIVING RISE TO LOSS OF CONFIDENTIALITY: FACTUAL NARRATIVE

33 On 15 April 2013, Newcrest accepted an invitation to present at Goldman Sachs' inaugural "Gold Day" conference in Sydney on 30 May 2013 (**Gold Day**). Originally Newcrest intended that Bond would present (accompanied by Cole) and use the trip to Sydney as an opportunity to meet Sydney-based analysts, whom he had not previously met. Meetings with the analysts were accordingly scheduled. However due to work pressures arising from the preparation of the FY14 budget and the ongoing review of the carrying value of Newcrest's assets, Bond had to cancel and Cole presented at Gold Day, and met with the Sydney analysts, in place of Bond.

34 It is common practice amongst ASX-listed companies to have investor relations representatives who interact directly with analysts and investors from time to time.

35 Cole prepared a draft presentation for Gold Day which was consistent, in all material respects, with what he then understood to be the final version of a presentation prepared for Robinson for

the Bank of America Merrill Lynch Global Metals, Mining and Steels Conference in Barcelona (**Barcelona Presentation**) on 14 May 2013.

36 On 25 May 2013, Warner emailed Cole and told him “Greg made some changes to the speaker notes [to the Barcelona Presentation] on the plane to Barcelona (which I don't have) so you should get these from him.”

37 On 27 May 2013, Robinson, responding to a request from Cole, forwarded the version of the Barcelona Presentation containing his amended speaking notes (**Barcelona Speaking Notes**) to Cole by email (with no covering text) on 27 May 2013.

38 The Barcelona Speaking Notes included the following statements:

(a) "We have a very long reserve life and will increase production in the years ahead at about 5% per annum due the [sic] recently completed two major expansion projects at our two largest assets, namely, Cadia and Lihir"; and

(b) "Our production this year is expected to be 2.0 to 2.15 mozs and we expect to grow production at 5% per annum over the next 5 years".

39 Cole then updated the draft speaking notes for his Gold Day presentation so that they aligned with the Barcelona Speaking Notes. As updated, the speaking notes to Cole’s presentation included the same statements as those referred to in paragraph 38. The earlier draft of the speaking notes referred to in paragraph 35 had included neither of these statements.

40 On 27 May 2013 at 12.44 pm Cole sent Robinson and Bond, copying Warner, an electronic copy of his presentation for the Gold Day conference, including embedded speaking notes. The email stated “[c]ould you please let me know if you recommend any further changes or if this is OK to be submitted (excluding speakers notes) to Goldman Sachs?”

41 That same day Robinson replied “Spencer, looks fine”. Bond later that day responded “OK by me, with one change to the slides: slide 12…” (copying his email to Robinson and Warner).

42 When Warner read the Barcelona Speaking Notes, he observed the reference to “our production this year is expected to be 2.0 to 2.15 mozs and we expect to grow production at 5% per annum over the next 5 years”. Warner inferred from the Barcelona Speaking Notes that a public

disclosure had been made that Newcrest expected FY14 production to be around 5% higher than Newcrest's revised FY13 production guidance.

43 There was email correspondence between Cole and Warner (to which Bond was also copied or addressed) concerning the messages that Cole should be delivering to analysts with whom he was meeting around the time of the Gold Day conference.

(a) On 28 May 2013 at 5.28pm, Cole sent an email to Warner and Bond with the subject "guiding analysts – feedback & latest updates" stating as follows:

(i) "Analysts are sitting at 2.6Moz average. As part of normal discussions, I had been nudging them down toward the <2.5Moz range, per our 5 Year Plan. However I now understand that our Budget is closer to 2.25 Moz, which means we need to get them much lower. I propose discussing the following topics/levers to guide them – could you please comment on these and any other thoughts you would like to share on guidance strategy?" (The topics/levers referred to by Cole in his email were cashflow focus, Lihir stockpiles, high cost ounces (Telfer), high cost ounces (Cadia), mine life, capital expenditure and exploration, being matters identified in the MQR, MQP and the related presentation and Q&A.);

(ii) "I had conversations with BAML and Credit Suisse today, since both were preparing to publish, to tell them they were too high and sharpen their pens based on the levers noted above. Gorro has now agreed to hold off on his Newcrest note until Friday, assuming I have a bit more background and can guide him directionally on costs as well as production. Mike is also holding off and thinking about it as well"; and.

(iii) "The real question is when I will have some more detail on the Budget to help guide them in the right direction on costs as well as production …".

(b) On 29 May 2013 at 2.15am (Melbourne time), Warner responded to Cole's email, copying Bond, stating:

(i) "This week is a good opportunity to discuss the key themes you have listed and the high level production directional moves with analysts. Avoid any site by site detail as still a WIP but ok to discuss themes as per your note below";

(ii) "So, Overriding message is that our previous comments about a 5% production growth yoy from current FY13 production guidance still valid …We have some time around the details as analysts won't get detailed guidance for nearly 3 months so key near-term objective is to get them in the ball park…";

(iii) "I haven't seen the status of the budget either but I suspect 3 key messages would be (Gerard to confirm):

1. Production around 5% higher than FY13
2. Cash costs unlikely to be significantly lower than FY13, but cost reduction initiatives will start to flow through during FY14
3. Looking to be cashflow neutral or slightly positive at spot gold, so expect significantly lower capex and reduced exploration spend."

44 Having regard to the references to future production in the Barcelona Speaking Notes, each of Warner and Cole believed that Robinson had already disclosed in a public forum that production in FY14 would be around 5 percent higher than FY13.

Gold Day Presentation

45 On 30 May 2013 at about 3.00 pm, Cole presented at Gold Day. Cole's presentation and speaking notes were materially identical to Robinson's Barcelona Presentation and Barcelona Speaking Notes, and included the statements referred to in paragraph 38. Cole read those statements during his presentation and, in response to a request by an attendee for clarification as to the meaning of those statements and their application in respect of FY14, indicated that Newcrest expected its FY14 gold production to be about 5% per annum above its revised FY13 gold production guidance.

Other meetings, emails and telephone calls with analysts and investors

Credit Suisse – 28 May

46 Prior to attending Gold Day, Cole had communications with analysts from Credit Suisse, as set out below:

(a) On 27 May 2013 at 6.57 pm Michael Slifirski, an analyst at Credit Suisse, sent Cole an email stating: "Work in progress. This does not show our new numbers. We'd like to discuss this with you if possible tomorrow. Sam will send our current numbers to look at."

(b) About 20 minutes later, at 7.18 pm, Sam Webb, another analyst at Credit Suisse, sent Cole an email including "tables show[ing] our latest published assumptions vs a new 'scenario'". The table showed total gold production for FY14: "old" of 2.841 Moz and "new" of 2.591 Moz.

(c) The next day, on 28 May 2013, Cole had a telephone conversation with Slifirski and Webb, which concluded at approximately 12.05pm. Webb's contemporaneous notes of that conversation include the following:

(i) "Nothing pubically [sic] until August";

(ii) "Production still has to come down in FY14";

(iii) "Maybe below 2.1moz in FY13"; and

(iv) "Just below 10% growth in FY14".

(d) At 12.15 pm on 28 May 2013, Webb sent Cole Credit Suisse's "next cut", with a table showing FY14 "new" total gold production forecast of 2.412 Moz, a more than 15% downward revision to Credit Suisse's previously published forecast. The email stated "appears as though we roughly need to still find another 100koz (minimum). Given FY13 v FY14 comparison, we're not sure where we should pull these from, any thoughts appreciated."

(e) Cole replied at 5.49 pm stating: "I suggest you look a bit harder at Lihir, assuming a heavy dose from stockpiles and some risk reduction, taking into account what Greg has said at the quarterly and again in Barcelona, and then you would just make small tweaks at the other sites to get to your final range. … I've asked Joylene to set up an in person catch up next week with you guys, possibly Wednesday, and perhaps we can discuss how to think about this in more detail."

(f) Slifirski replied a few minutes later: "Great Spencer, thank you. Very keen to catch up next week."

47 When Cole was in Sydney for Gold Day, he also met with a number of analysts, as previously scheduled including:

29 May meetings

UBS – 12.00 pm

(a) On 29 May 2013 at about 12:00 pm Cole met with Jonathan Battershill, a senior analyst at UBS, at the Sydney office of UBS. Battershill's contemporaneous notes of that meeting included the following item: "Merrill's – Greg stated FY14 volume 5-10% above FY13".

CLSA – 1:45 pm

(b) At 1.45pm Cole attended the Sydney office of CLSA and met with David Thompson, Andrew Driscoll and Sandy Isherwood. The audio recording of that meeting records that Cole stated:

(i) "I will repeat something Greg said at the Barcelona conference – we should be looking at 5 to 10% growth between where we have finished this year and where we go next year"; and

(ii) "for fiscal year '14 … if you're running with the herd you're probably sitting at 2.6moz … that's too high".

30 May meetings and communications

Deutsche Bank - 7.30am

(c) At about 7.30 am on 30 May 2013, Cole met with Brett McKay and Matt Hocking of Deutsche Bank in Sydney. McKay's contemporaneous notes of that meeting included the following item: "5% pa production growth next few years at Group level."

Citibank – 8.45am

(d) At about 8.45 am Cole met with Daniel Seeney, Matthew Schembri and Sam Heithersay, research analysts from Citibank, at Citibank's Sydney offices. Each of the analysts took contemporaneous notes of that meeting, which included the following items:

(i) "5% pa on 2013 for next couple of yrs (production)… 5-10% for FY14" (notes by Seeney); and

(ii) "FY14 … 5% increase in koz … 5-10%" (notes by Schembri).

RBC – 10.00 am

(e) At about 10.00 am Cole met with Michael Orphanides of RBC in RBC's Sydney office. Orphanides's contemporaneous notes of that meeting included the following item: "5% pa FY13 – 3 – 4 yrs (2-2.15) base".

Macquarie – 11.30am

(f) At about 11.30 am on 30 May 2013, Cole met with Mitchell Ryan of Macquarie Bank at Macquarie Bank's Sydney office.

(g) Later that day, at 5.28 pm, Ryan emailed Andrew Sullivan of Macquarie stating: "So I caught up with Spence today … now he's talking 2.2 – 2.3 moz next year…".

30 May - Sydney wrap up email

48 After Cole finished his meetings with Sydney based analysts and his presentation at Gold Day, he prepared and sent to Warner an email titled "wrap up" stating:

(a) "The main topic was to highlight Greg's comments in Barcelona and make sure analysts react to them";

(b) [an investor told Cole that] "… the word was Newcrest is talking down FY14 expectations, and clearly our stock price result today was impacted. Can't tell analysts their 25% increase assumption is wrong without getting a reaction…"; and

(c) "The presentation went fine, and some investors were there and heard me repeat Greg's comment on 5%pa growth".

49 Cole's email was forwarded by Warner to Bond, and then from Bond to Robinson on the morning of 31 May 2013.

50 At 7.05 am on 31 May 2013, Robinson responded to Bond's email, forwarding Cole's "Sydney wrap up" email, stating "Need to make sure Spencer is in control, is he back in Melb?".

51 About 40 minutes later, at 7.45 am on 31 May 2013, Bond replied to Robinson stating "Yes".

52 After returning to Melbourne from Sydney in the evening on 30 May 2013, Cole spoke with investors and an analyst from Morgan Stanley on 31 May 2013.

31 May meetings and communications

Colonial First State Asset Management

(a) At about 11.30am on 31 May 2013, Cole spoke with David Walsh, Research Analyst at Colonial First State Asset Management by telephone. Walsh's contemporaneous notes of that call included the following items:

(i) "5-10% growth pa"

(ii) "2.2 -2. 3 Moz".

Greencape – 3.00 pm

(b) At about 3.00 pm on 31 May 2013, Cole spoke with Marc Hester, Portfolio Manager of Greencape Capital, by telephone. Shortly after this call, at 4.21 pm, Hester sent his colleagues at Greencape an email stating that Cole had said that Newcrest's growth outlook was "5-10% growth on what going to achieve [sic] in actual production".

Morgan Stanley – 31 May

(c) At 4.53pm on 31 May 2013, Cole sent Brendan Fitzpatrick of Morgan Stanley an email stating: “I’d like to revisit the implications of Greg Robinson’s latest public comments at the BAML Barcelona conference as well as our March quarterly, in particular his reiteration of prior guidance that Newcrest would grow production at 5-10% per annum, with FY13 as our current base case.”

31 May 2013: Public sources email

53 At around 9.30am on 31 May 2013, James Walker of the Legal and Compliance Department of Citibank contacted Cole regarding concerns that Cole may have provided non public and material information to the Citibank analysts during the meeting on 30 May 2013 referred to in paragraph 47(d).

54 Following this discussion, at 12.19 pm on 31 May 2103, Cole sent an email to Walker. The email, with the subject "public info sources behind our discussion" set out what Cole said were the key assumptions and public sources on which material parts of his discussions with the Citibank analysts were based (**Public Sources Email**).

55 Between 31 May 2013 and 6 June 2013, Cole sent an email with similar content as the Public Sources Email to all of the analysts and some investors that he had met or spoken with between 29 May and 6 June 2013.

56 On 31 May 2013, at 1.00 pm, Cole forwarded to Bond a version of the Public Sources Email stating "Gerard, FYI in case it does bubble up to you. I have sent this information to each of the analysts for their reference. Most were comfortable already, but this covers the bases".

57 Some days later, on 5 June 2013, Cole had further discussions with analysts from RBC and the Commonwealth Bank.

5 June discussions with analysts

RBC – 5 June

(a) On 5 June 2013 at about 2.30 pm, Cole had a conference call with Orphanides and Geoff Breen of RBC. Orphanides' contemporaneous notes of that call included the following items:

(i) "FY14 2.3 Moz".

(ii)

"Capex	Prev	New
FY13	2000	
FY14	1500	1,000
FY15	1000	<1000
thereafter".		

Breen's contemporaneous notes of the conference call included the following item:

"Capex		FY14	FY15
WAS	2.0	1.5	1.0
		1.0	<$1.0"

Commonwealth Bank – 5 June

(b) On 5 June 2013 at about 1pm Cole met with Paul Hodsman and Andrew Knuckey of the Commonwealth Bank. Hodsman's contemporaneous notes of the meeting include the following item: "Capex: FY13: 2.0 FY14: 1.5→1.0 FY15+: 1.0".

VIII LOSS OF CONFIDENTIALITY

Total production information

58 From 28 May 2013, the total gold production information ceased to be confidential information within the meaning of Rule 3.1A of the ASX Listing Rules as Cole disclosed that information to various analysts and investors in the course of his Gold Day presentation, meetings and other communications between 28 May and 5 June, as set out above.

Capex information

59 From 5 June 2013, the capex information ceased to be confidential information within the meaning of Rule 3.1A of the ASX Listing Rules as Cole disclosed that information to analysts from RBC and the Commonwealth Bank, in the course of meetings and other communications on 5 June, as set out above.

IX INFORMATION REQUIRED TO BE NOTIFED TO ASX

60 On and from 12.05pm on 28 May 2013 (being the time at which the conference call between Cole, Slifirski and Webb referred to in paragraph 46(c) concluded), the total production information ceased to be confidential and, consequently, Newcrest was required to notify the ASX of that information under Rule 3.1 of the ASX Listing Rules and s 674(2)(b) of the Corporations Act.

61 On and from about 2pm on 5 June 2013 (being the time at which the meeting between Cole and Hodsman and Knuckey of Commonwealth Bank is estimated to have concluded), the capex information ceased to be confidential and, consequently, Newcrest was required to notify the ASX of that information under Rule 3.1 of the ASX Listing Rules and s 674(2)(b) of the Corporations Act.

IX 7 JUNE 2013

62 Newcrest did not notify the ASX of either the total production information or the capex information prior to 7 June 2013.

63 At 9.19 am on 7 June 2013 (prior to the commencement of trading), Newcrest released an announcement to ASX entitled “Newcrest completes business review: Update on outcomes, impacts and outlook”. The announcement disclosed Newcrest's expected FY14 gold production of

2.0-2.3 moz and expected FY14 capital expenditure of about $1 billion and addressed the following additional matters:

(a) the likelihood of an impairment of the carrying value of Newcrest's assets in the range of $5 to $6 billion;

(b) the focus on maximising free cash flow and that this was budgeted to be neutral in FY14;

(c) an expected material increase in Newcrest gearing levels as a result of the decline in the gold price and the likely asset write-downs;

(d) the likelihood that no final dividend would be paid by Newcrest in respect of FY13; and

(e) the intended closure of Newcrest's Brisbane office.

64 At 10.06 am on 7 June 2013, Newcrest shares opened at $11.52 (13.8% lower than the previous day's closing price) and closed at $12.35 (7.6% lower than the previous day's closing price). The volume of Newcrest shares traded on 7 June 2013 was approximately 14.9 million shares, significantly above the 30 day moving average of 5.8 million shares.

XI ADMITTED CONTRAVENTIONS

65 Newcrest admits that it contravened s 674(2) of the Corporations Act on and from 12.05pm on 28 May 2013 continuing until 9.19am on 7 June 2013, by failing to notify the ASX of the total production information.

66 Newcrest admits that it contravened s 674(2) of the Corporations Act on and from 5 June 2013, continuing until 9.19am on 7 June 2013, by failing to notify the ASX of the capital expenditure information.

67 Newcrest admits that each of the contraventions was "serious" within the meaning of s 1317G(1A)(c)(iii) of the Corporations Act.

XII OTHER FACTS RELEVANT TO RELIEF

Newcrest's size and financial position

68 Newcrest:

(a) is the largest gold company listed on the ASX and one of the world's largest gold mining companies;

(b) has a market capitalisation among the largest 50 companies listed on the ASX; and

(c) operates mines located in Australia, Papua New Guinea, Indonesia and Cote d'Ivoire.

69 As at 30 June 2013, Newcrest's:

(a) total sales revenue was $3.775 billion;

(b) earnings before interest, tax, depreciation and significant items was $1.367 billion;

(c) net assets were $10.085 billion;

(d) number of issued shares was 766,510,971; and

(e) market capitalisation was approximately $7.565 billion (based on a closing price of $9.87).

Notice to Newcrest senior management of matters relating to the contravention

70 Having regard to the email referred to in paragraph 43(b) above, Newcrest senior management was put on notice that Cole proposed to disclose the total production information.

71 Having regard to the email referred to in paragraph 48 above, Newcrest senior management was put on notice on 30 May 2013 that the total production information had ceased to be confidential.

Newcrest's policies and procedures

72 The version of Newcrest's policy titled "Public Announcements, Investor Relations and External Communications" (**Investor Relations Policy**) in force at the relevant time provided:

(a) "The quality, accuracy and consistency of external communications, the immediate disclosure of material information to the market and the avoidance of selective or inadvertent disclosure are fundamental to Newcrest and its reputation." (section 1.0);

(b) "Newcrest maintains an active investor relations programme for the purpose of keeping the broader investment community properly informed about the Company's activities. … In undertaking these activities only publicly available information will be referred to or provided" (section 5.0);

(c) "The Head of Investor Relations shall be the sole point of contact with analysts and investment advisers, on a day to day basis, subject always to the Managing Director and the Finance Director having authority to do so" (section 5.5);

(d) "All significant meetings and briefings conducted pursuant to the Investor Relations program must be attended by at least one Newcrest person in addition to the presenter so that the nature and content of what was discussed can be verified" (section 5.7); and

(e) "A record should be kept of all substantive discussions, meetings and briefings and placed on file with the Head of Investor Relations" (section 5.8).

73 In the circumstances which have been described, Newcrest failed to comply with sections 5.0, 5.5, 5.7 and 5.8 of its Investor Relations Policy.

74 Soon after 7 June 2013, Newcrest commissioned an independent review of the company's disclosure and investor relations practices. Newcrest released the full results of the independent review to ASX on 5 September 2013, and has since made changes to its policies and procedures following the recommendations to enhance Newcrest's policies and procedures contained in the review report (to the extent not already reflected in Newcrest's policies and procedures). This involved a comprehensive review of Newcrest's governance structure for market disclosure, and led to steps including:

(a) the establishment on 5 December 2013 of a Disclosure Committee (comprised of the Managing Director, Finance Director, General Counsel and Company Secretary, and Executive General Manager of External Affairs), having delegated authority for making and executing disclosure decisions (save for matters expressly reserved to the board) and overseeing investor relations functions; and

(b) the approval by the board on 13 February 2014 of revised and restructured policies, in the form of the publicly available *Market Disclosure Policy* and the internal *Market Releases and Investor Relations Policy* and *Media and External Communications Policy*.

75 Key aspects of Newcrest's revised governance structure for market disclosure include:

(a) requiring all external presentation materials with an investor or analyst focus to be provided as a market release to the ASX and other exchanges, and made available on Newcrest's website;

(b) requiring (so far as practicable) significant investor relations events to be webcast or recorded and made available on Newcrest's website;

(c) imposing an investor relations 'blackout' period (i.e. where investor meetings, site visits and other elements of the investor relations programme are not scheduled or initiated) for a period of two weeks leading up to Newcrest's Half Year and Preliminary Final Reports and quarterly production results, and for such other periods and in relation to such other events as the Disclosure Committee determines to be necessary;

(d) making all presentations at investor seminars and conferences and industry briefings subject to prior authorisation by the Managing Director (following documented legal review by the General Counsel and Company Secretary, and review by the Head of Investor Relations and Head of Corporate Affairs); and

(e) requiring all investor relations presentations, meetings, briefings and discussions to be:

(i) conducted by a specifically authorised spokesperson and attended by at least one additional Newcrest employee who has had formal disclosure training in the preceding 12 months; and

(ii) clearly and comprehensively documented and reviewed afterwards by the Newcrest participants (with the Disclosure Committee to be immediately informed of any market sensitive disclosure).

Extent of prejudice to persons trading shares

76 Newcrest admits that persons who traded in Newcrest shares during the period between which Newcrest was required to disclose the total production information to ASX (being 12:05 pm on 28 May 2013, the time at which Cole's telephone conference with Credit Suisse analysts concluded) and 9.19 am on 7 June 2013 (**Non-Disclosure Period**) may have been materially prejudiced as a result of Newcrest's contraventions.

77 It is admitted that there was a material decline in Newcrest's share price during the Non-Disclosure Period and following the release to ASX by Newcrest of the announcement of 7 June 2013 (see paragraph 78). However, there are a range of factors, in addition to the disclosure of the total production information and the capex information, which are likely to have affected Newcrest's share price during the relevant periods.

78 Relevant ASX and Chi-X data is set out in the table below.

Newcrest trading data								
Date (2013)	**Open**	**High**	**Low**	**Close**	**Volume (m)***	**VWAP***	**Value (volume x VWAP) ($m)***	**Market capitalisation ($m)***
27 May	15	15.1	14.71	14.78	2.124	14.85	31.527	11,329.03
28 May	14.9	14.96	14.54	14.65	1.613	14.66	23.651	11,229.39
29 May	14.42	14.84	14.29	14.69	2.710	14.53	39.361	11,260.05
30 May	15.04	15.19	14.42	14.42	5.185	14.65	75.956	11,053.09
31 May	14.8	14.91	14.42	14.51	8.621	14.59	125.752	11,122.07
3 June	14.4	15.37	14.3	15.12	4.834	14.95	72.247	11,589.65
4 June	15.49	15.68	15.14	15.15	3.923	15.42	60.491	11,612.64
5 June	14.58	14.79	14.25	14.35	7.384	14.40	106.308	10,999.43
6 June	14	14.01	13.36	13.36	9.462	13.56	128.313	10,240.59
7 June	11.52	12.54	11.4	12.35	13.332	12.15	162.028	9,466.41

* These figures are calculated from "on-market" trading on ASX and Chi-X and do not include reported and unreported “off-market” trading, trading in derivatives or trading in foreign markets. VWAP means volume-weighted average price.

Newcrest cooperation with ASIC

79 Newcrest has:

(a) cooperated fully with ASIC in its investigations in relation to Newcrest’s contraventions of the Corporations Act; and

(b) admitted it contravened the Corporations Act, as set out in paragraphs 65 and 66 above.

DATED:

Signed on behalf of ASIC by its lawyer

…….

Signed on behalf of Newcrest by its lawyer

…….

Federal Court of Australia No. ____ of 2014

District Registry: Victoria

Division: General

IN THE MATTER OF NEWCREST MINING LIMITED (ABN 20 005 683 625)

BETWEEN

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

and

NEWCREST MINING LIMITED (ABN 20 005 683 625)

Defendant

JOINT SUBMISSIONS OF ASIC AND NEWCREST MINING LTD

Contents

I. Background

1. In this proceeding, the plaintiff (**ASIC**) alleges two contraventions of s 674(2) of the *Corporations Act 2001* (Cth) (the **Act**).

2. The terms of the contraventions alleged are set out in the Proposed Orders annexed to these submissions as follows:

> ***First Contravention***
>
> *The defendant (**Newcrest**) contravened s 674(2) of the Act on and from 12.05pm on 28 May 2013 continuing until 9.19am on 7 June 2013 by failing to notify the Australian Stock Exchange (the **ASX**) that Newcrest management expected total gold production for financial year 2014 to be approximately 2.2 to 2.3 Moz (the **total production information**).*
>
> ***Second Contravention***
>
> *Newcrest contravened s 674(2) of the Act on and from 5 June continuing until 9.19am on 7 June 2013 by failing to notify the ASX that Newcrest management expected Newcrest's capital expenditure figure for financial year 2014 to be approximately AU$1 billion (the **capex information**).*

3. Newcrest admits, based on the Agreed Statement of Facts and Admissions (**SOFAA**)[1], that both contraventions occurred and consents to declarations being made in the terms set out in the Proposed Orders, which also provide for the imposition of pecuniary penalties and for Newcrest to pay ASIC's costs of this proceeding. On the basis that each contravention is "serious" for the purposes of s 1317G(1A)(c)(iii) of the Act, ASIC and Newcrest submit that the following proposed penalties are appropriate:

   (a) $800,000 for the First Contravention; and

   (b) $400,000 for the Second Contravention.

4. These submissions are jointly made by ASIC and Newcrest for the purpose of this proceeding and to assist the court in being satisfied that:

   (a) as a matter of fact and law, the contraventions alleged and admitted did occur; and

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[1] The SOFAA is submitted having regard to s 191 of the *Evidence Act 1995* (Cth) which provides that, where the parties have agreed facts that are not to be disputed for the purposes of the proceeding, evidence is not required to prove the existence of such a fact. See also Griffiths J's discussion of such agreed facts in *ACCC v Avitalb Pty Ltd* [2014] FCA 222 at [17]-[19] and Besanko J's discussion in *ACCC v P&N Pty Ltd* [2014] FCA 6 at [2], noting that whether or not the court accepts the admissions and acts on the agreed facts will be influenced by whether they are coherent or contain apparent contradictions.

(b) the proposed penalties are appropriate having regard to the relevant facts and circumstances.

II. The statutory framework and continuous disclosure regime

A. Statutory Provisions

5. The continuous disclosure regime is set out in Chapter 6CA of the Act. Section 674(2) imposes a statutory obligation on listed companies whose securities are listed on the financial market known as "ASX" and operated by ASX Ltd (**ASX**) to comply with Listing Rules of the ASX where the information required by the Listing Rules to be disclosed also meets the statutory requirements that it is price-sensitive and not already "generally available".

6. Section 674(2) is a civil penalty provision (s 1317E) and provides as follows:

> *If:*
> *(a) this subsection applies to a listed disclosing entity;*
> *(b) the entity has information that those provisions require the entity to notify to the market operator; and*
> *(c) that information:*
> *(i) is not generally available; and*
> *(ii) is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity;*
> *the entity must notify the market operator of that information in accordance with those provisions.*

7. Newcrest is a "listed disclosing entity"[2] to which s 674(2) applies[3] and that the relevant rules are the Listing Rules of the ASX.

8. As noted above, in order for there to be a contravention of s 674(2), three criteria must be satisfied:

(a) the Listing Rules must require notification of the information to the ASX;

(b) the information must not be "generally available"; and

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[2] Newcrest shares are "quoted ED securities" as that term is defined in Div 2 of Pt 1.2A of the Act.

[3] Pursuant to the terms of s 674(1).

(c) the information must be price-sensitive, ie it must be information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities[4] of the entity.

9. The determination of whether or not information is generally available is governed by s 676, which provides that:

> *(2) Information is generally available if:*
> *(a) it consists of readily observable matter; or*
> *(b) without limiting the generality of paragraph (a), both of the following subparagraphs apply:*
> *(i) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of a kind whose price or value might be affected by the information; and*
> *(ii) since it was so made known, a reasonable period for it to be disseminated among such persons has elapsed.*
> *(3) Information is also generally available if it consists of deductions, conclusions or inferences made or drawn from either or both of the following:*
> *(a) information referred to in paragraph (2)(a);*
> *(b) information made known as mentioned in subparagraph (2)(b)(i).*

10. The concept of information having a "material effect on price or value" is also subject to further statutory elaboration. Section 677 provides that:

> *For the purposes of sections 674 and 675, a reasonable person would be taken to expect that information to have a material effect on the price or value of ED securities of a disclosing entity if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the ED securities.*

B. <u>ASX Listing Rules</u>

11. There is no contravention of s 674 unless the Listing Rules require disclosure of the information.

12. Listing Rule 3.1 provides that:

> *Once an entity becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information.*[5]

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[4] As that term is defined in Div 2 of Pt 1.2A of the Act.

[5] Note also that the term "aware" is defined in Listing Rule 19.12 as follows: "an entity becomes aware of information if, and as soon as an officer of the entity … has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of that entity". The

13. However, the continuous disclosure obligation in Listing Rule 3.1 is subject to exceptions set out in Listing Rule 3.1A. Relevantly, Listing Rule 3.1 does not apply to particular information while:

    (a) one or more of the five situations set out in Listing Rule 3.1A.1 applies:

        - *It would be a breach of a law to disclose the information;*

        - *The information concerns an incomplete proposal or negotiation;*

        - *The information comprises matters of supposition or is insufficiently definite to warrant disclosure;*

        - *The information is generated for the internal management purposes of the entity; or*

        - *The information is a trade secret.*

    (b) and the information "is confidential and ASX has not formed the view that the information has ceased to be confidential"; and

    (c) "a reasonable person would not expect the information to be disclosed".

14. The requirements in Listing Rule 3.1A are cumulative. Accordingly, if any of the conditions in Listing Rule 3.1A is no longer satisfied, Listing Rule 3.1 applies to require disclosure of the relevant information.

15. In this matter, absent the loss of confidentiality in the total production information and the capex information (which information is the subject of the First and Second Contraventions), Listing Rule 3.1 would not have required Newcrest to make any announcement of that information to the ASX. This is because the gold production target and capex budget for FY14 were both matters which were required to go to the board of directors for approval. While management developed expectations in relation to those matters as drafts of the budget were prepared, its expectations of those matters, which were subject to final determination by the board, would not, in the circumstances of this case, ordinarily be disclosed to the ASX. It is only because confidentiality in the total production information and the capex information was lost that the obligation arose to disclose those matters to the ASX.

16. There are agreed facts that confidentiality was lost:

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term "information" is defined in Listing Rule 19.12 to include "matters of supposition and other matters that are insufficiently definite to warrant disclosure to the market" and "matters relating to the intention, or likely intentions of a person".

(a) over the total production information when Newcrest's employee, Spencer Cole (**Cole**) had discussions with several analysts between 28 and 31 May 2013 and presented at the Gold Day conference referred to below in which he disclosed the total gold production information;[6] and

(b) over the capex information when Cole had discussions with analysts from two houses (RBC and Commonwealth Bank) on 5 June 2013 in which he disclosed the capex information.[7]

17. Upon the loss of confidentiality, the exemption from disclosure previously afforded by Listing Rule 3.1A no longer applied and Newcrest was required to tell the ASX each piece of information.

C. Penalty provisions

18. Section 674(2) of the Act is a civil penalty provision, contravention of which requires that the court make a declaration of contravention (s 1317E)(1)). Section 674(2) is also a "financial services civil penalty provision" (s 1317DA), permitting the court to impose a pecuniary penalty of up to $1,000,000 if the contravention (s 1317G)(1A)(c)):

> *(i) materially prejudices the interests of acquirers or disposers of the relevant financial products; or*
>
> *(ii) materially prejudices the issuer of the relevant financial products or, if the issuer is a corporation or scheme, the members of that corporation or scheme; or*
>
> *(iii) is serious.*

19. ASIC alleges, and Newcrest accepts, that each contravention was "serious".[8] The meaning of "serious" and the reason why each contravention in this case is properly regarded as serious (so as to enliven the statutory discretion to impose a penalty) are set out further below.

III. Background to, and objectives served by, the continuous disclosure regime

20. In considering the appropriateness of the proposed penalties (particularly having regard to the question of the seriousness of the contraventions), it is relevant for the court to assess

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[6] SOFAA at [45]-[47], [52], [58].

[7] SOFAA at [57], [59].

[8] SOFAA at [67].

the contravening conduct in light of the statutory provisions and the objectives sought to be served by the continuous disclosure regime.

21. The statutory and regulatory history of the continuous disclosure regime was considered and conveniently summarised by Lindgren J in *ASIC v Southcorp Ltd (No 2)*[9] and by French J (as he then was) in *ASIC v Chemeq Ltd (**Chemeq**)*[10]. As Lindgren J described in *Southcorp*, the statutory continuous disclosure regime in Chapter 6CA of the Act has its origins in proposals in 1991[11] to amend the then *Corporations Law* to introduce a comprehensive statutory regime for continuous disclosure. Sections 1001A to 1001D were introduced into the *Corporations Law* by the *Corporate Law Reform Act (No 2) 1992* (Cth). In his second reading speech, the Minister for Administrative Services observed that "a well informed market leads to greater investor confidence and in turn to a greater willingness to invest in Australian business."[12]

22. Those reforms commenced operation on 4 September 1994, but the provisions were only contravened where the entity "intentionally, recklessly, or negligently" failed to notify the securities exchange of the information in question. The Chapter 6CA regime (which was introduced in October 2002 and amended in March 2004) no longer retains that significant limitation. Nevertheless, the Chapter 6CA regime continues to serve the same objective, namely securing a well-informed market. A well-informed market not only benefits existing and potential investors in an entity's securities but also, as the Minister alluded to, has broader benefits for the Australian economy. As is recognised by ASX Guidance Note 8[13] direct interactions between investor relations personnel can contribute positively to the maintenance of a well-informed market. However, in such direct interactions, investor relations representatives must not disclose market sensitive information which has not been made public.

23. In *Chemeq*, French J (dealing with the Chapter 6CA regime) quoted from the 1991 report of the Australian Companies and Securities Advisory Committee, which set out the ways in which that committee considered a system of continuous disclosure would promote

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[9] (2003) 130 FCR 406 at [7]ff.

[10] (2006) 58 ACSR 169 at [42]ff.

[11] As set out in the report of the Australian Companies and Securities Advisory Committee.

[12] Hansard, Senate 1992 p 3581.

[13] See, eg para 7.4.

confidence in the integrity of the Australian capital markets.[14] As French J set out, the Committee considered that such a system would:

- *Overcome the inability of general market forces to guarantee adequate and timely disclosure by disclosing entities;*
- *encourage greater securities research by investors and advisors. This ensures that securities prices more closely, and quickly, reflect underlying economic values;*
- *ensure that equity and loan resources in the Australian market are more effectively channelled into appropriate investments and that funds are withheld or withdrawn from poorly performing disclosing entities. This will promote capital market efficiency;*
- *assist debtholders (sic) in monitoring performance of disclosing entities and thereby determine whether, or when, to exercise any right to withdraw or reinvest their loan funds, or convert debt to equity;*
- *act as a further, or substitute, warning device for holders of charges over corporate assets, that breaches in covenants may have taken place, or the risk of default has increased;*
- *assist potential equity or debt holders of disclosing entities to better evaluate their investment alternatives;*
- *lessen the possible distorting effects of rumour on securities prices;*
- *minimise the opportunities for insider trading or similar market abuses;*
- *improve managerial performance and accountability by giving the market more timely indicators of corporate performance;*
- *encourage the growth of information systems within disclosing entities, thereby assisting directors to make decisions and to comply with their fiduciary duties;*
- *reduce the time and costs involved in preparing takeover and prospectuses (sic) documents.*

IV. Facts

24. For the purposes of this proceeding, the parties have agreed that the relevant facts are as set out in the SOFAA.

[14] See also *National Australia Bank Ltd v Pathway Investments Pty Ltd* [2012] VSCA 168 at [61]; *James Hardie Investments NV v ASIC* [2010] NSWCA 332 at [355].

V. Elements of the First and Second Contraventions

A. The existence of "information" requiring disclosure under Listing Rule 3.1

25. There are agreed facts that:

    (a) as at 28 May 2013, Newcrest was aware of the total production information;[15] and

    (b) as at 5 June 2013, Newcrest was aware of the capex information.[16]

26. However (and as noted above), the information would not have been required to be disclosed (absent loss of confidentiality) because of Listing Rule 3.1A:

    (a) as at 28 May 2013, Newcrest's management was still working on the company's draft Budget, and no draft Budget had yet been proposed by management to Newcrest's board of directors (the budget was provided to the board in draft on 31 May 2013); and

    (b) as at 5 June 2013, Newcrest's board of directors had not yet considered and approved the draft Budget presented to it by management on 31 May 2013.

27. There are also agreed facts that both the total production information and the capex information constituted information that "a reasonable person would expect to have a material effect on the price or value of the entity's securities".[17] As the ASX's Guidance Note 8 indicates (at para 4.1), where a company's earnings expectations are materially different from market expectations, information regarding earnings will typically be price-sensitive information requiring disclosure under Listing Rule 3.1 (unless Listing Rule 3.1A applies). Mining companies typically do not publish earnings forecasts but may release production forecasts. The production guidance of mining companies is, in some[18] ways, similar to earnings guidance. In this regard, it may be noted that Guidance Note 8 indicates that similar considerations apply to exploration and production targets issued by mining or oil and gas entities as attend earnings guidance.[19]

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[15] SOFAA at [26]-[27].

[16] SOFAA at [28].

[17] SOFAA at [31]-[32] (and see also SOFAA at [16]-[17], [78]).

[18] Production is a physical outcome of mining operations which, in turn, impacts revenue for a given commodity price, but is not a simple proxy for profit. For example, a gold mining company such as Newcrest may actually achieve higher profit with lower production.

[19] ASX Guidance Note 8 (revised March 2013), para 7.5.

28. At the time of the First Contravention, the reports of analysts indicated a consensus forecast gold production for FY14 in the order of 2.60 million ounces.[20] Although analysts' reports cannot necessarily be treated as a proxy for "market expectations" (particularly in relation to a company like Newcrest with a heavily institutional shareholder base), the total production information was materially lower than this figure and was market sensitive. Further, although it is impossible to assess the *extent* to which the fall in the price of Newcrest's securities between 28 May 2013 and 6 June 2013, and in the days after 7 June 2013 (following the company's 7 June 2013 announcement), was attributable to the release of the total production information, the court may nevertheless accept that the fall in price was at least in part attributable to statements regarding gold production in FY14 being disseminated following the briefings by Cole and then to the ASX by Newcrest through its 7 June announcement.

29. The capex information was also market sensitive.[21] In August 2012, Newcrest published a five year outlook for capital expenditure. A specific range of $1.8 to $2 billion was provided for FY13 and a bar chart set out a continuing decline (without specific numbers) over the years from FY14 to FY17.[22] Later, in presentations given by Newcrest the same chart was provided, with an axis giving readers a more specific indication that capex in FY14 was likely to be between $1.3 and $1.5 billion, depending on whether or not approximately $215 million in contingent funding for the pre-feasibility Wafi-Golpu exploration project in Papua New Guinea was included.[23] Although Newcrest's public statements (particularly Robinson's remarks in the March Quarterly Q&A)[24] suggested that capital expenditure was being closely scrutinised and might have been expected to decline, the specific figure of $1 billion was market sensitive, particularly in view of the company's prior indications of the likely level of capital expenditure in FY14 and the analysts' consensus forecast in the order of $1.4 billion.[25]

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[20] SOFAA at [16]-[17].

[21] SOFAA at [32].

[22] SOFAA at [7(g)], [7(h)].

[23] SOFAA at [8(d)], [10(d)], [11(d)].

[24] SOFAA at [15(e)].

[25] SOFAA at [7(g)], [8(d)], [10(d)], [11(d)], [16]-[17].

B. The loss of confidentiality and loss of protection of Listing Rule 3.1A

30. Confidentiality over the total production information was lost when Cole disclosed the substance of that information in a telephone call with Credit Suisse analysts at approximately 12.05pm on 28 May 2013.[26] Cole similarly disclosed the total production information in discussions with analysts and the audience at the Gold Day conference on 29, 30 and 31 May 2013.[27] When the total production information ceased to be confidential, Listing Rule 3.1A no longer applied and notification to the ASX was accordingly required from that time.[28] Cole's understanding that he was at liberty to disclose the total production information arose from a belief (on his part and that of his superior, Warner) that the information had already been disclosed.[29]

31. Confidentiality over the capex information was lost when Cole disclosed this information to analysts from RBC and CBA on 5 June 2013. When the capex information ceased to be confidential, Listing Rule 3.1A no longer applied and notification to the ASX was accordingly required from that time.

C. The information was not "generally available" and was price-sensitive

32. As noted above, the total production information and the FY14 capex information was confidential prior to Cole's disclosures referred to above. Neither piece of information was already "generally available" for the purposes of s 674(2)(c)(i) of the Act.[30] Further, for the reasons given in relation to the application of Listing Rule 3.1 above, both pieces of information constituted information which a "reasonable person would expect, if it were generally available, to have a material effect on the price or value of the ED Securities" for the purposes of s 674(2)(c)(ii) of the Act.[31]

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[26] SOFAA at [46(c)], [58].

[27] SOFAA at [45],[47], [52].

[28] SOFAA at [60].

[29] SOFAA at [44]. ASIC does not allege that Robinson disclosed the total production information in Barcelona.

[30] SOFAA at [29]-[30].

[31] SOFAA at [31]-[32].

D. The information was not notified to the ASX prior to 7 June 2013

33. Newcrest did not notify the ASX of either the total production information or the capex information prior to 7 June 2013.[32]

VI. Declarations of contravention

34. Provided the court is satisfied that the First and Second Contraventions occurred, it must make declarations of contravention pursuant to s 1317E(1). The declarations are required to specify: [33]

    (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; and

    (e) if the contravention is of a corporation/scheme civil penalty provision – the corporation or registered scheme to which the conduct related.[34]

35. Newcrest consents to declarations of contravention in the form set out in the Proposed Orders annexed to these submissions. ASIC and Newcrest submit that the proposed declarations of contravention meet the requirements of s 1317E(2).

VII. The court's role in relation to joint submissions proposing penalties

36. Not infrequently, a regulator and a company (or individual) may reach an agreement whereby the company concedes a contravention and the company and the regulator jointly propose a figure (or a range) as the appropriate penalty to be imposed by the court. The approach to be taken by the court in such circumstances has been the subject of extensive judicial consideration in recent years. As is set out further below, the proper approach of this court is set out in *NW Frozen Foods Pty Ltd v ACCC*[35] (***NW Frozen Foods***), as explained by the Full

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[32] SOFAA at [62].

[33] Section 1317E(2) of the Act.

[34] This requirement does not apply as breach of s 674(2) (being item 14 in the table in s 1317E(1)) is not a contravention of a corporation/scheme civil penalty provision under s 1317DA.

[35] (1996) 71 FCR 285.

Court in *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd*[36] (***Mobil Oil***).

37. That approach remains binding in this court notwithstanding the judgment of the Victorian Supreme Court in in *ASIC v Ingleby*[37] (***Ingleby***). In any event, for the reasons referred to by a number of judges of this court (referred to below) any divergence between the approach in this court and the approach of the Supreme Court of Victoria is more apparent than real: in neither jurisdiction does the court "rubber stamp"[38] the parties' settlement but, on the contrary, the court must determine the penalty that is appropriate in all of the circumstances. Further, given that concerns similar to those articulated by Weinberg JA in *Ingleby* (and echoed by other members of the Court of Appeal) had been expressed by His Honour and other judges[39] previously and considered by the Full Court in *Mobil Oil*,[40] it may be doubted that the Full Court would depart from its views as expressed in two unanimous judgments.

38. It is convenient to start with *Mobil Oil*, as that is the most recent Full Court decision setting out the approach to be taken where the regulator and an entity jointly propose a penalty. Having reviewed[41] the origins of and earlier authorities concerning the practice of this court receiving and acting upon joint submissions from the regulator and contravenor – which practice dates back more than 30 years to *Trade Practices Commission v Allied Mills Industries Pty Ltd (No 5)*[42] – the Full Court came to consider the judgment in *NW Frozen Foods.* As was observed in *Mobil Oil*,[43] the court in *NW Frozen Foods* expressed a clear view that responsibility for determining the appropriate penalty falls squarely "on the shoulders of the Court". However, on the basis that "[a] proper figure is one within the permissible range in all the circumstances", the court will (as stated by Burchett and Kiefel JJ in *NW Frozen Foods*):[44]

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[36] (2004) ATPR 41-993; [2004] FCAFC 72.

[37] [2013] VSCA 49.

[38] *Chemeq* (2006) 58 ACSR 169 at [100]; *ACCC v AGL Sales Pty Ltd* [2013] FCA 1030 at [40]

[39] Including Finkelstein J.

[40] [2004] FCAFC 72 at [61]ff.

[41] [2004] FCAFC 72 at [38]-[45].

[42] (1981) 60 FLR 38.

[43] [2004] FCAFC 72 at [49].

[44] (1996) 71 FCR 285 at 291, referred to in *Mobil Oil* at [59]-[50].

[N]ot depart from an agreed figure merely because it might otherwise have been disposed to select some other figure, or except in a clear case.

39. The Full Court in *Mobil Oil* distilled the following six propositions from *NW Frozen Foods*:[45]

> *(i) It is the responsibility of the Court to determine the appropriate penalty to be imposed under s 76 of the TP Act in respect of a contravention of the TP Act.*
>
> *(ii) Determining the quantum of a penalty is not an exact science. Within a permissible range, the courts have acknowledged that a particular figure cannot necessarily be said to be more appropriate than another.*
>
> *(iii) There is a public interest in promoting settlement of litigation, particularly where it is likely to be lengthy. Accordingly, when the regulator and contravenor have reached agreement, they may present to the Court a statement of facts and opinions as to the effect of those facts, together with joint submissions as to the appropriate penalty to be imposed.*
>
> *(iv) The view of the regulator, as a specialist body, is a relevant, but not determinative consideration on the question of penalty. In particular, the views of the regulator on matters within its expertise (such as the ACCC's views as to the deterrent effect of a proposed penalty in a given market) will usually be given greater weight than its views on more "subjective" matters.*
>
> *(v) In determining whether the proposed penalty is appropriate, the Court examines all the circumstances of the case. Where the parties have put forward an agreed statement of facts, the Court may act on that statement if it is appropriate to do so.*
>
> *(vi) Where the parties have jointly proposed a penalty, it will not be useful to investigate whether the Court would have arrived at that precise figure in the absence of agreement. The question is whether that figure is, in the Court's view, appropriate in the circumstances of the case. In answering that question, the Court will not reject the agreed figure simply because it would have been disposed to select some other figure. It will be appropriate if within the permissible range.*

40. Relevantly for present purposes, the Full Court in *Mobil Oil* considered the import of the sixth factor and stated that:[46]

> *[T]he sixth proposition drawn from the reasoning in NW Frozen Foods does not mean, in our opinion, that the Court must commence its reasoning with the proposed penalty and limit itself to considering whether that penalty is within the permissible range. A Court may wish to take that approach. However, it is open to a Court, consistently with the reasoning in NW Frozen Foods, first to address the appropriate range of penalties independently of the parties' proposed figure*

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[45] [2004] FCAFC 72 at [54].

[46] [2004] FCAFC 72 at [56].

and then, having made that judgment, determine whether the prepared penalty falls within the range.

41. *Mobil Oil* has continued to be followed by judges of this court, notwithstanding the criticisms levelled in *Ingleby*.[47]

42. The correctness of the approach in *NW Frozen Foods* and *Mobil Oil* has not been revisited by the Full Court following the High Court's decision in *Barbaro v The Queen*[48]. In *Barbaro*, the High Court determined that the practice adopted in the Victorian courts when sentencing criminal offenders of asking counsel for the prosecution for a submission on the "available range" of sentences was wrong in principle. A majority of the High Court reasoned that, contrary to the view of the majority in *R v MacNeil-Brown*[49] (overruled in *Barbaro*), the prosecution's view regarding the available range of sentences was merely a statement of opinion, and not a submission of law.[50]

43. Since *Barbaro*, several judges of this court have considered whether that case has any bearing on the approach to be taken in civil penalty cases where a regulator and a respondent make joint (or separate) submissions on penalty. In *ACCC v EnergyAustralia*[51] Middleton J considered that *Barbaro* did not require any change in the court's approach in civil penalty cases. Middleton J considered that the High Court did not intend to exclude the making of submissions (joint or otherwise) in a civil penalty context and drew a distinction between the role of a civil regulator, such as the ACCC or ASIC, and that of a Crown prosecutor in a criminal proceeding. Middleton J observed that, notwithstanding that courts have drawn on sentencing principles in determining the appropriate penalty in civil penalty cases[52]:

[140] A regulator bringing a civil penalty proceeding stands in a different position than that of a prosecutor in a criminal proceeding. By its very establishment and functions, such a regulator does not have, and is not expected to have, the

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[47] Eg, in *ACCC v AGL Sales Pty Ltd* [2013] FCA 1030 at [39], Middleton J considered that "subject to a matter of emphasis, I do not consider the position taken in *Ingleby* to be much different from that taken by the Full Court"; note also His Honour's remarks at [42] on the applicable approach. See also: *ACCC v Luv-a-Duck Pty Ltd* [2013] FCA 1136 at [13] per Davies J; *Cozadinos v Construction, Forestry, Mining and Energy Union* [2013] FCA 1243 at [20]-[22] per Tracey J.

[48] (2014) 88 ALJR 372; [2014] HCA 2.

[49] (2008) 20 VR 677.

[50] (2014) 88 ALJR 372; [2014] HCA 2 at [42].

[51] [2014] FCA 336 at [113]-[152].

[52] [2014] FCA 336 at [129].

> *independent role and characteristics of the prosecutor. ... The regulator typically has responsibility for all aspects of the regulatory sphere including administering its statutory regime, investigating breaches, enforcing breaches through nonjudicial processes (such as enforceable undertakings) and through judicial processes such as obtaining penalties, injunctions, and remediation orders.*
>
> *[141] The separate and distinct role of a prosecutor is clearly illustrated when a regulatory agency refers a brief for criminal prosecution to the Director of Public Prosecutions. It is then that the special independence, role and functions of the prosecutor become engaged.*
>
> *[142] It is the very nature of a civil regulatory proceeding that the regulator contends for a particular outcome (often not confined to civil penalties but including injunctions, disqualification orders, and compensation orders). The very purpose of the proceedings brought by the regulator is to secure a particular regulatory outcome. Accordingly, the very process undertaken by a civil regulator makes it a party with a different interest and different functions from a criminal prosecutor.*
>
> *[143] In fact, the specialist role of a regulator is one of the reasons why the Full Court has supported the practice of submissions being made as to the appropriate penalty amount.*[53]

44. More recently, McKerracher J came to the same conclusion in *ACCC v Mandurvit Pty Ltd.*[54] Like Middleton J, McKerracher J drew attention to fundamental distinctions between the role of criminal prosecutors and regulators such as the ACCC (and ASIC).[55] While a contrary conclusion was reached by Logan J in *ACCC v Flight Centre Limited (No 3)*[56], as Middleton J observed in *EnergyAustralia*, Logan J did not hear argument on the point.[57]

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[53] [2014] FCA 336 at [140]-[141].

[54] [2014] FCA 464. See also the decision of the District Court of Western Australia in *Commissioner for Consumer Protection v Realgold Corporation* [2014] WADC 51 where it was held (at [70]-[83]) that *Barbaro* did not apply to a civil penalty proceeding

[55] [2014] FCA 464 at [71]-[72].

[56] [2014] FCA 292. Logan J held that '…in my view, there is a relevant analogy to be drawn from the practice in the criminal jurisdiction in a civil proceeding for the recovery of a pecuniary penalty. The imposition and assessment of a penalty involves the exercise of a discretion by a judge, not the parties. I have not therefore taken into account the ranges respectively submitted' (at [56]). Similar though perhaps more hesitant comments, to the effect that *Barbaro* had not been addressed by the respective parties but may have relevance for civil penalty proceedings, were made by White J of the Federal Court in *Director of the Fair Work Building Industry Inspectorate v CFMEU* [2014] FCA 160 at [26]-[27] and Beech J of the Supreme Court of Western Australia in *Commissioner for Consumer Protection v Susilo* [2014] WASC 50 at [113]-[120].

[57] [2014] FCA 336 at [151], relying on *CSR v Eddy* (2005) 226 CLR 1 at [13]. The same approach was taken by McKerracher J in *Mandurvit* at [74]. Both Middleton J in *EnergyAustralia* and McKerracher J in *Mandurvit* also distinguished *Grocon v CFMEU (No 2)* [2014] VSC 134 (***Grocon***), where *Barbaro* was treated as being applicable in the context of fines for contempt of court, on the basis that *Grocon* dealt mainly with criminal contempt: see [2014] FCA 336 at [152] and [2014] FCA 464 at [76] respectively.

45. Accordingly, the High Court's decision in *Barbaro* does not, in ASIC and Newcrest's submission, cast doubt on the approach to be adopted by this court in the present proceeding. The correct principles remain those set out by the Full Court in *Mobil Oil.*

VIII. The appropriate penalties in this case

46. Section 674(2) is a "financial services civil penalty provision" pursuant to s 1317DA(b). Accordingly, for each contravention, a pecuniary penalty may be imposed by the court under s 1317G(1A) on the basis that Newcrest contravened a financial services civil penalty provision and a declaration of contravention has been made under s 1317E.

47. As noted above, ASIC and Newcrest submit that, as regards the criterion in s 1317G(1A)(c), the court's discretion in this case is enlivened on the basis that each contravention is "serious". The maximum penalty for each contravention by Newcrest as a body corporate is $1,000,000 (s 1317G(1B)).

A. The First and Second Contraventions were "serious"

48. Newcrest admits that the First and Second Contraventions were "serious" within the meaning of s 1317G(1A)(c)(iii) of the Act.[58] However, as noted by Robson J in *ASIC v Lindberg*,[59] it appears to be unsettled whether characterisation of a contravention as "serious" is a pure question of fact (permitting the court to proceed on the basis of an admission that the contravention is serious) or whether it is a question of mixed law and fact. Newcrest and ASIC submit that, consistent with the factual character of subparagraphs 1317G(1A)(c)(i) and (ii) (which provide relevant context for subparagraph (iii) of that section), the reference to a contravention being "serious" in subparagraph (iii) is a question of fact. In any event, both the First and Second Contraventions meet the threshold of being "grave or significant"[60] and "weighty, important, grave, considerable".[61]

49. The First Contravention and the Second Contravention meet the statutory threshold of being serious contraventions for the following reasons:

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[58] SOFAA at [67].

[59] (2012) 91 ACSR 640 at [131]-[132].

[60] *ASIC v Donovan* (1998) 28 ACSR 583 at 608, referred to by Robson J in *ASIC v Lindberg* (2012) 91 ACSR 640 at [135].

[61] *ASIC v Lindberg* (2012) 91 ACSR 640 at [135], referring to the *Shorter Oxford Dictionary.*

(a) The First Contravention arises from the disclosure of information concerning Newcrest's expected gold production in FY14, derived from the budget process. For resources companies, which do not typically publish earnings guidance, production estimates are market-sensitive. What Newcrest's management expected gold production in FY14 to be was a sensitive piece of information, particularly in light of the surrounding circumstances including the discrepancy between analyst consensus forecasts and management expectations and the market's interest in how gold majors such as Newcrest would respond to the new, lower gold price environment.

(b) Although the loss of confidentiality over the total production information arose from Cole and Warner's belief that they were able to disclose the total production information, Newcrest's senior management was nevertheless put on notice early on 29 May 2013 that Cole proposed to disclose the total production information to analysts when he met with them in Sydney[62] and that the total production information had ceased to be confidential from 30 May 2013.[63]

(c) During the period of the First Contravention over 40 million shares in Newcrest were traded on market with a total value of over $600 million (being the daily volume-weighted average price (***VWAP***) multiplied by the volume of shares): see paragraph 65 below.

(d) Cole disclosed the total production information to more than 10 firms of analysts or investors over a period of days. This was apt to create market "[s]peculation and rumour"[64] and "to cause a loss of confidence in the market".[65] In *ASIC v Southcorp*, the court stated: "the continuous disclosure provisions are intended, inter alia, to prevent selective disclosure of market sensitive information."[66] ASX Guidance Note 8 repeats the guidance set out in ASIC Regulatory Guide 62, including:[67]

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[62] SOFAA at [43(b)], [70].

[63] SOFAA at [48], [71].

[64] *ASIC v Southcorp Ltd* at [36].

[65] Ibid.

[66] *ASIC v Southcorp Ltd* (2003) 130 FCR 406 at [2]. See also *ASIC v Macdonald (No 12)* (2009) 73 ACSR 638 at [179]

[67] ASX Guidance Note 8, Annexure C at p 79; ASIC Regulatory Guide 62 at p 2. See also ASX Guidance Note 8, 4.17, 6.4, 7.3, 7.4.

Confine your comments on market analysts' financial projections to errors in factual information and underlying assumptions. Seek to avoid any response which may suggest that the company's or the market current projections are incorrect. The way to manage earnings expectations is by using the continuous disclosure regime to establish a range in which earnings are likely to fall. Publicly announce any change in expectations before commenting to anyone outside the company.

(e) The Second Contravention was serious because Newcrest had made statements previously indicating a significantly higher capex figure for FY14 (which was reflected in analyst consensus) and because of Newcrest's public statements commencing with the March Quarterly regarding a focus on free cash flow generation. Newcrest's lowered capex expectations were significant to the market in an environment where maximising cash flow was paramount and where there was a direct relationship between capital expenditure and the approach Newcrest was to take to production (in particular, processing stockpiles at Lihir).

B. Applicable principles in the assessment of penalty

50. The question for the court to address is whether the penalties proposed by ASIC and Newcrest are appropriate. The principles applicable to the assessment of civil penalties for breach of regulatory regimes have been essayed in a number of cases, including (in the context of s 674(2)) the decision of French J in *Chemeq.* As His Honour there stated[68]:

> *The pecuniary penalties which the Act applies are punitive in nature. Their character is not adequately described by the rather anodyne term 'protective' – Rich v Australian Securities and Investments Commission [2004] HCA 42; (2004) 220 CLR 129 at [35] – [37], [41] – [43] and [99]. Consistently with the characterisation as punitive the object of the penalties is general and specific deterrence. That is the deterrence of those who might be tempted not to comply with the law and the deterrence of the particular contravenor who might be tempted to re-offend – Australian Securities and Investments Commission v Donovan (1998) 28 ACSR 583 at 608 (Cooper J), Australian Securities and Investments Commission v Adler [2002] NSWSC 483; (2002) 42 ACSR 80 at 114 (Santow J).*

51. The emphasis on specific and general deterrence in fixing civil penalties for contravention of regulatory provisions has also been emphasised and reinforced in a number of cases

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[68] *Chemeq* (2006) 58 ACSR 169 at [90].

including *General Manager of Fair Work Australia v Health Services Union* where Middleton J observed that "[t]he principal purpose for the imposition of a financial penalty is deterrence".[69]

52. In fixing penalty, it is relevant to enquire whether the company has cooperated with the regulator and whether it has acknowledged contraventions.[70] Where there has been cooperation and acknowledgement of wrongdoing, that bears upon the evaluation of the need for specific deterrence in fixing the level of the penalty.[71] Further, it has also been recognised in many cases that, where contraventions are admitted, court resources have been saved and public resources (in the form of the regulators' resources) then become available to be deployed in further regulatory activity, thereby contributing, overall, to the achievement of the regulatory objectives of the provisions in question.[72] In a related statutory context,[73] Mortimer J observed that the relevant circumstances in considering penalty include "the substantial public interest in the early and final resolution of enforcement proceedings and the role of the Court in giving weight and effect to such resolutions".

C. Penalties imposed in other cases for contravention of s 674(2)

53. The magnitude of a proposed penalty is (as it should be) heavily fact-dependent. Nevertheless, as Lindgren J noted in *ASIC v Southcorp Ltd*, the court may be assisted by an awareness of the penalties imposed in other cases for contravention of the same provisions.[74] ASIC and Newcrest are aware of only three cases in which penalties have been imposed for contravention of s 674(2): *Chemeq, ASIC v Southcorp Ltd*, and *ASIC v Macdonald (No 12).*

Chemeq

54. In *Chemeq*, French J considered the penalties to be imposed for two contraventions of s 674(2) of the Act. At the time of the first contravention, the statutory maximum penalty was

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[69] [2013] FCA 1306 at [24]. See also *ASIC v Adler* (2002) 42 ACSR 80; [2002] NSWSC 483 at [125] where Santow J said "It is well established that the principal purpose of a pecuniary penalty is to act as a personal deterrent and a deterrent to the general public against a repetition of like conduct"; see also *ASIC v Macdonald (No 12)* (2009) 73 ACSR 638 at [359]-[364], referring to *ASIC v Adler* and *Chemeq*.

[70] Eg *Chemeq* (2006) 58 ACSR 169 at [24].

[71] *Chemeq* (2006) 58 ACSR 169 at [97].

[72] *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285 at 291 per Burchett and Kiefel JJ; *ASIC v Southcorp Ltd* (2003) 130 FCR 406 at [47] per Lindgren J.

[73] *ACCC v Artorios Ink Co Pty Ltd (No. 2)* [2013] FCA 1292.

[74] *ASIC v Southcorp Ltd* (2003) 130 FCR 406 at [58].

$200,000 but, at the time of the second contravention, the statutory maximum had been increased to $1,000,000. The parties jointly submitted, and French J accepted, that a penalty of $150,000 (equivalent to 75% of the maximum penalty) was appropriate for the first contravention and a penalty of $350,000 (equivalent to 35% of the statutory maximum) was appropriate for the second contravention.

55. The first contravention in *Chemeq* arose from the company's failure to notify the ASX that the costs of constructing a commercial facility had increased from the originally budgeted $25 million to over $50 million. As is evident from the declarations in *Chemeq*, the company had knowledge of specific cost increases on various dates within a period of just over a year but failed to disclose that information to the ASX. While not disclosing information regarding the increased cost of the facility beyond the level initially announced, the company continued to make announcements concerning the progress of construction.

56. The second contravention in *Chemeq* arose from the company's failure to tell the ASX information about the limited significance of a patent (which meant that the company's commercial position had not been materially changed by the grant of that patent). The failure to disclose that information occurred against the backdrop of the company having made an announcement to the ASX that the patent had been obtained.

57. In considering the appropriateness of the penalties proposed by the parties, French J stressed, in finding that a penalty at the higher end of the range was appropriate for the first contravention:

    (a) the importance of the construction of the relevant facility to the company, which could not produce commercial quantities of its product until that facility was complete;

    (b) the context in which the information concerning construction costs was not disclosed, which included the public announcement of the original cost and the making of further announcements regarding the progress of construction (ie use of the ASX to announce good, but not bad, news);

    (c) the contravention, while not the result of deliberate or reckless conduct, could not be dismissed as mere carelessness;

    (d) the absence of effective compliance systems; and

    (e) responsibility for the contraventions being found at the most senior levels of the company (directors and officers were kept informed of cost overruns and

announcements concerning construction progress, but not cost overruns, were made).

58. By contrast, the second contravention was less serious. The contravention arose from the company's initial announcement regarding the patent overstating its significance, contributing to an increase of 58% in the market price of Chemeq's shares. A corrective announcement was made two days later, but not until after a query was received from the ASX.

ASIC v Southcorp Ltd

59. In *ASIC v Southcorp Ltd*, the company contravened s 674(2) when an employee sent an email to several analysts disclosing information about the company's likely sales and gross profit during the 2003 financial year. The email was sent at about 4.29-4.30pm on 18 April 2002, and several analysts then issued updated reports before trade opened on 19 April. The company's securities were placed in a trading halt (at the company's request) at 1.07pm on 19 April. A corrective announcement was made after the market closed on 19 April. ASIC and Southcorp jointly submitted that a penalty of $100,000 was appropriate. At the time the maximum penalty was $200,000. In imposing a penalty at the proposed level, Lindgren J:

(a) highlighted the importance of general deterrence, observing that it is important "to send the message into the marketplace that contraventions of [the continuous disclosure] provisions are serious and not acceptable";[75]

(b) while accepting that the fall in the price of Southcorp's securities could not be shown to have resulted from disclosure to the analysts, said that it was nevertheless relevant on the basis that "selective disclosure is apt to generate confusion and a loss of faith in the market", at least because of after-the-event speculation that the fall in price was caused by "favoured informants' offloading" and because "[s]peculation and rumour is apt to cause a loss of confidence in the market";[76]

(c) accepted that there was no dishonesty or other impropriety, referring to ASIC's submission that there had been an "honest blunder" by an employee seeking to ensure that all analysts had the same information, but overlooking that the information provided went further than the company's previous public disclosures;

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[75] *ASIC v Southcorp Ltd* (2003) 130 FCR 406 at [32].

[76] *ASIC v Southcorp Ltd* (2003) 130 FCR 406 at [36].

(d) noted that Southcorp had instituted a new disclosure regime, which was still significant even though the process occurred after the company was aware that ASIC was investigating the disclosure to analysts;

(e) also referred to the fact that Southcorp's admissions had obviated the need for a lengthy trial (thereby freeing ASIC staff (and the court) to deal with other matters), only one employee of Southcorp had been involved, and the company acted reasonably promptly in requesting a trading halt the following day[77]; and

(f) the immediacy of the action taken by Southcorp.

ASIC v Macdonald (No 12)

60. In *ASIC v Macdonald (No 12),* the court (Gzell J) considered the penalties to be imposed on two companies in the James Hardie group, JHIL and JHINV. Amongst other contraventions, JHIL was found to have contravened the former continuous disclosure provisions[78] (s 1001A(2)) in February 2001 by negligently failing to notify the ASX of information concerning aspects of the restructure of the James Hardie group and its asbestos liabilities. ASIC did not seek pecuniary penalties against JHIL. The other company, JHINV, was found (again, amongst other contraventions) to have breached the new continuous disclosure provision, s 674(2) from late March to the end of June 2003 by failing to disclose to the ASX information concerning the transfer of JHIL out of the James Hardie group of companies.[79]

61. In considering the pecuniary penalty to be imposed on JHINV, Gzell J determined that a pecuniary penalty of $80,000 would be imposed. Without recording in full Gzell J's consideration of all of the factors going to penalty, it is relevant for present purposes to note the judge's reference to the following:

(a) contravention was the result of negligent conduct on the part of JHINV;[80]

(b) that the contravention persisted for a period of just over three months;[81]

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[77] The reported facts do not disclose when or how the company became aware of the employee's email to analysts.

[78] *ASIC v Macdonald (No 12)* at [258(8)].

[79] *ASIC v Macdonald (No 12)* at [262(3)].

[80] *ASIC v Macdonald (No 12)* at [403].

[81] *ASIC v Macdonald (No 12)* at [404].

(c) the non-disclosure in question was probably unique and, in any event, not of a class of information generally subject to the continuous disclosure obligation;[82] and

(d) the directors of JHINV were aware of the facts that ought to have been disclosed.[83]

D. Appropriateness of the proposed penalties

62. Newcrest and ASIC jointly submit that the proposed penalty of $800,000 for the First Contravention is appropriate. A penalty at that level lies towards the higher end of the scale of contraventions, while allowing that there are mitigating factors that would make a penalty at the statutory maximum inappropriate.

63. Newcrest and ASIC also jointly submit that the proposed penalty of $400,000 for the Second Contravention is appropriate. That contravention lies lower on the scale than the First Contravention as it involved the disclosure of information that was less sensitive (while still meeting the threshold requirement of being price-sensitive information), the disclosure was only made to two analysts, the time between the contravention and the release of the 7 June announcement was shorter and senior management did not receive any emails that might have alerted the company to the contravention at an earlier point in time.

64. The salient features of the present case which support the proposed penalties are set out below.

65. Market impact and prejudice to investors: During the period of the First Contravention:

(a) The volume of Newcrest shares traded on market was over 40 million shares;[84] and

(b) The value of Newcrest shares traded on market was over $600 million (being the daily VWAP multiplied by the volume of shares traded).[85]

66. While it is not possible to say with any precision what the effect would have been if the total production information had been disclosed to the ASX immediately upon its loss of confidentiality on 28 May 2013, it may be accepted that the announcement that Newcrest expected gold production to be at a level which was materially lower than analysts' consensus figures would have led to a fall in the share price. Precisely how much that fall

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[82] *ASIC v Macdonald (No 12)* at [411].

[83] *ASIC v Macdonald (No 12)* at [408].

[84] SOFAA at [78].

[85] SOFAA at [78].

would have been on 28 May is not known. However, given that the information was disclosed to the ASX on the morning of 7 June,[86] the price impact arising from the First Contravention is most appropriately considered to be one of timing, not quantum per se. In other words, the First Contravention *delayed* whatever price drop was referable to reduced FY14 expectations. This was unfair to those investors whose receipt of the price-sensitive information was delayed. It was inimical to belief that a level playing field exists, as well as to its existence in fact.[87]

67. In relation to the Second Contravention, it is submitted that, by itself, disclosure of the capex information would have had only a limited (although material) impact on the price of Newcrest's shares. The price impact of disclosure of that information to the market by the 7 June announcement cannot be isolated from the price impact of the disclosure of other information by that announcement, including very significant asset impairments. As with the disclosure of the total production information, the price impact of disclosure of the capex information was not *created* by the contravention, but was *delayed* by the contravention.

68. As price falls referable to each piece of information were delayed by reason of the two contraventions, it may be inferred that some persons may have acquired securities in the period between 28 May (First Contravention) or 5 June (Second Contravention) and 7 June at a price that was higher than the price the securities would have traded at had the total production information been disclosed on 28 May and the capex information on 5 June. Disposers of shares in this period would not have suffered any damage as it is not suggested that the price of the securities was depressed in that period.

69. Impact on market integrity: Selective disclosure to analysts can generate confusion and a loss of faith in market integrity.[88] Newcrest's disclosures involved many of the large broker firms, created market "[s]peculation and rumour"[89] during the period of the contravention from 28 May 2014 to the morning of June 7 2014, and resulted in significant media attention

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[86] Other material information was also disclosed in the 7 June announcement, including significant asset impairments.

[87] *ASIC v Southcorp Ltd* at [36].

[88] Ibid.

[89] Ibid.

following the 7 June announcement, which was "apt to cause a loss of confidence in the market".[90]

70. Compliance policies and procedures: Prior to the contraventions occurring, Newcrest had written policies and procedures to manage its continuous disclosure obligations. The continuous disclosure policy provided for the Head of Investor Relations to be the sole point of contact with analysts and investment advisers, on a day to day basis, subject always to the Managing Director and the Finance Director having authority to do so. Although the situation arose by reason of Warner being located in New York, Cole's contact with analysts was not consistent with this aspect of Newcrest's policy. Newcrest's policy also provided that "All significant meetings and briefings conducted pursuant to the Investor Relations program must be attended by at least one Newcrest person in addition to the presenter so that the nature and content of what was discussed can be verified" and required that a record be kept of all substantive discussions, meetings and briefings and placed on file with the Head of Investor Relations. These aspects of the policy were also not complied with.

71. After the events in question, Newcrest recognised the need to examine its continuous disclosure and investor relations processes and practices. Newcrest commissioned an independent review of its disclosure and investor relations policies and practices. Newcrest released the independent review to ASX on 5 September 2013 and has since made changes to its policies and procedures following the recommendations contained in the report.[91] That process led to:

    (a) the establishment of the Disclosure Committee (comprised of the Managing Director, Finance Director, General Counsel and Company Secretary, and Executive General Manager of External Affairs), which has delegated authority for making and executing disclosure decisions (save for matters expressly reserved to the board and approval of routine or incidental releases) and overseeing investor relations functions; and

    (b) the approval by the board on 13 February 2014 of revised and restructured policies, in the form of the publicly available *Market Disclosure Policy* and the internal *Market Releases and Investor Relations Policy* and *Media and External Communications Policy*.

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[90] Ibid.

[91] SOFAA at [74]-[75].

72. Key aspects of Newcrest's revised governance structure for market disclosure include:

(a) releasing all external presentation materials with an investor or analyst focus to the ASX and other exchanges, and posting them on Newcrest's website;

(b) requiring (so far as practicable) significant investor relations events to be webcast or recorded and made available on Newcrest's website;

(c) imposing an investor relations 'blackout' period for a period of two weeks leading up to regular results and reports announcements and for any other periods as determined by the Disclosure Committee;

(d) making all presentations at investor seminars and conferences and industry briefings subject to prior authorisation by the Managing Director, the Head of Investor Relations and the Head of Corporate Affairs; and

(e) requiring all investor relations presentations, meetings, briefings and discussions to be:

(i) conducted by a specifically authorised spokesperson and attended by at least one additional Newcrest employee who has had formal disclosure training in the preceding 12 months;

(ii) clearly and comprehensively documented; and

(iii) reviewed afterwards by the Newcrest participants (with the Disclosure Committee to be immediately informed of any market sensitive disclosure).

73. The level of management involved and circumstances in which the contraventions occurred: Newcrest's senior management was put on notice that Cole intended to disclose the total production information to analysts. Similarly, Newcrest's senior management was put on notice that Cole had disclosed market sensitive information that was not public.[92]

74. Cooperation with the regulator and the making of admissions: Newcrest has cooperated fully with ASIC in its investigations in relation to Newcrest's contraventions[93] and has, by these submissions, the SOFAA and the proposed orders annexed to these submissions, admitted the First and Second Contraventions.

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[92] ASIC does not allege that Newcrest knowingly or intentionally contravened its continuous disclosure obligations.

[93] SOFAA at [79].

E. Conclusion

75. ASIC and Newcrest submit that the proposed penalties are appropriate as they pay heed to the size of the company, the volume of the trading on the ASX that occurred during the periods of contravention and the potential impact on confidence in market integrity. The First Contravention lies toward the upper end of the range of contraventions of this kind as it involved disclosure to numerous analysts, the contravention persisted from 28 May to 7 June, during which some market participants had access to information not available to the market at large, and involved the disclosure by Newcrest of information that was clearly price-sensitive and ought to have been recognised as such by Newcrest. A pecuniary penalty of $800,000 toward the upper end of the statutory maximum appropriately recognises the gravity of the contravention while allowing for some mitigating circumstances.

76. As to the Second Contravention, a penalty of $400,000 is appropriate in view of the fact that, while serious, the Second Contravention persisted for a shorter period of time and, unlike the First Contravention, senior management did not have access to any information indicating that the capex information would be or had been disclosed by Cole on 5 June 2013.

77. Both proposed penalties give appropriate weight to general deterrence as the primary consideration in fixing the penalty. Specific deterrence is less relevant in fixing the penalty in this matter given that Newcrest has already reviewed and amended its policies and procedures and has suffered significant adverse publicity as a result of the events giving rise to the contraventions. The proposed penalties are also appropriate as they would send a strong message to market participants to be mindful of the care and caution needed when interacting with analysts and would reinforce the message that equal access to market sensitive information by it first being lodged on the ASX platform is paramount in ensuring that markets operate on an informed, and equally informed, basis.

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