

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
<b>Average</b>		<b>2.626</b>	<b>1.44</b>

### 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 publically [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)

<u>Capex</u>	<u>Prev</u>	<u>New</u>
FY13	2000	
FY14	1500	1,000
FY15	1000	<1000

thereafter".

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

<u>Capex</u>	<u>FY14</u>	<u>FY15</u>
WAS	2.0	1.5
	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 NOTIFIED 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

  
 .....  
 CHRISTOPHER SAVUNDRA

Signed on behalf of Newcrest by its lawyer

  
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 of 101 Collins Street, Melbourne  
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