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

[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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