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Continuous disclosure and Newcrest Mining

ASX is reviewing Guidance Note 8 on Continuous Disclosure, prompted by confusion over "earnings surprises" and disclosure obligations. A consultation paper was released on 6 March 2015 and the ASX has called for feedback by 24 April 2015.

ASX has stated that "listed entities and their advisers would benefit from further guidance in these areas". Importantly, ASX noted significant developments in the area since the release of Guidance Note 8 in May 2013 including (a) ASIC release REP 393 in May 2014 on *Handling of confidential information: briefings and unannounced corporate transactions*, and (b) the decision of the Federal Court in July 2014 to impose $1.2 million penalties on Newcrest Mining for breaches of its continuous disclosure obligations.

Importantly, ASX is proposing to include an earnings guidance "upfront statement" that advises,

"All other things being equal, an entity is not required by Listing Rule 3.1 to release its internal budgets or earnings projections to the market. They are generated for internal management purposes and, provided they remain confidential, clearly fall within the carve-outs to immediate disclosure in Listing Rule 3.1A."

The proposed guidance statement follows the Federal Court decision in *ASIC v Newcrest Mining Limited* [2014] FCA 698 (Newcrest decision).

The Newcrest decision has placed a spotlight on the behaviour of companies giving analyst briefings with confidential information. Continuous Disclosure issues have also recently surfaced with Myer in this past fortnight.

Background to the Newcrest Case

The ASIC imposed significant penalties on Newcrest relating to a number of disclosures and analyst briefings that took place prior to an announcement on 7 June 2013. At these briefings confidential information concerning revised production and capex information for the 2014 financial year was disclosed. The Newcrest manager of investor relations, who disclosed the information to a number of analysts, mistakenly thought the information was already in the public sphere despite no announcement to the Australian Stock Exchange (ASX).

Under ASX Listing Rule 3.1, an entity must, when it 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, immediately tell ASX that information unless an exception applies.

On 7 June 2013 Newcrest released an announcement to the ASX that included the disclosure of the information previously given to Analysts.

ASIC Investigation and the Federal Court

Whilst the information that was disclosed was always likely to have a material effect on the share price of Newcrest, it was information that (Newcrest argued) related to an incomplete proposal (the financial year 2014 budget) of Newcrest at the relevant time. As at 28 May 2013, 'management's expectations' (expectations regarding production and capex for the financial year 2014) has not been provided to the Board and as at 5 June 2013 had not been approved by the Board. It was accepted that the budget was a work in progress and fell within the exemption to disclosure found within Listing Rule 3.1A.

It was agreed that the information still held a quality of confidence until it was disclosed to analysts between 28 May 2013 and 5 June 2013. Because the information had lost its quality of confidence, the exemption from disclosure that previously applied to the information no longer applied and the information was required to be disclosed. Newcrest failed to disclose the information to the ASX until 7 June 2013.

Upon the opening of trade on 7 June 2013, Newcrest's shares opened 13.8% lower than the previous day's closing price. In the two days prior to the announcement on 7 June 2013, several analysts had downgraded their profit guidance and earnings forecasts for Newcrest. ASX issued an "aware query" following the announcement on 7 June 2013. ASIC then launched an investigation into the surrounding circumstances of Newcrest's announcement on 7 June 2013.

Newcrest admitted to two "serious" contraventions of s 674(2) of the *Corporations Act 2001* (Cth) (Corporations Act):

- Failing to notify the ASX during the period 28 May 2013 and 7 June 2013 in regards to the expected total gold production for the 2014 financial year
- Failing to notify the ASX during the period 5 June 2013 and 7 June 2013 of the expected capital expenditure for the 2014 financial year.

Subsequent to an ASIC investigation, the parties reached a settlement of $1.2m in penalties under s 1317G(1A) of the Corporations Act ($800,000 in respect of the contravention with regards to production information and $400,000 in respect of the contravention with regards to capex information). The Federal Court, in its decision on 2 July 2014, confirmed the penalties sought by ASIC.

Where do we go from here?

The Newcrest decision gives guidance on the behaviour of Companies when interacting with analysts. It is important to note that the Newcrest case was not a case where it was alleged that Newcrest knowingly or intentionally contravened its Continuous Disclosure obligations, or had an internal systematic error that caused the contraventions.

If the updated Guidance Note 8 on Continuous Disclosure is introduced (in its current form) a new emphasis is on the necessity for price sensitive information to remain confidential and the internal policies and procedures of listed entities. Employees must be aware of the correct internal procedures by which to act, especially in briefing analysts or external parties with information likely to be confidential and within Continuous Disclosure obligations. We will issue a further update when the revised Guidance Note is issued.