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Briefing note July 2014

Think before you speak: Continuous disclosure lessons for analysts, investors and companies following ASIC v Newcrest

Failure to comply with continuous disclosure obligations can have serious repercussions not only for listed companies but also for the investors and analysts who deal with them.

ASIC v Newcrest Mining Limited [2014] FCA 698 case highlights the common pitfalls that companies face when managing the release of price sensitive information in the context of continuous disclosure obligations, as well as the implications of briefing analysts selectively.

In brief

- The Australian Securities and Investments Commission (ASIC) recently investigated Newcrest Mining Limited (Newcrest) for selective disclosures of total production information and capital expenditure (capex) information.
- These were found to contravene Newcrest's continuous disclosure obligations under the Corporations Act 2001 (Cth) (the Act).
- On 2 July 2014, the Federal Court of Australia confirmed civil penalties totalling A$1.2 million sought by ASIC with Newcrest's consent.
- The penalties are the highest on record for breaches of continuous disclosure obligations.
- Technically ASIC could also bring charges against the analysts who received the price sensitive information from Newcrest before it was disclosed to the Australian Securities Exchange (ASX) and who subsequently published brokerage reports based on that information.

Total production information

Newcrest is the largest gold producer listed on the ASX and one of the world's largest gold mining companies, operating in four countries globally.

During May and June 2013, the management and board of Newcrest were engaged in finalising budgeting and planning, including forecasting physical and financial activity, for the new financial year.

On 14 May 2013, the CEO and Managing Director of Newcrest, Greg Robinson, gave a presentation at the Bank of America Merrill Lynch Global Metals, Mining and Steels Conference in Barcelona.

In preparing his speaking notes, Robinson had noted that total production was expected to grow 5% year on year for the next five years, an effective downgrade from the company's earlier 5-10% forecasts.

The slides of Robinson's presentation were not released to the ASX. They were posted to the Newcrest website but did not contain the total production information.

While the total production information was in the speaking notes, ASIC did not allege that Robinson disclosed this information at the presentation.

On 30 May 2013, Spencer Cole, Manager Investor Relations at Newcrest, presented at the Goldman Sachs "Gold Day" conference. The speaking notes for Cole's presentation included the total production information from Robinson's Barcelona speaking notes.

Cole read out that information during his presentation and, in response to a

request by an attendee for clarification, he stated that Newcrest expected its FY14 gold production to be about 5% above its revised FY13 gold production guidance.

Cole spoke under the mistaken and unverified belief that Robinson had already disclosed the total production information in a public forum.

Cole had private meetings and email correspondence with a number of analysts prior to and following the Gold Day conference. This included email and phone correspondence with analysts from Credit Suisse on 28 May 2013 during which he told them, amongst other things, about the total production information.

Importantly, the issue of guiding analysts' forecasts and the need to "get them much lower" had been internally discussed by Newcrest management on that day.

On 31 May 2013, the Legal and Compliance Department of Citibank contacted Cole regarding concerns that he may have provided non-public and material information to Citibank analysts during his meeting with them.

Cole responded by providing Citibank and the other analysts and investors that he had spoken to with what he thought were the public sources of the total production information. As it turned out, such information had not in fact been previously disclosed.

Capex information

On 5 June 2013, Cole had conference calls with analysts from Royal Bank of Canada (RBC) and Commonwealth Bank of Australia (CBA) during which he informed them of Newcrest's revised 2014 capex information of approximately A$1 billion. This was despite Newcrest previously disclosing higher capex information to the market.

Before trading began on 7 June 2013, Newcrest released an announcement to the ASX entitled '*Newcrest completes business review: Update on outcomes, impacts and outlook*.' That announcement included a disclosure of future production and capex information.

Less than an hour later, Newcrest shares opened 13.8% lower than the previous day's closing price. By the end of the day, the stock closed 7.6% lower than the previous day's closing price.

Loss of confidentiality and contraventions

Newcrest admitted that from the time of Cole's communication with Credit Suisse on 28 May 2013, the future production information ceased to be confidential, and Newcrest was required to notify the ASX of that information under the continuous disclosure obligations in Rule 3.1 of the ASX Listing rules.

This rule requires a listed entity to inform the ASX immediately once it becomes aware of information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities and which is not subject to applicable exceptions.

The future production information was not notified to the ASX until the 7 June 2013 Newcrest announcement. ASIC and Newcrest submitted to the Federal Court that a pecuniary penalty of A$800,000 would be appropriate for this contravention.

Newcrest admitted that from the time of Cole's conference calls with RBC and CBA, the capex information ceased to be confidential, and Newcrest was required to notify the ASX of that information under the continuous disclosure obligations.

The capex information was not notified to the ASX until the 7 June 2014 Newcrest announcement. ASIC and Newcrest submitted to the Federal Court that a pecuniary penalty of A$400,000 would be appropriate for this contravention.

ASIC and Newcrest submitted that the contraventions were "serious" within the meaning of section 1317G(1A)(c)(iii) of the Act, being "grave or significant" (*ASIC v Donovan* (1998) 28 ACSR 583) and "weighty, important, grave, considerable," (*ASIC v Lindberg* (2012) 91 ACSR 640).

ASIC applied to the Federal Court of Australia seeking against Newcrest the highest civil penalties ever imposed on a company under continuous disclosure laws, totaling A$1.2 million. The Act permits the Court to impose a penalty of up to A$1 million for each of the two contraventions.

In determining the appropriateness of the proposed penalties being sought, ASIC gave consideration to factors such as the sensitivity of the information, the number of parties to whom the information was disclosed, and market impact and prejudice to investors.

Federal Court judgment

In its judgment handed down on 2 July 2014, the Federal Court confirmed both penalties sought for the contraventions by ASIC.

The Court took the opportunity to emphasise that the Court must

determine for itself the appropriate penalty for a contravention of the Act rather than merely 'approving' a settlement reached between a company and ASIC.

While acknowledging that this was not a situation where a maximum penalty would be appropriate, the Court envisaged such circumstances as being, "*where conduct is deliberate, undertaken at a high level of management, and there is no co-operation made with the regulator.*"

Mindful that these were the highest penalties ever imposed under the continuous disclosure provisions, the Court said, *"the penalties are such to send a strong message to market participants to be mindful of the care and caution needed when interacting with analysts*."

Analysts beware

Most listed companies employ investor relations professionals who interact with analysts and investors from time to time. Companies need to manage price sensitive information carefully in these situations so that inadvertent disclosures are prevented, or failing that, detected as early as possible.

Whilst ASIC has agreed not to take action against Newcrest employees, it has not addressed whether it will take the same approach with the analysts who received the price sensitive information before it was disclosed to the ASX and who subsequently published client trading recommendation notes based on that information (inside information).

There may be scope for ASIC to bring charges against analysts for insider trading where those analysts (insiders) were in possession of information that is not generally available, and that a reasonable person would expect to have a material effect on the price or value of securities.

The insider trading prohibition has two prongs which are relevant. First, insiders are prohibited from trading, or procuring trading, in securities that are the subject of the inside information.

Second, "tipping" is also prohibited. Tipping involves an insider communicating inside information when the insider knows or ought reasonably to know that the other person would likely trade, or procure trading, in securities the subject of the inside information.

This would cover analysts who communicate the information to their clients, as those analysts would have known (or ought to have known) that their clients would trade in securities based on the inside information.

> "…the penalties are such to send a strong message to market participants to be mindful of the care and caution needed when interacting with analysts."
>
> **Middleton J**
>
> ASIC v Newcrest Mining Limited [2014] FCA 698 at [87]

Finally, possibly of even more concern is the procuring element of each of the above offences. Procuring is broadly defined and includes inciting, inducing or encouraging someone to trade based on inside information.

In this regard, it may be arguable that any report by an analyst which recommends the buying or selling of securities, constitutes "encouraging" another person to trade in those securities (particularly if some clients do actually trade based on the recommendation).

If that report is therefore issued while the analyst is in the possession of inside information (whether or not such information is repeated in the report), the analyst may well be at risk of having engaged in insider trading. The Newcrest case has provided an important reminder to listed companies of their continuous disclosure obligations and the care that should be taken in selectively disclosing information to analysts and investors. Significantly, it has also highlighted the possibility that analysts may be implicated in breaches of continuous disclosure rules through insider trading laws.

In ASIC Report 393 '*Handling of confidential information: Briefings and unannounced corporate transactions*' released on 27 May 2014, ASIC indicated that it will continue to focus on analyst and investor briefings by "*(i) undertaking enforcement action against insider trading and against listed entities that fail to comply with their continuous disclosure obligations; and (ii) conducting a targeted review of research reports by analysts*".

In that report, ASIC also said that it will consider the type of information that is available to analysts at the time that they make a material change in their forecasts or recommendations.

ASIC will look to ensure that changes to research recommendations are not based on non-public material information that analysts might have received from listed entities prior to any formal announcement.

Takeaways

Listed companies	Analysts
■ Don't attempt to manage the expectations of the market by selectively briefing analysts and key investors. ■ Do have compliance systems in place to support the handling of confidential, price sensitive information. ■ Keep access to briefings as broad as possible, and make materials and recordings available to the public.	■ Don't elicit confidential price-sensitive information from listed entities. ■ Clarify with investor relations teams whether the information received has previously been released and ask where and when this was disclosed. ■ Ensure everyone is aware of the correct internal procedures if an analyst suspects they are in possession of confidential price-sensitive information. For example, immediately inform the compliance team and do not pass information on to colleagues or clients, or prepare any brokerage reports.

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