FEDERAL COURT OF AUSTRALIA

Earglow Pty Ltd v Newcrest Mining Ltd [2015] FCA 328

Citation:	Earglow Pty Ltd v Newcrest Mining Ltd [2015] FCA 328
Parties:	**EARGLOW PTY LIMITED (ACN 055 664 769) v NEWCREST MINING LTD (ACN 005 683 625) AND OTHERS (NAMED IN THE ATTACHED SCHEDULE OF PARTIES)**
File number:	VID 406 of 2014
Judge:	**BEACH J**
Date of judgment:	10 April 2015
Catchwords:	**PRACTICE AND PROCEDURE** – representative proceedings – securities class action – s 674 of the *Corporations Act 2001*(Cth) – scope and application of s 33ZF of the *Federal Court of Australia Act 1976* (Cth) – application concerning first stage trial – role of institutional investors – identification and accelerated adjudication of sample institutional investor claims – application dismissed **EVIDENCE** – relevance – materiality – event studies – efficient capital market hypothesis – indirect causation theory – relevance of direct evidence of institutional investors
Legislation:	*Corporations Act 2001* (Cth) ss 111AC, 111AL, 674, 676, 677, 1041H *Evidence Act 1995* (Cth) ss 55, 79 *Federal Court of Australia Act 1976* (Cth) ss 22, 33C, 33N, 33Q, 33R, 33ZF, 37M
Cases cited:	*Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 5)* (2009) 264 ALR 201 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364 *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345 *Australian Securities and Investments Commission v Newcrest Mining Limited* (2014) 101 ACSR 46 *Blatch v Archer* (1774) 1 Cowp 63 *Cammer v Bloom* 711 F. Supp. 1264 (D.N.J. 1989) *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168 *Grant-Taylor v Babcock & Brown Ltd (in liquidation)* [2015] FCA 149

James Hardie Industries NV v ASIC (2010) 274 ALR 85
Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd [2011] FCA 671
Johnson Tiles Pty Ltd (Barrett Burston Malting Co Pty Ltd) v Esso Australia Pty Ltd [2003] VSC 211
Johnson Tiles Pty Ltd and Ors v Esso Australia Pty Ltd and Ors (No 3) [2003] VSC 244
Johnson Tiles Pty Ltd v Esso Australia Pty Ltd & Anor (No 3) [2001] VSC 372
Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 4) [2004] VSC 466
Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (2003) Aust Torts Reports 81-692
Jones v Dunkel (1959) 101 CLR 298
Krogman v Sterritt 202 F.R.D. 467 (N.D. Tex. 2001)
Madgwick v Kelly (2013) 212 FCR 1
Matthews v SPI Electricity Pty Ltd (Ruling No 5) (2012) 35 VR 615
McMullin v ICI Australia Operations Pty Ltd (No 6) (1998) 84 FCR 1
Meaden v Bell Potter Securities Ltd [2011] FCA 136
Murphy v Overton Investments Pty Ltd [1999] FCA 1123
National Australia Bank Ltd v Pathway Investments Pty Ltd (2012) 265 FLR 247
O'Neil v Appel 165 F.R.D. 479 (W.D. Mich. 1996)
Owners of the Ship 'Shin Kobe Maru' v Empire Shipping Co Inc (1994) 181 CLR 404
P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 2) [2010] FCA 176
Regent Holdings Pty Ltd v State of Victoria (2012) 36 VR 424
Thomas v Powercor Australia Ltd (No 1) [2010] VSC 489
Weimann v Allphones Retail Pty Ltd (No 3) [2009] FCA 1292
Williams v FAI Home Security Pty Ltd (No 1) [1999] FCA 1771
Woodcroft-Brown v Timbercorp Securities Ltd (in liquidation) (2011) 253 FLR 240

Date of hearing:	27 March 2015
Place:	Melbourne
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	142
Counsel for the Applicant:	Mr M B J Lee SC with Mr A Nash

Solicitors for the Applicant:	Slater & Gordon Lawyers
Counsel for the Respondent/ Cross-Claimant:	Ms W Harris QC with Dr C Button
Solicitors for the Respondent/Cross-Claimant:	Herbert Smith Freehills
Counsel for the First Cross-Respondent:	Mr R Pintos-Lopez
Counsel for the First Cross-Respondent:	Lander & Rogers
Counsel for the Second, Third, Fourth and Fifth Cross-Respondents:	Mr C M Archibald
Solicitors for the Second, Third, Fourth and Fifth Cross-Respondents:	Clyde & Co
Counsel for the Sixth Cross-Respondent:	Mr C Caleo QC with Mr M Rush
Solicitors for the Sixth Cross-Respondent:	Norton Rose Fulbright Australia

Table of Corrections

20 April 2015	In paragraph 138, “merit” has been replaced with “meruit”.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 406 of 2014**

BETWEEN:	**EARGLOW PTY LIMITED (ACN 055 664 769)** **Applicant**
AND:	**NEWCREST MINING LTD (ACN 005 683 625)** **Respondent**
	AND OTHERS NAMED IN THE ATTACHED SCHEDULE OF PARTIES

JUDGE:	**BEACH J**
DATE OF ORDER:	**10 APRIL 2015**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The respondent's application seeking the identification and adjudication of two additional sample group members' claims for the first stage trial be dismissed.
2. The costs of all parties of and incidental to the respondent's application be their costs in the cause.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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AND:	**NEWCREST MINING LTD (ACN 005 683 625)** **Respondent**
	AND OTHERS NAMED IN THE ATTACHED SCHEDULE OF PARTIES
JUDGE:	**BEACH J**
DATE:	**10 APRIL 2015**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

1 The respondent (Newcrest) has sought an order that the individual claims of two institutional shareholder group members, who were amongst Newcrest's top 20 shareholders at the relevant time, be tried at the first stage trial of this proceeding involving the applicant's individual claim and the common issues. Newcrest submits that those institutional shareholders should be drawn from the cohort of group members who have signed litigation funding agreements with Comprehensive Legal Funding LLC. It is said by Newcrest that the funded group members are known to Slater & Gordon, the applicant's solicitors, have taken active steps to pursue their claims and have bound themselves to cooperate in the prosecution of this proceeding.

2 Newcrest contends that the individual claims of two institutional shareholders should be tried at the first stage trial for the following reasons:

(a) First, Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (the Act) exists to permit group members who share "a substantial common issue" (s 33C) to have their claims determined using the representative proceeding provisions, unless the Court determines that the representative proceeding will not provide an "efficient and effective means" of dealing with group members' claims

(s 33N). In that context, there is no principle that the initial trial in a representative action must be confined to common issues.

(b) Second, the guiding criterion is that a representative proceeding should be managed so that it is determined justly. It is said that recent case law countenancing the selection of sample group members, as well as the provision of discovery and particulars by group members, demonstrates that any assumption that group members are entitled to remain passive, particularly where funded group members have taken active steps to retain Slater & Gordon and entered into litigation funding agreements, is outmoded.

(c) Third, Newcrest's shareholder base is made up of at least 80% institutional shareholders. In that context the applicant seeks to try common issues at the first stage trial on a basis divorced from the reality of the market for Newcrest securities.

(d) Fourth, the evidence of institutional shareholders at the first stage trial is likely to have a significant bearing on:

(i) the assessment of materiality in the non-disclosure case;

(ii) the assessment of whether statements published by Newcrest conveyed the pleaded representations to their intended audience; and

(iii) the identification and application of principles relevant to causation and assessment of loss or damage.

(e) Fifth, there are no material practical impediments to Newcrest's proposal and nor is there any realistic prospect that having one or more sample group members would add disproportionately to the cost and duration of the proceeding.

3 Newcrest has principally relied on the affidavit of Mr Kenneth Alexander Adams dated 13 March 2015, Newcrest's solicitor (the Adams affidavit). The Adams affidavit addresses various matters raised in the affidavit of Mr Benjamin James Yang Phi dated 27 February 2015 (the Phi affidavit), the applicant's solicitor. At the hearing of this application there was a challenge to the admissibility of various aspects of the Phi affidavit. It was said that opinions had been expressed without foundation and that there was a doubt as to whether s 79 of the *Evidence Act 1995* (Cth) had been satisfied. Similar objections were made to corresponding aspects of the Adams affidavit. A *voir dire* was held and I provisionally

admitted the disputed paragraphs. I am now satisfied that the contested paragraphs of both affidavits are admissible and I have so treated them, although weight is another matter. In addition to this evidence, earlier filed affidavits of the parties have also been relied upon including the evidence in chief that has now been filed for the applicant's director Mr Michael Boorne (Mr Boorne).

4 Notwithstanding my initial attraction to the convenience and utility of the orders sought by Newcrest, I have determined that its application should be refused.

BACKGROUND

(a) The proceedings and its history

5 In 2013 and 2014, the Australian Securities and Investments Commission (ASIC) carried out an investigation into the conduct of Newcrest which culminated on 2 July 2014 in the imposition of pecuniary penalties against Newcrest as set out in *Australian Securities and Investments Commission v Newcrest Mining Limited* (2014) 101 ACSR 46; [2014] FCA 698 (the ASIC proceeding).

6 In the ASIC proceeding, ASIC alleged that Newcrest had engaged in two contraventions of s 674(2) of the *Corporations Act 2001* (Cth) (the Corporations Act). The alleged contraventions related to a failure to disclose to the Australian Securities Exchange (ASX), Newcrest's total expected gold production and capital expenditure for the financial year ending 30 June 2014 (FY14). Specifically, it was alleged that:

(a) Newcrest had contravened s 674(2) on and from 12.05 pm on 28 May 2013 continuing until 9.19 am on 7 June 2013 by failing to notify the ASX that Newcrest management expected total gold production for FY14 to be approximately 2.2 to 2.3 million ounces (Moz); and

(b) Newcrest had contravened s 674(2) on and from 5 June 2013 continuing until 9.19 am on 7 June 2013 by failing to notify the ASX that Newcrest management expected Newcrest's capital expenditure figure for FY14 to be approximately A$1 billion.

7 Newcrest admitted each contravention for the purpose of the ASIC proceeding and consented to appropriate declarations being made and the imposition of pecuniary penalties. Newcrest and ASIC made joint submissions to the Court in relation to the allegations, including the

filing of an agreed statement of facts setting out the factual context for the allegations and Newcrest's admissions.

8 The Court declared that Newcrest had contravened s 674(2) as alleged. The Court ordered that it pay the Commonwealth $1.2 million in penalties.

9 In or about December 2013 (during the pendency of the ASIC investigation) the lawyers for the applicant (Slater & Gordon) informed Newcrest that they had received instructions to commence a representative proceeding against Newcrest concerning a failure by Newcrest to make certain market disclosures over a period between 2012 and 2013.

10 In or around February 2014, Newcrest, Slater & Gordon and the applicant's litigation funder, Comprehensive Legal Funding LLC, agreed to participate in a confidential and without prejudice process for the purpose of considering the resolution of the dispute.

11 The confidential process did not result in the resolution of the dispute. On 21 July 2014, the applicant filed an originating application and statement of claim commencing the present proceeding against Newcrest under Pt IVA of the Act.

12 The first directions hearing was held on 15 August 2014. At that directions hearing it was ordered *inter alia* that:

(a) the applicant file and serve an amended statement of claim on or before 19 September 2014; and

(b) the matter be listed for further directions on 26 September 2014.

13 On 22 September 2014, it was further ordered that:

(a) the orders made on 15 August 2014 be vacated;

(b) the applicant file and serve an amended statement of claim on or before 26 September 2014; and

(c) the matter be listed for directions on 8 October 2014 at 2.15 pm.

14 The applicant filed and served an amended statement of claim on 26 September 2014.

15 The parties attended a directions hearing on 8 October 2014. At this hearing I did not fix a date for the commencement of the trial but granted the applicant leave to substitute its amended statement of claim with a further amended version of that pleading dated 8 October 2014 (ASOC).

16 On 26 November 2014, the cross-respondents, who are Newcrest's insurers, were joined to the proceeding under a cross-claim filed by Newcrest seeking indemnity in respect of the applicant's claims and defence costs.

17 On 8 December 2014, the following timetabling directions were made:

> 1. The Applicant file and serve any reply by 13 February 2015.
> 2. The Cross Respondents file and serve any defences to the Respondent's statement of cross-claim by 13 February 2015.
>
> …
>
> 4. The Respondent file and serve any reply in response to the defences to the statement of cross-claim by 13 March 2015.
> 5. The Respondent give electronic discovery (as agreed or ordered) in two successive tranches each by the following dates:
>
> (a) 16 March 2015; and
>
> (b) 13 April 2015.
>
> …
>
> 7. The Applicant is to file and serve any amendments to the amended statement of claim by 11 May 2015.
> 8. The Respondent file and serve any amended defence by 8 June 2015.
> 9. The Applicant file any application to close the class of Group Members on whose behalf the proceeding is conducted by 22 June 2015.
> 10. Pursuant to section 33J of the Act, 4.00 pm on 27 July 2015 be fixed as the date before which a group member may opt out of the proceeding.
>
> …
>
> 12. The Applicant file and serve by 27 July 2015 any expert evidence that it relies upon.
> 13. The Respondent file and serve any affidavits containing the lay evidence on which it proposes to rely at trial by 28 September 2015.
> 14. The Applicant on or before 9 October 2015 file and serve a list of the documents proposed to be tendered by it at trial to the extent that such documents are not otherwise annexed or exhibited to any affidavit.
> 15. The Respondent file and serve its expert evidence on or before 23 October 2015.
> 16. The Respondent on or before 30 October 2015 file and serve a list of the documents proposed to be tendered by it at trial to the extent that such documents are not otherwise annexed or exhibited to any affidavit.
> 17. The Applicant file and serve any expert evidence in reply on or before 1 December 2015.
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> …
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> 20. The proceeding is listed for trial at 10.15 am on 2 February 2016, on an estimate of 12 to 14 weeks.
>
> …

18 As is apparent, the trial has been fixed for hearing on 2 February 2016 on an estimate of 12 to 14 weeks. Originally it had been proposed that the trial commence in November 2015, but that was not convenient to Newcrest for reasons that it ultimately justified. What is to be

dealt with at the first stage trial, other than the applicant's individual claim and the common issues, is the subject of the present dispute. I have also ruled that Newcrest's cross-claim against its insurers not be dealt with at the first stage trial, although the cross-respondents will be entitled to participate in and accordingly will be bound by relevant findings from the first stage trial.

(b) The central allegations

19 The applicant brings the proceeding on its own behalf and on behalf of persons (group members) who:

(a) at any time during the period from 13 August 2012 until the close of trading on the ASX on 6 June 2013 (the class period) acquired an interest in securities traded on the ASX under the designation "NCM" (Newcrest shares); and

(b) suffered loss or damage by or resulting from the conduct of Newcrest pleaded in the ASOC.

20 The applicant has pleaded two central causes of action against Newcrest namely:

(a) non-disclosures to the ASX of alleged material information during the class period in contravention of s 674(2) of the Corporations Act and the ASX Listing Rules (the non-disclosure case); and

(b) misleading or deceptive conduct in relation to the making of certain alleged representations in contravention of s 1041H of the Corporations Act and s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (the misleading or deceptive conduct case).

21 The alleged material information of which Newcrest was aware, or ought to have been aware, and did not disclose to the ASX throughout the class period is described in the ASOC as the:

(a) August 2012 Information (at [24]);

(b) FY14 Gold Production Information (at [52]);

(c) February 2013 Information (at [67]);

(d) Impairment Information (at [90]);

(e) Advance Information (at [98]); and

(f) Analyst Briefing Information (at [100]),

(collectively, the material information).

22 The applicant's misleading or deceptive conduct case is premised on a number of alleged categories of representations made by Newcrest, described in the ASOC as the:

(a) August 2012 Representations (at [22]);

(b) Compliance Representation (at [23]); and

(c) February 2013 Representations (at [66]),

(collectively, the representations).

23 The legal and factual issues raised by the pleadings are extensive. Twenty-five common questions of fact or law are raised by the applicant ([119] of the ASOC). In summary, the common issues that will require determination at the first stage trial include:

(a) whether Newcrest made the representations and, if made, whether they were misleading or deceptive or likely to mislead or deceive;

(b) whether the representations were continuing representations;

(c) whether Newcrest had reasonable grounds for making the representations;

(d) Newcrest's knowledge, if any, of the material information throughout the class period;

(e) whether any or all of the material information was generally available in the market;

(f) whether the material information was known to Newcrest and of a kind required to be disclosed during the class period.

(c) The applicant's individual claim

24 The genesis of Newcrest's present application is partly explained by what it perceives to be the limited scope of the applicant's individual claim.

25 The applicant has filed its evidence in chief in relation to its individual claim. Mr Boorne, director and controlling shareholder of the applicant, has deposed to the following matters:

(a) The applicant is the trustee of two trusts, the Boorne Super Fund Account (Superannuation Fund) and the Boorne Holdings Family Trust (Family Trust).

(b) Mr Boorne is a director of, and the controlling shareholder in the applicant, and solely responsible for the management of the investment decisions of both the Superannuation Fund and the Family Trust.

(c) Mr Boorne had kept track of the performance of Newcrest and its shares since 2010.

(d) At the commencement of the class period, the applicant already held 5,406 shares in Newcrest, which had been acquired on behalf of the Family Trust between 27 March 2012 and 27 April 2012.

(e) On 29 and 30 May 2013, the applicant purchased 4000 Newcrest shares on behalf of the Superannuation Fund.

(f) On 25 June 2013, the applicant sold all Newcrest shares it held on behalf of the Superannuation Fund and the Family Trust.

(g) In deciding to buy Newcrest shares in May 2013, the applicant relied on Newcrest's ASX announcements and other conduct that comprise:

(i) the Compliance Representation;

(ii) the August 2012 Representations; and

(iii) the February 2013 Representations.

(h) According to Mr Boorne, the applicant purchased Newcrest shares on behalf of the Superannuation Fund after he had formed the view that the fair value of Newcrest's share price was greater than the prevailing share price. Mr Boorne considered the shares at that price to be good value on the basis of Newcrest's likely future earnings, having regard to Newcrest's strong production growth guidance for FY14 through FY17.

(i) Although the applicant did not purchase those shares until the end of the class period, the applicant held shares on behalf of the Family Trust immediately prior to and throughout the class period. On this basis, Mr Boorne says that he attended to each of Newcrest's ASX announcements during the class period. Further, that those announcements and the conclusions that he drew from them informed the applicant's decisions whether to buy, sell or hold shares during the class period. It is said that the applicant's reliance on the August 2012 Representations and the February 2013 Representations when purchasing further Newcrest shares in May 2013 should be understood in this context.

(j) Further, Mr Boorne has said that from 13 August 2012, he assumed that Newcrest was complying with its continuous disclosure obligations. The Compliance Representation comprised express statements made by Newcrest prior to 13 August 2012 and representations implied by Newcrest's conduct prior to and following 13 August 2012, as set out in the particulars to [23] of the ASOC, including:

(i) Newcrest's status as a registered corporation listed on the ASX, being subject to the ASX Listing Rules, and its status as a disclosing entity within the meaning of ss 111AC and 111AL of the Corporations Act;

(ii) Newcrest's obligation to comply with the continuous disclosure requirements of the Corporations Act; and

(iii) Newcrest's practice of releasing company documents to the market by means of the ASX company announcements platform, in which Newcrest made statements to the market upon which it knew potential investors might rely in making decisions whether to trade in its shares.

(k) Mr Boorne's evidence is that the applicant relied on the Compliance Representation in that it caused the applicant to assume as at 13 August 2012 that Newcrest was complying with its continuous disclosure obligations. It is said that Newcrest did not withdraw the Compliance Representation on that day or at any time during the class period.

26 Newcrest has sought to emphasise the limited coverage, as it perceives it, of the applicant's individual claim. It has asserted the following:

(a) The applicant acquired a small number of Newcrest shares in three tranches during a very limited temporal window (the 2 day period of 29 and 30 May 2013);

(b) These acquisitions occurred only days before the end of the class period;

(c) The applicant's misleading or deceptive conduct case is founded on three sets of alleged representations, two of which are alleged to have been made in August 2012 and continued to the end of the class period, and one of which is alleged to have been made in February 2013 and continued to the end of the class period. It is said that both are temporally remote from the time when the applicant acquired Newcrest shares;

(d) Leaving aside what appears to be an indirect causation plea in [113] of the ASOC, a plea of direct reliance on representations allegedly made by Newcrest is advanced by the applicant and some (presently unidentified) group members ([114] of the ASOC);

(e) But the ASOC, it is asserted, does not specify which of the representations the applicant relied upon in purchasing its shares. I should say that, nevertheless, in the further and better particulars of the applicant's claim dated 27 November 2014, it is asserted that the applicant relied on *each* of the representations. This is also asserted in substance in Mr Boorne's evidence in chief, although Newcrest has pointed out some perceived deficiencies in that evidence to the effect that it is not co-extensive with the breadth of the pleaded case in relation to the content of the representations, what was understood by Mr Boorne and the applicant's reliance case.

(f) The applicant's individual claim alone is a poor vehicle for facilitating an adjudication of the issues in the proceeding;

(g) It is appropriate for group members relying on each of the alleged representations to be put forward as sample group members to enable a more effective resolution of issues in the proceeding; this position has to some extent been resiled from by Newcrest as I will later explain;

(h) The individual claim of the applicant will not be based on evidence relevant to the manner in which investment decisions were made by institutional group members, who it is said are likely to have made investment decisions employing a methodology quite different to that of the applicant; and

(i) If, at the initial trial of common issues in the proceeding, causation, reliance and loss issues are limited to those relating to the applicant, the only findings able to be made by the Court regarding questions of causation, reliance and loss will necessarily be unique to the applicant. Those findings may be unhelpful in identifying how the balance of group members' claims in respect of such matters should be resolved by the Court if the matter progresses to the stage of determining the individual claims of group members (and would arguably be of less assistance to the parties in any discussions after the first stage trial regarding the resolution of the claims of group members).

(d) Shareholding and shareholder spreads in Newcrest

27 Newcrest has also asserted that the applicant is not truly representative of Newcrest's investors. It has put forward various statistics. A share register analysis prepared by Thomson Reuters of the top 100 registered shareholders of Newcrest as at each month end throughout the class period, excepting December 2012, demonstrates the following:

(a) During the class period, putting to one side insignificant shareholder classes (in terms of looking at these spreads for the moment), Newcrest's issued capital was held as follows:

(i) an average of approximately 85% of Newcrest's issued share capital was held by institutional shareholders;

(ii) an average of approximately 0.41% of Newcrest's issued share capital was held by 'Corporates & Non Profit'; and

(iii) an average of approximately 1.11% was held by 'Private Investors'.

(b) During the month ending 31 May 2013, being the month in which the applicant acquired shares in Newcrest, putting to one side insignificant shareholder classes, Newcrest's issued capital was held as follows:

(i) approximately 82.43% of Newcrest's issued share capital was held by institutional shareholders;

(ii) approximately 0.44% of Newcrest's issued share capital was held by 'Corporates & Non Profit'; and

(iii) approximately 1.27% of Newcrest's issued share capital was held by 'Private Investors'.

28 On the basis of this information, Newcrest contends that during the class period, the applicant fell within either a group of shareholders who held approximately 0.41% to 0.44% of the issued share capital of Newcrest or a group of shareholders who held approximately 1.11% to 1.27% of the issued share capital of Newcrest.

29 Further, Newcrest's 2012 Annual Report dated 20 September 2012 records that as at 31 August 2012:

(a) there were 765,000,000 Newcrest shares on issue;

(b) of Newcrest's 81,043 shareholders, there were 63,609 shareholders holding between 1 to 1000 shares, and these shareholders collectively held 20,587,225 shares in Newcrest or 2.70% of the issued capital of Newcrest; and

(c) of Newcrest's 81,043 shareholders, there were 78 shareholders holding 100,001 shares or more, and these shareholders collectively held 689,367,381 shares in Newcrest or 90.11% of the issued capital of Newcrest.

30 Newcrest's 2013 Annual Report dated 23 September 2013 records that as at 31 August 2013:

(a) there were 766,510,971 Newcrest shares on issue;

(b) of Newcrest's 86,994 shareholders, there were 65,072 Newcrest shareholders holding between 1 to 1000 shares, and these shareholders collectively held 22,131,538 shares in Newcrest or 2.89% of the issued capital of Newcrest; and

(c) of Newcrest's 86,994 shareholders, there were 78 Newcrest shareholders holding 100,001 shares or more, and these shareholders collectively held 671,701,895 shares in Newcrest or 87.83% of the issued capital of Newcrest.

PART IVA – SOME GENERAL OBSERVATIONS

31 It is necessary to identify the power that Newcrest says I should exercise. Both the applicant and Newcrest identified only the power in s 33ZF(1) as supplemented or contextualised, if at all, by s 37M. Further, the applicant accepted that s 33ZF(1) empowered the Court to make orders of the type sought, providing that the statutory test was satisfied and that it was an appropriate exercise of discretion, both of which it denied had been established by Newcrest in the present case. It is appropriate to make some general observations concerning s 33ZF(1) before turning to the detailed arguments.

32 First, it is true that a central feature of Pt IVA is the general notion, absent the invocation of ss 33Q or 33R, that a group member who has not opted out, may play or is entitled to assume that he will play a passive role. But it is erroneous to elevate such a notion to an entitlement. Part IVA does not enshrine any such entitlement. Moreover, the power in s 33ZF(1) would deny such an entitlement. And there are many examples where a court has acted in a manner inconsistent with such assumed passivity, let alone its elevation to the status of a canon of Pt IVA. There is no authority that binds me to accept such an entitlement.

33 Second, although in a general sense s 33ZF(1) has been described as a plenary power, nevertheless it is not unlimited. It is in one sense both trite and question begging to assert

that the power must be exercised judicially. But let me pass to the language of s 33ZF(1) itself. It uses the language "make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding". Grammatically, "thinks" is to be applied distributively, so that it reads "thinks appropriate" or "thinks necessary"; there is no "is" before "necessary". But as applied distributively, "thinks appropriate" has a lower threshold than "thinks necessary". But in the composite phrase, the concept is "thinks appropriate… to *ensure* that justice is done in the proceeding" [my emphasis]. In other words, although the words "thinks appropriate" have a lower threshold than "thinks necessary", nevertheless the relevant element of necessity in another guise is enshrined in the coupling of the words "to ensure that". In summary, the question becomes whether I think it is appropriate, to *ensure* that justice is done in the proceeding, to make the orders sought by Newcrest. It is not whether I think it to be merely convenient or useful *per se*. Section 33ZF(1) is not a licence for me to impose my own expansive case management philosophy. Rather, I must be satisfied that any order that is made satisfies the statutory test. Now I accept that s 33ZF(1) is a very wide power and ought not to be construed narrowly (*McMullin v ICI Australia Operations Pty Ltd (No 6)* (1998) 84 FCR 1 at 4 and *Owners of the Ship 'Shin Kobe Maru' v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421). Nevertheless, any exercise of power has to fit within the statutory formulation.

34 Much of Newcrest's argument has described the effect of the orders sought as "contributing" to an efficient resolution, being "of assistance" to such a resolution, being "helpful" or "facilitating" such a resolution. Now these are all laudable objectives, but that is not the language of s 33ZF(1). Newcrest cannot go so far as to maintain that such orders are necessary for the applicant to make out its individual case or the case on the common issues. Moreover, and for reasons that I will elaborate on, Newcrest has not established that such orders are appropriate to *ensure* a proper adjudication thereof and therefore to ensure justice in the proceeding.

35 Now I accept that the Court has the power to order the acceleration of the adjudication of individual claimants' cases. But the Court should be cautious in doing so outside the contemplated statutory mechanisms of s 33Q and s 33R. Section 33Q is not relevant in the present case. Section 33R is permissive rather than coercive. Section 33ZF(1) can be used coercively, but it has the higher threshold "to ensure that justice is done in the proceeding". Moreover, it cannot be used as a vehicle to rewrite the procedures and constraints expressed

in or necessarily implied by other provisions of Pt IVA (see *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168 at [52]).

36 Third, reference has been made to s 37M(3), which requires the Court to interpret and apply the civil practice and procedure provisions in a way that best promotes the overarching purpose, *viz*, the just resolution of disputes "according to law" (s 37M(1)(a)) and "as quickly, inexpensively and efficiently as possible" (s 37M(1)(b)). Let me assume for the moment that s 33ZF(1) is a "civil practice and procedure provision" (s 37M(4)(b)), although this is not beyond doubt given that one dimension to s 33ZF(1) could arguably travel beyond that description. Section 37M cannot be used to give a broader meaning or scope to s 33ZF(1) than I have indicated above. I say this for at least two reasons. The phrase "according to law" in s 37M(1)(a) takes one back to the proper construction of s 33ZF(1) in any event. Further, if there is any tension between the contextually *specific* provision of s 33ZF(1) and the *general* provision of s 37M, the general may be impliedly limited. Finally, even if s 37M had work to do and scope in the present context, because the words "ensure that justice is done" can embrace the content of the overarching purpose, for the reasons set out later at [141] I do not consider that the orders sought by Newcrest, if made, would best promote the overarching purpose.

37 Fourth, and for completeness, even if the statutory test in s 33ZF(1) is satisfied, that merely empowers the Court to make the relevant order sought. But the Court still has a discretion to refuse the order. But perhaps such distinctions are more of theoretical difference than practical significance. If the order would satisfy the condition stipulated, it may be difficult to see why any residual discretion to refuse would then be exercised.

ANALYSIS

38 There are various themes that can be distilled from Newcrest's detailed written and oral submissions.

39 First, Newcrest has submitted that orders of the type it seeks are unremarkable. It says that there have been many cases where group members have been ordered by the Court to actively participate in pre-trial procedures. Further, there are various examples where individual group members' claims have been adjudicated upon at the first stage trial. As explained in sections (a) and (b) below, although there are such examples they are distinguishable from the present case.

40 Second, Newcrest then submits that justification for the orders it seeks is strengthened because, in essence, the two institutional investors, whose claims it seeks to be identified and adjudicated on, have already signed up to litigation funding agreements and have agreed to participate. Although such a context strengthens Newcrest's position, for the reasons that I explain in section (c) below, this nevertheless does not make its position compelling.

41 I should say before proceeding further that what Newcrest refers to as an institutional investor is an entity that essentially pools funds together on behalf of others, generally members of the public, and invests such funds in a variety of various asset classes and financial instruments. Such investors include mutual funds, insurance companies, banks, other savings institutions, foundations, retirement/superannuation and pension funds, and hedge funds. Newcrest seeks the identification of two of such investors from Newcrest's top 20 shareholders at the relevant time, but only those who have signed litigation funding agreements.

42 Third, Newcrest puts forward as one compelling justification for the orders sought that the applicant's individual position in terms of its position as a retail investor is not representative of the group members or their claims generally. As I explain in section (d) below, I do not agree. But even if the point was good, it does not take Newcrest far. It does not justify the s 33ZF order sought. It does not establish that justice to be done in the proceeding is not ensured if the first stage trial only deals with the applicant's individual claim and the common issues.

43 Fourth, Newcrest contends that the conduct and role of institutional investors will be relevant to the common issues. So much may be accepted (see sections (e) and (f) below). But it is not my role to in substance (as distinct from form) compel the applicant directly or indirectly (through the device of accelerating the adjudication of institutional investors' individual claims) to adduce evidence of the conduct and role of institutional investors. I can, however, compel the production of documents and information from institutional investors pre-trial if a sufficient basis is made out for showing that the material is required by Newcrest to compile or complete its evidence on the common issues including providing its own experts with necessary factual foundational material.

44 Fifth, Newcrest puts forward an argument that the applicant's individual claim does not cover off all permutations of the representations case or the damages methodology. I do not necessarily agree (see sections (g) and (h) below). But even if the point was good, that does not establish that s 33ZF should be invoked. Moreover, even if there were deficiencies, they

are not necessarily solved by Newcrest's proposal in relation to identifying and adjudicating upon only two institutional investors' claims.

45 Sixth, Newcrest contends that the orders sought are designed to facilitate a potential settlement. Whilst such a perspective is commendable, the orders sought by Newcrest, if they have any such beneficial effect, more deal with settlement *post* the first stage trial. Moreover, the existence of such an advantage flowing from such orders is contentious (see section (i) below). Further, there are more suitable procedures that can be put in place to facilitate settlement in the more desirable time frame pre-trial.

46 It is appropriate to address some of these points in detail.

(a) Circumstances where active participation has been required

47 I accept that group members other than the lead applicant can be and have been compelled by court order to actively participate in representative proceedings at a time prior to the first stage trial and without any s 33Q or s 33R consideration coming into play. Examples of such compulsion include the following contexts:

(a) Provision of discovery has been compelled in at least four cases (*P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 2)* [2010] FCA 176; *Thomas v Powercor Australia Ltd (No 1)* [2010] VSC 489 (*Thomas*); *Regent Holdings Pty Ltd v State of Victoria* (2012) 36 VR 424 (*Regent Holdings*) and *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2011] FCA 671).

(b) Provision of particulars of group members' claims has been compelled in at least seven cases (*Kirby v Centro Properties Ltd* (No VID 326 of 2008), pursuant to an order made on 14 February 2011; *Thomas*; *Meaden v Bell Potter Securities Ltd* [2011] FCA 136; *Regent Holdings*; *Weimann v Allphones Retail Pty Ltd (No 3)* [2009] FCA 1292; *Murphy v Overton Investments Pty Ltd* [1999] FCA 1123 and *Williams v FAI Home Security Pty Ltd (No 1)* [1999] FCA 1771).

(c) Provision of a contribution towards security for costs has been contemplated in at least one case, namely *Madgwick v Kelly* (2013) 212 FCR 1 where it was held that an order for security for costs was appropriate, and that it was fair that the group members who stood to benefit from the proceeding make a real but not oppressive contribution to a pool of funds for security.

(d) Provision of particulars of group members' identities has been compelled in order to facilitate the service of subpoenas (*Kirby v Centro Properties Ltd*, unreported, Federal Court of Australia, 8 February 2011, transcript of hearing at T22 and T45).

48 But the context of these examples is all important.

49 Discovery and particulars of group members' claims may be accelerated in order to facilitate a mediation so that there can be an adequate appraisal of potential quantum ranges for the total class and the avoidance of a disproportionate level of information asymmetry.

50 Discovery and particulars from group members may be accelerated because they are relevant to the trial on common issues. For example, in a cartel proceeding where a common issue at the *liability* stage is whether an arrangement to price collude was put into effect involving a large number of customers over a long time frame over an entire industry, inputs into a multiple regression linear analysis (to establish a positive value for the relevant dummy variable) may require data from all group members, so that a statistical analysis can be performed for the first stage trial in order to determine whether the arrangement was put into effect.

51 More generally, discovery from *particular* group members may be accelerated because they might have documents relevant to one of the common issues.

52 But to admit of these possibilities and justifications does not support the proposition that whenever the Court perceives it to be convenient, such an acceleration can be or should be ordered. Section 33ZF still needs to be satisfied. Moreover, in the present case the application that I am addressing is not covered by the foregoing scenarios.

(b) Accelerating the adjudication of sample group members' claims

53 The identification of sample group claimants who have their cases adjudicated on at the first stage trial is not unprecedented. And there is no doubt that this can be *useful* (not the test required by s 33ZF) in an appropriate case.

54 Newcrest has given four examples to demonstrate its point (see the Adams affidavit at [45] to [53]).

***Johnson Tiles* litigation**

55 In *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd & Anor (No 3)* [2001] VSC 372, the trial judge permitted group members to give evidence at trial in relation to specific categories of claim. Sample group members gave evidence in relation to issues relevant to their claims, even though that evidence was not relevant to the claim of the representative plaintiffs.

56 The utility of permitting sample group members to give evidence in the *Johnson Tiles* litigation was highlighted in the judgment on the determination of the common questions, where it was found that, while the representative plaintiffs failed in their claims, two members of the 'business users' group of claimants (being Barrett Burston Malting Co Pty Ltd and Nando's Australia Pty Ltd), whose claims were tried as sample group members, succeeded: *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2003) Aust Torts Reports 81-692; [2003] VSC 27.

57 The successful sample group members gave evidence as to their own loss, which was found to be compensable loss, and were subsequently awarded damages: *Johnson Tiles Pty Ltd (Barrett Burston Malting Co Pty Ltd) v Esso Australia Pty Ltd* [2003] VSC 211, *Johnson Tiles Pty Ltd and Ors v Esso Australia Pty Ltd and Ors (No 3)* [2003] VSC 244 and *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 4)* [2004] VSC 466.

***Timbercorp* litigation**

58 *Woodcroft-Brown v Timbercorp Securities Ltd (in liq)* (2011) 253 FLR 240; [2011] VSC 427 was a representative proceeding commenced by Mr Woodcroft-Brown as lead plaintiff on his own behalf and on behalf of persons who had acquired or held an interest in certain managed investment schemes of which Timbercorp Securities Ltd (in liq) was the responsible entity.

59 The plaintiff's case was that the defendants had failed to disclose information about risks relating to certain managed investments schemes, and that the failure to make such disclosures to the group member investors amounted to misleading or deceptive conduct. In that case, the parties agreed that a sample group member ought be identified as a representative of 'early investors', that is, persons who invested in managed investment schemes which pre-dated the relevant period. The sample group member selected, Mr Van Hoff, had invested both in the 'early schemes', which the lead plaintiff had not, and the 'recent schemes', in which the lead plaintiff had invested. Prior to the trial of the *Timbercorp*

proceeding, Mr Van Hoff delivered particulars of his claim, and gave evidence at trial in respect of it.

***Matthews* litigation**

60 In *Matthews v SPI Electricity Pty Ltd (Ruling No 5)* (2012) 35 VR 615, J Forrest J observed that determination of the claim of the representative plaintiff, Mrs Matthews, would not cover the field in relation to the potential claims of all members of the class, and held that four 'sample group members' would be permitted to give evidence at the trial of the proceeding in relation to the question of the liability of the defendants. In *Matthews*, which concerned a bushfire that had ignited on Black Saturday and burned through the Kilmore East and Kinglake areas, the characteristic which went to selecting the sample group members related to both:

(a) the type of loss and damage suffered by each relevant sample group member, in circumstances where the lead plaintiff's claim did not include a claim for pure economic loss, nor loss of dependency; and

(b) the geographical location of each relevant sample group member relative to the fire ignition point, in circumstances where J Forrest J considered that different considerations of duty, breach, damage and causation might apply in respect of areas geographically distant from the lead plaintiff's property.

***Rowe* litigation**

61 In *Rowe v AusNet Electricity Services (formerly SPI Electricity Pty Ltd)* (S CI 2012 04538), the Supreme Court of Victoria ordered by consent that, as modelled on the *Matthews* framework, sample group members would be permitted to give evidence as to the question of the liability of the defendants at the trial. The *Rowe* proceeding also concerned a bushfire which ignited on Black Saturday, but which burned through the Shire of Murrindindi. The same sampling characteristics were applied to the selection of sample group members as were applied in *Matthews*.

General

62 But one has to be careful with the use of these examples.

63 First, the individual selection and procedure used in a particular case may have proceeded on the basis of consent or non-opposition. That is not the present case.

64 Second, the individual selection and procedure used in a particular case may have been justified because of significant differences in the liability cases of individual claimants apart from just individual causation and damages issues. Three of the four cases discussed above related to common law representative proceedings where there were different duty cases. That is not the present case. Further, in the *Timbercorp* representative proceeding, multiple managed investments schemes were involved and it was necessary to ensure that the first stage trial had an investor claim covering each scheme. The present case is no analogue for such scenarios.

65 Third, sometimes the individual selection and procedure used has been justified because of the importance of individual claimants' evidence to adjudicating upon the *common* issues. But in such a situation, the representative party has usually acquiesced in the procedure because it has been consistent with its own forensic strategy. In the present case there is no such acquiescence and, according to the Phi affidavit, there is a different forensic strategy to be pursued that the applicant perceives will obviate the need to adduce the evidence of institutional investors at the first stage trial.

66 Fourth, even if s 33ZF had been invoked in those cases, the exercise of power may have been justified by factual circumstances establishing the threshold "to ensure that justice is done in the proceeding" which differ from the case before me.

(c) Litigation funding agreements – "opting in"?

67 Newcrest has made much of what it perceives to be a distinguishing feature of this case, namely, that its application only concerns group members who have "opted in" rather than chosen to take a passive role. Whilst this is an important factor to consider, nevertheless two points should be made. First, in my view they are still entitled to opt out (I elaborate on this at [138]). Second, the litigation funding agreements do not necessarily pre-suppose that funded group members have acquiesced to have their claims *accelerated* as such. True it is that the breadth of various terms of the litigation funding agreements may oblige a funded group member to cooperate (see clauses 3.1, 3.2 and 3.4 and the definitions of "Claim" and "Litigation") if given a direction by Slater & Gordon, but such clauses are equally consistent with an expectation that their claims will be dealt with in the usual way as opposed to being accelerated in the manner envisaged by Newcrest. I accept that those provisions are not solely directed to the prosecution of an investor's individual claim but are broad enough to encompass participation in broader questions such as the trial of common issues, other group

members' claims and also the individual applicant's claims. But the machinery provisions contained in the litigation funding agreements may be seen as facilitative, but otherwise beg the question of whether and how any power should be exercised under s 33ZF. In any event, the fact that the litigation funding agreements take their present form still does not answer the test in s 33ZF.

(d) Is the applicant truly representative of the investor class?

68 Newcrest asserts that the applicant is not an institutional investor. Accordingly, it is said that it and its claim is not representative of the group. This reasoning is then used to support the submission that it is appropriate for the first stage trial to deal with and adjudicate upon two institutional investors' claims.

69 Now such an argument breaks down at a number of levels.

70 First, true it is that at least 80% of Newcrest *shares* at the relevant time were held by institutional investors. But if one considers the number of *shareholders,* and those who are group members depending upon their trading position over the relevant time window from which the number of *claims* can be derived, a different and more relevant picture emerges.

71 As the applicant has emphasised:

(a) According to Newcrest's 2012 Annual Report, as at 31 August 2012, Newcrest had 81,043 shareholders, of whom only 78 held more than 100,000 shares. Indeed, 63,609 shareholders held 1,000 or fewer shares, and by inference the balance of 17,356 shareholders held between 1,001 and 100,000 shares.

(b) According to Newcrest's 2013 Annual Report, across the relevant period its total number of shareholders grew to 86,994, but the number holding over 100,000 shares remained the same at 78. The number of shareholders holding 1,000 or fewer shares increased to 65,072, and the balance of shareholders holding between 1,001 and 100,000 shares increased to 21,844.

72 So, as the applicant has contended, the data reveals that the *vast majority* of actual and potential Newcrest shareholders held, or would have been expected to buy, small parcels of Newcrest shares, and were unlikely to have at their disposal the *"information advantages"* available to an institutional investor.

73 In fact, when one looks at *shareholders* and claims, the applicant is more representative than any institutional investor.

74 Second, it is not adequately explained why, as Newcrest contends, "justice is not well-served by having the matter go to trial with only the evidence of one small retail investor". According to the experience of Slater & Gordon, which was not denied by Newcrest, most, if not all, shareholder class actions in Australia to date have had a retail investor as the representative party with only that individual claim (together with the common issues) being dealt with at the first stage trial, without any apparent impediment to justice being done between the parties.

75 Third, even if the foundation for Newcrest's argument was sound, how is it established that identifying and adjudicating upon the claims of *two* institutional investors is representative of, say, the top 20 shareholders, let alone the group? Even assuming that they are drawn from the top 20, in some cases they would hold less than 1% of the issued capital. Further, one would expect significant variations between institutions having regard to:

(a) entity type, noting the significant differences as between institutional entity types such as retail and industry superannuation funds, equity products offered by banks targeted at wholesale investors, other equity products targeted at retail investors, index funds, hedge funds, private equity funds, and appointed institutional trustees of individuals' assets;

(b) constitution;

(c) size;

(d) client base; and

(e) investment mandates and parameters.

76 Fourth, this asserted lack of "representative" capacity (as discussed in the present context) provides more of a jury point than a principled argument in any event. Even assuming that it was made good on the statistics, so what? How is it said that this justifies a s 33ZF order? The premise does not justify the conclusion except through some *deus et machina* mechanism. How is it said that having the applicant's individual claim only and the common issues adjudicated at the first stage trial does not ensure that justice is done in the proceeding?

77 Fifth, the applicant has asserted that, in any event, it invests and has invested in a manner comparable to an "institutional" investor. At a high level of generality this may be accepted,

(see [31] and [32] of the Phi affidavit). But there are likely to be qualitative and quantitative differences of the type explained in the Adams affidavit. I do not need to decide these points now. If the Phi position is accepted, that diminishes the justification given in this context for the orders sought. Contrastingly, if the Adams position is accepted, that still does not justify the orders sought (see section (f) below).

78 Finally, Newcrest has referred to the capacity of large shareholders to "move the market". But accepting that by virtue of the scale of their trades, institutional investors can and do "move the market", where does this take Newcrest? It is not established that the two institutional investors to be selected would have or had that capacity. I accept though that an institution pursuing a technical strategy such as a contrarian strategy or a momentum strategy could stabilise or exacerbate price changes respectively if persisting with such a strategy, which is known to the market, even if the magnitude of the scale of the trades on each occasion may not be very large. Moreover, if at the first stage trial this is somehow established on the evidence and they are funded group members who have not been called by the applicant, then that may have a *Jones v Dunkel* (1959) 101 CLR 298 consequence.

(e) Is evidence of institutional investors relevant to the first stage trial?

79 There can be little doubt as to the relevance (in the sense required by s 55(1) of the *Evidence Act 1995* (Cth)) of the role and behaviour of institutional investors and the significance of such evidence to the common issues.

80 Let me begin with the question of materiality of the relevant information. Materiality arises in a number of contexts.

81 First, it is embedded in ss 674(1) and 674(2)(b) itself, which requires reference to listing rule 3.1 of the ASX Listing Rules. Listing rule 3.1 in turn refers to information that "a reasonable person would expect to have a material effect on the price or value" of the relevant shares.

82 Second, and relatedly, it is expressly referred to in s 674(2)(c)(ii) in similar terms. This is elaborated on in s 677, which refers to information that would, or would be likely to, "influence persons who commonly invest in securities"; the issue as to whether s 677 only applies to s 674(2)(c)(ii) or also s 674(2)(b) and listing rule 3.1 can be put to one side for the moment. Note also that s 677 provides a *sufficient* condition for establishing the s 674 materiality, but it is not expressed to be a necessary condition.

83 Third, it arises separately in dealing with causation. The first two contexts refer to a reasonable person's expectation on materiality. But in the general causation context (as opposed to individual investor's actions or failures to act on the basis of information or the absence of information) where one is seeking to ascertain the effect of information or its non-disclosure on share price, what I would describe as objective materiality arises. In other words, did the non-disclosure of adverse information produce share price inflation? Did the non-disclosure of favourable information produce share price deflation?

84 Now in terms of the first two contexts, the headline test is objective and not focused on individual subjective states of mind. But how is this objective test established forensically? Usually evidence will be sought to be adduced in the following manner:

(a) One will have the direct evidence of the applicant to establish its individual causation case.

(b) One may have evidence from large institutional or wholesale investors (including fund managers) as to their expectation of materiality; this is relevant given the genus of the class referred to in s 677 of the Corporations Act (see *National Australia Bank Ltd v Pathway Investments Pty Ltd* (2012) 265 FLR 247; [2012] VSCA 168 at [89] to [90]). Now to say that the evidence of institutional investors may be relevant to materiality and its statutory elaboration in s 677 is not to limit materiality and the operation of s 677 to any particular genus narrower than the breadth of the statutory language used, being "persons who commonly invest in securities". And nor is it to introduce any fluctuating standard (see the discussion in *Grant-Taylor v Babcock & Brown Ltd (in liq)* [2015] FCA 149 at [69]). Rather, it is simply to recognise that such evidence is relevant, whatever the breadth the language of s 677 can accommodate. To say that materiality and s 677 is not a subjective test is not to deny that evidence of institutional investors' behaviour and perceptions can inform the application of the objective test.

(c) One may have expert evidence from brokers, analysts, investment bankers and capital market researchers opining on the question of materiality and expectation; this is more indirect than category (b) evidence.

(d) One will have evidence, at least on the causation question, on the purely objective materiality question ie whether the information and its non-

disclosure actually produced share price inflation or deflation. Alternatively expressed, if on the day the information is disclosed to the market there is a statistically significant movement in the share price that can be attributed to the disclosed information, then this provides some evidence of materiality. But the absence of such evidence does not mean that one cannot establish the relevant s 674(2)(c)(ii) expectation as illuminated by s 677. As noted in *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364 at [188], s 677 is not a "high threshold". The terms of s 677 "do not invite any inquiry as to whether any change in the price of securities has occurred… caused by an announcement". Nevertheless "[w]hat happened in the market, in terms of movements in share price, may assist the Court in applying the 'likely influence' test"; such an analysis is an ex post analysis, albeit that the expectation issue is an ex ante one (see also at first instance (2009) 264 ALR 201; [2009] FCA 1586 at [474] to [629] and *James Hardie Industries NV v ASIC* (2010) 274 ALR 85; [2010] NSWCA 332 at [531] to [540]). Now all of this is to be understood in the context of s 677.

(e) Finally, the company's own views on materiality are not irrelevant, but may carry little weight.

85 Further, on the non-disclosure case, the evidence of institutional investors may be relevant to the issue dealt with in s 676 as to what information was generally available, particularly in relation to s 676(2)(b)(i) and s 676(3). Now even though such matters deal with objective tests, the understanding and perceptions of institutional investors on matters relating to what information was in the market place, and what could be deduced, concluded or inferred therefrom, whilst not definitive is not irrelevant.

86 Further, their evidence may be relevant to establishing whether the relevant information was of a kind that a reasonable person would not expect to be disclosed (see the listing rule 3.1A carve outs to listing rule 3.1).

87 In terms of the third context, namely, whether the non-disclosure of information had a price inflationary effect, a statistical tool for analysing this involves linear regression analysis known as event studies. One variable involved in the correlation analysis looks at the movement in market price over a time frame. Now of course the market prices used are a

composite of numerous investors' expectations and transactions and cancel out different classes of investors and their idiosyncratic expectations, choices and transactions.

88 The essential elements of such studies are the following:

(a) First, one takes a market and/or industry share index and obtains data for the movement in that index over a relevant period. What "relevant period" does one use? Some methods would use an index for a period before the announcement and look at the relationship of the movement in that index against the movement in the company's share price over that time. So, for example, and perhaps usually, one might use an estimation window of one year. Other methods would actually also include data after the corrective disclosure to anchor the index with the company's "true" share price; at that time the share price will have the inflation or deflation removed. Another aspect to consider is whether one uses any data at all for the period of the contravention. Some models use only data for the index and data for the company's share price before the contravening non-disclosure period. Other models would also include within period data.

(b) Second, one looks at the movement of the share price for the particular company over that same relevant period.

(c) Third, what is modelled is the relationship of the share price movement for the particular company against the movement of the index that has been chosen over the relevant period. What is hoped to be produced is a statistically significant linear trend using regression analysis, so that one can then make predictions as to the company's share price based upon the movement in the index.

(d) Fourth, one takes the day when (and immediately after) the information is disclosed to the market. At that time one has the actual share price for the particular company immediately after disclosure.

(e) Fifth, one compares this actual share price with what one can predict for the share price based upon the relationship with the movement of the index as referred to in subparagraph (c). In essence, one is looking at what one would have predicted for the change in share price on the day by reference solely to normal background or market conditions (economic, general investor market

confidence etc). One then compares this predicted share price with the actual share price immediately after disclosure. The difference between the predicted and actual price is then taken to be attributable to the information that was disclosed. If the actual price falls from what one would have predicted (based on normal market movements), then one has established that the share price was inflated by reason of the non-disclosure (but then deflated when full disclosure was made). If the actual price rises from what one would have predicted, then one has established that the share price was deflated by reason of the non-disclosure (but then inflated when full disclosure was made).

(f) Sixth, share price impacts of an event can usually only be revealed if the following conditions are present:

(i) The event is a well-defined news item.

(ii) The time that the news reaches the market is known.

(iii) There is no reason to believe that the market anticipated the news.

(iv) It is possible to isolate the effect of the news from market, industry, and other firm-specific factors which also *simultaneously* affect the company's share price.

89 Now this is the simple case. But there is an important feature to note which is relevant to the present discussion. Event studies rely on the "semi-strong" version of the efficient capital market hypothesis, which states that share prices in an actively traded security reflect all publicly available information and respond quickly to new information. The "strong" form is that prices incorporate both public and private (including inside) relevant information. The "weak" form excludes contemporary information of any sort; present price is taken to reflect *only* historic price changes.

90 If one is not able to proceed on the efficient capital market hypothesis and to satisfy these conditions, then one cannot assume that the difference between the actual share price and the predicted share price (based on the relationship of the movement with the index) will produce the quantum of the inflation/deflation.

91 Now in order to use event studies at the first stage trial in the proceedings before me, one matter that will need to be established on the evidence is the "semi-strong" version of the efficient capital market hypothesis. I accept, of course, that an event study may itself show one aspect that in and of itself partially supports demonstrating market efficiency, that is, the

speed of the *apparent* cause and effect relationship between an unexpected event or financial release and a response in the share price.

92 Unsurprisingly, reference may have to be made to the well-known proxy factors referred to in *Cammer v Bloom* 711 F. Supp. 1264 (D.N.J. 1989) at 1286 to 1287 for determining market efficiency. These have been supplemented (see for example *Krogman v Sterritt* 202 F.R.D. 467 (N.D. Tex. 2001) at 477 to 478) including looking at the volume and patterns of trading by institutional investors (*O'Neil v Appel* 165 F.R.D. 479 (W.D. Mich. 1996) at 503).

93 Evidence concerning the behaviour of institutional investors may well be relevant in analysing or establishing any assumption used as to the "semi-strong" version of the efficient capital market hypothesis. Moreover, one may also need to consider how market price is affected by factors other than informational inputs. For example, some large investors may engage in portfolio rebalancing exercises so that their spread of investments matches weightings of stock in an index. Further, they may vary their investments to meet their own liquidity or taxation requirements. Further, market price may be affected not just by human assimilation of information but by computerised trading programs where complex algorithms implement trades on metrics that are pre-determined.

94 Let me also address some other contexts where institutional investors' evidence may be relevant.

95 On the representation case, it cannot be said that the evidence of institutional investors relating to the applicable common issues is irrelevant. What relevant message(s) is conveyed to the intended audience can partly be informed by such evidence, which may differ from the applicant's personal evidence.

96 Further, some of the pleaded representations dealing with gold production and associated forecasting rely upon inferences that it is said should be drawn. The evidence of institutional investors as to what they did infer or may have inferred may have relevance, although it would not be definitive.

97 Further, evidence of particular investors to whom the representations were made, even as part of a group, concerning whether they were led into error is relevant and accordingly admissible.

98 But to say in the present case that evidence from institutional investors is or may be relevant to such matters relevant to the common issues is a far cry from saying that the Court cannot

try such matters without that evidence. First, so to contend is an exaggeration. Second, if that was to be the case, then no doubt the applicant would have to address that aspect. And if it was not addressed (and assuming the significance of such evidence as asserted by Newcrest), then that would be to the applicant's and the group's detriment.

99 Generally, it seems to me that evidence from institutional investors will be relevant if not significant evidence for determining the common issues.

100 Contrastingly, it would seem that the applicant's preferred forensic choice on the availability and materiality of information disclosed and not disclosed is to rely on expert opinion evidence and what it seductively asserts to be "market-wide" objective data. Mr Phi has deposed at [37] to [39]:

> 37. The expert evidence the Applicant intends to file includes evidence from, among others:
>
> (a) a forensic economist expert, who will undertake a quantitative assessment of the impact of the Representations and non-disclosure contraventions alleged by the Applicant on the price of Newcrest securities; and
>
> (b) a materiality expert, who will undertake a qualitative assessment of the materiality to Newcrest's market of investors of the Representations and the information the subject of the non-disclosure contraventions alleged by the Applicant (material information).
>
> 38. Based on my experience, I believe that the evidence of these two experts will:
>
> (a) provide a proper basis to test the occurrence and material effect of each of the alleged Representations on the market for Newcrest shares, individually and cumulatively, and with sufficient regard to other factors prevailing in the market at the time; and
>
> (b) similarly provide a proper basis to test the availability and materiality of the information the subject of Newcrest's alleged breaches of its disclosure obligations, individually and cumulatively and with sufficient regard to other factors prevailing in the market at the time.
>
> 39. In my experience in proceedings of this nature, the Court, in determining the questions set out at paragraph 38 above, will be assisted by expert evidence reflecting an assessment of the qualitative and quantitative effect of the Representations and material information on Newcrest's market of investors, considered as a whole (rather than by the necessarily partial and idiosyncratic evidence of one or a number of individual investors).

101 Whether this is a sound forensic choice is not for me to say, at least at this stage. Questions of the "best evidence", the adducing of evidence necessary to establish the factual foundations upon which experts may opine, the drawing of *Jones v Dunkel* and, more generally, *Blatch v Archer* (1774) 1 Cowp 63 at 65 type inferences are all interesting questions for trial (see more generally *Australian Securities and Investments Commission v*

Hellicar (2012) 247 CLR 345 at [164] to [170] and [250] to [270]). Moreover, the choices to be made, and the risk assessments attending such choices, are all for the parties to make. They are not for the Court to impose in form or to conduce in substance if not in form. They are certainly not for one party to impose on the other directly or indirectly via the s 33ZF mechanism or through the likely effect of any order that might be made under s 33ZF.

102 It may be accepted that the evidence from institutions is relevant to the common issues. But that is, of course, not saying that such evidence is *necessary* to establishing the applicant's individual claim or one or more of the common issues. In my view, the status of such evidence cannot be so elevated. But even if it could be, that does not establish the s 33ZF test. Section 33ZF does not exist as a coercive power to compel the applicant to file evidence necessary for its case either in an individual or representative capacity. If such evidence is necessary but not adduced, its individual or representative claim will fail. But it is for the applicant and its advisers to make that forensic choice, rather than for Newcrest to invite the Court to impose it. Now Newcrest eschews putting a position that it is seeking to compel the applicant to file evidence of a particular type. True it is that the orders sought do not so directly impose in terms, but the reality is that the effect of such orders has that tendency and likely effect. And after all, the foundation of Newcrest's argument or the consequence that it seeks to achieve is that the Court should *hear from* and *consider* the conduct of two institutional investors at the first stage trial.

(f) Institutional investors – different investment methodologies?

103 There was a related debate before me as to whether institutional investors make investment decisions employing different methodologies and resources than the applicant and retail investors. I do not need to resolve this debate, but it is worth observing the following.

104 There was evidence that institutional investors make investment decisions employing different methodologies and resources than the applicant and retail investors. Specifically, some institutional investors describe themselves as having access to specialised internal research capabilities, proprietary financial models and experienced global resources which enable such investors to carry out in depth industry analysis, not available to retail or small investors, to inform their investment making decisions.

105 Further, there is academic support for such a proposition. Qualitative and quantitative research techniques have arguably illustrated the distinction between institutional investors and retail investors. See for example:

(a) Karen Schnatterly, Kenneth Shaw, and William Jennings, 'Information Advantages of Large Institutional Owners' (2008) 29 *Strategic Management Journal* 219 at 219, 220 and 225;

(b) Sanford Grossman and Joseph Stiglitz, 'On the Impossibility of Informationally Efficient Markets' (1980) 70 *American Economic Review* 393;

(c) Brian J Bushee and Theodore H Goodman, 'Which institutional investors trade based on private information about earnings and returns?' (2007) 45 *Journal of Accounting Research* 289; and

(d) Robert Parrino, Richard W Sias and Laura T Starks, 'Voting with their feet: Institutional ownership changes around forced CEO turnover' (2003) 68 *Journal of Financial Economics* 3 at 8.

106 Further, there is literature which supports the proposition that it is institutional rather than retail investors who make trading decisions which impact the market and affect the price of securities and, in turn, the volatility of the market. See for example:

(a) Larry Harris, *Trading and Exchanges: Market Microstructure for Practitioners* (Oxford University Press, 2003) at 224;

(b) Robert W Holthausen, Richard W Leftwich and David Mayers, 'Large-block transactions, the speed of response, and temporary and permanent stock-price effects' (1990) 26 *Journal of Financial Economics* 71 at 90;

(c) Laura Spierdijk, 'An empirical analysis of the role of the trading intensity in information dissemination on the NYSE' (2004) 11 *Journal of Empirical Finance* 163 at 172;

(d) Suleyman Basak and Anna Pavlova, 'Asset Prices and Institutional Investors' (2012) *London Business School – Centre for Economic Policy Research* (available at http://ssrn.com/abstract=2153561) at 1 and 34; and

(e) Donald B Keim and Ananth Madhavan, 'Anatomy of the trading process: Empirical evidence on the behavior of institutional traders' (1995) 37 *Journal of Financial Economics* 371 at 372.

107 Even accepting that there is force in such an analysis, which I do not need to presently decide, it still does not change the conclusion set out above at [102].

(g) Permutations of the representations case

108 Newcrest originally contended that it was appropriate to identify sample group claimants to cover off all permutations of the various cases based upon reliance on particular sets of representations, including those who bought and sold over particular time windows based upon different representations.

109 Given that Newcrest now only seeks the identification of two institutional investors, it would seem that it has stepped back from such a position. Nevertheless, in oral submissions it confirmed that it was still pursuing that rationale. It was said that the identification of only two institutional investors was still consistent therewith as one could expect that they would engage in multiple trades over the extended time window and therefore, by such conduct, implicitly cover off such permutations.

110 In my view, Newcrest faces a number of difficulties on this aspect of its argument.

111 First, one does not need to deal with all permutations of various reliance cases over the extended time window to adequately address the common issues. The making of the representations and their objective characteristics and effect can be determined without dealing with such permutations at the first stage trial. Further, even if it be accepted that institutions were part of the intended audience, the intended audience is likely to have been a broader class. And in any event, such a consideration merely entails that the evidence of institutional investors may be relevant to the *common* issues in that context in terms of objectively viewing the relevant conduct and considering its tendency to lead into error.

112 Second, the applicant's individual case deals with many permutations in any event. Its case is that it relied upon all representations. Whether that is established on the evidence is another matter. Newcrest pointed out that there was a disconformity between on the one hand the pleaded case and the applicant's individual further and better particulars, and on the other hand the evidence in chief of Mr Boorne. But accepting that there is some force to such submissions still does not justify the orders sought. It simply means that part or all of the applicant's individual claim may fail. Further on this aspect, I should also say that the plea in [112] of the ASOC, which is part of the applicant's individual claim, demonstrates that all conduct, including the representations, and effects will need to be considered, whatever the limitations in the scope or evidence of the applicant's direct reliance case.

113 Third, and contrary to Newcrest's contention, I do not accept that the identification and adjudication of two institutional investors' claims would cover off these permutations in any event.

114 Fourth, dealing with such permutations is classically something that *may* arise under s 33Q and *will* arise later under s 33R (assuming that the applicant is successful on the common issues). But there is no compelling reason established for any acceleration of the adjudications of such permutations.

(h) The applicant's individual causation and damages case

115 Further, the applicant's individual causation and damages case would appear to cover the methodological possibilities, contrary to Newcrest's contention.

116 The applicant has made a claim on a "no transaction" basis, that is, that the contravening conduct caused the acquisition of Newcrest shares, which acquisition would not otherwise have occurred but for the contravening conduct. In the "no transaction" scenario, that is, no transaction in Newcrest shares, an alternative transaction may have been made.

117 In the alternative, the applicant claims on a "price inflation" basis, that is, that the contravening conduct caused price inflation in the shares, which shares were then acquired by the applicant. In other words, but for the contravening conduct the transaction would still have occurred but there would have been no price inflation in the shares acquired.

118 The four calculation permutations (see the particulars to [116] of the ASOC), namely, calculation types (i) to (iii) for the "price inflation" basis and calculation type (iv) for the "no transaction" basis appear to be covered.

119 Newcrest asserts that if the Court finds for the applicant on the "no transaction" scenario, then there will be no occasion for findings on calculation types (i) to (iii) dealing with the "price inflation" basis, which is relevant to a common issue dealing with the indirect causation theory (see one convenient description of that theory that I have given elsewhere in 'Class Actions: Some Causation Questions' (2011) 85 *Australian Law Journal* 579 at 583 to 586), although whether such a theory is correct remains for me to decide. But as the trial judge, it is difficult to see why I would not in any event deal with the price inflation methodologies regardless as part of the first stage trial and, further, as alternative methods of calculating damages for the applicant. It is to be recalled that the applicant is seeking to use the method which gives it the *highest* quantum of damages; in order to ascertain the highest, I

will need to consider all methods. In any event, even for the applicant's individual case it would be appropriate for me to provide alternative calculations in case I am found to be in error on my preferred method. Moreover, the events study analysis which may be used for loss calculations, particularly on the indirect causation theory, would still be undertaken and would be useful on the materiality question in any event.

120 I have said nothing so far concerning the potentiality for Newcrest to advance loss methodologies based upon "fundamental value" or "true value" rather than upon market price and any quantum of price inflation in the market price. If such an issue arises, it would not speak to the present debate. It cannot seriously be contended that one or two institutional investors' perceptions about the application of the capital asset pricing model (assuming that value is calculated on a discounted cash flow basis with discount rates being calculated) and the values that they would use for the variables as inputs thereto can drive such methods. In any event, s 33ZF does not exist to enable a respondent to push its own forensic agenda through compelling an applicant to advance a particular individual case.

(i) Promoting settlement after first stage?

121 It was suggested that it may be desirable to have several other individual group members' claims decided at the first stage trial in order to facilitate potential settlement *after* the first stage judgment. The applicant had two responses to what seems to be a beneficial objective. First, it was said that there was no evidence that settlement post the first stage trial had been facilitated in other cases by such prior adjudications, alternatively there was no evidence that settlement post the first stage trial had been impeded by the absence of such prior adjudications in other cases. Newcrest disputed this. Second, it was said that if there was any merit in the suggestion, it only applied where individual adjudications had occurred for different *liability* cases (such as the individualised duty cases adjudicated upon at the first stage trial in the *Johnson Tiles* litigation; see *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2003) Aust Torts Reports 81-692; [2003] VSC 27); that is a different context from what is now envisaged before me. I am inclined to accept that whatever the perceived advantages of adjudicating on a range of individual cases to facilitate a *post* first stage trial mediation process, that they are not sufficient to justify the requested exercise of power under s 33ZF. It is also to be recalled that Newcrest is not seeking to advance a position that a sufficiently diverse sample of individual claimants be identified so that they can be presently adjudicated on. Its application is confined to identifying two institutional investors, albeit that their buy

and sell transactions are likely to cover a broad period sufficient to cover each and all relevant windows concerning "positive" information disclosures and also the non-disclosure of material information.

122 Finally on this aspect, it is important to distinguish this scenario from the situation described earlier where discovery and particulars has been ordered of individual group members' claims *prior* to the first stage trial in order to achieve an overall settlement *before* trial (see for example *Thomas* and *Regent Holdings*). Such pre-trial disclosure of sufficient individual data to facilitate an overall settlement pre-trial is a different context than the context of saying that several sample group claimants' individual claims should be adjudicated on at the first stage trial to facilitate settlement *thereafter*. The informational content is different, as is the potential settlement prospects as a function thereof.

(j) Are there any impediments, additional costs or delay?

123 Counsel for Newcrest have contended that selecting and having adjudicated sample group members' claims for the first stage trial would not give rise to significant practical impediments or cause *excessive* costs or delay. I am inclined to agree, subject to one matter discussed below. But the lack thereof does not carry the day for Newcrest.

124 True it is that the terms of the litigation funding agreements contain broad ranging obligations for funded group members to cooperate (see for example clauses 3.1(b), 3.2(a), 3.2(d), 3.4 and the definitions of "Claim" and "Litigation"). And they apply notwithstanding the failure of any funded group member to respond "positively" to Slater & Gordon's letter of 11 February 2015 to actively participate in the manner invited by Newcrest.

125 True it is that these funded institutional investors can be identified now, although, as I discuss below, it would be inappropriate to order participation until at least the opt out date had passed.

126 True it is that the obligations under the litigation funding agreements do not presume or entail passivity. Those obligations theoretically *may* require active participation at any stage, although equally they do not presume or entail it.

127 True it is that funded group members stand in a different position from unidentified group members in the paradigm case of open class representative proceedings, some of the latter of whom may not even know that such a proceeding has been commenced.

128 True it is that the making of the orders requested would not result in disproportionate costs being incurred, either in terms of preparing and filing evidence or in disproportionately extending the duration of the trial. The proceeding is in any event large and complex. Further, the applicant's own costs will be substantial. The additional expense associated with trying the claims of one or more institutional investor group members would not be disproportionate to the benefit achieved in the context of litigation of this scale if I otherwise thought that the orders were justified.

129 Newcrest has estimated, purportedly based upon Mr Phi's analysis, that the cost of identifying and leading evidence from each institutional group member would equate to 2.9% of the estimated party/party costs of the litigation (it is correct to treat these as additional costs rather than just a time value of money point flowing from acceleration, as there are some contingencies under which such costs would never need to be incurred).

130 Further, Newcrest asserts that such costs would be borne by the litigation funder in any event. That may be correct in the first instance, but ultimately the funder will obtain reimbursement out of any recoveries in the proceeding. Moreover, Newcrest's point does not address unrecoverable costs or expenses in terms of management time and the like.

131 But to say all of this does not establish that to *ensure* that justice is done in the proceeding, the orders sought by Newcrest should be made.

132 Further, to say all of this does not justify me stretching modern case management principles to such an extent as to endorse some Continental idea of in effect (although not in form) coercing a party to file evidence of a particular type against its wishes. Newcrest cavils with that description or such an effect, but I consider that to be a likely consequence if I made the orders sought. Nothing in Pt IVA demands or enshrines such an intrusive role. The Court's role under Pt IVA is both adjudicative and supervisory. But neither dimension entails or requires such interference, except in a most exceptional case of which this is not.

(k) No prejudice to Newcrest if orders are refused

133 In my view, there is no substantial prejudice to Newcrest if the orders are refused.

134 First, if there is a lack of institutional investors' participation or evidence at trial, then any potential forensic deficiencies are likely to be more to the prejudice of the applicant and the group rather than Newcrest. If such evidence is relevant to the common issues but not called, that may be to the applicant's and the group's disadvantage.

135 Second, if because of such lack of participation, the first stage trial and its adjudication does not have the breadth of scope that Newcrest would wish, then that may be of equal or greater prejudice to the applicant and the group.

136 Third, if there were any additional costs or delay flowing from the making of the orders, this will be avoided by their refusal.

137 Fourth, refusing the orders would not substantially diminish the prospects of pursuing a meaningful mediation prior to trial. I have the necessary powers to order information and document production that I can now exercise to ensure that any relevantly disproportionate information asymmetry is ameliorated as to the number, nature and scope of individual group members' claims, whether aggregate data or atomistic data.

(l) Should the orders be made now or after opt out?

138 On any view, even if I thought that it was appropriate to direct in one or more ways the involvement of one or more institutional investors in the first stage trial, I would not do so until two conditions had been satisfied. First, that the time for the opt out date had passed. Until such time, it would not be clear which institutional investors were participating. Now it may be said that it is now clear for those investors who have presently signed litigation funding agreements. But in my view those contractual arrangements (including the termination provisions) do not and could not override any statutory opt out entitlement, notwithstanding the infelicitous drafting of such arrangements that do not, surprisingly, refer to the opt out mechanism. To the extent that any such contractual provision purported to override such a statutory mechanism or purported to enshrine any financial or other fetter or disincentive on exercising any such opt out right, then in my view it would be unenforceable; query the limitations in cll 3.1(e), 11.1, 11.2, 11.3 and 11.9. Perhaps in such circumstances a quantum meruit claim *might* survive for the value of any *prior* services *directly* provided to the investor who has opted out, but that is all. Second, assume that the opt out date had passed, and relevant institutional investors "participating" had been identified. In my view, it may then be appropriate to give the particular investors selected for participation an opportunity to be heard before final orders were made directing their involvement, on this hypothesis, against their will; perhaps a second opt out opportunity may then need to be given to the institutional investors selected. Of course, neither condition has yet been satisfied.

(m) A chilling effect?

139 I should discuss one final matter. Counsel for the applicant cautioned me that if I were to accede to Newcrest's application I would be:

- changing the paradigm upon which cases of this type have been constructed and run;
- creating a chilling effect on investors' participation, particularly that of the institutional investors;
- doing something unprecedented.

140 I have put such spectres to one side. If the orders sought had otherwise been justified, such consequences would not have persuaded me not to make the orders sought.

(n) General

141 For the foregoing reasons, I do not think it appropriate, let alone necessary, to make the orders sought to *ensure* that justice is done in the proceeding. Justice will be done absent such orders. Alternatively, even if the trigger for the exercise of the s 33ZF(1) power was enlivened, I would in the exercise of my discretion decline to make the orders sought for all the above reasons. Finally, if s 37M(3) is controlling or s 33ZF is to be read subject thereto such that part of ensuring that justice is done in the proceeding requires me to consider whether the orders sought are conducive to the resolution of the proceeding "as quickly, inexpensively and efficiently as possible," in my view they are not so conducive. First, they are likely at the least to cause the acceleration of the incurring of costs or additional costs that may otherwise (on some contingencies) never need to be incurred for the reasons previously discussed, albeit not excessive costs. Second, I cannot say that they would quicken the resolution of the proceedings; on one view they may even extend the first stage trial. Third, I also cannot be satisfied that the proceedings would run more efficiently if the orders were made.

CONCLUSION

142 I will dismiss Newcrest's application. On the question of costs, I would propose, subject to hearing further from the parties, that all parties' costs of and incidental to the application be their costs in the cause. The present application was partly encouraged by a suggestion that I had previously made. Further, I consider that the application was an appropriate vehicle for the Court to address an important aspect of the case management of this proceeding that needed to be considered.

I certify that the preceding one hundred and forty-two (142) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Beach.

Associate:

Dated: 10 April 2015

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 406 of 2014**

Schedule of Parties

CROSS CLAIM

Cross Claimaint	**NEWCREST MINING LTD (ACN 005 683 625)**
First Cross Respondent	**ALLIANZ AUSTRALIA INSURANCE LIMITED (ACN 000 122 850)**
Second Cross Respondent:	**CHUBB INSURANCE COMPANY OF AUSTRALIA LIMITED (ACN 003 710 647)**
Third Cross Respondent:	**AIG AUSTRALIA LIMITED (ACN 004 727 753)**
Fourth Cross Respondent:	**ACE INSURANCE LIMITED (ACN 001 642 020)**
Fifth Cross Respondent:	**ZURICH AUSTRALIAN INSURANCE LIMITED (ACN 000 296 640)**
Sixth Cross Respondent:	**CGU INSURANCE LTD (ACN 004 478 371)**