BURRELL
stockbroking & superannuation

Level 4
24 Little Edward Street
Spring Hill Qld 4000

Phone 07 3006 7200
1300 4 BURRELL
(1300 4 2877355)
Fax 07 3839 6964
Email info@burrell.com.au
Web www.burrell.com.au

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5th May 2023

To: Senate Economics Legislation Committee

Attachment to Burrell Stockbroking Submission 31/03/23

Including matters on notice from 2 May 2023 hearing

Dear Committee,

RE: NOTES TREASURY LAWS AMENDMENT (2023 MEASURES NO. 1) BILL 2023 (PROVISIONS)

The following notes deal only with Schedule 4 and Schedule 5 of the Bill

SCHEDULE 4- Off Market Share Buybacks and Selective Share Cancellations

1. Schedule 4 deals with two distinct categories of transaction when effected by a listed public company, namely

   (a) Off Market share Buybacks (Part1)

   (b) Selective share Cancellations (Part2)

Off Market Share Buybacks

2. The appropriate tax treatment of Off Market Share Buybacks (in the context of listed public companies using conventional tender processes) was considered in detail by the Board of Taxation in its 43 page Report to the Treasurer in June 2008. That Report was comprehensive and prepared with the benefit of extensive private sector consultation as well as input from Treasury and the ATO. The measures now advanced in Schedule 4 run entirely contrary to the conclusions reached by the Board of Taxation and its reasoning.

3. In particular the Board acknowledged at para 3.3 that the current taxation treatment "comes at a cost to revenue" but nonetheless concluded at para 3.8 that

   " The Board considers that off-market share buybacks add to the efficiency of capital markets and so have broader economy-wide benefits. The Board finds that they should continue to be available to companies as a capital management tool. The recommendations that have been made by the Board are therefore designed to retain off-market share buybacks as a viable option for companies to return capital to shareholders"

4. The measures in Schedule 4 will likely mean that Off Market Share Buybacks cease to be one of the tools which is useful to listed public companies for capital management purposes.

5. The Explanatory Memorandum makes no reference to the Board Report (or its extensive consultation processes and reasoning), and simply contends at para 4.1 that

"Schedule 4 to the Bill improves the integrity of the income tax system by aligning the tax treatment of off market share buybacks undertaken by listed public companies with the tax treatment of on market share buybacks"

6. On market share buybacks are something of a *"special case"* because there is no viable way in which to deal with on market transactions as anything other than a conventional "sale on market" by the seller of the share. A buyback is only treated as "on market" for tax purposes if it is "made in the *ordinary course of trading* on the relevant" stock exchange"- see Sec 159GZZZK ITAA 36 (albeit the ASX has some additional regulation of the company whilst it is so engaged) The company necessarily buys on market in competition with other purchasers, the seller is indifferent to the identity of the buyer (and commonly unaware of it), and the transaction has to be fungible. There is inherently no scope for tax treatment of the transaction in the hands of the seller so as to incorporate a dividend. The resultant tax treatment has been adopted *"of necessity"* However, the company effecting the buyback has to debit its franking account *as if* it had paid a dividend (at least where the buyback is funded from profits). So the "price" imposed by Treasury for *choosing* to buy "on market" has been the "wastage" of franking credits. Thus far it has been administratively permissible to source on market buybacks from capital to a much greater extent than is permitted administratively in respect of off market buybacks (thereby mitigating this impact) So one of the questions is whether the *"next step"* in the "alignment" (franking wastage) process will be to apply similar rules (administratively) to on market transactions.

7. The Board saw no need to align the tax treatment of off market share buybacks with the special case rules *adopted of necessity* for on market share buybacks. Insofar as the Board saw alignment as a virtue it endorsed alignment with the "dividend" and "franking" treatment of unlisted companies (see paras 4.54 and 4.55 of the Board Report). So the *"alignment argument"* put by the EM is entirely unconvincing.

8. The buyback amendments apply whether or not the buybacks are "selective" in any sense of that term. The new regime will apply whether or not all shareholders have "equal access" and ability to participate, and whether or not ASIC would treat the process as "equal access" (cf discussion of ASIC Practice in Board Report at para 2.37)

9. An alternative approach (if there must be change) would be to revisit the comprehensive administrative restraints on off market buybacks already imposed by the ATO including those in PSLA 2007/9 (with legislative facilitation if need be so) so as *for example* to

   (a) Further limit the extent of permissible discount (i.e. so as to reduce the maximum from 14%) at least in some circumstances modulated by reference to the percentage of dividend

   (b) Further limit the opportunity for recent acquirers to avail themselves of franking (i.e. akin to an extension of the 45 day rule targeted specifically at relevant buybacks)

Selective Share Cancellations

10. Part 2 of Schedule 4 contends that the principle of *"alignment "* should be taken a step further so as to apply some new measures generally to Selective Share Cancellations. So the EM contends at para 4.25 that

    "To ensure alignment across the capital management activities of listed public companies, Schedule 4 to the Bill inserts a new paragraph in the list of unfrankable distributions this is an integrity measure designed to prevent companies using selective reductions of capital as an alternative way to take advantage of the concessional tax status of shareholders as part of their capital management activities"

11 So the chain of logic is that procedures historically adopted of necessity for on market buybacks should be extended to off market buybacks, and this in turn is used to justify new measures for selective share cancellations. The logic path effectively seeks to pull itself up by its own bootstraps.

12. The meaning of "selective reduction of capital" appears to be undefined The EM at para 4.27 says that

    "'The reference to a selective reduction of capital is intended to be broad and to take its ordinary meaning, so as to include reductions of capital effected through selective cancellations of non-share equity interests as other reductions of capital that in substance result in a disproportionate cancellation of membership interests"

    This will inevitably raise a number of questions as to the scope of the measures including

    (a) where all ordinary shareholders have 10% of their shares cancelled is this a "selective reduction"
    (b) is the answer different if there is more than one class of membership interest on issue (as may be the case with hybrids for example)

13. The provisions which operate to *waste franking credits* are "modelled" on those to be enacted for off market share buybacks in Part 1. (Compare new para 9B with new para 9A) These provisions are directed not merely to amounts paid out of the share capital account (which are already rendered unfrankable by para € of Sec 202.45), but to all amounts distributed "as consideration for the cancellation of a membership interests as part of a selective buyback" so as to capture all amount distributed (including out of profits) Upon the occasion of a reduction of capital. So the distributions denied will include amounts otherwise treated as a dividend

14. However, the mechanism by which the benefits of franking are to be denied to selective share cancellations is entirely different. Part 2 simply renders the proceeds of selective cancellation unfrankable (by adding new para (k) to the list of unfrankable amounts in sec 202-45) Part 1 deemed the purchase price in respect of the off market buyback not to be a dividend for all purposes within the Act (see new Sec 159 GZZZPA) and thereby renders it unfrankable. So Part 2 operates so that the dividends denied the benefits of franking retain their status as dividends, and are fully taxed on that basis.

15. So in the end result these provisions do not really seek to "align" the tax position of selective reductions with supposedly equivalent "off market buybacks" Rather the so called alignment only goes so far as to secure the wastage of franking credits, which is thus exposed as the real purpose

16. Incidentally, the Board was alive to the potential "equivalence" of some forms of selective buyback, making the following side observation at 4.40 (arguing for equivalence of CGT treatment) *"The Board also noted that there are a number of other circumstances where company's shares are cancelled in the same way as of market share buybacks including capital reductions involving share cancellations and liquidations. At present in those cases shareholders are not entitled to notional losses .It would seem appropriate to align the taxation treatment of transactions that achieve similar outcomes"*

    These comments by the Board are evidently directed to equivalence of CGT treatment

17. Incidentally it seems that Schedule 4 does not even bother to align the CGT treatment of off market buybacks with the CGT treatment of on market buybacks insofar as

    (a) Off market buybacks are subject to administrative constraints on the sources of funds which force payment from profits to a grater extent (so will those be relaxed)

    (b) Sec 159GZZQ (2) will continue to provide a market value substitution rule to off market buybacks which does not apply to on market transactions. This may be of little practical consequence, since the off market practice will die and discounts seem unlikely if no franking is available. Nonetheless it underlines the conclusion that the only alignment sought is the wastage if franking credits. If this legislation was subject to any form of "purpose test" it would fail

SCHEDULE 5 -Franked Distributions funded by capital raisings

18. Schedule 5 is *described* as applying to "franked distributions *funded* by capital raisings"

19. The genesis of these amendments is to be found in *Taxpayer Alert 2015/2* and the subsequent *MYEFO Budget Announcement* (originally in [2016]) which on any fair reading was directed to the transactions of the kind described in the Taxpayer Alert. However, the proposed legislation is much broader in scope. Whilst some commentary is appreciative that the proposed legislation is not retrospective, the expansion of its width likely rendered retrospectivity a practical impossibility (at least if complete uproar was to be avoided)

20. *Taxpayer Alert 2015/2* appeared to be directed to transactions of the following general character

    (a) The capital raising and the franked distribution occur at a similar time

    (b) The amounts of capital raised and the franked dividends are similar in amount

    (c) The capital raising and the distribution are effected by the same entity

    (c) There is accordingly no net inflow or outflow

21. The provisions within Part 5 are potentially much wider. Factors of the kind listed as descriptors in the Tax Alert are reduced to mere items includes as matters to be weighed up when applying the operative provisions. The operative provisions which determine which distributions are taken to be relevantly "funded" by capital raisings include the following matters *operating collectively*

(a) They apply to "*direct* and *indirect* funding" (albeit this was per se flagged)

(b) They apply to capital raisings made *after* as well as *before* the distribution (Sec 207-159(1) b)

(c) The respective *amounts* need not be *similar*

(d) So "Funding" (directly or indirectly) *part* of the distribution can taint the whole distribution see Sec 207 -159(1) c in combination with the operation of the provision to the entirety of the distribution

(e) Use of *part* of the capital raising to so "fund" (directly or indirectly) *part* of the distribution can taint the entire distribution;

(f) Although there now *appears* to be a requirement in all cases that "the *principal effect*" of the capital raising (issue of equity interests) was to so fund (so one might be tempted to think that at least 50% of the capital raising must be so applied). However, the matter is rendered ambiguous by its application to any <u>*part*</u> of the distribution and para 5-36 of the EM states that

"Even if the test is satisfied only in relation to <u>some</u> of the capital raised from an issue of equity interests or <u>part</u> of a franked distribution ,the entire distribution ceases to be able to be franked. This is to deter entities entering into these arrangements"

(g) A purpose of so funding which is "*more than incidental*" suffices as regards *purpose* (Sec 207-159(1) c) albeit this no longer provides an alternative to the "principal effect" requirement

(h) The entity raising capital need not be the entity making the distribution (see Sec 207-159 (1) b which refers to any other entity)

22. Many of the worst implications (and uncertainties) flow primarily from the way in which the "twin tests" in Sec 207-159(1) c are <u>"*framed*"</u> and it is useful to focus on its specific wording in order to fully comprehend the breadth of what is proposed

(c) It is reasonable to conclude having regard to all relevant circumstances that

(i) the principal effect of the issue of <u>any</u> of the equity interests was the direct or indirect funding of the relevant distribution or <u>part</u> of the relevant distribution

(ii) Any entity that issued or facilitated the issue of <u>any</u> of the equity interests did so for a purpose (other than an incidental purpose) of funding the relevant distribution or <u>part</u> of the relevant distribution

Note that an earlier draft circulated for consultation was even worse because the tests were not cumulative requirements and were posed as alternatives (i.e. the "*or*" was previously an "*and*").Whilst the current draft is an improvement serious problems nonetheless remain.

The tests are framed so they can be applied to each part of the capital raising and each part of the relevant distribution, but what is tainted is the entirety of the distribution. The "more than incidental" test then "supercharges" the tainting process by applying a low threshold to the purpose test

23. Applied collectively these provisions mean that the new regime has a *prima facie scope* (absent favourable rulings) extending well beyond situations in which the distribution can be said to be *"funded"* by the capital raising in any conventional sense. The provisions go well beyond any conventional concept of legal *tracing of funds* or the kind of tracing applied (where necessary proportionately) to determine the extent to which borrowings have been deployed for income producing purposes. Elements in 21 (d) and (e) above have potential for a punitive operation which has much in common with the older concepts of *"tainting "* of share premium and capital accounts (and para 5-36 of the EM discussed above suggests this is intentional)

24. Read literally it is not even clear whether and in what circumstances funds from capital raisings which are contributed to the general pool of funds and working capital of a company escape the tests as so framed; albeit Example 5.4 gives the impression that in the case of Banks at least the ATO will accept that a deemed tracing is not feasible. However what is to say that this kind of principle will be accepted in respect of entities with much smaller balance sheets.

25. Conversely where some level of tracing applying traditional concepts is feasible (so for example the *effect test* is satisfied in fact) the extent to which the various matters to which regard is permitted actually speak to the test in a fashion which provides relief is unclear. At best these matters might be of assistance in relation to the test based upon *intent*

26. The provisions which are commonly held out as ameliorating the prima facie operation of the "funding provisions" (discussed above) are contained in Sec 207 -158 par (1) a. The Schedule 5 regime only operates where

    (i) The entity has a practice of making distributions of that kind on a regular basis and the relevant distribution is not made in accordance with that practice or

    (ii) The entity does not have a practice of making distributions of that kind on a regular basis

27. In relation to these ameliorating provisions (which may be thought of as offering some form of *safe harbour*):

    (a) Generally this assumes that companies will generally have some settled practice as regards distributions, and this will not always be the case.

    (b) The provisions make some degree of sense for larger listed companies with a well-defined set of practices, although even for such companies the extent of the level of adherence to practice which provides a safe harbour is unclear .So to take but two examples

When BHP changed its dividend policy so that dividends began to fluctuated with profits was that technically a departure from antecedent relevant practice

When banks moderated dividends in response to regulators was that technically a departure from antecedent relevant practice

(c) Smaller listed companies may well have no practice which satisfies these tests, especially if they are in transition to sustainable profits or have profits which are extremely cyclical

The mining industry generally, but particularly in Western Australia, is likely adversely impacted.

(d) Unlisted companies are even less likely to have such a practice

(e) Although Item 3(1) expressly provides that distributions antecedent to September 15 2022 may be used to evidence a practice of making distributions ; this provision (and indeed the integrity of the underlying *practice test*)may nonetheless be undercut by Sec 207- 159(3)

(3) In considering whether the condition in paragraph (1) (a) is satisfied disregard a distribution if (a) The distribution

(i) Is a franked dividend or

(ii) Would be a franked distribution if subsection (1) did not apply to it and

(b) Subsection (1) would apply to the distribution if paragraph (1) (a) were omitted"

This provides that you need to test antecedent distributions (and on my reading of it distributions before and after September 15, 2022) without the benefit of the any safe harbour afforded by subsection (1) a. If the distributions would (hypothetically) fail the tests as so applied they cannot be used to evidence an antecedent practice.

(f) The EM purports to explains the position at 5.20 as follows

Any practice involving the sort of mischief the amendments seek to prevent does not protect future distributions even if the practice existed prior to the date of application of these amendments ..."

(g) However this nonetheless seems to mean that whenever you are relying *purely* upon subsection (1) (a) for salvation in respect of a practice you will not be protected in the end result (a matter relevant to DRIPs for example discussed below)

28. The new provisions will render uncertain a wide range of transactions .It is useful to consider the following by way of illustration of the issues

(a) Dividend Reinvestment Plans (DRIPs)

(b) Pre Takeover Distributions

(c) Hybrids

Dividend Reinvestment Plans (DRPs)

29. In relation to DRPs note the following

(a) TA 2015/2 says that a "typical dividend reinvestment plan applicable to an ordinary regular dividend" will not be captured (as it would not have been given the relative disparity in amounts)

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(b) The MYEFO statement nonetheless flags that an "underwritten" DRIP will be a capital raising for the purposes of the proposed regime

(c) The EM provides a specific example concerning a DRIP as Example 5-2. This example concerns a "once off" franked dividend of $40 million with an underwritten DRIP raising $40 million .Not surprisingly this is said to be captured , but this begs the question concerning the proper analysis to be applied to more typical or conventional DRIPs

(d) The mechanics of a DRP process (whether or not underwritten) will mean that *all* of the capital raised from *shareholders* has been directly *sourced* from the dividend, and the drafting in Schedule 5 will "turn this around" so as deem the capital raising to have funded part of the dividend in the defined sense. Although some commentary suggests that you can argue that in reality the dividend funds the capital raising (and not vice versa) I would place little store on that argument. It is not supported by the drafting which is specifically designed to suspend reality, and could not be supported by the ATO since it would mean that all DRIPs would escape. Curiously enough the capital raised from *underwriters* has less directly "funded" the dividend in the defined sense, even though underwriting per se is otherwise regarded as an adverse factor

1 See article by Gilbert & Tobin

(e) In my view if the provisions are *strictly applied* a conventional DRP (whether or not underwritten) would likely have both a "more than incidental purpose" of "funding " the capital raising (in the defined sense) and a "principal effect" of funding the dividend (in the defined sense) thereby satisfying the twin tests in Sec 207-159 (c) as they are presently framed

(f) The various matters listed in Sec 207-159(4) are factors to be taken into account, but for the most part they do not (in this factual context) speak meaningfully to the *twin tests* at hand.

(g) The fact that the capital raising is typically much less in amount than the dividend is specifically listed as a relevant matter. However, once the heart of each test is framed as whether the capital raised funds <u>part</u> of the dividend it fails to speak meaningfully to either test as thus framed and does not of itself afford salvation (although perhaps it should do so) For reasons noted above (at para 21(f) of this note) the *"principal effect"* test seems not be overly helpful in any event since the capital raising is smaller than the dividend and so *all* of the capital raised can be said to have been applied to "fund" the distribution

(f) So you then look to reliance upon past practice. However if past practice is the only source of salvation, it will not suffice (and this seems to be so even for companies who have in fact a real past practice)

(g) The end result seems to be a need to rely upon the good grace of the ATO to afford appropriate benevolent rulings. Presumably the ATO will do so in order to facilitate conventional DRPs, but it is unfortunate that such matters should arguably be captured and have to talk their way out of assessment. This is all the more so in a

context where (as here) the provisions self-execute, and do not depend upon the Commissioner forming any particular view or taking action to invoke the provisions.

(h) The potential tainting effect of DRPs on historical dividends may have "flow on " effects discussed below in the context of hybrids

Pre Takeover distributions

30. In relation to pre takeover distributions note the following

(a) It is relatively common for listed companies which have been targeted by a successful takeover offer to effect a special dividend (fully franked) antecedent to completion of the takeover process, and such dividends may well be funded in part by borrowings within the Target. Commonly also the acquisition is completed by a scheme of arrangement.

The Newcrest/Newmont proposed takeover is a current example (refer attachment)

(b) There are potentially some nice issues concerning the extent to which the special dividends are also treated as part of the consideration for the purpose of effecting the relevant CGT calculations (cf TR 2010/4) However, what generally occurs is that the documents permit a special dividend to occur and the special dividend is ignored for CGT purposes.

(c) Where the company or group making the Takeover Offer effects a capital raising (before or after completion of the takeover) in order (in part) to fund the Target following acquisition, the provisions in schedule 5 will potentially be attracted if Target repays the borrowings from which the dividend is sourced using funds supplied by its new parent

(d) This is so even though the capital raising is undertaken by an entity other than the entity which made the distribution (thereby illustrating this aspect of sec 207-159 (1) b)

(e) The former shareholders of Target are potentially impacted even though they have no control over the post-acquisition structuring of the Target.

(f) What is particularly egregious is that it would seem that events after payment of the dividend and completion of the Takeover can impact "retrospectively" upon the position and upon whatever is disclosed to shareholders in advance of the transaction (commonly in a scheme booklet) The franked dividend will be deemed unfranked.

(g) Incidentally the kinds of problem exposed by this example will very commonly apply to takeovers of private companies, and buyouts of shareholder blocks in that context.

This is likely a significant unintended consequence of the wide drafting and a material change in how franking is understood in Australia. All sales of private companies involving a dividend payout of accumulated profits to the vendors and recapitalisation of working capital etc. by the buyers are likely unfairly impacted by this proposed legislation.

Hybrids

31. In relation to listed hybrids note the following

(a) Hybrids are commonly issued as shares on which franked dividends are paid. The issuers are mostly Banks and financial institutions, but there are other issuers

(b) Hybrids in this category are commonly issued periodically and in a cycle which operates over time in parallel with the payment of dividends and other transactions affecting ordinary shares. So you will inherently have issuances of shares as hybrids running in parallel (from a timing perspective) with dividends on ordinary shares and on other hybrids.

(c) It is not uncommon for such institutions to have DRPs operating in respect of their ordinary shares. Additionally the dividend policies of APRA regulated bodies have been modified over time by regulators particularly in recent years

(d) The EM contains an example (Example 5-4) dealing with hybrids issued by an APRA regulated body which raises $10 million by the issuance of hybrids where the funds raised "contribute to the general pool of funds available to the company" and the issuance is followed 6 months later by a regular dividend on ordinary shares of $3 million. The example is intended primarily to illustrate arrangements in accordance with established practice (and is so flagged in the heading) The EM reasons as follows

"The measure does not apply as the company has a longstanding established practice of paying such dividends to its members. Regardless, it is clear that there is a genuine commercial purpose for the capital raising to meet capital regulatory requirements/accordingly there is insufficient linkage between the capital raising and the payment of the dividend for the purpose test to be satisfied in relation to the arrangement "

(d) For the general reasons noted above it seems unlikely that antecedent established practice *per se* can dispose of the matter; so (despite the stated primary object of the example) the outcome really depends on its reasoning in relation to the purpose test and the way in which that test is framed

(e) Furthermore, reliance upon "established practice" may (ironically enough given the regularity of dividend payments by Banks) present difficulties even if the general problems are ameliorated for a variety of reasons including

What impact do movements in dividend policy over time to suit economic conditions (including movements driven by regulators) have upon application of the "established practice test"

Banks commonly have DRPs and so the past practice in relation to DRPs may mean that all of the historical dividends on ordinary shares are technically excluded from consideration on that score alone

(f) Example 5.4 a helpful assumption (or curating of the facts) that funds from the capital raising are properly characterized as "within the general pool" and have not in fact been used in part to fund the dividend. This is helpful and is an assumption which has more validity in the case of a financial institution with a large balance sheet and general pool of funds than in other situations. Whether or not the provisions are so clear on this point as the example suggests is debateable (see discussion above)

(g) So the ATO is really saying that it (in the circumstances in the Example) accepts that - when APRA regulated companies issue hybrids the *primary purpose* will be to meet capital regulatory requirements and they generally have no "more than incidental purpose" that the capital proceed will be used to pay franked dividends (presumably in reliance upon Sec 207-158 (4) e which focuses on "reasons for the issue other than the funding of part of the relevant distribution"

(h) However this does not necessarily resolve the potential for issues with hybrids even when issued by banks and financial institutions if the facts are not so carefully curated. So one might ponder upon the outcome if for example

The funds raised upon a particular issuance are less than the upcoming dividend on ordinary shares ,are raised within days of the relevant dividend and can be traced in fact to the dividend payment *or*

The hybrid capital raising is effected to "replace" an earlier hybrid issuance sitting in the capital stack which is about to mature, and the redemption of the expiring issuance includes a dividend component

(i) Presumably other categories of issuer will need to identify a similarly compelling primary purpose acceptable to the ATO and ensure that funds cannot be traced indirectly to the payment of any dividend

Summary

In summary, neither schedule 4 nor schedule 5 should be proceeded with. Schedule 4 interferes with bona fide off market buybacks by public companies. Schedule 5 applies to public and private transactions. It fails to understand the clientele effects of normal commercial transactions. Examples include dividend reinvestment plans, takeovers and many sales of businesses owned by private companies. It says little for the competence of Treasury and the ATO that such poor legislation is proposed.

Yours truly

Chris Burrell
Managing Director
MFM, BCom(Hons), LLB(Hons), FCA, SF Fin, MSIAA

Market Release

11 April 2023

NEWCREST MINING LIMITED

Revised non-binding indicative proposal received from Newmont

- **Revised conditional and non-binding proposal is at 0.400x exchange ratio and, in addition, permits Newcrest to pay a franked special dividend of up to US$1.10 per share**
- **Represents an aggregate implied value of A$32.87 per share to Newcrest shareholders[1]**
- **Newcrest has agreed to grant Newmont the opportunity to conduct confirmatory due diligence to put forward a binding proposal**

Newcrest Mining Limited (ASX, TSX, PNGX: NCM) advises that it has received a revised conditional and non-binding proposal (Revised Proposal) from Newmont Corporation (Newmont) to acquire 100% of the issued shares in Newcrest, by way of a scheme of arrangement.

Under the Revised Proposal, Newcrest shareholders would be entitled to receive 0.400 Newmont shares for each Newcrest share held.

In addition, the Revised Proposal permits Newcrest to pay a franked special dividend of up to US$1.10 per share[2] on or around the implementation of the scheme of arrangement. In aggregate, the Revised Proposal represents an implied value of A$32.87 per share to Newcrest shareholders[1].

Following Newcrest's announcement of 16 February 2023, Newcrest and Newmont signed a non-disclosure and standstill agreement. Newcrest subsequently provided Newmont with access to limited, non-public information on a non-exclusive basis to determine if Newmont could provide an improved proposal that appropriately reflected the value of Newcrest.

The implied consideration which would be received by Newcrest shareholders under the Revised Proposal from Newmont, when aggregated with the franked special dividend, represents an increase of 16.0%[3] to Newmont's initial proposal (0.363x exchange ratio) and represents:

- an implied Newcrest share price of A$32.87 per share[1];
- an implied equity value of A$29.4 billion and enterprise value of A$32.0 billion for Newcrest[4];
- 31.1% ownership of the combined group by Newcrest shareholders on implementation;
- a 46.4% premium to Newcrest's undisturbed closing price of A$22.45 per share on 3 February 2023[5]; and
- a 41.2% premium to Newcrest's undisturbed 30 day volume weighted average price (VWAP) of A$22.22 per share on 3 February 2023[5,6].

[1] Based on: 1) exchange ratio of 0.400x (with implied Newcrest price calculated using Newmont's closing price on the NYSE of US$52.05 per share as of 6 April 2023 and an AUD:USD FX rate of 0.667 as of 6 April 2023); and 2) a franked special dividend of up to US$1.10 per share.
[2] Newcrest expects to have sufficient franking credits available to frank a dividend to an amount of US$1.10 per share. The franking of the special dividend amount is subject to change based on timing of completion of the transaction, business performance, foreign exchange movements and ATO ruling.
[3] Based on an aggregate implied offer ratio of 0.4211x, which assumes the US$1.10 per share dividend is paid in full and reflects spot AUD:USD FX rate of 0.667.
[4] Equity value based on: 1) exchange ratio of 0.400 (with implied Newcrest price calculated using Newmont's closing price on the NYSE of US$52.05 per share as of 6 April 2023 and an AUD:USD FX rate of 0.667 as of 6 April 2023); 2) a franked special dividend of up to US$1.10 per share; and 3) 894,230,732 Newcrest shares outstanding. Newcrest enterprise value calculated as implied equity value and net debt of US$1.7 billion.
[5] Represents the last trading day prior to Newcrest's 6 February 2023 market release confirming Newmont's previous proposals.
[6] Calculated using Newmont's undisturbed 30 day VWAP on the NYSE of US$51.56 per share, converted to A$74.51 per share using spot AUD:USD for each trading day.

Forward Looking Statements

This document includes forward looking statements and forward looking information within the meaning of securities laws of applicable jurisdictions. Forward looking statements can generally be identified by the use of words such as "may", "will", "expect", "intend", "plan", "estimate", "target", "anticipate", "believe", "continue", "objectives", "outlook" and "guidance", or other similar words and may include, without limitation, statements regarding estimated reserves and resources, internal rates of return, expansion, exploration and development activities and the specifications, targets, results, analyses, interpretations, benefits, costs and timing of them; certain plans, strategies, aspirations and objectives of management, anticipated production, sustainability initiatives, climate scenarios, dates for projects, reports, studies or construction, expected costs, cash flow or production outputs and anticipated productive lives of projects and mines. The Company continues to distinguish between outlook and guidance. Guidance statements relate to the current financial year. Outlook statements relate to years subsequent to the current financial year.

These forward looking statements involve known and unknown risks, uncertainties and other factors that may cause the Company's actual results, performance, and achievements to differ materially from any future results, performance or achievements, or industry results, expressed or implied by these forward looking statements. Relevant factors may include, but are not limited to, changes in commodity prices, foreign exchange fluctuations and general economic conditions, increased costs and demand for production inputs, the speculative nature of exploration and project development, including the risks of obtaining necessary licences and permits and diminishing quantities or grades of resources or reserves, political and social risks, changes to the regulatory framework within which the Company operates or may in the future operate, environmental conditions including extreme weather conditions, recruitment and retention of personnel, industrial relations issues and litigation. For further information as to the risks which may impact on the Company's results and performance, please see the risk factors discussed in the Operating and Financial Review included in the Appendix 4E and Financial Report for the year ended 30 June 2022 and the Annual Information Form dated 14 December 2022 which are available to view at www.asx.com.au under the code "NCM" and on Newcrest's SEDAR profile.

Forward looking statements are based on management's current expectations and reflect Newcrest's good faith assumptions, judgements, estimates and other information available as at the date of this report and/or the date of Newcrest's planning or scenario analysis processes as to the financial, market, regulatory and other relevant environments that will exist and affect Newcrest's business and operations in the future. Newcrest does not give any assurance that the assumptions will prove to be correct. There may be other factors that could cause actual results or events not to be as anticipated, and many events are beyond the reasonable control of Newcrest. Readers are cautioned not to place undue reliance on forward looking statements, particularly in the current economic climate with the significant volatility, uncertainty and disruption caused by global events such as geopolitical tensions and the ongoing COVID19 pandemic. Forward looking statements in this document speak only at the date of issue. Except as required by applicable laws or regulations, Newcrest does not undertake any obligation to publicly update or revise any of the forward looking statements or to advise of any change in assumptions on which any such statement is based.