ARTICLES

MURRIN MURRIN CREDITORS' SCHEMES

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A company and its creditors may restructure their debt through consensual arrangements (eg individual negotiations), pursuant to a deed of company arrangement, or by way of scheme of arrangement.

Of the many schemes of arrangement approved by Australian courts in recent years, only a very small proportion have been creditors' (as opposed to members') schemes.

This article explores a few of the complexities and critical issues arising from the four separate but interdependent creditors' schemes of arrangement relating to the Murrin Murrin project in Western Australia, which were approved by the Supreme Court of Western Australia in January last year.[1]

1. WHY A CREDITORS' SCHEME OF ARRANGEMENT?

A company and its creditors may restructure their debt through consensual arrangements (eg individual negotiations), pursuant to a deed of company arrangement,[2] or by way of scheme of arrangement. This article focuses on the last of these – the creditors' scheme.

In brief a scheme of arrangement or compromise approved by the court under section 411 of the *Corporations Act* (Cth) (CA) enables the company to make arrangements which will bind all its creditors, or a class of its creditors, even if individual creditors oppose the restructure.[3] The key components of the scheme process provided for in section 411,[4] are:

(1) The applicant company prepares the explanatory statement, being the main document prescribed by the CA to inform creditors of the scheme;[5]

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1 The judgments in relation to all hearings for all four schemes are consolidated in two cases: *Re Glencore Nickel Pty Ltd* (2003) 44 ACSR 210; BC200300179; [2003] WASC 18; *Re Anaconda Nickel Holdings Pty Ltd* (2003) 44 ACSR 229; BC200300180; [2003] WASC 19.

2 Part 5.3A of the *Corporations Act 2001* (Cth) provides for a deed of company arrangement regime, where a company is under administration. Similar to the scheme of arrangement, it has the benefit of binding all the relevant creditors of the company: section 444D(1) of the *Corporations Act*.

3 Such arrangements may involve, for example, deferral, rearrangement or extinguishment of the company's obligations to creditors.

4 In addition to section 411 of the CA, other relevant legislation includes section 412 of the CA, Regulation 5.1.01 and Schedule 8 of the *Corporations Regulations 2001* (Cth), and section 1322 of the CA (with respect to irregularities). There may also be applicable rules of the relevant court, for example, in relation to advertisements and incorporation of CA meeting regulations (eg Order 81G of the Rules of the Supreme Court 1971 (WA)). There are also applicable ASIC policy statements.

5 Section 411(3), regulation 5.1.01 and Schedule 8 of the *Corporations Regulations 2001* (Cth).

(2) ASIC is given notice and a reasonable opportunity to review the terms of the proposed scheme and the explanatory statement;[6]

(3) The first court hearing, at which ASIC may make submissions and when the court may order the convening of meetings of the creditors or classes of creditors and despatch of the explanatory statement;[7]

(4) A meeting is held for creditors to vote for or against the scheme. The scheme vote must be supported by a majority in number of creditors present and voting, whose debts and claims amount in aggregate to at least 75% of the total amount of debts and claims of the creditors present and voting.[8]

(5) Final court hearing for approval of scheme.[9]

(6) Office copy of court orders lodged with ASIC – the court order approving the scheme is only effective on lodgment with ASIC.[10]

In practical terms, a typical scheme would involve the process set out on p165 below:
This court-approval process provides a statutory mechanism for a company seeking to restructure its debt, a more viable option than individual negotiations where there is a large number of creditors:

> "The great attraction of the scheme of arrangement as a procedure for corporate reconstruction flows from the perception that the court's order, binding all relevant parties including dissentients, is final, subject to appeal."[11]

Such was the case in relation to the principally US debt of the Murrin Murrin project (Project), established in 1997 to develop a nickel and cobalt deposit near Leonora. The Project is owned by a joint venture between Glenmurrin Pty Limited (Glenmurrin) (40%) and Murrin Murrin Holdings Pty Limited (MMH) (60%).[12] The Project is operated by Anaconda Operations Pty Ltd, a related company of MMH.

Late in 2002 each of Glenmurrin and MMH, and their parent companies, Glencore Nickel Pty Limited (Glencore Nickel) and Anaconda Nickel Holdings Pty Ltd (ANH), respectively, applied to the Supreme Court of Western Australia pursuant to section 411 for:

- orders to convene scheme meetings and to approve a explanatory statement to be despatched to creditors in relation to the scheme; and
- directions as to the convening, advertising, holding and conduct of those meetings.

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6 Section 411(2), (3).

7 Section 411(1), (2).

8 Section 411(4)(a)(i) materially provides that a scheme is binding if and only if: "(i) in the case of a compromise or arrangement between a body and its creditors or a class of creditors - the compromise or arrangement is agreed to by a majority in number of the creditors or of the creditors included in that class of creditors, present and voting, either in person or by proxy, being a majority whose debts or claims against the company amount in the aggregate to at least 75% of the total amount of the debts and claims of the creditors present and voting in person by proxy, or of the creditors included in that class presenting and voting in person or by proxy, as the case may be".

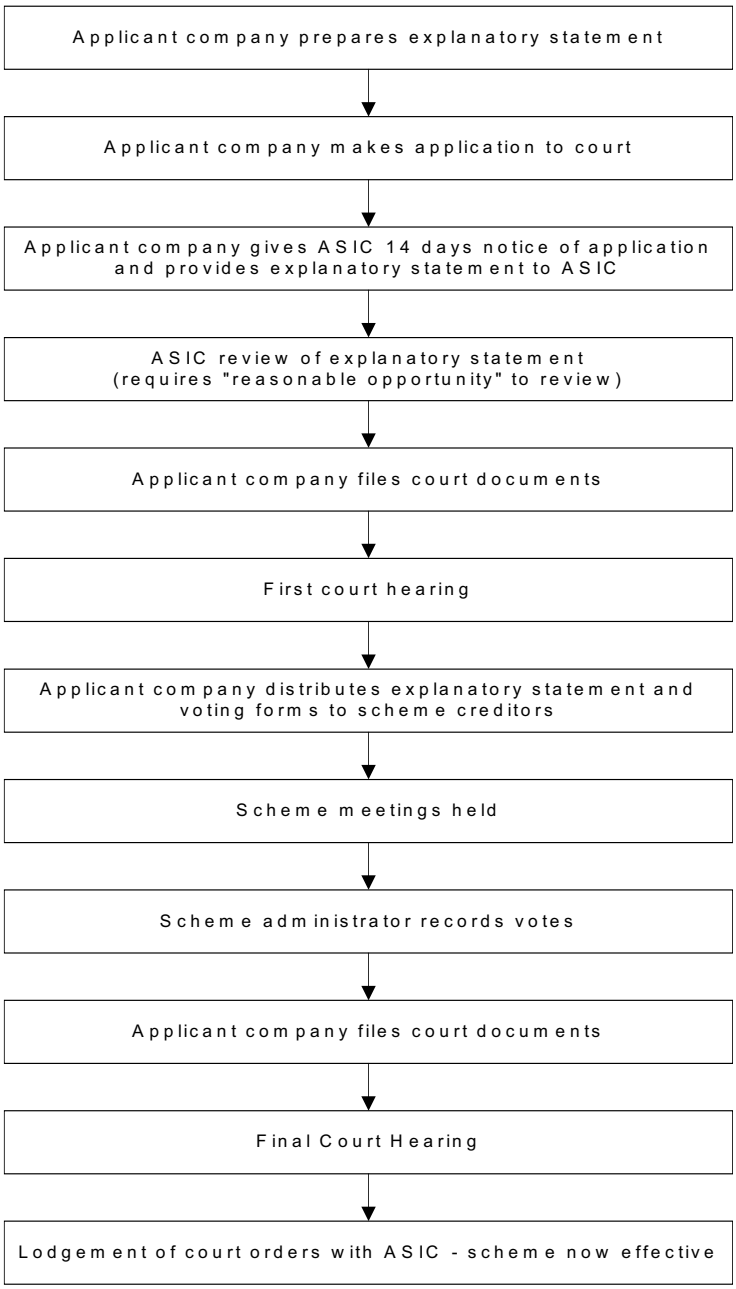
9 Section 411(4), (6).

10 Section 411(10).

11 *Ray Brooks Pty Ltd v New South Wales Grains Board* (2002) 41 ACSR 631 at 635; BC 200202509; [2002] NSWSC 374.

12 The structure of the joint venture and the original financing arrangements put in place in 1997 are set out in Schedules 1 and 2 respectively to this article. Those financing arrangements are discussed in greater depth in R Ladbury, "Resource Project Financing: Capital Markets Project Financing" [1998] AMPLA Yearbook 190.

These applications were the result of lengthy discussions with the companies' secured creditors throughout 2002, and were already fully supported by a majority of those creditors before the applications were made.



2. DEAL STRUCK WITH THE PROJECT'S SECURED CREDITORS

One unusual aspect of the Glencore Nickel and Glenmurrin schemes of arrangement was that they involved only those companies' *secured* creditors. The unsecured creditors of Glencore Nickel and Glenmurrin were unaffected by the proposed restructure pursuant to the schemes of arrangement – they continued to be paid 100 cents in the dollar.

The two relevant categories of secured debt of Glencore Nickel and Glenmurrin (Scheme Debt),[13] were:

(a) Bonds (US$300M)

The principal amount comprised the US$300 million aggregate principal amount of 9% senior secured bonds issued by Glencore Nickel in 1997 and due in 2014, and guaranteed by Glenmurrin (Bonds).[14]

(b) Working Capital Facility (US$15M)

Under a Working Capital Facility Agreement dated 30 September 1999 (WCFA), ABN Amro Bank NV (ABN Amro) made a US$15 million cash advance working capital facility available to Glenmurrin (with Glencore Nickel as guarantor), which was fully drawn.

Both the holders of the Bonds (Bondholders) and ABN Amro (together Secured Creditors) had the same security on a pari passu basis.

In 2002 Glencore Nickel and Glenmurrin were in default under the Indenture, which governs the Bonds, and under various related security documents. The joint venture companies were able to continue financing the Project through a combination of the Project's available cash flow and proceeds from a US$10 million first priority senior secured loan provided to the Project (with Glenmurrin as borrower and Glencore Nickel as guarantor) by Glencore International AG.

This, however, was an interim measure pending some final resolution between Glencore Nickel, Glenmurrin and the Secured Creditors. Following extensive negotiations between the two companies and their Secured Creditors, in August and October 2002 Secured Creditors representing in excess of 75% of the aggregate principal amount and accrued interest outstanding of the Secured Debt (Consenting Secured Creditors) agreed not to take enforcement action with respect to specified events of default under the Indenture and WCFA before 15 February 2003 (or no later than 28 February 2003).

In addition, under a Voting Agreement dated 30 September 2002, the Consenting Secured Creditors agreed to vote in favour of the financial restructuring of Glencore Nickel and Glenmurrin as described in the Voting Agreement and a draft explanatory statement as prescribed by section 411 of the CA.

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13 Glencore Investment AG was also a creditor of Glencore Nickel, but that debt was subordinated to all other creditors of Glencore Nickel by a subordination deed dated 4 November 2002.

14 Under an offering memorandum dated November 24, 1997, Glencore Nickel offered US$300 million aggregate principal amount of 9% senior secured bonds due 2014 (Initial Bonds), with Glenmurrin as guarantor. As a condition to the purchase of the Initial Bonds, Glencore Nickel agreed to commence an exchange offer following the offering of the Initial Bonds, under which the Initial Bonds would be exchanged for similar US$300 million aggregate principal amount of 9% senior secured bonds due 2014. Under a prospectus dated April 21, 1998, Glencore Nickel offered the Bonds in exchange for the Initial Bonds (which were identical in all material respects, except that the transfer restrictions and the registration rights applicable to the Initial Bonds did not apply to the Bonds).

Therefore, by September 2002, MMH and ANH, and Glencore Nickel and Glenmurrin, had reached agreement with in excess of 75% of their respective secured creditors to an agreed financial restructure of their respective secured debts over the Project. The terms of that agreement are reflected in four separate schemes of arrangement.[15] The Glencore Nickel and Glenmurrin schemes (Schemes) were identical,[16] were governed by the same explanatory statement and other implementation documents,[17] and in very broad terms involved two reciprocal primary objectives:

(a) the extinguishment of secured debt of each of Glencore Nickel and Glenmurrin (with corresponding discharges and releases of securities);

(b) in return for the Scheme Creditors receiving their Entitlement,[18] comprising a proportionable share of:

  (i) a cash payment funded by Glencore International AG, the ultimate holding company of Glencore Nickel (being a cash payment in aggregate of US$76 million); and

  (ii) proceeds from an ongoing arbitration against Flour Australia Pty Ltd (Fluor) relating to the Project (Fluor Arbitration).[19]

3. COURT'S FUNCTION AT FIRST AND FINAL HEARINGS

The first hearing of the applications was before McLure J in the Supreme Court of Western Australia on 17 November 2003, at which her Honour convened meetings for the scheme votes for

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15 MMH and ANH separately undertook financial restructures of their respective secured debt which were parallel and interdependent with (their approval being conditions precedent to) the Glencore Nickel and Glenmurrin schemes. Those restructures are not covered in this article.

16 The terms of each of the Schemes were not listed in one document, but instead comprised:
(a) sections 2, 6, 7, 8 and 9 of the explanatory statement; and
(b) an implementation deed, other than c11 9 and 10. The implementation deed annexed and included the "Glenmurrin Fluor Trust Documents", which comprised the Fluor Proceeds Trust Agreement, the Fluor Litigation Deed, the Glenmurrin Fluor Fixed Charge and the Glenmurrin Fluor Deed of Priority. These documents related to the management of the continued funding of, and distribution of proceeds from, the Fluor Arbitration as part of the Schemes.
Note discussion at section 5 and footnote 32 below regarding where the terms of the schemes can be recorded.

17 The Scheme documents comprised not only the explanatory statement but significant voting and implementation documentation, such as initial transaction documents prior to schemes (1 November 2002); Scheme meeting notices for each company; Proxy forms and Postal Ballots for ABN Amro for each company; Proxy forms, Master Proxy Forms, Postal Ballots and Master Postal Ballots for the Bondholders for each company; Proofs of Debt for the Bondholders and ABN Amro for each of the companies; ASIC forms; company and director releases; the Supplemental Notice; all court process documents (affidavits etc); US 304 proceedings documentation.

18 This distribution would take place once certain conditions precedent were met by the Effective Date (which was 28 February 2003). The conditions precedent ranged from court approval of the four schemes, to transaction documents remaining valid and binding, through to receipt by the scheme administrator of funds for distribution to the Scheme Creditors.

19 More specifically, the Scheme Creditors received a proportionate beneficial interest in certain proceeds from the Fluor Arbitration, which would be initially distributed pursuant to the Fluor Litigation Deed by the Scheme Administrator to the Fluor Trustee, the latter entity then making further distribution to the Secured Creditors pursuant to the Fluor Proceeds Trust Agreement.

8 January 2003, with the final hearing for approval of the schemes then scheduled for 14 January 2003.[20]

In relation to the first hearing, McLure J observed that:

> "The task of the court in deciding whether to make orders under s 411 of the Act convening a meeting a creditors is to see, on the material placed before it, that:
>
> (a) the proposal fits within the statutory concept of arrangement or compromise;
>
> (b) all the main facts relevant to the exercise of their judgment will be available to creditors;
>
> (c) ASIC has had a reasonable opportunity to examine the proposal;
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> (d) the scheme is so conceived and presented as to its structure, purpose and effect that there is no apparent reason, so far as can be foreseen, why it should not in due course receive the court's approval if the necessary majority of creditors is achieved."[21]

Therefore, the court's role at this stage of the process is *not* to pass finally on whether it should be approved. That matter requires the creditors meeting, the scheme vote as expressing the will of the creditors and the opportunity for any objections by dissenting parties.[22]

At the first hearing, in exercising her discretion to convene the scheme meetings and approve the explanatory statement, her Honour had regard to the following matters (amongst others):

- the existence of executed voting agreements meant that a very significant proportion of creditors had already indicated their support for the compromise;
- ASIC had considered the Schemes and "had identified nothing that caused it to appear [at the first hearing or] make submissions opposing" the orders sought by Glencore Nickel or Glenmurrin;
- if the scheme did not take effect "the most likely result would be the appointment of administrators under the CA;
- it appeared that the Scheme Creditors would be better off financially under the Schemes;
- there was no evidence or suggestion that the Schemes were contrary to public policy"; and
- there was no apparent reason why in due course the Schemes would not receive the court's approval.[23]

McLure J also confirmed the role of the court on the *final* court hearing, following the scheme vote, for approval of the schemes. Provided the court is satisfied that it has jurisdiction, in exercising its discretion whether or not to approve the schemes:

> "where there is no opposition to the order for approval and there are no public policy grounds for withholding approval, very considerable weight should be given to the commercial judgment of the secured creditors who have voted to approve the schemes."[24]

At the final hearing in January 2003, McLure J was of the view that nothing had changed as to her earlier conclusion that there was no apparent reasons which had been brought to her attention or

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20 A timetable of the court hearings, ASIC notifications and transaction key dates is set out in Schedule 3 to this article.

21 McLure J at para [33], citing at para [34] *Re Ranger Minerals Ltd; Ex parte Ranger Minerals Ltd* (2002) 42 ASCR 582; *Re Hills Motorway Ltd* (2002) 43 ACSR 101 at 103; *Re Foundation Healthcare Ltd* (2002) 42 ASCR 252.

22 McLure J at para [35], quoting Hayne J in *Re Sonodyne International Ltd* (1994) 15 ACSR 494 at 497.

23 McLure J at para [61].

24 McLure J at para [71].

which she could foresee why the schemes would not in due course receive the court's approval. In determining the applications for approval, her Honour considered whether:

(a) the applicants had complied with court orders and other directions, concluding that with minor exceptions the applicants had done so;

(b) the statutory majorities in section 411(4)(a)(i) were met (which was achieved); and

(c) section 411(17) of the CA, which prohibits the court from approving a scheme unless either it receives such a statement, or it is satisfied that the scheme has not been proposed to avoid the operation of the takeover provisions of Chapter 6 of the CA, had been complied with. The court was satisfied that the schemes had not been proposed for the purpose of enabling any person to avoid Chapter 6 of the CA.[25]

After commenting on two discrete matters,[26] her Honour approved the Schemes.[27]

4. ROLE OF ASIC IN SCHEME PROCESS

The section 411 combination of creditor meetings and court approval involves significant participation by ASIC. At the very outset of the scheme process, ASIC must be notified of the hearing of the application at least 14 days in advance, and be provided with a reasonable opportunity to review the draft explanatory statement and then make submissions to the court.[28] Obviously the more complex and intricate the proposed scheme components, the more notice and background material should be provided to ASIC to ensure that any concerns are addressed prior to the hearing.

In relation to the Schemes, disclosure was made on a continuing basis to ASIC, for example providing early drafts of the explanatory statement and other scheme documentation, and often meeting with ASIC to provide further explanations. ASIC advised in writing prior to the first and final hearings that it did not propose to appear at those hearings to make submissions or intervene to oppose the Schemes.[29]

Another critical role of ASIC is the provision at the final hearing of a written statement that it had no objection to the scheme under section 411(17).[30] Both Glencore Nickel and Glenmurrin received such written statements from ASIC, which were produced to the court.[31]

5. COMPLICATED ASPECTS OF THE SCHEMES

The Schemes raised a variety of legal and commercial issues, ranging from quite narrow legal questions (eg the form of the Fluor Funding Election and whether it could take place at the

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25 McLure J at para [87]. ASIC's role in relation to section 411(17) is discussed below in section 4.

26 These matters, being amendment to the Schemes and the court's jurisdiction to bind creditors whose contractual rights are governed by law outside Australia, are discussed in detail below at sections 11 and 6 respectively.

27 McLure J at paras [88-92].

28 Section 411(2). Note also relevant ASIC policy statements.

29 ASIC also provided a letter in relation to the additional court hearing in December 2002 to approve issue of the Supplemental Notice to Scheme Creditors, discussed below at section 11. In that letter ASIC confirmed that it had no objection to the proposed amendments or to the despatch of the supplemental notice to the scheme participants.

30 Note that section 411(17) specifies that the court need not approve the scheme merely because ASIC provides such a statement.

31 McLure J at para [87].

meeting convened for the scheme vote),[32] to broader issues, such as whether the court has jurisdiction at all. In addition the companies in their applications encountered many unforeseen commercial and novel factual situations which often required considerable innovation, usually in minimal timeframes. Some of these more complex interesting dimensions of the Schemes are discussed further below.

6. BINDING DISSENTIENT US CREDITORS: JURISDICTION AND CONCURRENT US 304 PROCEEDINGS

As noted above, the real benefit of a court-approved section 411 scheme is that it binds *all* relevant creditors of the applicant company. Where the contracts that give rise to, or regulate, the creditors' debts are governed by the law of another jurisdiction, the court may consider whether a creditors' scheme of arrangement pursuant to section 411 of the CA can bind those creditors.

At the first hearing, McLure J raised this preliminary issue in the context of whether the court had jurisdiction to approve the schemes; if it did not have jurisdiction, the court would not even proceed to ordering the meetings of creditors.[33] It was therefore a fundamental matter that needed to be addressed for the court to proceed to convene the meetings and then approve the Schemes.

Heenan J, in *Re Bulong Nickel Pty Ltd*[34] (where the proposed scheme also modified the rights of creditors resident outside Australia whose bonds were governed by an indenture governed by the law of New York) was satisfied that Part 5.1 and section 411 of the CA were properly characterised as a law relating to insolvency of corporations. Such a law accommodates the interests of the community as well as the company, its members and creditors.

This association with insolvency means that the compulsory discharge or variation of contractual rights between the company and its creditors approved in accordance with the legislation will be effective notwithstanding some or all of those rights are governed by a foreign system of law. It followed that:

> "s 411 confers on this court a power to approve a compromise or arrangement even if the effect of the scheme of arrangement will be to modify or discharge obligations existing between the company concerned and third parties under a contract which stipulates that it is to be governed by a foreign system of law.[35]

Similar factual circumstances to those in *Re Bulong Nickel Pty Ltd* arose in relation to the Schemes – the Bonds were regulated by documents which stipulated the governing law to be the law of New York. In determining whether or not to convene the creditor meetings, McLure J agreed with Heenan J's statement of law set out above, but continued:

> "it is possible that the schemes, if approved, may not be binding upon a dissentient or non-participating bondholder who sought to enforce rights under the bonds or the securities in the US. For that reason, it is a term of the schemes that, on or before the effective date, applications are to be made in the US under s 304 of the US Bankruptcy Code (304

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32 The view was taken that the scheme meetings could not extend to such business, so that the Fluor Funding Election could not be voted on at the same meeting.

33 McLure at para [39]. Note that it was a condition precedent to the Schemes that each of them was approved by the court and other regulatory bodies. Accordingly, from the Consenting Secured Creditors' point of view, the court was given a role in order that the Schemes may operate.

34 (2003) 44 ASCR 210.

35 McLure at para [15].

proceedings) to enjoin scheme creditors from taking action in the US in relation to any property or rights dealt with under the schemes."[36]

The Schemes did not expressly address the risk of the schemes not binding all bondholders in actions taken in the US. The 304 proceedings were not conditions precedent to the scheme, and there was no other express scheme provision for that risk's theoretical potential to impact on Glencore Nickel's and Glenmurrin's solvency.[37] Her Honour's view was that it was relevant to consider the potential consequences of successful "post-scheme" US actions by dissentient or non-participating Bondholders, particularly as to the companies' solvency at that time, and whether conditions or alterations to the Schemes should be made or imposed under section 411(6) of the CA.[38]

At the final hearing McLure J concluded that it was unnecessary to make the court's approval of the Schemes subject to alterations or conditions.[39] Evidence at the final hearing, in relation to the extent of the risk of dissentient or non-participating Bondholders seeking to enforce their rights in the US, with the concomitant risk to the companies' insolvency, was that:

(a) the 304 proceedings had been commenced, a preliminary injunction granted in the week prior to the final hearing, and a permanent injunction would be sought if the Schemes were approved;

(b) it was likely that permanent injunctive relief would be granted;

(c) in any event, under the comity principle it was probable that the US courts would give effect to the orders of the Supreme Court of Western Australia.

Consistent with the court's role in the final hearing noted above, her Honour concluded that it was unnecessary for the court to make its grant of approval subject to alterations or conditions – "[t]he scheme creditors were provided with relevant information on this subject and made their commercial judgment".[40]

7. WHO IS ENTITLED TO VOTE AT THE SCHEME MEETING?

For these Schemes the practical question was not whether the Scheme Creditors were "creditors" for the purposes of section 411,[41] but whether the parties identified in the explanatory statement as

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36 McLure at para [41].

37 McLure J at paras [43], [45] and [90].

38 Note however that those considerations were not a ground for refusing to convene the scheme meetings: McLure at para [45].

39 McLure J at para [92]. Note also that her Honour made a stay order, pursuant to section 411(16) of the CA, that any proceedings in any action or other civil proceedings by a Scheme Creditor against Glencore Nickel or Glenmurrin be restrained until the earlier of the Effective Date (28 February 2003) or further order, except by leave of the court and subject to such terms as the court may impose. Compare the much earlier decision in *Re Reid Murray Acceptance* [1964] VR 82, which held that section 411(16) did not permit a stay of future, as distinct from pending, proceedings.

40 McLure J at para [92].

41 For any scheme the court must identify the "creditors", and any distinct *classes* of creditors, who will be bound by the scheme. The term "creditor" is generally given a wide meaning (*Glendale Land Development Ltd (in liq)* [1982] 2 NSWLR 563; (1982) 7 ACLR 171; *Bond Corp Holdings Ltd v Western Australia (No 2)* (1992) 7 WAR 61; 7 ACSR 472, applied by McLure J at para [50]), but it is not defined in, or for the purposes of, section 411. In relation to the Schemes, McLure J concluded that there was no need to divide the Scheme Creditors into different classes – they held the same security under the same trust document, were ranked pari passu, and were to receive the same proportionate entitlements (McLure J at paras [47] - [49]).

voting at the Scheme Meetings (as well as participating in the Fluor Funding Election) were so entitled to vote.

This was because the explanatory statement did not simply provide for "the Bondholders" to vote.[42] The voting and election arrangements for the Bondholders, with the intention that they would bind the owners of the Bonds but also properly empower the correct voting entities in respect of those Bonds, involved the following persons:

- DTC, being the registered holder of the Bonds;
- Custodians, each being a broker, bank, or other nominee acting as a custodian for a one or more beneficial owners; and
- beneficial owners as of the Record Date,[43] each being the beneficial owner of the relevant Bonds or other person entitled to exercise the voting rights in respect of those Bonds.[44]

On one view, the only "creditor" in respect of the Bonds was DTC because it was the party in whose name all of the Bonds were issued and hence was the registered holder of all the Bonds. On that basis DTC would be the only creditor entitled to vote, meaning that the ultimate beneficial owners of the Bonds would not have the opportunity to vote. To avoid this result, the explanatory statement was despatched in a manner which is customary in the securities industry in the US for holders of bonds (ie to both DTC and each Custodian for distribution to its beneficial owners), and provided for voting procedures which acknowledged that industry's "tiered" structure.[45]

In terms of solicitation mechanics, this multi-layered distribution, collation and voting procedure necessitated:

- considerable tailoring of proposed voting instruments together with preparation of additional "master" voting instruments for the Custodians to draw together their participant votes;
- significant involvement and monitoring by a specialist US solicitation agent (the Voting Agent), who acted as authorised agent of the scheme administrator in the US;
- the Custodians ensuring their beneficial owners received the appropriate material and returning properly completed master voting instruments to the Voting Agent in a timely manner. This was a critical role, since neither the Voting Agent nor the scheme administrator would be looking behind the master voting instruments prepared by the Custodians to the initial voting forms completed by the beneficial owners; and

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42 There was no issue in relation to the only other Secured Creditor, ABN Amro. ABN Amro participated directly and in its own right in the vote on the Schemes and the Fluor Funding Elections in accordance with the explanatory statement. In its case, all correspondence on voting, elections and the Letter of Proof of Debt was sent from, and returned to, the scheme administrator.

43 The Record Date was close of business in New York on the date the court convened the Scheme meetings ie 18 November 2002. Consequently, the register of participants for Bonds was closed for voting purposes on this date.

44 A schematic representation of the Scheme Creditors is set out in Schedule 4, and the mechanics for voting on the Schemes (by way of proxy forms) and for participating in the Fluor Funding Elections (by way of postal ballots) is set out in Schedule 5 to this article.

45 The voting procedures utilised in the Schemes are essentially identical to those used in the RSL Communications plc scheme of reorganisation which involved an English company in administration, with most of that company's bonds being issued in the US. Those procedures were endorsed by the Chancery Division of the High Court of England and Wales. McLure J noted at para [32] in relation to this structure of voting procedures that "[i]t seems the cumbersome procedure is necessitated by the confidentiality attaching to the identity of the beneficial owners of the bonds."

- extensive affidavit material relating to the distribution of material and notifications from the two companies through to those various layers, and the actual voting process of those layers, both at the first hearing in order for approval of the proposed methodology, and at the final hearing on confirmation of the proper process being implemented.

The explanatory statement provided for an equally tailored process (ie one matching the usual mechanics of the US public securities such as bonds) in relation to the letters of proof of debt. These letters, if uncontroverted by the scheme administrator, established that Scheme Creditor's claim against Glencore Nickel and Glenmurrin. In comparison to the voting process, however, the distribution of material was much simpler since it did not go down to the Custodian layer. Instead only the Bond Trustee was required to ensure that a single letter was lodged to allow *all* beneficial owners of the Bonds to receive their proportionate payment of the cash payment (which would be distributed by the scheme administrator through DTC).[46]

8. CONCURRENT DISTRIBUTION OF SCHEME MATERIAL IN AUSTRALIA AND US

One of the significant practical issues for the companies under the section 411 process arose from the relevant court proceedings and the scheme administrator being in Perth, Australia, while Scheme Creditors were principally based in Sydney and New York. In addition to managing concurrent deadlines across time zones, the purely logistical matter of printing, collating and distributing scheme material needed to be considered.

The solution was to utilise local printers in New York for production of the explanatory statement (a 500 page bound document), overseen by the Voting Agent (who would produce the shorter notices of meeting and voting instruments to accompany despatch of the explanatory statement). Immediately after the explanatory statement was approved for distribution at the first court hearing, an electronic copy of the explanatory statement was "uploaded" on to the secure internet site of the US printer, who was then able to download the relevant documents within a few hours and commence the printing process.

With much fewer Scheme Creditors in Australia, the same scheme documents were simultaneously printed in Australia, for distribution by the Scheme Administrator out of Perth.

9. IMPORTANCE OF "POST-SCHEME" SOLVENCY

It is fundamental for the viability of a creditors' scheme, particularly in its commercial acceptability to the voting creditors, that the company will be solvent once the scheme is put into effect. As such, the court will take into account the company's post-scheme solvency in deciding to convene a scheme meeting, and ultimately approve the scheme. One of the matters to which McLure J had regard in exercising her discretion to convene the Scheme meetings was that:

> "if the schemes did not take effect, the most likely result would be the appointment of administrators under the Act which in turn would be likely to result in the collateral trustees enforcing their security interests. Further, based on the assumptions contained in the explanatory statement, it appeared that the scheme creditors would be financially better off under the schemes than if the plaintiffs were to be wound up."[47]

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46 A schematic representation of the process for returning Letters of Proof of Debt and for the payment of the Cash Payment to Scheme Creditors is set out in Schedule 6 to this summary.

47 McLure J at para [61].

This information contained in the explanatory statement is in fact prescribed by the CA, and reflects the statute's concern that the creditors are informed on the financial position of the company "pre" and "post" the scheme. Specifically, for a creditor's scheme the company must set out in the explanatory statement:

- the expected dividend if the company is liquidated within six months of the application to the court in relation to the scheme; and
- the expected dividend that would be available to creditors if the scheme is put into effect as proposed.[48]

In addition to this prescribed information, Glencore Nickel and Glenmurrin provided half yearly unaudited financial statements and a pro forma statement of financial position adjusted for effect of the schemes to provide a clear indication of solvency (eg reflecting the debt extinguished by the schemes and indicating positive net assets).

10. AMENDMENT TO SCHEMES PRIOR TO VOTE

The Fluor Arbitration featured quite significantly in the explanatory statement and the other scheme documentation. For instance, the Scheme Creditors could elect to participate in some of the funding arrangements for the Fluor Arbitration (which is proceeding in two parts, Phase 1 and Phase 2), both as a group (with the scheme creditors of MMH and ANH, collectively the "Collective Scheme Creditors") and individually.

Initially it was contemplated that there would be four such "Fluor Funding Elections".[49] However only one out of the four proposed Fluor Funding Elections was open to the Scheme Creditors at the time of voting, as a result of an amendment to the Schemes approved by McLure J at an additional interim hearing on 17 December 2002.

This amendment was the outcome of an unexpected early *partial* payment to the scheme administrator by Fluor on 5 December 2002, of undisputed portion of a tranche of the Fluor Arbitration proceeds, being the sum of A$27,632,623.39 (the Payment). Such a partial payment was not foreseen. The scheme documents, already distributed to Scheme Creditors, only contemplated a "full one-off" receipt of a "Phase 1 Net Recovery", being the *final* proceeds of Phase 1 of the Fluor Arbitration.

Amendment to a scheme between the first hearing and the actual scheme meetings has not been the subject of extensive judicial consideration. However, a number of decisions make it clear that:

- directors of applicant companies, having "an obligation to disclose to the members or creditors affected by the scheme any material new development occurring after the despatch of the explanatory statement and notice of meeting and before the scheme was approved … may well think it prudent to apply to the court for directions";[50] any such application for

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48 Items 8201(a) and (b) of Schedule 8 of the Regulations (applied by regulation 5.1.01(1)(a)). Under Schedule 8 other financial information to be provided in an explanatory statement includes most recent audited annual statements and financial information required by Form 507.

49 The two group elections essentially involved an election to contribute towards funding of Phase 2, depending on whether proceeds from Phase 1 was received before or after the Effective Date. There were also two individual elections to contribute towards funding certain Phase 1 expenses.

50 *Cleary v Australian Co-Op Foods (No 3)* (1999) 32 ACSR 701 at 745 per Austin J. See also at 711, where Austin J accepted the propositions that "directors of a corporation who seek the approval of its members must provide such material information as will fully and fairly inform the members of what is to be considered. At least in the context of the scheme of arrangement under the Corporations Law, the directors' duty continues until the members have taken their decision and the court has approved it, in

directions regarding disclosure of supplementary information about a material new event may be dealt with in the court's supervisory jurisdiction to make appropriate orders prior to the second final hearing;[51]

- accordingly any new material circumstance should be promptly brought to the attention of the court so that its implications for the scheme and the company's continuing disclosure obligation can be properly assessed.[52]

On 12 December 2002, the Board of Directors of Glencore Nickel and Glenmurrin each resolved to treat the Payment as Phase 1 Net Recovery received before the Effective Date and each resolved that this was for the overall benefit of each of the companies and of the Scheme Creditors. Further, each Board resolved to approve certain amendments to the Fluor Litigation Deed and to approve the Supplemental Notice for despatch to Scheme Creditors.

The Supplemental Notice:

- informed the Scheme Creditors of the receipt of the Payment, the manner in which it is proposed to be treated, and the advantages of the proposed treatment of the Payment. For example, certain deductions from the cash payment component of the payout to the Scheme Creditors once the Schemes were effective, were not longer required, so that the expected dividend if the Schemes are put into effect as proposed would increase from US$0.247 to US$0.256 per US$1.00 of Scheme Debt;
- explained the consequential amendments that have been made to the Fluor Litigation Deed and the explanatory statement. The most significant of these was that three of the four Fluor Funding Elections were disregarded. This achieved a considerable simplification of the material to be considered by Scheme Creditors.

The despatch of the Supplemental Notice was approved by the court on 17 December 2002,[53] but with reservations as to the possible prejudice to Scheme Creditors given the time period for such despatch and recording of votes/elections, particularly given the Christmas/New Year period. At both the 18 November and 17 December hearings McLure J emphasised the importance of evidence that the Scheme Creditors received proper and timely notification of the Schemes and the votes.[54]

From the actual results of the Fluor Funding Election it was clear that the vast majority of the Scheme Creditors who had returned the voting instruments had made their election in light of the Supplemental Notice (ie disregarding all elections other than Election 2). For the final hearing, lengthy and extensive affidavits were prepared by Voting Agent as to timing in the US over Christmas, customary US postal delivery times, actual delivery receipt notifications and lack of

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the sense that they must bring to the attention of the members and the court any change of circumstances which is material to the members decision".

51 Ibid at 746. His Honour further explained that any such directions would have the same general effect as the court's orders have when they are made at the first hearing (at 746).

52 *Re Australian Co-Operative Foods Ltd* (2001) 38 ACSR 71 at 93 per Santow J. Note also the general principle that it is the duty of a party asking ex parte for an order which creates or confirms rights to bring under the notice of the court all facts material to the determination of those rights: (*Thomas A Edison Ltd v Bullock* (1913) 15 CLR 679 at 682; *Bentley v Nelson* [1963] WAR 89 at 93-4; *Garrard v Email Furniture* (1993) 32 NSWLR 662 at 677). The existence of the duty of full disclosure is not confined to injunction cases, though (see *Garrard v Email Furniture* (1993) 32 NSWLR 662 at 676).

53 ASIC had been provided with the Supplemental Notice with explanatory information prior to the interim hearing, and provided a letter as discussed above in footnote 29.

54 McLure J at para [21].

complaints from Bondholders or Custodians. Her Honour's conclusion at the final hearing was that:

> "The evidence adduced at the hearing satisfied me that the documents the subject of the orders in November and December 2002 were promptly served on the bondholders. Further, there is no evidence that any custodian or beneficial owner complained of any inability to vote on the schemes or the Fluor funding election in the time available."[55]

11. ACTUAL SCHEME VOTES AND ELECTION

The Scheme Meetings for Glencore Nickel and Glenmurrin were held consecutively in Perth, Western Australia on 8 January 2003. No Scheme Creditors attended in person, but instead voted on the Schemes by proxy. Scheme Creditors also made the Fluor Funding Election at this time, by completing and returning postal ballots to the scheme administrator.[56]

Consequently, on 8 January 2003, the final votes and election were:

Final votes as at 8 January 2003			
	In Favour (US$ Scheme Debt)	**Against (US$ Scheme Debt)**	**Percentage of total Scheme Debt who voted/elected in favour**
Glencore Nickel Scheme Vote	272,353,461.47	nil	82%
Glenmurrin Scheme Vote	265,802,833.97	nil	80%
Fluor Funding Election	224,775,000	36,250,000	70.44%

Two matters required action by the scheme administrator and the Voting Agent in the days leading up to these meetings. All Scheme Creditors were required to return the relevant forms by the Proxy and Ballot Deadline, being just prior to the meetings.[57] First, when the scheme administrator in Perth on Saturday 4 January 2003 received by fax both the master voting instruments and a draft

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55 McLure J at para [89].

56 Scheme Creditors could only participate in the Fluor Funding Election by completing and returning the Postal Ballot. It was not considered at the scheme meetings, the view having been taken that the scheme meetings could not extend to such business.

57 Proxy and Ballot Deadline in Australia was two Business Days before the date of the Scheme Meetings, being 5.00pm Australian Western Standard Time on Monday 6 January 2003. However the Proxy and Ballot Deadline in New York was at 5.00pm New York Time, on the previous Business Day, namely Friday 3 January 2003. Given that the *Corporations Regulations* (regulation 5.6.36) states that a proxy must not be required to be received more than 48 hours before the meeting, with which the New York deadline did not conform, an abridgment of time was sought from the court for this earlier date and was granted.

report tallying those votes and elections from the Voting Agent in New York it was apparent that some forms were "incomplete" in some way.

Further, it seemed that some Scheme Creditors had chosen not to return all three forms, ie a Scheme vote for each company, plus the Fluor Funding Election. For example one Scheme Creditor made the Fluor Funding Election, but had not submitted any Scheme votes. This was odd, since without the Schemes there would be no purpose for a Fluor Funding Election. Others had voted on one Scheme but not the other. Again, this was difficult to understand, given the interdependency of the Schemes.

The Scheme votes would have been passed notwithstanding either of these matters, having obtained the statutory requirement set out in section 411(4)(a)(i), but with relatively low percentages of the total Scheme debt, much lower than expected in light of the lockup agreements. Those agreements covered around 82% of Scheme Creditors, considerably more than the 71.49% or 66.07% Scheme votes, so that potentially some Scheme Creditors may have inadvertently breached the Voting Agreements by failing to vote "consistently" (or at all) across the three votes/elections.

Since both the explanatory statement and voting instruments gave each of the Voting Agent and scheme administrator a broad discretion to accept voting instruments, they exercised their respective discretions to accept:

- further master voting instruments until the morning of the Scheme Meetings, being Wednesday 8 January 2003;
- certain master voting instruments with technical or minor defects/irregularities.

At the final court hearing McLure J observed that no objection had been taken by anyone to this action.[58]

12. OBJECTIONS BY BONDHOLDERS AT FINAL HEARING

The Schemes provided a *higher* threshold for success of Election 2 than the prescribed threshold in section 411(4) of the CA in respect of Scheme votes discussed above, namely:

- agreement of the Scheme Creditors holding at least 75% of the aggregate principal amount of the Scheme Debt; and
- agreement to similar election by the MMH and ANH scheme creditors holding at least 75% of the aggregate principal amount of the debt covered by the MMH and ANH schemes.

The table in section 12 above demonstrates that the stricter threshold for Election 2 was in fact not reached, so that Election 2 was announced as having failed to the ASX and the market on Wednesday 8 January 2003.

Prior to the final court hearing in the following week, some Bondholders, who either had not made any election or had voted against the election, indicated that they now wanted to register a vote in favour of the election (either by making a "new" vote or changing their previous vote). Between

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[58] McLure J at para [78]: "The voting agent exercised its power to accept as valid voting instruments or master voting instruments submitted after the proxy and ballot deadline. The exercise of the power did not make any difference to the achievement of the statutory majorities in favour of the resolutions nor did it make any difference to the result of the Fluor funding election. However, it enabled the votes of scheme creditors received in New York up to 7 January to be taken into account. Further, in the course of exercising its discretion, the voting agent permitted certain custodians to submit rectified master voting instruments. No objection is taken by anyone to this action."

Monday 13 January and the day of the final hearing for approval of the Schemes, being Wednesday 15 January, new forms were received from those Bondholders, which either sought to replace an earlier "against" vote or which constituted a wholly "new" vote.

At the final hearing on Wednesday 15 January, McLure J heard all submissions regarding approval of the Schemes, other than considering this newly arisen issue, which was adjourned to Friday morning. At that adjourned Friday hearing Australian counsel for the objecting Bondholders applied for relief only in relation to this issue, *without* objecting to approval of the Schemes. McLure J noted that the precise relief sought by the objecting Bondholders, supported by affidavit material of US counsel for those Bondholders, was not clearly articulated.[59]

Her Honour concluded that, in addition to the fact that the election result had been announced to the market, and that there was no satisfactory evidence that notice of the objecting Bondholders' application had been given to all Scheme Creditors:

> "It would only be in exceptional circumstances that the result of a ballot or vote under Pt 5.1 of the Act would be adjusted after it has been declared. It is generally undesirable to undermine the finality associated with the declaration of the result. It may be appropriate to do so where a vote cast before the deadline or the scheme meetings had been ignored as a result of an administrative error. However, it is difficult to envisage circumstances in which it would be appropriate to allow a person to change their vote or, alternatively, vote for the first time after the declaration of the poll. Further, the generalised nature of the affidavit in support of the application provided no, or no adequate, explanation for the change of heart or failure to vote by the relevant scheme creditors."[60]

Accordingly, McLure J concluded not to accede to the application in the exercise of her discretion, so that the Fluor Funding Election result was unchanged.[61]

13. FINAL COMMENTS

With the court approval granted on 17 January 2003, and the Schemes' various conditions precedent met by 28 February 2003, the Bondholders (through DTC) and ABN Amro each received their entitlement as outlined in the Schemes. This process is ongoing, in light of the continuing Fluor Arbitration, but any further proceeds to be distributed through to Scheme Creditors will be managed according to the systems put in place by the approved Schemes.

These creditors schemes involved many complicated and novel legal issues, such as identification of the scheme voters, amending the scheme documents prior to the scheme vote and satisfying the court that it had jurisdiction. They reflect the individual factual matrix behind the lock-up arrangements settled with the companies' creditors, but also the changing circumstances during the scheme processes. The scheme process under section 411 by its very nature must take place over a minimum time period, to allow ASIC and the scheme creditors to assess the scheme. That time period provides the opportunity for a creditors' scheme to become "a moving feast", necessitating expeditious legal analysis and response in an area of the *Corporations Law* not greatly utilised or considered.

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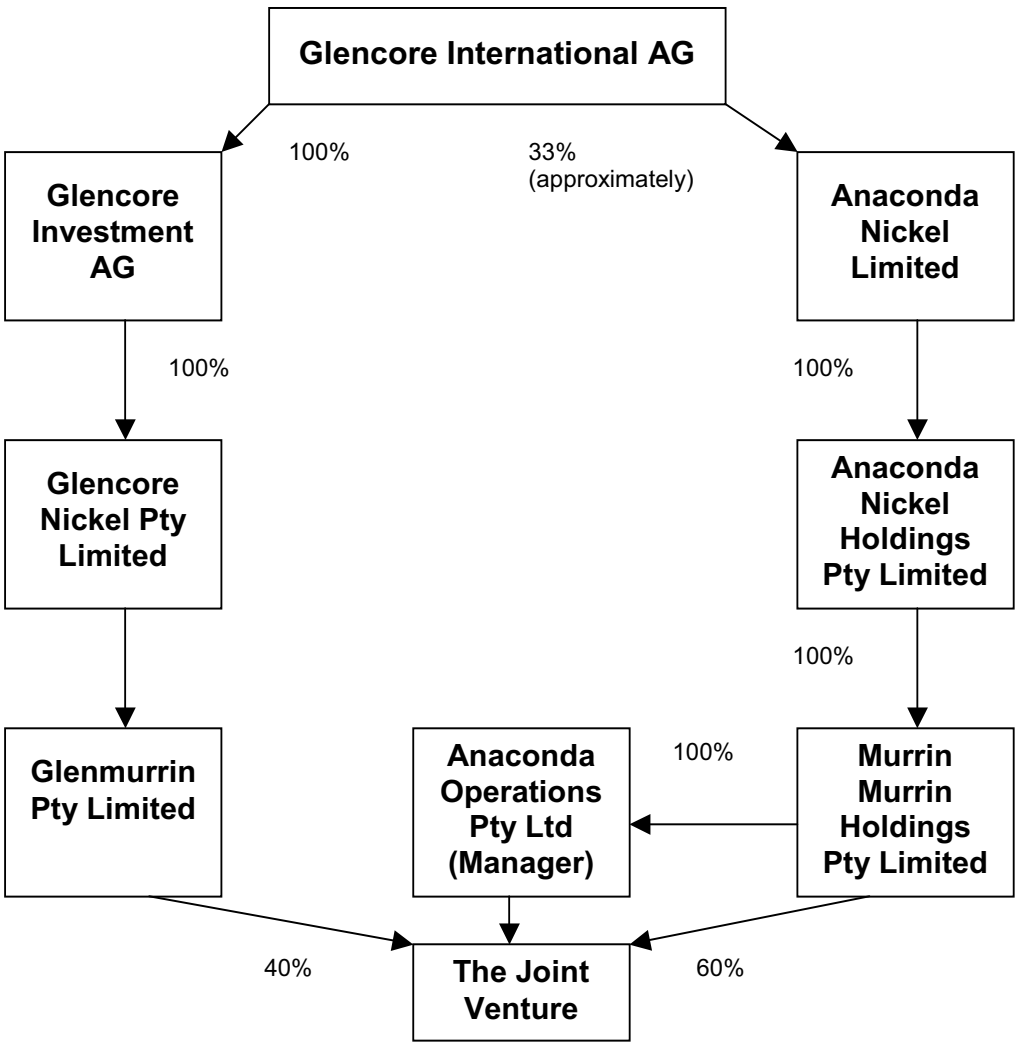
59 McLure J at para [81].

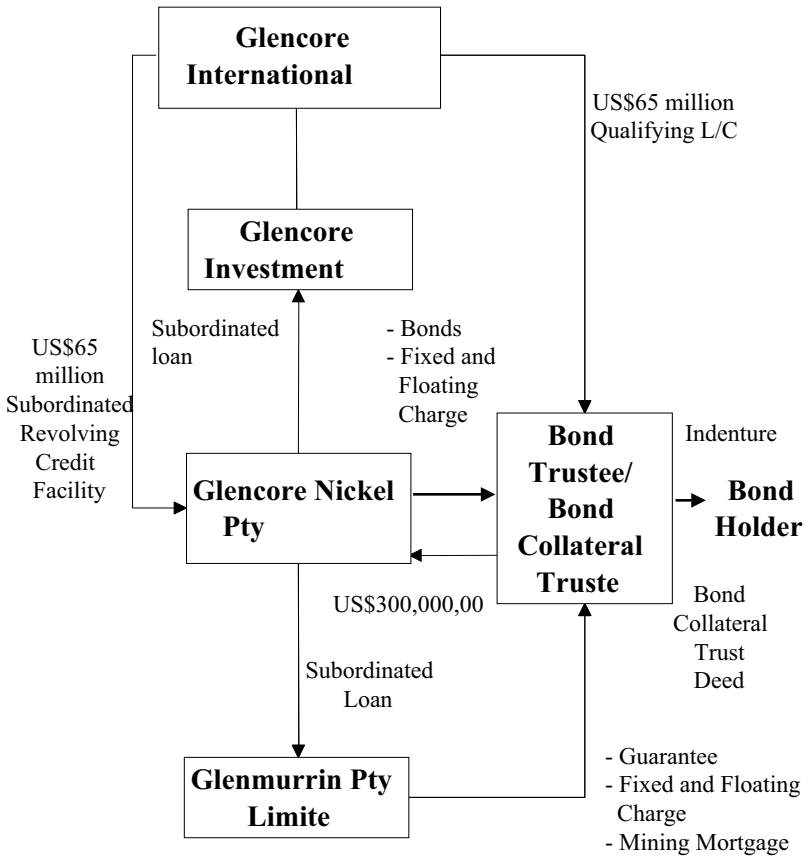
60 McLure J at paras [85] and [86].

61 Her Honour, at para [84], left to one side the question of whether she had the *power* to grant the relief sought.

Schedule 1 – Joint Venture Structure (2002)



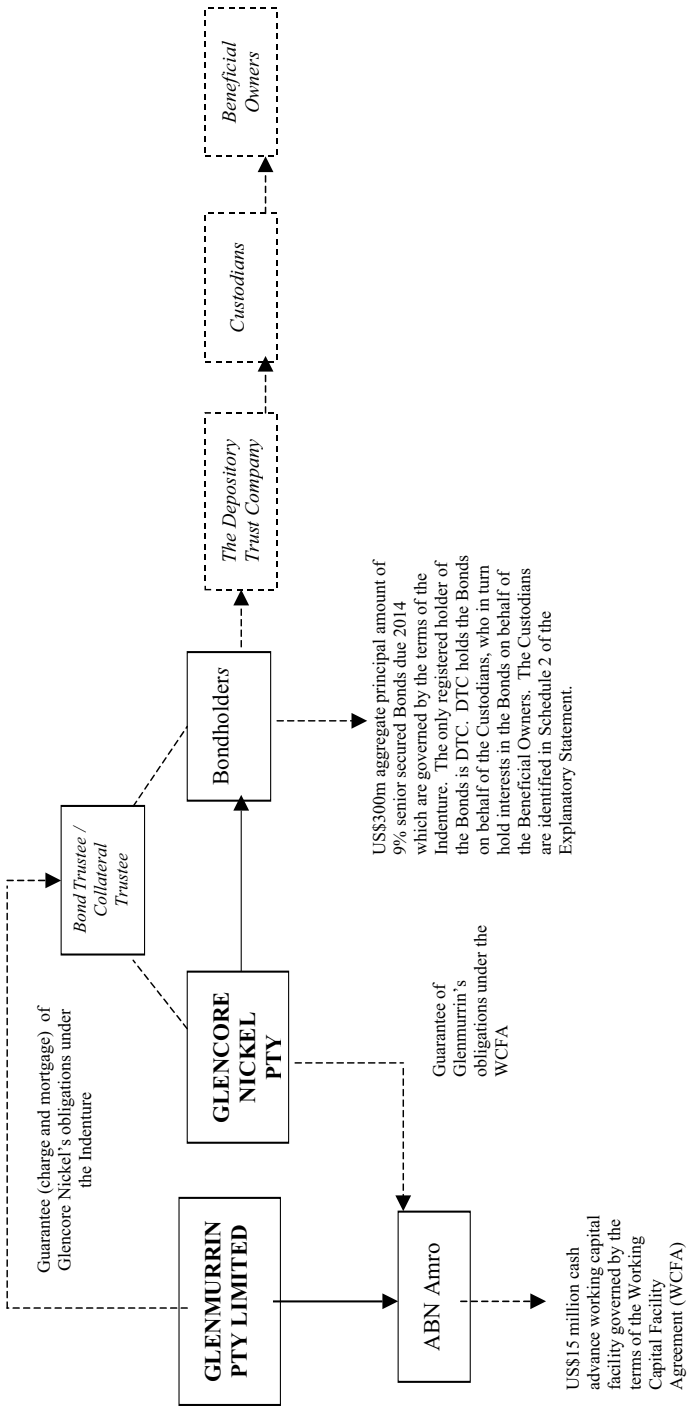
Schedule 2 – Initial financing Structure of Joint Venture (1997)



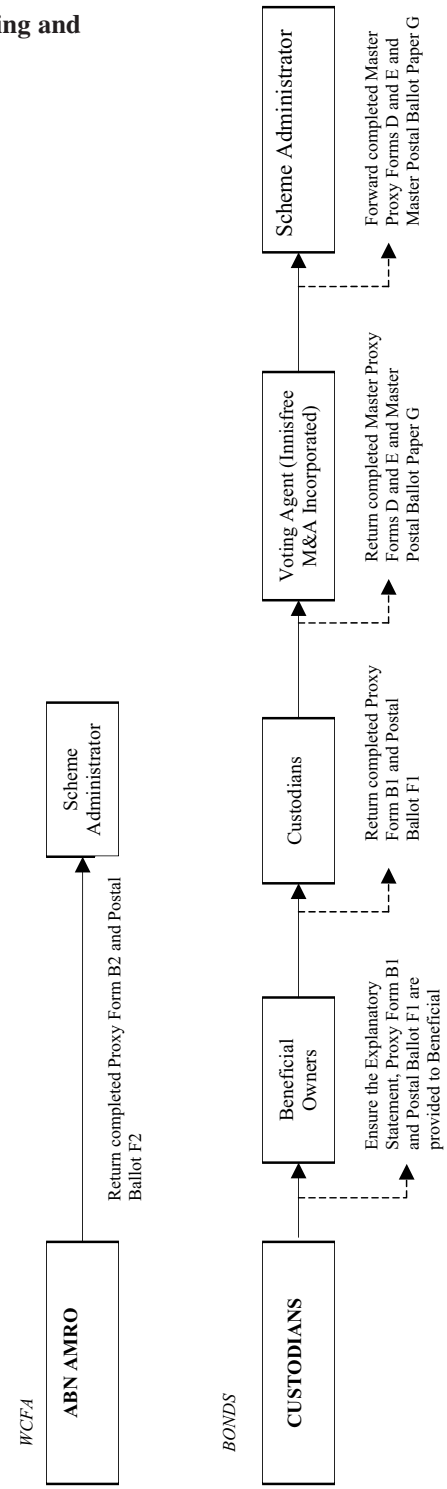
Schedule 3 – Timetable of major critical dates

Mid 2002	Voting Agreements
October 2002	Provision of draft explanatory statement to ASIC, and commencement of discussions with ASIC
1 November 2002:	Execution of Transaction documents
18 November 2002:	First court hearing
18-25 November 2002:	Issue of explanatory statement, notices of meeting and voting instruments to Scheme Creditors
17 December 2002:	Supplemental court hearing
3 January 2003:	Proxy and Ballot Deadline in New York
6 January 2003:	Proxy and Ballot Deadline in Perth
8 January 2003:	Scheme meetings
8 January 2003:	Fluor Funding Election result declared
15 January 2003:	Second court hearing , adjourned 17 January 2003
January-February 2003	Satisfaction of conditions precedent
February 2003:	Notification Date, receipt of Letters of Proof of Debt from ABN Amro and Bond Trustee and establishment of US Trust arrangements
28 February 2003:	Effective Date

Schedule 4 – Scheme Creditors



Schedule 5 – Scheme Voting and Fluor Funding Election



Schedule 6 – Letters of Proof of Debt and Cash Payment