

# Australian approach to TP and ADR

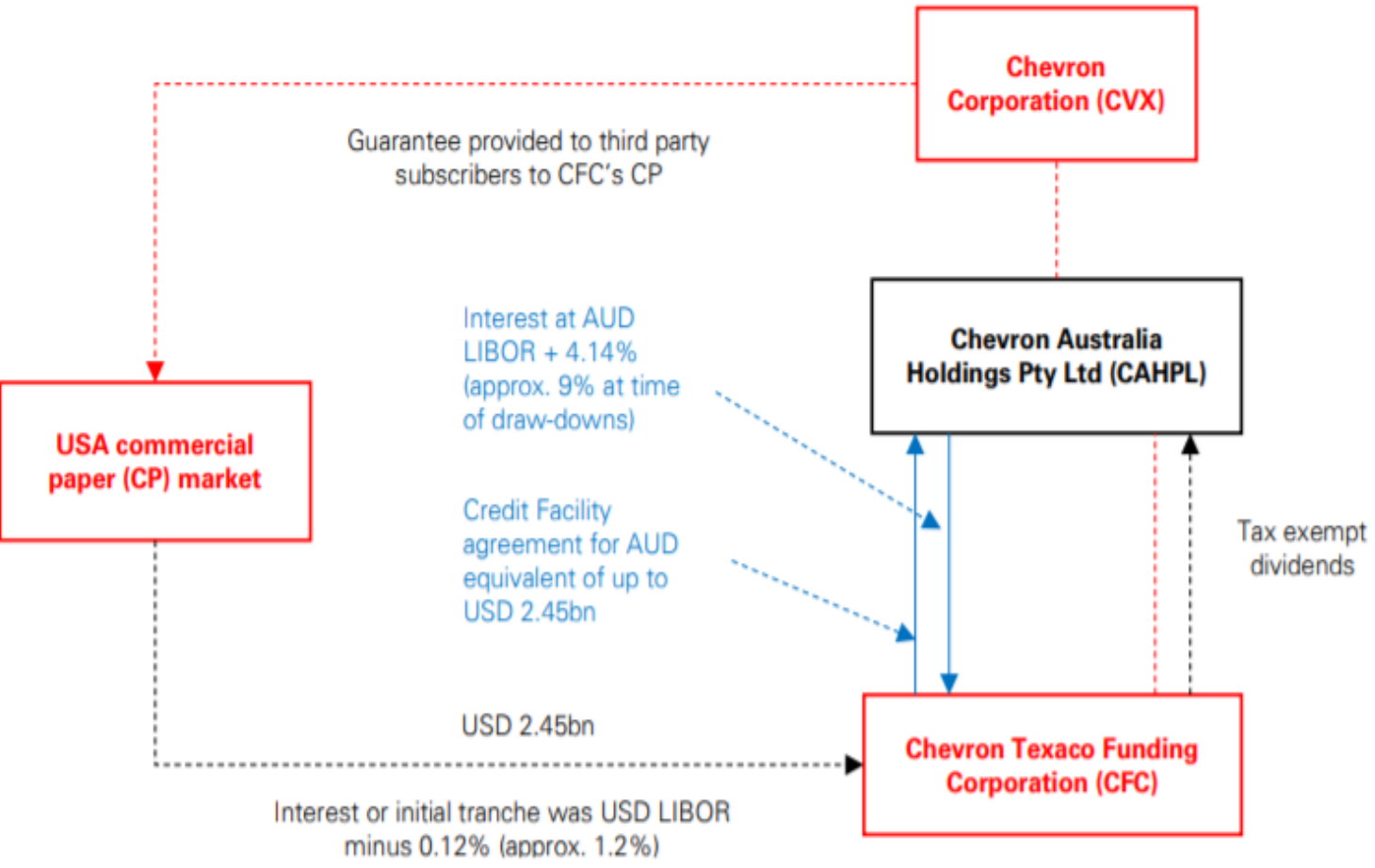
## Case Study: Chevron and Glencore

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1. ATO challenges TP prices of MNE's (historic perspective)
  - Risk review process
  - Following BEPS and Political Pressure -- sector (Big Tech, Pharma, Mining, etc.) and topic review
  - Current focus Loans, marketing Hubs, Inbound Distributors.
- 2. Chevron Case in 2017 big win for ATO
- 3. ATO regularly issues so-called Practical Compliance Guidelines (PCG's), setting risk profiles (almost "safe harbours").

# Case 1: Chevron Australian Finance Set-up



External funding costs (CP program by CFC) for Chevron where approx. 1.2%.

Internal funding from CFC to CAHPL was at an interest rate of approx. 9%.

The interest income to CFC was not taxed in the US and resulted in a tax expense in Australia at the level of CAHPL.

No Guarantees, no securities etc., were provided by CAHPL.

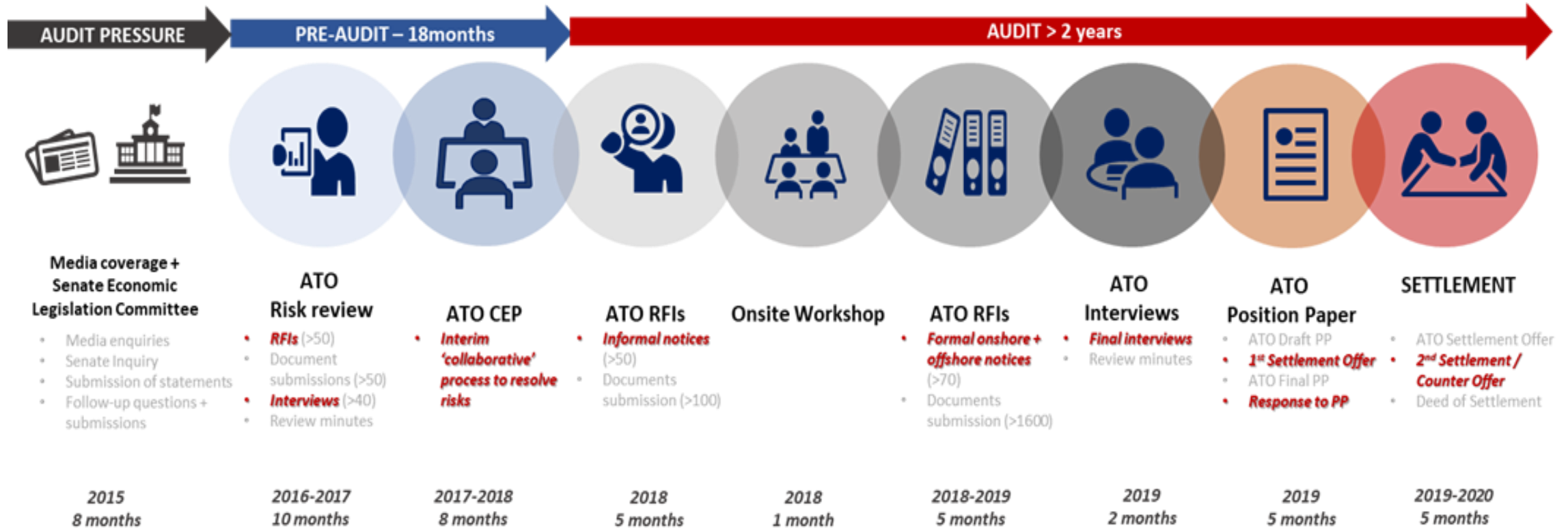
The Federal Court in April 2017 allowed the Commissioner to "reconstruct the transaction" thus allowing to look at the arrangement and assuming guarantees would be given thus reducing the effective interest rate.

Chevron and ATO reached a confidential settlement in 2018.

# Case 2: Glencore

- In 2007 Glencore adjusted its purchase price for copper to allow for a rebate of 23% of the LME reference price due to market uncertainty around future Copper Prices.
- ATO replaced the new transaction by the former pricing mechanism used by Glencore. ATO applied the right to change the transaction as per the Chevron decision allowing to "reconstruct the transaction".
- The Federal Court in September 2019 ruled in favor of Glencore considering (key elements only and paraphrased):
  - The actual arrangements should be the basis for review. One cannot use the "reconstruct the transaction" unconstrained. Also the OECD only allows the application thereof only "under exceptional circumstances"
  - As such the Commissioner can not "just" take the approach of looking at the "transaction that might reasonably be expected".
  - Comparables put forward by Glencore (ie., internal CUPS), were not identical but clearly provided a "reference price between 20%-27%".
  - Glencore's approach aligned with International Standards.
- The Full Federal Court in November 2020 ruled also in favor of Glencore.
- The Australian High Court on May 21, 2021 refused to hear the ATO's request for an appeal. Thus the Full Federal Court decision will stand.

# Practical Experience from the Field



# ATO: Next Steps?

- Where is the ATO going next?
- Impact of the PCG's? Risk of double taxation? Sectorial Safe Harbours?
- Alignment with OECD guidance?

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