

Chapter 7

Legal Solutions to Commercial Concerns – Creditors' Schemes of Arrangement

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Introduction

This chapter examines the economic problem that arises for insolvency reconstructions, the current commercial and legal solutions for insolvency reconstructions in respect of schemes of arrangement and issues of third party releases in schemes.

The economic problem

The professionals in charge of a company in insolvent reconstruction seek to realise its assets and pay distributions to creditors as swiftly and efficiently as possible.

Those professionals consider who caused the damage to the company and, thereby, the creditors and shareholders. They then consider whom they could or should pursue, with regard to (i) the prospects of success in litigation, (ii) the likely net assets of the defendants, and (iii) the considerable transaction costs of litigation.

Although the company is a legal fiction, it has been a very compelling one. It has been recognised that there are only very limited circumstances where creditors or shareholders have claims directly against those who caused harm to the company (and thereby to them), and may recover. In some important respects, the company has acted as a gate through which those claiming loss must pass in order to assert rights to recovery. This is true of claims in contract. In some important respects it has been true of claims in tort.¹

¹ Although, surveying the diversity of positions in, for example, *Esanda Finance Corp Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241, the fiction of the company might be more porous than is generally assumed.

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