

**NEGOTIATING FULL**

**AND**

**FINAL SETTLEMENT**

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## **NEGOTIATING FULL AND FINAL SETTLEMENT**

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A significant part of the daily work of financial counsellors is dealing with creditors or debt collectors on behalf of clients. If the process results in a deal being struck, the vital question is then – how can this verbal agreement be made into a final and binding settlement of the matter? The most reliable way is the process of accord and satisfaction.

### **Accord and Satisfaction**

In the usual context of a debt under a contract, accord and satisfaction is the most reliable way of extinguishing the debt. What is accord and satisfaction? ‘The essence of accord and satisfaction is the acceptance by the plaintiff of something in place of his cause of action ‘(1). The most common way of doing this is by making an offer of a lesser sum paid in full and final settlement of a claim. If the creditor accepts this offer, and the debtor makes the payment, there is a binding contract. Though this process is called accord and satisfaction, it is a variety of variation of the contract by the agreement of the parties to it.

Of course, this must be done in a provable way, in case a dispute arises later. Writing is desirable, and a provable method of payment.

It is important to note that simply making an offer to a creditor, in writing, and sending the offered sum, does not create an accord and satisfaction. The creditor can receive the money, and use it to sue the debtor for the rest. The agreement must be in place first.

## **Debt Agreements**

If a debtor has a number of debts, and the majority in dollar value of the creditors agree to a debt agreement proposal put forward by the debtor, the debtor can make a deal which binds all the creditors (2). This prevents an unhappy creditor who was in the minority from taking any enforcement action against the debtor or pursuing a creditor's petition, or suing the debtor for a provable debt.

## **Summary**

A debtor wishing to extinguish a debt can do so by accord and satisfaction, in the way set out above. A debtor can also obtain effective protection from a minority of unreasonable creditors by using a debt agreement, provided that the majority are reasonable. If a debtor does not use one of these paths, but simply seeks the indulgence of the creditor, who agrees to waive or write off the debt, this is no more than an indication of the creditor's plans. It can change its mind, and pursue the debt later. Certainty, for the debtor, comes at a cost.

## **NOTES:**

1. McDermott v Black (1940) 63 CLR 161 per Dixon J
2. Bankruptcy Act 1966 (Commonwealth) ss 185F and 185K

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