

**CONTRACTS A**

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**Key**

Text highlighted green = legislative provisions

Text highlighted blue = illustrative cases

P = Plaintiff

D = Defendant

## Offer

An offer is an expression of willingness to enter into a contract on specified terms.

A reasonable person must conclude that an offer was intended, and that a binding agreement would form on acceptance of that offer.

Offer can be made to an individual, a group, or the world.

### Requirements

- It must give the offeree the choice between acceptance and rejection – [Brambles Holdings Ltd v Bathurst City Council](#) (Heydon JA).
  - An offer that uses language of command is not an offer.
- The language used must indicate commitment – [Gibson v Manchester City Council](#)
  - D offered to sell tenants in block of flats the houses they were renting. P wrote to them asking for price details. D wrote back and say “we may be prepared to sell to you for x amount” and “if you are interested please complete application form”. P completed form but left price blank. Before application processed, Council discontinued buying scheme. P argued D had made an offer which he had accepted. Court held the language used was uncertain and did not suggest offer.
- Must not be a statement of policy – [Australian Woollen Mills v Commonwealth](#)
  - D announced scheme whereby govt would subsidise wool companies for wool purchased for domestic use. P purchased wool and claimed subsidy. D had since cancelled scheme. D’s letter was a statement of policy, not an offer.

### Types of contracts

#### Unilateral contracts

Promise made by A to B (could be a group or the world at large). Contract formed once B completes required act, under no obligation before then. A then has an obligation once B has performed the act. Once a unilateral contract is made, the offeror is bound and the offeree has rights.

#### Bilateral contracts

A makes offer to B. When the offer is accepted on its terms, contract formed. Both parties have rights and obligations.

### Offers to the world

Offers to the world are unilateral contracts that create a separate contract with everyone who accepts the offer by fulfilling the requirements.

- The offeree (any person to whom the offer is made) accepts the offer by performing the required act. E.g. lost dog poster advertising a reward – the offeree has accepted the contract by finding the dog. They are not required to accept the offer before undertaking the task.
- [Carlill v Carbolic Smoke Ball](#) – D sells smoke ball which purportedly prevents cold & flu. £100 reward to anyone who uses it and becomes ill. £1000 deposited in bank as

## Sufficiently complete

Must contain all essential terms that cannot be filled in by the Court - [Hall v Busst](#): 'Better for the thing to have effect than be found void.'

Is the omission of a term fatal to the contract?

Three factors to consider:

- Is the term essential?
  - An essential term is one without which the contract cannot be enforced – [Thomson v White](#).
  - A term of such importance that a party would not have entered into the agreement without it – [Tramways Advertising Pty Ltd v Luna Park \(NSW\) Ltd](#).
  - For the parties to decide what is essential. E.g. subject matter, parties, time periods, etc.
  - For land, the parties, subject matter, and price are essential terms – [Hall v Busst](#)
  - For lease, commencement date is essential – [Harvey v Pratt](#)
- Have the parties intentionally left the term out?
  - Agreements to agree - Court will not add a term if parties have agreed to decide it later – [May and Butcher Ltd v The King](#).
- Has the agreement been partly performed?
  - Courts less likely to find a contract incomplete if it has been wholly or partly performed – [Foley v Classique Coaches](#).
- How likely are the courts to fill the gaps?
  - The more novel and complex the case is, the less likely the court will fill the gaps – [Milne v Attorney General \(Tas\)](#).
  - Court will not imply terms to make the agreement enforceable – [Australia and New Zealand Banking Group Ltd v Frost Holdings Pty Ltd](#).

## Sufficiently certain

A contract may fail if a Court cannot attribute meaning to it. If a term is vague or imprecise, or the obligations of parties cannot be identified.

- "So long as the language employed by the parties is not so obscure and so incapable of any definite or precise meaning that the Court is unable to attribute to the parties any particular contractual intention" - [Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd](#): Energy supply contract.
- Test of reasonableness may be used in some cases:
  - Court will never look at 'reasonable terms' for a lease or sale of land – [Whitlock v Brew](#).
  - For goods, price not necessarily essential. [Goods Act 1958 s13\(2\)](#) – Reasonable price to be paid if price not fixed.
  - Cannot use reasonable price for novel or complex things.
- Agreements to negotiate not sufficiently certain
  - In UK - An agreement to negotiate is not binding – [Walford v Miles](#).
  - In Aus – Agreements to negotiate can be enforceable as long as promise is clear – [Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd](#).
  - Critical analysis: If parties are prepared to negotiate in good faith they should be allowed to. If they negotiate in good faith but cannot reach an agreement, they can then withdraw without being forced to compromise.

- If a minor repudiates a contract, they are not liable for any obligations that arise in the future, but are bound by any that have already accrued – [Norman Baker Pty Ltd v Baker](#): If a lease is repudiated, the minor will still be bound by rent due up to the date of repudiation, but not after.
- Minor entitled to recover any land they have transferred on repudiating the contract – [Rain v Fullerton](#).
- Minor will only be able to recover goods if they have not received consideration – [Steinberg v Scala](#): Minor bought shares in company, repudiated contract when achieved majority. Court held money paid for shares did not have to be repaid because consideration was given – payment made for shares received.

### Binding only if ratified

Applies to any contracts not for necessities or continuing interests. Void unless approved.

- No action can be taken on contract unless ratified by the minor
- Ratification can be inferred from conduct
- [Supreme Court Act 1986 s50](#) – Cannot enforce:
  - A promise made by over 18 to pay for debt incurred while they were a minor
  - Ratification by over 18 of a promise that was made when they were a minor
- Contract is not binding on minor unless ratified, but minor may sue for breach of contract even if not ratified.
  - Minor cannot get order for specific performance – equitable since other party cannot get such an order against them.

### Void

These contracts are unenforceable and cannot be ratified.

- [Supreme Court Act 1986 s49](#) – Contracts that are void:
  - Repayment of money loaned – cannot be ratified or enforced
  - Payment for non-necessary goods – need not pay for non-necessaries, becomes property of minor
  - Accounts stated – admission of obligations to pay an amount
- [Supreme Court Act 1986 s51\(1\)](#) – A promise made by a person who is 18 to pay back a loan they received when they were a minor is void.
  - [s51\(2\)](#) – If another person has transferred the debt to themselves in good faith and without knowing the person was a minor, they can recover.
  - If the person successfully recovers from the minor because they have taken on the debt in good faith and without notice, the minor can enforce the loan from the original person to get the amount back.
  - If the loan to a minor is void, any guarantee is also unenforceable.
- Minor cannot be liable in tort where it would indirectly enforce a contract

### Mental incapacity

- Contract voidable at the option of the mentally disabled person. They must show:
  - That they were incapable of understanding the contract
  - That the other person knew or ought to have known they would not understand.

## Express Terms

### Terms incorporated by signature

The general rule is that a person who signs a contractual document will be bound by the terms expressly stated, even if they have not read or understood them.

- **L'Estrange v Graucob**: P purchased cigarette vending machine from D, signed sales agreement. Machine did not work and P sued under implied warranty that goods would be fit. D relied on clause in contract that 'any warranty not stated is excluded.
- **Scrutton LJ in L'Estrange** – "When a document containing contractual terms is signed, then, in the absence of fraud or...misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not"

### Exceptions to the general rule

- Misrepresentation
  - General rule does not apply if contents of document have been misrepresented.
  - **Curtis v Chemical Cleaning and Dyeing Co**: P took wedding dress to be dry cleaned, was asked to sign receipt to say D would not be liable for damage arising from certain risks. In fact it said D would not be liable for any damage whatsoever. When it was returned, the dress had a stain on it. Court held D could not rely on exemption clause because the scope of clause had been misrepresented to the P.
  - **Toll (FGCT) Pty v Alphapharm Pty Ltd**: If the document is misleading as to its significance, effect of signature will be negated.
- Non-contractual documents
  - General rule does not apply if the document is not a contractual document.

### Terms incorporated by notice

If a business does not rely on signed contracts, they must give adequate notice of terms before the contract is made (e.g. by delivering documents or displaying signs).

When are terms sufficiently expressed?

### Timing of notice

- Notice must be given prior to or at the time of entering into a contract.
  - **Oceanic Sun Line Special Shipping Co Inc v Fay** – P booked cruise of Greek islands, and would exchange her receipt for the ticket once she boarded the ship. The ticket contained a condition that the Greek courts would have jurisdiction over any action against owner. D was injured on cruise and sued liner. The liner said it would be in Greek jurisdiction. HCA held the contract was made when the cruise was booked. The terms printed on the ticket issued later could not form part of the contract.
- Reasonable notice of terms must be given.
  - Party seeking to incorporate terms must make reasonable efforts to make contracting party aware of them.

## Construing terms

If the express terms in a contract are vague or there are unforeseen events that effect the terms, the court may need to construe the terms to determine their legal effect.

### Parol evidence rule in construction – contract wholly in writing

Second limb of Parol evidence rule restricts extrinsic evidence that can be relied upon to interpret terms.

- Where there is ambiguity – Evidence of surrounding circumstances can be admitted only if there is ambiguity – [Codelfa Construction Pty Ltd v State Railway Authority of NSW](#).
  - [Western Export Services Inc v Jireh International Pty Ltd](#) – HCA did not express any strong view on whether this should change.
  - Where words capable of more than two meanings, extrinsic evidence of surrounding circumstances may be admitted – [Royal Botanic Gardens and Domain Trust v South Sydney City Council](#).
- Language specific to trade – If language is used that has special meaning in the parties' specific trade or industry, extrinsic material can be admitted to establish that usage – [Appleby v Purcell](#).

### Other factors in construction – contract not wholly in writing

Where the contract is not wholly in writing, courts construe the terms taking into account:

- natural and ordinary meaning
- any other relevant provisions of the contract
- overall purpose of the term and contract as a whole
- facts and circumstances known to parties when contract executed
- disregarding subjective intentions of parties

### Process of construction

In addition to the above factors and the Parol evidence rule:

- Construed objectively, determined on facts only – [Byrnes v Kendle](#)
- Commercial construction favoured – If there are two possible meanings, the Court will favour the interpretation that avoids uncommercial or unreasonable consequences – [Australian Broadcasting Corporation v Australasian Performing Right Association Ltd](#).
  - Cannot rewrite the contract to ensure it makes commercial sense
  - Only to choose the most commercially common-sense option between two alternative meanings.

destroyed the garage, truck, and goods. The driver had deviated from agreed route, so exclusion clause inapplicable.

## Unfair contract terms

Australian Consumer Law Part 2-3 regulates unfair terms in 'standard form contracts' with consumers and with small businesses.

- s23 - Terms in consumer and small business standard form contracts are void if they are unfair.

### What is a standard form contract?

- s23(3) – Consumer contract is a contract for supply of goods or services or interest in land
- s24(4) – Small business contract is one for supply of goods, services, interest in land, and one party was a business with <20 persons. Upfront price of payable under contract <\$300k or if contract is greater than 12 month duration, upfront price is <\$1m.
- s27 - A standard form contract is prepared by a trader and used uniformly in all transactions. Generally presented 'as-is' without opportunity for negotiation.
  - (1) Presumed unless proven otherwise
  - (2) When determining if it is a standard form contract, court must take into account:
    - (a) whether one party has bargaining power
    - (b) contract prepared by one party before discussion
    - (c) party was required to either accept or reject on terms
    - (d) whether party given opportunity to negotiate
    - (e) whether terms in contract point to specifics of that transaction
    - (f) any other matter

### What is an unfair term?

- s24 – A contract is unfair if:
  - (a) It would cause significant imbalance in parties' rights and obligations:
    - Imbalance – [Director of Fair Trading v First National Bank](#) – granting to trader a beneficial option or discretion of power, or imposing on consumer a burden or risk.
    - Significant - Would it detract from rights or expectations of consumer?
  - (b) not reasonably necessary to protect legitimate interests of party advantaged by the term
    - s24(4) - Presumption that it is not necessary unless proven otherwise.
    - Legitimate interests – Not being opportunistic.
    - Reasonably necessary – Proportionate response to risks it seeks to address.
  - (c) would cause detriment to party if relied upon.
    - Financial or otherwise.
- s24(2) – other factors taken into account:
  - (a) Transparency of contract
    - Expressed in plain language