

- The question “**Is there a contract?**” Requires the establishment of 4 material elements:
 - An **agreement** between the parties (often expressed as “offer” and “acceptance”);
 - **Consideration** (each party must give something in return for the other’s promise); - Sufficient, not adequate
 - An **intention** to create legal relations between the parties;
 - The agreement must be **complete and certain** (i.e., there should not be any doubt as to exactly what each party is obliged to do in terms of the agreement).
 - Other aspects of formation:
 - Certain **formalities** required for some types of contract (e.g. need to be written, not oral, contract to sell land)
 - **Privity** - only parties to the contract are bound
 - A party must have **capacity** to contract to be bound (e.g. minors)
- Estoppel
→ Express terms
→ Implied terms
→ Consumer contracts

Contract formation – Agreement

Bilateral and Unilateral contracts

- Bilateral contract
 - Most contracts
 - 2 parties to the contract (“A” and “B”)
 - Both parties exchange a promise or set of promises for each to do something in the future (e.g. A promises to transfer ownership of his car to B. In return, B promises to pay \$100 to A)
 - Both A and B’s promises are executory (i.e. to be performed at some point after the contract is formed)
- Unilateral contract
 - Typically reward scenarios
 - 2 parties to the contract (“A” and “B”)
 - Only 1 promise is made (e.g. A promises to pay \$100 to B if B finds A’s lost puppy)
 - B accepts A’s offer when B performs the stipulated task. Contract is formed at same time B performs her obligations under it. (No need to give notice of acceptance prior to performance.)
 - At time contract formed, A’s obligation/promise is executory and B’s obligation has been executed (i.e. already performed).
 - E.g. Carlill v Carbolic Smoke Ball; Mobil Oil v Wellcome

OFFER – CONTRACT FORMATION

<p><i>Gibson – council application form to see housing;</i> <i>Carlill – smoke bomb unilateral contract</i></p>	<p>Objective test: “an offer is an objective manifestation of willingness to be bound by certain terms, upon the acceptance of those terms by the relevant party” (<i>Gibson v MCC, per denning LJ</i>)</p> <p>What elements distinguish an offer?</p> <ul style="list-style-type: none"> • The language must be sufficiently certain and promissory (<i>Gibson v MCC</i>) • Must be distinct from mere puff (<i>Carlill v Carbolic smoke ball</i>) • Must be distinct from an invitation to treat (<i>Pharmaceutical Society v Boots Chemist</i>) 	
<p>Ticket case</p> <p><i>Mac Robertson – airline ticket is not agreement (offer/exemption clause)</i></p>	<p>General rule: ticket is an offer which the passenger can accept or reject after he or she has had reasonable opportunity to accept or reject, which can be done by conduct (<i>Mac Robertson, per Stephen J</i>)</p> <ul style="list-style-type: none"> • Ticket is just a receipt of prepaid fare (<i>Mac Robertson, per Barwick CJ</i>) • Contractually, tickets represent an Invitation to Treat, the Offer of which is provided when the passenger/spectator selects the ticket. Acceptance is provided when the organisation (airline, ground etc.) fulfils the obligation of the ticket; that is, admittance to a venue, carrying passenger. 	
<p>Invitation to treat</p> <p><i>Boots – invitation to treat at chemist</i></p>	<ul style="list-style-type: none"> • Communication indicating willingness to enter into negotiations/contractual relations, inviting another party to make an offer 	
	<p>Shop sales</p>	<ul style="list-style-type: none"> • Displaying of goods (even with price) is not an offer, but an invitation to treat (<i>Boots</i>) • The customer offers to buy and the shopkeeper accepts that offer
	<p>Online sales</p>	<ul style="list-style-type: none"> • Goods or services offered online generally to be treated as an invitation to treat (unless clear intention to be bound by acceptance) • <u>Online proposals: Electronic Transactions (Victoria) Act 2000 S14B Invitation to treat regarding contracts</u> <ol style="list-style-type: none"> 1. A proposal to form a contract made through one or more electronic communications that: <ol style="list-style-type: none"> a. Is not addressed to one or more specific parties; and b. Is generally accessible to parties making use of information systems is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance. 2. Subsection (1) extends to proposals that make use of interactive applications for the placement of orders through information systems.
	<p>Auctions</p> <p><i>AGC – mortgagee auction</i></p>	<ul style="list-style-type: none"> • Generally invitations to treat, and bids are offers (<i>AGC v Whirter</i>) • The offer is accepted by the auctioneer’s “fall of the hammer” • This means that: <ul style="list-style-type: none"> ○ The seller can withdraw the property before acceptance of a bid; ○ The seller can refuse to accept a bid (doesn’t have to sell to the highest bidder); and ○ The buyer can withdraw a bid before acceptance.
	<p>Tenders</p> <p><i>Harvela – “highest offer will be accepted” (fixed price); Hughes – bid</i></p>	<ul style="list-style-type: none"> • Generally invitations to treat, with <u>exceptions</u>: <ul style="list-style-type: none"> ○ If the wording of the call for tender is promissory and can potentially seen as an offer e.g. “the highest bidder will be successful” (<i>Harvela</i>) ○ If the call for tenders creates a contract regarding tender process (<i>Hughes</i>) ○ If there is a strong element of good faith (<i>Hughes</i>)

	for air traffic control services	CISG: Offers and invitations to treat (article 14) <ul style="list-style-type: none"> (1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price. (2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.
Termination of offer	<ul style="list-style-type: none"> Agreement occurs upon acceptance, but when is it too late for an offeree to accept the offer? 	
	Revocation <i>Goldsborough – paid for option to keep right to purchase land open; Mobil – incentive to do better over 6 years revoked after 4;</i>	General principle: revocation can occur at any time before acceptance, but will only be effective when received by the offeree (<i>Stephenson v McLean</i>) <ul style="list-style-type: none"> Even if the offeror promised to keep it open (<i>Dickinson v Dodds</i>) Effective when it is communicated to the offeree by offeror or some other reasonably reliable source (<i>Dickinson v Dodds</i>) Exceptions: <ul style="list-style-type: none"> If consideration has been paid to keep the offer open – options (<i>Goldsborough Mort v Quinn</i>) If there is a promise to hold an offer for the international sale of goods open (CISG, Article 16) If a <u>unilateral contract</u>, and performance (acceptance) has commenced, and there is an implied contract not to revoke or an estoppel (<i>Mobil Oil v Wellcome</i>) Revocation of offer: CISG <ul style="list-style-type: none"> A promise to hold an offer for the sale of goods open is binding: <ul style="list-style-type: none"> Article 16: <ul style="list-style-type: none"> (1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance. (2) However, an offer cannot be revoked – <ul style="list-style-type: none"> (a) If it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (b) If it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.
	Lapse of time <i>*Lapse of an offer</i>	<ul style="list-style-type: none"> Offer may be open for specified period – will lapse at end of specified time if not revoked nor accepted If no period specified – will lapse after a “reasonable time” <ul style="list-style-type: none"> What is “reasonable” will depend on the context and is determined by an objective test
	Death of the offeror <i>*Lapse of an offer</i>	<ul style="list-style-type: none"> The death of the offeror will cause the offer to lapse on the notice of death <ul style="list-style-type: none"> An offer may still be accepted before notice of death unless personal services required (<i>Fong v Cilli</i>) <ul style="list-style-type: none"> E.g. <i>Fong – vendor died before purchaser signed – offer lapsed when notice of death given</i> Option contracts remain enforceable against deceased unless: <ul style="list-style-type: none"> Personal services of the deceased required Intent that the option is not enforceable after death (<i>Laybutt v Amoco</i>)
	Failure of a condition/	<ul style="list-style-type: none"> A fundamental change in circumstances will cause the offer to lapse or terminate (<i>Nielson v Dysart</i>)

	change of circumstances	<ul style="list-style-type: none"> ○ Objective intention of the offeror having regard to the terms of the offer and the circumstance in which it was made – high test (<i>Dysart</i>) • Not every change in circumstances will cause the offer to lapse • An offer may be made subject to an implied condition that must be fulfilled before the offer can be accepted
	Rejection and counter-offer <i>Stevenson – mere enquiry is not rejection nor counter offer</i>	<ul style="list-style-type: none"> • To be distinguished from mere enquiry (<i>Stevenson</i>) • Rejection of an offer terminates the offer (<i>Stevenson v McLean</i>) • A counter offer “kills” the original offer and transfers the onus of acceptance between parties <p>CISG: rejection and counter-offer (Article 19)</p> <ul style="list-style-type: none"> • Allows for certain discrepancies between offer and acceptance: <ul style="list-style-type: none"> ○ Article 19: <ul style="list-style-type: none"> • (1) A reply to an offer, which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer. • (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

CONDITIONAL OFFER

- An offer may be made subject to an express/implied condition, which must be satisfied before it can be accepted
 - If the condition is not satisfied, any attempt by the offeree to accept is futile (*Financings Ltd v Stimson*)
 - [Offer for sale/purchase of a car was conditional upon the car remaining in substantially the same condition until the moment of acceptance]