

AGREEMENT:

1. AGREEMENT WITHOUT OFFER AND ACCPETANCE?

- a. “In all the circumstances **can an agreement be inferred?** Has **mutual assent** been manifested?

What would a **reasonable person in the position of the Council and a reasonable person in the position of the defendant** think as to whether there was a **concluded bargain?**” – *Brambles v Bathurst*

2. OFFER:

- a. DEFINITION = an **expression of willingness to be bound immediately without further negotiation.**

- b. IS IT AN OFFER?

1. WHETHER AN OFFER IS MADE IS DETERMINED OBJECTIVELY: - *Carlill v Carbolic Smoke Ball Company*.

- In determining whether an offer has been made, the issue is **whether it would appear to a reasonable person in the position of the offeree that an offer was intended, and that a binding agreement would be formed upon acceptance**

2. OFFER MADE TO WHOLE WORLD - *Carlill v Carbolic Smoke Ball Company*.

- Unilateral contract! - In such an agreement, the **offer is accepted by performing an act, and the performance of that act is all that the contract requires of the offeree.**

3. OFFER V INVITATION TO TREAT:

- Invitations to treat are **NOT OFFERS!** – **Invitations to make offers** (room for negotiation).
Pharmaceutical Society of Great Britain v Boots.

- **Ticket Cases** - Offer is made **once the ticket is received, and acceptance of said offer is completed when the party uses the ticket** – *MacRobertson Miller Airline Services v Commissioner of State Taxation*.

4. OFFER V REQUEST FOR INFORMATION:

- The word "**offer**" is **not conclusive of an offer**; **Subsequent conduct of parties can be considered** to determine if offer or not.

- **Agreeing on price alone may not be sufficient** in some cases - *Seppelt & Sons Ltd v Commission for Main Roads*

c. REVOCATION

1. REVOCATION MUST BE COMMUNICATED:

- Revocation **only effective upon communication** to the offeree – *Stevenson, Jacques & Co v Mclean*
- **Notification by a third party of an offer's withdrawal is effective** just like a withdrawal by the person who made an offer – *Dickinson v Dodds*
- A **rejected offer could remain operative** if it were repeated, or otherwise revived, or ... remaining on foot, available for acceptance – Heydon JA in *Brambles v Bathurst City Council*.

2. REVOCATION OF UNILATERAL CONTRACTS – *Mobil Oil Australia v Wellcome International*

- **May still be possible to revoke after performance has started** - The offeror will only be **prevented from revoking the offer where there is an implied contract not to revoke, or an estoppel** (an estoppel will only arise where the offeree is induced to assume that the offer will not be revoked and relies on this).

3. OPTION CONTRACT? – *Goldsbrough Mort & Co Ltd v Quinn (1910)*

- A promise to keep an offer open is **not enforceable unless the offeree has given consideration**
- **The option holder is free to choose whether to exercise the option to enter into the contract, and the grantor cannot withdraw the option.**

d. COUNTER OFFER:

1. BATTLE OF THE FORMS - *Butler Machine Tool Co Ltd v Ex-Cell-O-Corp (England) Ltd*

- There are two different approaches to resolving the battle of the forms: **conflict and synthesis**.
Conflict = treats the **exchange of terms as a battle**; the last shot, or most persistent party prevails.
Synthesis = the court **builds a contract from the two sets of terms**.
- If the offeree accepts an offer on a form which sneakily alters the terms in counter-offer, he may be held to the original form's conditions, since a reasonable offeror would have thought his original offer was being accepted.

3. ACCEPTANCE:

a. DEFINITION = an unqualified assent to the terms of the offer.

b. MUST BE IN RELIANCE ON OFFER:

- **Acceptance only arises if the offeree performs the requested acts in reliance on the offer** – *R v Clarke*

c. ACCEPTANCE MUST BE COMMUNICATED:

- An acceptance generally has effect only when communicated to the offeror – *Felthouse v Bindley*

1. POSTAL ACCEPTANCE RULE:

- If it is **known** that acceptance is to be made via post (*Bressan v Squires*), acceptance made when letter is posted (mailbox rule) – *Adams v Lindsell*.

- This rule **does not apply to payments**; payment is not made simply by placing it in the post (unless the contract allows that) – *Wardle v Agricultural and Rural Finance*

2. INSTANTANEOUS COMMUNICATIONS:

- In instantaneous communications, acceptance is only effective when it is received by the offeror – *Brinkibon v Stahag Stahl*

- When a message is sent via a **third party** or **sent out of office hours** (not intended to be read immediately), it may be that the acceptance becomes effective sometime after it is received by the offeror's machine – resolved by determining offeror's presumed intention.

3. ACCEPTANCE VIA ELECTRONIC SYSTEMS (+ SOME RULES):

- Has an **electronic communications system and an address been designated** for receiving communications? (*Electronic Transactions Act 2000 S13A(1)(A)*)

YES = communication is **effective when it can be retrieved** by the addressee.

NO = communication is **effective when it can be retrieved by the addressee** and the addressee has become aware it was sent by that address.

s 14C = A contract formed between a natural person and an automated machine, or two machines, is not invalid purely because a natural person was not directly involved in the process

s 14D = Where a person makes an input error in the course of an electronic transaction, and the system does not allow the correction of the error, the person is entitled to withdraw, only provided they do so ASAP after learning of the error and that they haven't gained any benefit from the other party

4. SILENCE IS NOT ACCEPTANCE:

- A reasonable person in the position of the offeror cannot accept silence as a mode of acceptance; cannot be reasonably distinguished from a lack of acceptance – *Felthouse v Bindley*

5. UNILATERAL ACCEPTANCE:

- Acceptance by performance – *Carlill*.

d. ACCEPTANCE CAN BE INFERRED BY CONDUCT:

- Where an offeree, with a **reasonable opportunity to reject the offer of goods or services**, takes the **benefit of them under circumstances which indicate they were to be paid for**, the tribunal of fact may hold that the offer was accepted according to its terms – *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd*

e. AUSTRALIAN CONSUMER LAW SS 41-43:

s 41: Liability of recipients for unsolicited goods

- If a person sends unsolicited goods, they cannot claim money for them, or seek damages to the goods.

s 42: Liability of recipient for unsolicited services (basically the same as above)

s 43: Assertion of right to payment for unauthorised entries of advertisements

- Don't charge people for putting an advertisement in something if they didn't ask for it or authorise it.

CERTAINTY:

1. REQUIREMENTS:

1. Sufficiently complete.
2. Sufficiently certain.
3. Not Illusory.

2. COMPLETENESS:

- a. No binding contract can be made unless the parties **have reached agreement on all terms**.
 - b. **The parties, subject matter and price must be determined or else a contract fails for uncertainty**. BUT, the courts will imply necessary obligations to complete the transaction, including an obligation to complete all steps within a reasonable time – *Hall v Busst*
 - c. ESSENTIAL TERMS:
 - “A term without which the contract cannot be enforced” – All essential terms must be agreed upon.
 - Parties may make ‘open contracts’, agreeing on only essential terms, and allowing the courts to imply the rest.
 - d. AGREEMENTS TO AGREE:
 - An **agreement that provides that the parties will reach agreement on essential terms** in the future is characterised as an agreement to agree.
 - The **courts do not enforce these agreements; they lack essential terms** - *Booker Industries v Wilson Parking*
 - e. EXECUTED CONTRACTS:
 - Less likely to find an agreement incomplete if it has been wholly/partly performed – *Foley v Classique Coaches Ltd.*
- ### 3. CERTAINTY:
- a. The agreed terms **must be sufficiently certain and clear**.
 - b. A contract of which there can be more than one possible meaning is not therefore void for uncertainty. As long as it is capable of a meaning, it will ultimately bear that meaning which the courts...decides is its proper construction. The question becomes one of construction, of ascertaining the **intention** of the parties, and of **applying it**. - *Upper Hunter Country District Council v Australian Chilling and Freezing Co Ltd.*
 - c. SEVERANCE:
 - The courts will **sever uncertain terms if they are not essential to the contract** – *Whitlock v Brew*.

d. AGREEMENTS TO NEGOTIATE:

- Agreements to negotiate are found often in commercial contracts. They are usually labelled 'letters of agreement' or 'terms of intent'.

- *Coal Cliff Collieries* = A2N are generally unenforceable.

i. AGREEMENT TO NEGOTIATE IN GOOD FAITH:

- An **agreement to negotiate in good faith is enforceable** - *United Group Rail Services Ltd v Rail Corporation New South Wales*

- Supported in *Harold R Finger & Co Pty Ltd v Karellas Investments Pty Ltd* [2016] – Court of appeal decided that the heads of agreement made by the parties were binding, though they best characterised an agreement to negotiate in good faith which bound the parties to enter into a formal contract if agreement was reached.

4. ILLUSORY PROMISES:

a. DEFINITION = A promise will be illusory "if its payment or fulfilment depends upon an **unfettered discretion** vested in the promisor" – *Biotechnology*

b. ILLUSORY PROMISE OR CONDITIONAL PROMISE: *Meehan v Jones*

- **'Subject to finance' clauses = enforceable.**

- Purchaser is **required to act honestly and reasonably** when deciding if finance is satisfactory.

- Court could assess this – **"Correctly construed the clause means satisfactory to the purchaser"**

- A contract is illusory when one of the parties is given discretion as to whether to perform the contract, but **not where one of the parties has a discretion in relation to the fulfilment of a condition on which the contract depends.**

i. *Placer Development Ltd v Commonwealth:*

- This contract, in which there was a term that stipulated the rate would be "determined by the commonwealth", was unenforceable -- The Commonwealth's promise to pay an unspecified sum of money was illusory, since they were expressly given a discretion to determine the amount to be paid.

c. IMPORTANT MATTERS DETERMINED BY THIRD PARTY: *Godecke v Kirwan*

- A binding agreement may be made leaving some important, even essential, matter to be settled by a third party or even, in most cases, by one of the parties.

d. WAIVER:

- Where performance of a contract is subject to an unfulfilled condition, or is and uncertain or illusory promise, that can be waived by a party for whose benefit that clause was inserted.

- A party cannot waive an essential term – *Grime v Bartholomew*