

Offer	<ul style="list-style-type: none"> • Standard offer • Invitation to treat / Tender • Conditions • Termination / Revocation / Lapse / Rejection
Acceptance	<ul style="list-style-type: none"> • Acceptance • Communication • Silence / Conduct • Method of Communication • Correspondence (Offer/acceptance)
Consideration	<ul style="list-style-type: none"> • Benefit / Detriment • Bargain requirement • Sufficiency • Past consideration & Existing legal duty
Intention	<ul style="list-style-type: none"> • Intention objective • Presumption • Preliminary agreements
Certainty	<ul style="list-style-type: none"> • Completeness • Certainty • Illusory terms
Formalities	<ul style="list-style-type: none"> • Instruments Act (Land / Guarantees) <ul style="list-style-type: none"> ◦ Detail ◦ Existence ◦ Joinder ◦ Signature • Part Performance
Capacity	<ul style="list-style-type: none"> • Mental Incapacity / Intoxication / Minors
Estoppel (Sword / Shield)	<ul style="list-style-type: none"> • Assumption • Inducement • Detrimental Reliance • Reasonableness • Departure • Unconscionability • Independent cause of action
Privity	<ul style="list-style-type: none"> • Agency • Assignment and novation • Remedies • Insurance exception • Unjust enrichment • Trust and torts
Express terms	<ul style="list-style-type: none"> • Signature • Notice - onerous terms • Dealings • Parole evidence rule • Negotiations • Constructioni • Exclusion clauses
Implied terms	<ul style="list-style-type: none"> • Custom / Fact / Law • Good faith
Consumer Contracts	<ul style="list-style-type: none"> • Unfair contract terms • Consumer guarantees

Agreement - Offer

'Indication by one person to another of his or her willingness to enter into a contract with that other person on certain terms.'

- Carter's definition

Determining an offer

- Objective test - reasonable person in position of offeree (**Carlill v Carbolic Smoke Ball Company**)
 - Would it appear to RP that offer was intended? / that binding agreement would be made upon acceptance?
- Ideally 'offer' and 'acceptance' - Without offer and acceptance there is no contract
- Invitation to treat or offer (may be prepared - not on certain terms)
- Wording of an offer must be on certain terms
 - (**Gibson v Manchester**)
- Bringing about different results
 - Barwick CJ & Stephen J (**MacRobertson**)
 - Plaintiff's quotes fare & availability of seats then issues ticket after payment
 - Ticket contained condition where flights can be cancelled without liability

Invitation to Treat (ITT): - communication inviting another to make offer / enter negotiations (not an offer)

- (**Boots**) - Display of goods is not an offer - placing goods in basket and taking to the till is offer which can be accepted/rejected by pharmacists
- (**McWhirter**) - Auction merely ITT, bids not binding unless assented (acceptance)

Tenders: Call for tenders > ITT > Tender submission > Offer

- **Harvela** - Fixed price tender constituting offer b/c certain terms (highest bid = acceptance) - referential bid did not conform
- **Hughes** - Tender process contract stipulating governing criteria

Conditions - failure and changed circumstances

Offer may be made subject to express / implied conditions - if condition is not satisfied, offer cannot be accepted

- (**Dysart Timbers**) - Implied condition that: "offer will lapse upon a fundamental change of circumstance" 'Fundamental' indicates high threshold / rare

Termination: offer will cease if: **revoked**; lapses; rejected

Bilateral

- Offer may be withdrawn any time before acceptance, even if promised to be open for a specified period. (**Goldsborough**).
- **NOT** for 'option' agreements - where consideration is given for the offeror 'option' to accept (purchase) within the period. (**Goldsborough**).
- Withdrawal/revocation must be communicated

Unilateral

- Offer can be revoked before performance is complete, even if performance has commenced (**Mobil Oil**)
- BUT: revocation prevented when implied contract not to revoke or estoppel (**Mobil Oil**)

Lapse:

- Offer express to be open for set period will lapse at end of period
- If unspecified: offer lapses after reasonable time (eg. car sale - week)
- After death of offeror (if known by offeree) and before acceptance (*Fong*)
- If 'options' (*Goldsborough*), option/contractual obligation may accrue to deceased's estate (*Laybutt*)

Rejection

- If offer is rejected - no longer option to acceptance
- Counter-offer amounts to rejection of original offer (*Butler*)
- 'Mere inquiry' about offer does not amount to rejection (*Stevenson*)

Agreement - Acceptance - Unqualified assent to the offer (*Patterson et al.*)

Determining acceptance

- Objective test - the reasonable person in position of offeror.. (*Smith v Hughes* - Oats)
- Outward manifestations (*Taylor v Johnson*)
- What each party would have 'led a reasonable person in the position of the other party to believe.' (*Alphapharm*)
- Signing document - outward manifestation of acceptance (*Fitness First v Chong*)
- Subjective state of mind to terms is irrelevant (*Smith v Hughes*; *Fitness First*)

Exceptions:

- Equity may intervene if party 'subjectively...mistaken belief about what is being agreed if: (*Taylor v Johnson*)
 - Other party aware of mistake belief
 - And deliberately ensures party does not become aware
- Acceptance must be made in (subjective) response to offer - in reliance of reward (*Crown v Clarke*) - unilateral contracts - external manifestations no conclusive

Communication of acceptance

- Acceptance only effective when communicated (*Latec*; *Brinkibon*)
- Contract is formed when and where acceptance received (*Brinkibon*)
- Must be communicated to the offeror (*Latec Finance*)
- However, if permitted in contract (*Latec Finance*)
 - Offeror may agree to treat act as acceptance
 - Offeror may treat particular method effective regardless of receipt

Silence / conduct

- Silence generally does not constitute acceptance (*Felthouse*)
- Unilateral contract - performance sufficient acceptance (*Carlill*)
- Postal Rule - acceptance effective at time of posting (*Adams*)
- Parties expressly/impliedly contemplate effective communication not necessary - needs to be supported with clear language (*Latec Finance*)
- Acceptance inferred from conduct (*Empirnall*)
 - Silence in conjunction with other circumstances
 - Where offeree:
 - Has reasonable opportunity to reject offer, and
 - Takes benefit of them under (*Brambles*)
 - Circumstances which indicate there would be paid for

- Open for tribunal of fact to find offer was accepted
- Whether reasonable bystander would regard conduct, including silence as signal to offeror of acceptance
- Conduct may indicate acceptance despite initial reject (*Brambles*)

Communication methods

- Postal rule - acceptance effected as soon as posted (*Adams*)
- Parties must contemplate post as possible or permitted mode
- Not extended to telex / fax / email (*Brinkibon*)

Electronic Communications Act (2000) Vic

- Email / fax / SMS / all online communications (s3 def)
- Time of receipt:
 - If address specified: when capable of being retrieved s 13A(1)(a)
 - Not specified: When capable of being retrieved and addressee becomes aware communication sent to that address s 13A(1)(b)
 - Parties may agree otherwise
 - Place dispatch/receipt addressor/ee place of business s 13 B(1)
 - Domain / address in country does not = business location s 13B(4)

Correspondence between offer and acceptance

- When parties have different standard terms (*Butler*)
 - Counter-offer = rejection (*Butler*)
- Attempts by offeree to change or add term may amount to counter offer (*Butler*)

Determining accepted terms

- Synthesis approach: terms of all documents construed together to achieve acceptance on all material points (*Lord Denning, Butler*)
- Classical approach: final signed terms accepted (*Majority, Butler*)

Agreements without offer/acceptance

- Classical approach (offer/acceptance) should be applied where possible

Note: *Heydon JA Brambles:*

- Classic approach: neither sufficient nor necessary to explain all cases
- Possible to find contract exist even though offer/acceptance is not obvious
- Relevant questions to ask
 - In all circumstance can an agreement be inferred?
 - Has mutual assent been manifested?
 - What would a reasonable person in the position of the parties think as to whether there was a concluded bargain?