

# Offer

An offer is a statement that proposes that parties enter into a contract. The offer must be definite (Gibson v Manchester City Council [1979] UK). It must take the form of a proposal (Australian Woollen Mills v Commonwealth (1954)). Thus language of command or request is insufficient, there needs to be a form of choice (Brambles v Bathurst City Council (2001)). The offer must contain a clear statement of terms and the consideration (Carlill v Carbolic Smoke Ball [1893]), indicating an intention to be contractually bound (Australian Woollen Mills v Cth). The offer must be made to a single person or a class of persons (Carlill v Carbolic Smoke Ball [1893]). The offer must then be communicated to the other party, which means there must be knowledge of the offer before there can be a contract (Fitch v Snedaker (1886)). The offer must be expressed with sufficient certainty (AWM). The courts adopt an objective approach to determine the existence of an offer (Carlill v Carbolic Smoke Ball Company [1893]).

## OPTION:

An OPTION is a form of offer which also contains a promise not to withdraw it for a certain time. The crucial feature: the offeree must have provided a consideration for the benefit of being given the exclusive right to accept for a certain period – may include nominal sum of money (e.g. \$1) (Goldsbrough Mort Co Ltd v Quinn (1910)). In this case, the court linked options contract to the main contract, and the remedy was that of the main contract's

Remedy for breach of option: specific performance is applicable to rare goods such as antiques, artworks and parcels of land!

## ONLY IF RELEVANT - UNILATERAL CONTRACT

Unilateral contracts are contract where the offered accepts the offer by performing his or her side of the bargain (Australian Woollen Mills). The performance of the contract forms the contract. A unilateral contract arises when a doing of the act is requested in return for promise (establishing a quid pro quo nature) (Australian Woollen Mills). The offer must be made to induce the doing of the act (Australian Woollen Mills).

A unilateral contract must be distinguished from a conditional gift. A conditional gift is "On your arrival at X, I'll pay you \$1000" whereas a unilateral contract is "Come to X and I'll pay you \$1000". Conditional gifts require satisfying a condition, whereas a unilateral contract is where an act is done expressly in regard to a promise of an act. This is in contrast to bilateral contract which are contracts formed by an exchange of promises. The obligations of **both parties are executory** at the time of formation- United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd [1968]

**ONLY IF RELEVANT - Distinguishing an Offer (the following do not amount to an offer :**

- Mere supply of information
  - **Harvey v Facey [1893]**: A statement of the minimum price at which a seller would sell, is not an offer
- Mere puff: Leonard v Pepsico Supp (1999)
- Invitation to Treat: An invitation to treat is an invitation for another individual to make an offer
  - An interest in selling property is regarded as an invitation to treat (Harvey v Facey). The facts will determine whether an offer has been made.
  - Shop Sales: Display of goods in shop windows or shelves is ordinarily treated as an invitation to treat, not an offer (Fisher v Bell). It is not an offer until the person brings the good to the counter (Pharmaceutical Society v Boots Cash Chemist)
  - Auctions: Public auctions are an invitation to treat. Bids = offers; Raising the gavel = acceptance. Pg 61 for footnotes.
  - Tender: Tenders are where a person makes a bid without knowing what other bids are made. In Harvela Investments Ltd v Royal Trust of Canada: Tenders = Offer because party promised to accept the highest bid. An obligation not to withdraw tenders (

**ONLY IF RELEVANT - Ticket Cases:**

If ticket handed out by a person: 'If the customer took it and retained it without objection, his act was regarded as an acceptance of the offer. Purchasers of tickets are bound by T&Cs when buying the tickets, provided that they are brought to their attention at the time of acceptance. (eBay International AG v Creative Festival Entertainment Pty Limited (2006)).

If from an automatic machine: 'The offer is made when the proprietor of the machine holds it out as being ready to receive the money...The acceptance takes place when the customer puts his money into the slot. **Denning MR** - Thornton v Shoe Lane Parking Company [1971]

Example of the difficulty of applying the offer /acceptance model

MacRobertson Miller Airline Services v Commissioner Of State Taxation (WA) 1975

Airline Tickets: Stephens J says an offer ( 3 High Court judges used entirely different reasoning concerning offer and acceptance in determining whether the ticket was an agreement. Ultimately not but at most a voucher.

**ONLY IF RELEVANT - REVOKING AN OFFER:**

The offer can be revoked any time before its acceptance, as long as it is communicated by express or implied conduct (Byrne v Van Tienhoven (1880)). Withdrawing an offer can be done by informing the offeree of the withdrawal via a third party (Dickinson v Dodds 1876). Once the offer is revoked, it can no longer be accepted (Stevenson Jacques & Co v McLean (1880)), but a counter offer can be made which can then be accepted (Hyde v Wrench (1840) UK). It must be

ensured that a request for information is not perceived as a counter offer (Stevenson Jacques & Co v McLean (1880)). It is possible for an offer to be lapsed due to failure to accept within a reasonable time (Ballas v Theophilos (1957)), or due to a death of a party (Fong v Cili (1968)).

**Revocation in unilateral contracts:**

- Prior to performance: offer may be withdrawn prior to performance so long as it is publicized as prominently as the original offer (Shuey v United States (1875))
- Partly performed: It has been held a unilateral offer cannot be withdrawn once the offeree has partly performed the requested act (Daulia Ltd. v. Four Millbank Nominees Ltd (1978) UK)
  - BUT The notion that there is a general principle preventing revocation of offers in exchange for acts (unilateral contracts) has been rejected by the Full Federal Court (Mobil Oil Australia Ltd v Wellcome International Pty Ltd (1998)).
    - An offer made in return for performance of an act is, like any other offer, revocable at any time
    - 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 arise only where the offeree is induced to adopt the assumption that the offer will not be revoked and relies on that assumption in such a way that he or she will suffer detriment if the offer is revoked.

# Acceptance

Acceptance is the unqualified assent to the terms of an offer made. This means that acceptance requires a consciousness of the offer, and it must be a response to the choice given by the offer (R v Clarke (1927)). The acceptance must be by the person to whom the offer was made (Boulton v Jones (1857)). The acceptance must correspond with the offer - that is, there must be a “meeting of the minds” about what is being offered and what is being accepted (Dickinson v Dodds (1876)). It must be communicated to the offeror by express or implied means (Latec Finance Pty Ltd v Knight (1969)), however, silence as to the offer made cannot amount to good acceptance (Felthouse v Bindley (1862)). In determining whether there has been acceptance, the courts will apply the objective test of whether a reasonable person would find that there has been a acceptance of only the terms in the offer ((Taylor v Johnson(1983)).

Note: The courts can still find agreement without an offer and acceptance.<sup>1</sup> In *Brambles*, the Court found that the ‘offer/acceptance’ approach was insufficient to establish an agreement because both parties had been engaged in a contract without an ‘offer’ and ‘acceptance’ being present. The Court proposed that where there is ‘mutual assent’ and where a reasonable person would find there is a ‘concluded bargain’ the element of agreement is satisfied.<sup>2</sup> The courts have found it useful to look at the parties conduct, commercial aims, and their intent.<sup>3</sup>

Note: Postal Rule - When offeree has placed his acceptance in the post there is a fictional meeting of minds which concludes offer and gives effect to acceptance ((even if received later/ lost) (Adams v Lindsell (1818)). The postal rule does not apply to instantaneous forms of communication (telephone or telex) (Entores v Miles Far Eastern Corp (1955)). Facsimile are treated as instantaneous communication therefore acceptances sent by fax are governed by the general rule that an acceptance is only effective when received by the offeror (Reese Bros Plastics Ltd v Hamon-Sobelco Australia Pty Ltd (1988)). Contract is made where acceptance is received (Brinkibon Ltd v Stahag Stahl und Stahl (1983) UK)

- In [Mrjana v Imagine Education Australia Pty Ltd \[2016\] NSWCATAP 232](#): the issue was whether the a contract formed by email was made at the place where the party accepted the contract or where the offeror was communicated of the acceptance by the other party. The NSWCA held that the postal rule does not apply to emails (which are instantaneous forms of communication) and thus a contract is made when the acceptance is communicated to the offeror.

---

<sup>1</sup> see *Brambles Holdings Ltd v Bathurst City Council full citation*(‘*Brambles*’)

<sup>2</sup>

<sup>3</sup> textbook, authority

Note: Conditional Acceptance

- Conditional acceptance is NOT acceptance. Acceptance must be without addition, deletion or qualification.
- Masters v Cameron (1954) described the categories of conditional acceptance :
  - The parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound but wish to have their terms restated in a form that is more full or precise.
  - The parties have agreed to all the terms and plan no departure from the terms but have made performance conditional upon the execution of a formal document.
  - The intention of the parties is not to make a concluded bargain at all unless they execute a formal contract.

Note: Battle of The Forms

- Suggested two different approaches are available Conflict or synthesis.
  - Butler Machine Tool Co. Ltd v Ex-Cell-O Corp (England) Ltd (1979) Held: In this case the Conflict approach used : last shot (the counter offer of the buyer) prevails = on buyers terms
  - In Goodman v Cospak [2004] NSWSC 704 at [46]-[53]: Macready M stated that the Court looks to interpret the terms using the 'global approach' in such a manner'[s]o as to give a "harmonious result" when construed with a "commonsense and practical approach" which takes account of the "realities of commerce" ... and reflects the general trend of modern contract law.