

# FORMATION

## Agreement

Was there an offer? ‘*An expression of willingness to be bound on certain terms*’ (objective test of RP)

1. Definition? *Carlill v Carbolic Smoke Ball* (also says you can't add new terms into K, need fresh consideration)
  - A. Was it a request for information → *Seppelt v Commission for Main Roads*
    - Request/provision of info relating to future transactions not necessarily an offer
  - B. an invitation to treat (invitation to others to make an offer: ads, shop displays..) → *Pharmaceutical Society of Great Britain v Boots Cash Chemists*:
    - customer makes offer at cash register which cashier accepts by completing transaction
  - C. or a mere puff? (non-promissory, exaggerated, RP knows not an offer)
2. Counter-offer? → *Stevenson, Jacques & Co v McLean*
  - Inquiry as to terms not necessarily a counter offer (treated as rejection of original offer).
  - Revocation not effective until it reaches offeree
  - Counter offer = can't accept original offer

→ *Butler Machine Tool v Ex-Cell-O Corp*

  - mirror image rule (an offer must be accepted exactly with no modifications)
  - Denning: Battle of forms? A contract as soon as last of forms is sent & received w/o objection being taken to it.
3. Was the offer revoked?
 

→ *Dickinson v Dodds*

  - Can revoke at any time prior to acceptance, but only effective when actively communicated to offeree/thru reliable 3<sup>rd</sup> party.

→ *Goldsborough v Mort*

  - Can't revoke if there's an option (promise to keep open for certain time)
  - Options require separate consideration

→ *Mobil Oil v Wellcome International* (revocation of unilateral K)

  - Where no implied ancillary K exists, offer may be revoked regardless of whether offeree has commenced performance.
  - If they have begun, there may be a remedy in equity.
    - Main offer must be clear, unvague parties must know obligations, how party will be rewarded. Here they needed a 2<sup>nd</sup> option K. Implied term not to revoke not useful here since there wasn't a K yet

UNILATERAL OFFER	CONDITIONAL GIFT
<ul style="list-style-type: none"> <li>• <i>Carlill</i>: can make offer to whole world</li> <li>• Offeree can accept thru performance</li> <li>• Only 1 promise is executory at time of performance</li> </ul>	<ul style="list-style-type: none"> <li>• <i>Aus Woollen Mills</i>: offer must be made to induce performance of act, not merely a benefit if a particular condition is fulfilled by the other party</li> </ul>

Was there acceptance? ‘*unqualified assent to terms of an offer*’

1. Definition? → *R v Clarke*
  - Knowledge of & reliance on an offer is required for acceptance. (actions done on the faith of K)
2. Was the acceptance communicated? *Must be actively communicated. If offeror nominates specific method for acceptance, only that method is effective.*
  - *Felthouse v Bindley*: **silence/inaction ≠ acceptance.**
    - Need clear & unequivocal acceptance.
  - *Empirnall Holdings v Machon Paull Partners*: **conduct/circumstances**
    - When on party's conduct is sufficient to imply the existence of a contract & induces contractual performance by the other party, the K will be said to exist
      - (*Empirnall knew of terms of contract & continued to perform as if bound by them, objectively signifying acceptance*)
  - *Brambles Holdings v Bathurst City Council*
    - acceptance of an offer can be implied by conduct, which may take precedence over communications designed to have the opposite effect.
    - Agreement doesn't have to be considered in detail if existence of K is contingent on other factors (intention, certainty).
  - ✳ Postal acceptance → *Bressan v Squires*)
    - Acceptance effective as soon as posted (which forms K, which is formed where acceptance is communicated)- applies to telegrams
    - *Can it be reasonably inferred that th parties contemplated likelihood of acceptance by post (not if they contemplated legal effects of such methods)*
    - Revocations only valid upon receipt.
  - *Brinkibon Ltd v Stahag Stahl Und Stahlwarenhandels-gesellschaft*
    - If acceptance is sent by post, it's accepted when it's sent. If acceptance is communicated instantaneously it's accepted when it's received. (but there's no universal rule)
  - *Electronic Transactions Act 2000* (NSW)
    - the time of receipt of an email (or the like) is when it becomes capable of being retrieved at the designated address (i.e. it reaches the inbox), or if there is no designated address, when it is both capable of being retrieved and the addressee is aware it has been sent to that address.

## Consideration

3. Elements: → *Australian Woollen Mills v Commonwealth*
  - *Act of forbearance done on faith of the promise & at request of promisor (express/implied).*
  - *Must be a bargain- quid pro quo*
  - *Here if it was a private K, intentions would've been different*
  - → *Currie v Misa: Fulfil detriment requirement*
4. Did consideration move from the promisee? → *Coulls v Bagot's*
  - For joint promises, only 1 has to provide consideration to promisor.
5. Is consideration sufficient? → *Chappell & Co v Nestle*
  - Doesn't matter that it's inadequate→ *Woolworths v Kelly*
  - CL declines to weight the adequacy of consideration in judging whether a bargain amounts to a legally enforceable K
6. Past consideration? *Roscorla v Thomas*
  - Can't use past consideration (of services rendered in the past) to support new promise (always need fresh consideration)→ *Pao On Lau Yiu Long*
  - Exception: an act done before a promise was made was good consideration for that promise if it was done at the promisor's request and the parties understood the act was to be paid for at a later date, and the payment or benefit would have been enforceable had it been promised in advance.
7. Was there an existing legal duty to perform? → *Foakes v Beer*
  - Parties can't discharge obligations by part performance. Promise to pay part of debt isn't consideration for a promise to accept the payment in satisfaction of the debt.----exceptions:
  - a) Does the party receive a practical benefit → *Williams v Roffey Bros- courts now more inclined to find consideration where there's agreement btw 2 parties to vary a prior contract.*
    - If so, then can be treated as consideration. Only if the variation, gives other party a benefit which is capable of being viewed by them as worth more than any likely remedy against the party (that's only fulfilling their pre-existing legal duty)or obviate a detriment (*Musumeci v Winadell*)?
  - Modifying party agrees to accept less \$ in consideration of practical benefit derived from concession