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## How to ensure your Calderbank offer is valid

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In December last year, my colleague Dylan Trickey published an article on the [“Elements and Benefits of the Offer of Compromise.”](#) In his article, Dylan compared the Offer of Compromise and the Calderbank offer and provided a number of reasons as to why the Offer of Compromise can be more favourable.



However, there are often instances where Offers of Compromise may not be available or appropriate and a Calderbank offer is more suitable. For this reason, it is vital that legal practitioners are aware of the elements which constitute a valid Calderbank offer.

Litigation is more often than not costly and timely, and awarding costs is at the discretion of the courts. For this reason, (where appropriate), legal practitioners encourage their clients to explore settlement options with the opposing party in order to avoid an expensive, uncertain and perilous litigation process.

Calderbank offers are often looked at as a more flexible way to reach a settlement in situations where Offers of Compromise are not a viable option.

**Please note that this article provides an overview only. Proceedings can be complex, and advice needs to be tailored to individual circumstances. This article is not intended as a substitute for independent legal advice.**

If you have any questions or concerns we suggest that you contact JHK Legal for further information.

## What is a Calderbank offer?

The Calderbank offer derived from the case of *Calderbank v Calderbank* [1975] 3 All ER 333 (“Calderbank v Calderbank”) and is an offer from one party to the other in order to attempt to resolve a dispute.<sup>1</sup>

A Calderbank offer must be a “genuine” offer, and open for a period of time that is reasonable. If the party receiving the Calderbank offers unreasonably rejects the offer, this may result in the rejecting party incurring adverse costs. A Calderbank offer can provide protection for parties who have incurred costs unnecessarily but can only do so if the offer complies with the requirements as set out below.

## What are the elements of a Calderbank offer?

A Calderbank letter can be oral or written, and requires the following elements:

1. The offer must be marked “without prejudice save as to costs”.

Meaning the contents of the letter can only be used in Court with respect to the question of costs.

2. The offer is clear, precise and certain:

In the matter of *Kemp v Ryan* [2012] ACTCA 12, the Court of Appeal commented that the offer needs to be “sufficiently clear” to create a binding contract if the offer was accepted. It was noted that any terms which were open to multiple interpretations would not be classified as clear, precise and certain<sup>2</sup>.

3. The offer must state the time in which the offer must be accepted and the offer must give a reasonable time for acceptance:

What is a “reasonable” time for acceptance will depend on a number of factors, including the complexity of the case. In *Meldov Pty Ltd v Bank of Queensland* [2015] NSWSC 2015 (No. 2)<sup>3</sup>, it was found that an offer left open for acceptance for 12 days was “plenty” of time for the party receiving the offer to consider and accept the offer.

Despite this, it is recommended that an offer remain open for acceptance for at least 14 days.

4. The offer must make reference to being in accordance with the principles in the decision of *Calderbank v Calderbank* and that the offeror reserves its right to tender the offer on an application for costs if the offer is rejected:

<sup>1</sup> *Calderbank v Calderbank* [1975] 3 All ER 333

<sup>2</sup> *Kemp v Ryan* [2012] ACTCA 12.

<sup>3</sup> *Meldov Pty Ltd v Bank of Queensland* [2015] NSWSC 2015

Words to the following effect provide an example as to what should be included in the offer:

*“This formal offer of settlement is made pursuant to the principles of Calderbank v Calderbank [1975] 3 W.L.R 586. This offer will remain open for a period of 28 days from the date of this letter at which time it will lapse and the matter will proceed to hearing. In the event that this offer is not accepted we will rely on this letter in any application for indemnity costs.”*

5. The offer should include reasons as to why the offer should be accepted:

Although not required, it is recommended that the offer outlines reasons as to why the opposing party should accept the offer. A level of particularity will arguably improve the reasonableness of the offer, and this was supported by Lindgren J in *NMFM Properties Pty Ltd v Citibank Ltd* [2001] 109 FCR 77 (No 2):

*“...No doubt where a party puts with sufficient particularity to the opposing party the reasons why the latter must fail, yet the latter does not recognise the inevitable, this will be a factor pointing to an award of indemnity costs...”<sup>4</sup>*

Conversely, in *Macquarie Bank Ltd v National Mutual Life Association of Australasia Ltd*, Cole J noted that:

*“...there is no obligation upon a party making an offer of settlement in a Calderbank letter to specify with precision the reasons why the opposing party will fail or should accept the offer....”<sup>5</sup>*

It is also important to note that if a party makes an application for indemnity costs, they bear the onus of proving that rejecting the Calderbank offer was unreasonable.<sup>6</sup>

## The Takeaway

Calderbank offers are an important tool in the litigation process and encourage compromise and settlement between parties where a formal offer is undesirable.

Calderbank offers need to be carefully drafted to ensure they constitute a reasonable offer of compromise. For the parties receiving the offer, a Calderbank offer should be considered seriously, and if the offer is reasonable, the opposing party should take careful consideration as to whether or not the offer should be accepted. This is because an offer that is unreasonably rejected will ultimately benefit the offering party when costs are ordered.

**At JHK Legal, we can provide you with expert advice in commercial dispute resolution as well as a number of other areas of law. If you require any legal assistance or advice, please contact JHK Legal on (02) 8239 9600.**

<sup>4</sup> *NMFM Properties Pty Ltd v Citibank Ltd* [2001] 109 FCR 77.

<sup>5</sup> (Unreported, Supreme Court of New South Wales, 27 July 1994), 4. Cited in *Multicon Engineering Pty Ltd v Federal Airports Corporation* (1996) 138 ALR 425, 440 (Rolfe J).

<sup>6</sup> *MGICA (1992) Pty Ltd v Kenny & Good Pty Ltd* (1996) 70 FCR 236, 240 (Lingren J); *Sural Spa v Downer EDI Rail Pty Ltd* [2007] NSWSC 1292, [8] (Einstein J).