

(1a) OFFER

Objective test: The offeror will be bound if it appears to a reasonable person in the offeree's position that the offeror was offering to enter into a contract (*per Heydon JA in Brambles*)

- I.e. determined according to the offeror's outward manifestation of intention
- Is the language of the offer **clear and unambiguous?**
 - The language of the offer must be clear, not vague or ambiguous (*Gibson*).
 - The words 'to make formal application to buy' and 'may be prepared to sell' were too vague to constitute an offer.
- Does the offer use **language of commitment?**
 - The offer must use the language of commitment (*Mobil*)
 - The use of the words 'perhaps', 'find a way', 'we hope' was not sufficiently clear to show commitment.
- Does the offer use the **language of command?**
 - The offer cannot use the language of command (*per Heydon JA in Brambles*)
 - It must give the offeree the opportunity to accept or reject the offer
- Is it merely **an invitation to treat?** (*Carlill*)
 - An invitation to make an offer (usually advertisements)
 - Advertisements are usually invitations to treat ('mere puff')
 - HOWEVER, in *Carlill* the advertisement was an offer because, among other factors, of the deposit in the bank showing 'sincerity in the matter' (this satisfied the court that the advertisement was not mere puff)
 - *Gibson*: Council's letter was an invitation to enter into contractual negotiations – 'If you would like to make a formal application to buy your Council house'
- Is it altogether unclear **what the actual offer was?** (*MacRobertson*)
 - Stephen J and Barwick CJ disagree as to whether the ticket was the offer or the acceptance.
- Has the offer **been revoked?**
 - Rule: An offer may be revoked at anytime before it accepted, provided that revocation is communicated to the offeree.
 - Revocation is effective when it is communicated to the offeree (Electronic Transactions Act).
 - The postal acceptance rule does NOT apply to revocation
 - Unilateral offers: An offer may be revoked at anytime before it is accepted, unless there is an implied ancillary contract not to revoke (*Mobil*)- consider if unilateral.

1(b) ACCEPTANCE

- Once you have established that there is a valid offer, and that it has not been revoked, you need to establish whether it has been accepted
- **Acceptance: An unqualified assent to the terms of the offer.**
- **General rule:** Offer has not been accepted until acceptance has been communicated to the offeror.
 - **Exception: Postal Acceptance Rule**
 - PAR: acceptance is effective when posted (*Adam v Lindsell*).
 - This rule operates only where the offeror intended that an effective acceptance could be made in this way (*Tallerman v Nathan's Merchandise*)

-*Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH*: this case suggested that it is unlikely that the postal acceptance rule will be extended to modern methods of communication; it will be effective only upon receipt. (This is implemented in legislation in Victoria by the ETA).

- Exception: Unilateral offers: where acceptance is indicated by performance of the terms of the offer (*Carlill*)
 - NB: a unilateral offer CAN stipulate that acceptance needs to be provided to the offeror

- **Silence cannot constitute acceptance** (*Felthouse v Bindley*)

- The offeror cannot say that unless he/she hears something to the contrary, he/she can assume the offer has been accepted.

- **Electronic Transactions Act (Vic):**

- S3: there is a broad/wide definition of 'electronic commerce'

- S13A Time of Receipt:

- S13A(1)(a): In situations where the addressee has designated (specified) an address as the manner in which to communicate, acceptance is effective when it becomes capable of being retrieved by the addressee (e.g. when the email hits the inbox)

- S13A(1)(b): If an address was not designated, then acceptance is effective when it is capable of being retrieved AND the addressee is aware of the communication

- 'Designated' is not defined in the ETA

- Recall that this legislation was based on the UNICTRAL Model Law on Electronic Commerce

- Guide to the enactment of the UNICTRAL Model Law on Electronic Commerce (1996)

- By 'designated' information system', the Model Law is intended to cover a system that has been specifically designated by a party, e.g. in the case where an offer expressly specifies to which acceptances should be sent.

- **Non-traditional offer and acceptance is recognised:** Courts do recognise that an agreement can be made even without an identifiable offer and acceptance (*Heydon JA in Brambles*)

- Courts are willing to **depart from the traditional offer and acceptance framework** and use the reasonable person test to see whether an offer has been accepted (*MacRobertson Miller; Empirnall; Brambles*)

- Parties can reach an agreement without there being an expressed act of acceptance, acceptance can be inferred from a **party's overall conduct** (*per Ipp JA in Brambles*)

- Acceptance can be indicated by a party's overall conduct, most notably whether they have taken the benefit of the terms of the offer, even if they have remained silent (*Empirnall*).