

AGREEMENT: OFFER

START→ An offer is an expression to another of a willingness to be bound by the stated terms (*AWM*). Determined objectively by reference to reasonable person in position of offeree (*Carlill*).

DETERMINING IF AN OFFER IS MADE:

- Ask: Would it appear to RP that an offer/binding agreement was intended?

CONVENTIONAL APPROACH:

- Identify 'offer' and 'acceptance' (*Gibson v Manchester City Council*)
- This can yield differing results (Barwick CJ & Stephen J in *MacRobertson*)

ITT

A communication inviting another to make offer/enter negotiations.

Not an offer capable of being accepted.

- *Boots*: Goods displayed in shop not offer to sell.
- *McWhirter*: Auction merely ITT, bids capable of acceptance.
 - **S 14 (b) ETA** A proposal to form a contract made through one or more electronic communications that is not addressed to one or more specific parties; and is generally accessible to parties making use of information systems is ITT unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

TENDERS

- Call for tenders = ITT
- Tender submission = Offer
- *Hughes*: Tender process contract stipulating governing criteria.
 - **However:** *Harvela*: Fixed price tender constituting offer. Highest bid = automatic acceptance. (i.e. Call for tender is an offer, not ITT)

CONDITIONS

- Offer may be made subject to express or implied conditions.
- If condition is not satisfied, offer cannot be accepted.
- Look for a 'fundamental change of circumstances' (*Dysart Timbers – NOTE NZ*)
 - Implied condition that: 'offer will lapse upon a fundamental change of circumstances'. 'Fundamental' indicates high threshold/rare.
 - Applies generally to all offers.
 - Fundamental circumstances threshold question for court.

TERMINATION: REVOCATION

- Offer may be withdrawn anytime before acceptance, even if promised to be open for specified period (*Goldsborough*).
- But not for 'option' agreements – where consideration given for offer or for 'option' to accept (purchase) within period. (*Goldsborough*).

- Withdrawal/revocation only effective when **actually communicated** – identify communication in answer.
- **Special case for unilateral contracts:**
 - No 'firm' rule that offeror must keep offer open after commencement of performance (*Mobil*).
 - But: revocation prevented when implied contract not to revoke or estoppel (*Mobil*).

TERMINATION: LAPSE

- Offer expressed to be open for period will lapse at end of period.
- No period specified: offer lapses after reasonable time (car sale: week).
- 'Reasonable' depends on circumstances. (*cf* car vs house).
- After death of offeror (if known) and before acceptance (*Fong*).
- If 'option' (*Goldsborough*), option/contractual obligation may accrue to deceased's estate (*Laybutt*).

TERMINATION: REJECTION

- An offer that has been rejected is no longer open to acceptance.
- Counter-offer amounts to rejection of original offer (*Butler*)
- 'Mere inquiry' about an offer does not amount to a rejection (*Stevenson*)

AGREEMENT: ACCEPTANCE

START → Acceptance is an unqualified assent to the terms of an offer (*Taylor v Johnson*), and parties must be *ad idem* in that each fully understand the terms of their agreement (*Fitness First*). To be effective, acceptance must be communicated (*Latec*).

DETERMINING ACCEPTANCE

- Objectively with reference to outward manifestations (*Taylor v Johnson*).
- What each party would have 'led a reasonable person in position of the other party to believe.' (*Alphapharm*).
- Signing document is outward manifestation of acceptance (*Fitness First*).
- Subjective state of mind as to terms is irrelevant (*Smith v Hughes; Fitness*)
- **However:**
 - Equity may intervene if party 'subjectively...mistaken belief about what is being agreed.' (*Taylor v Johnson*). If:
 - Other party aware that circumstances exists which indicate mistake,
 - **and**, other party deliberately ensures party does not become aware.
- Acceptance must be made in (subjective) response to offer. (*Crown v Clarke*) for unilateral contracts – external manifestations not conclusive.

COMMUNICATION OF ACCEPTANCE: GENERAL

- Acceptance effective when communicated. (*Latec; Brinkibon*)
- Contract formed when and where acceptance received (*Brinkibon*).
- Acceptance must be communicated to the offeror (*Latec Finance*).
- However, if made clear in contract (*Latec Finance*):
- offeror may agree to treat doing act as acceptance.
- offeror may treat particular method effective regardless of receipt.
- Silence generally does not constitute acceptance (*Felthouse*).

COMMUNICATION OF ACCEPTANCE: SILENCE AND CONDUCT

Silence generally does not constitute acceptance (*Felthouse*).

Exceptions:

- Unilateral contracts – **performance** sufficient acceptance (*Carlill*)
- Postal Rule (below): Acceptance effective at time of posting (*Adams*)
- Parties expressly/impliedly contemplate effective communication not necessary – need clear language to support this (*Latec Finance*).
- Acceptance inferred from conduct (*Empirnall*):
 - Silence in conjunction with other circumstances.
 - Where an offeree:
 - Has reasonable opportunity to reject offer, and;
 - Takes benefit of them, (also discuss, *Brambles*) under;
 - Circumstances which indicate they 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*).

METHOD OF COMMUNICATION

- Instantaneous communication most effective, oral or in writing.
- **Postal rule:** Not instantaneous, but acceptance effected as soon as posted (*Adams*).
 - Parties must contemplate post as possible or permitted mode.
 - Not extended to telex, fax, email (*Brinkibon*).

ELECTRONIC TRANSACTIONS ACT (2000) VIC [ETA]

- Covers email, fax, sms, all online communications ([s 3](#) Definitions).
- 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 13B\(1\)](#).
 - Domain/address in country does not = business location [s 13B\(4\)](#).

CORRESPONDENCE BETWEEN OFFER AND ACCEPTANCE:

- Consider when parties have differing standard terms (*Butler*).
- Note: **counter-offer** amounts to a rejection (*Butler*).
- Attempts by offeree to vary or add to the proposed term may amount to a counter-offer and subsequent rejection (*Butler*).
- Two approaches to 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*)

AGREEMENT WITHOUT OFFER AND ACCEPTANCE:

- Classical approach (offer/acceptance) should be applied wherever possible.
 - Note: Heydon JA's comments in *Brambles, accepting through conduct*
 - Classic approach neither sufficient nor necessary to explain all cases.
- Possible to find a contract exists even though it is not easy to locate offer/acceptance.
- Relevant questions to ask:
 - In all circumstances 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 conclude bargain?