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## AGREEMENT

### 1.0 Agreement

A valid agreement based on offer and acceptance can exist between two or more parties.

*Clarke v Dunraven*

It may, though, be necessary to objectively look at the whole of the relationship in order to determine whether there has been agreement, rather trying to isolate an 'offer' and an 'acceptance'.

*Empirnall Holdings v Machon Paul Partners* per Kirby P

*Integrated Computer Services Pty Ltd v Digital Equipment Corporation (Aust) Pty Ltd* (and *Marist Bros Community v Harvey SC*)

In general the law is concerned, not with the subjective intentions of the parties, but with the objective outward manifestations of those intentions

*Taylor v Johnson*

### 2.0 Offer

'the expression to another of a willingness to be bound by the stated terms.'

The person who makes the offer is called the 'offeror'. The person to whom the offer is made is called the 'offeree'.

Similarly, the person who makes a promise (which may be an offer) is called the 'promisor' and the person to whom the promise is made is called the 'promisee'.

### 2.1 Invitations to treat compared with offers

Some examples of invitations to treat are:

(i) Advertisement of goods for sale in a catalogue or through a circular

*Grainger v Gough*

or in a newspaper or magazine or periodical

*Partridge v Crittenden*

Cf goods advertised for sale on the internet: *Electronic Transactions Act 2001* (Qld) s 26B

#### 26B Invitation to treat regarding contracts

(1) A proposal to form a contract made through one or more electronic communications that—

(a) is not addressed to one or more specific parties; and

(b) is generally accessible to parties making use of information systems;

is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

*eBay International AG v Creative Festival Entertainment Pty Ltd* - goods displayed on a website was held to constitute an offer.

(ii) Goods displayed in shops at marked prices

*Pharmaceutical Society of Great Britain v Boots Cash Chemists;*

*Fisher v Bell*

(iii) Usually, an announcement inviting tenders unless the announcement indicates that the lowest tender will be accepted.

*Spencer v Harding*

Each tender submitted is an offer, which the party calling for tenders is free to accept or reject.

*Cf. Blackpool & Flyde Aero Club v Blackpool Council*

Each case must be determined on its facts: *Hughes Aircraft Systems International v Aircservices Australia*

(iv) In an auction, the auctioneer's requests for bids is an invitation to treat. They have discretion to accept or reject any particular offer and there is no obligation to accept the highest bid.

*Payne v Cave*

*AGC (Advances) v McWhirter*

and the advertisement of an auction sale

*Harris v Nickerson*

*Cf Warlow v Harrison* in relation to auctions without reserve, disapproved in *eg AGC (Advances) v McWhirter*

By contrast, the following are construed as offers:

(i) Automatic vending machines

*Thornton v Shoe Lane Parking Ltd*

(ii) A notice at the entrance to an automatic car park

*Thornton v Shoe Lane Parking Ltd*

A mere statement of the price of which someone would contract if they decided to sell does not amount to an offer.

*Harvey v Facey*

One factor the courts will consider in determining whether an advertisement is an offer or an invitation to treat is its likely effect upon the potential customer.

*Carlill v Carbolic Smoke Ball Co*

## 2.2 Communication of the offer

An offer can be made to the whole world and need not be directed to a particular person.

*Carlill v Carbolic Smoke Ball Co*

An offer is effective **when** and not until it is communicated to the offeree or his/her agent by the offeror or his/her agent.

*Taylor v Laird*

Within the terms of the offer, the offeror may expressly or impliedly prescribe the method of communicating acceptance. Failure to adopt that method is at the offeree's risk.

However, in an appropriate case an equally expeditious method of communication may be acceptable.

*Tinn v Hoffman & Co*

*Manchester Diocesan Council v Commercial and General Investments Ltd*

An offeror can waive communication of acceptance. In such a case it must be shown:

(i) That there is an express or implied suggestion from the offeror that a particular mode of acceptance will suffice – and that the particular mode does not involve communication; and

(ii) There must be some overt act or conduct on the part of the offeree which evidences an intention to accept and which conforms to the mode of acceptance indicated by the offeror.

*Carlill v Carbolic Smoke Ball Co*

### 2.3 Standing offer

An offer to supply goods for a period up to a certain amount *as required* is known as a standing offer. The offer is accepted *each time* an order is placed, giving rise to a series of independent contracts. The standing offer can be withdrawn or revoked at any time prior to an acceptance. Once revoked no further acceptances are valid unless the offer is renewed.

*Colonial Ammunition Co. v Reid*  
*Great Northern Railway v Witham*

### 2.4 Termination of offer

An offer can be terminated at any time before it has been accepted. Once an offer has been accepted, the offer is irrevocable.

*Great Northern Railway Co v Witham*

Where the offer takes the form of an option (e.g. where there is consideration to keep the offer open) then the offer cannot be terminated before the time of the option has expired.

*Goldsborough Mort v Quinn*

An offer may be terminated in a number of ways:

#### (1) **Withdrawal by the offeror**

Before acceptance, an offer can be freely revoked unless a promise by the offeror to keep it open for a fixed period is supported by consideration or under seal.

*Routledge v Grant*

Revocation of an offer is ineffective until communicated by the offeror or his/her agent and received by the offeree

*Byrne v Van Tienhoven*

In *Dickinson v Dodds*, it was held that communication of revocation by a reliable third party was sufficient.

In the case of an offer made to the world at large, revocation of the offer may be effectively communicated by using the same means as communication of the offer, even if someone who saw the offer does not see the revocation.

*Shuey v United States*

In the case of certain unilateral contracts, an offer may not be withdrawn after the promisee has begun to perform the necessary conditions to enable acceptance of the contract to be completed. This is because commencing to perform is acceptance of an implied offer not to withdraw the express offer. This does not mean that a purported revocation will be ineffective – instead the revocation may be effective but the offeree will be entitled to a remedy for breach of the implied contract

*Abbott v Lance*

*Mobil Oil Australia v Lyndel Nominees Pty Ltd*

This means not withdrawn with impunity: if the offeror attempts to withdraw there will be breach of the implied contract not to withdraw: *Mobil Oil Australia v Lyndel Nominees Pty Ltd*

#### (2) **Rejection by the offeree**

Rejection may be express or implied.

*Stevenson Jaques & Co v McLean*

A counter-offer amounts to rejection by the offeree

#### (3) **By lapse of time**

An offer must be accepted within the time prescribed or, if there is no time prescribed, within a reasonable time.

*Ramsgate Victoria Hotel Co v Montefiore*

What amounts to a reasonable time is a question of fact depending on circumstances – the matters that are taken into account are the nature of the subject matter and the means used to communicate the offer.

*Manchester Diocesan Council for Education v Commercial and General Investments Ltd*

**(4) By failure of a condition subject to which the offer was made**

*McCaul (Aust) Pty Ltd v Pitt Club Ltd*

**(5) By death**

An offeree cannot accept an offer after he or she has had notification of the death of the offeror.

*Coulthart v Clementson*

If the *offeree* dies, it appears that he or her personal representative cannot accept the offer on behalf of her or his estate – the offer lapses automatically.

*Reynolds v Atherton*

Revocation by post is ineffective until it reaches the offeree – *Byrne v Van Tienhoven*.

### **3. Acceptance**

#### **3.1 Definition**

Acceptance of an offer is the expression, by words or conduct, of assent to the terms of the offer in the manner prescribed or indicated by the offer. Acceptance may be express or implied.

*HBF Dalgety v Morton*

*Brogden v Metropolitan Railway Company*

#### **3.2 Requirements**

A person cannot accept an offer which has not been properly communicated.

*Taylor v Laird*

There are two requirements for the acceptance to be valid:

- (1) The offeree must assent to the terms of the offer.
- (2) The acceptance must be communicated to the offeror.

##### **3.2.1 Assent to the terms of offer**

An offeree must intend to accept the offer. In addition, an acceptance must be unqualified and must correspond to the terms of the offer.

###### **(a) Intention to accept**

It appears that there is no contract if two offers identical in terms, cross in the post - neither can be construed as an acceptance of the other, although there is unanimity of mind.

*Tinn v Hoffman & Co*

The acceptance must be in reliance on the offer rather than for some other reason.

*R v Clarke*

It will be a question of construction whether the offer is such that it may be accepted only by the first person responding or by more than one person

*Robinson v M'Ewan*

In the case of an offer is capable of being accepted by more than one person, more than one valid contract may be formed.

*Patterson v Dolman*

However, if the offer relates to a single item of property the offeror will only be able to perform one of the contracts and will be obliged to breach the others.

**(b) Counter-offer**

The acceptance must correspond with the offer. Where a person purports to accept an offer but introduces new terms (not in the offer), no contract is made; the offeree, in effect, refuses the offer and makes a counter-offer of his or her own.

A counter-offer is not an acceptance but causes the original offer to terminate.

Therefore, the original offer cannot be accepted unless it is renewed.

*Hyde v Wrench*

A purported acceptance that departs from the terms of the offer but only in a minor, non-material way may be effective and not amount to a counter-offer.

*Turner Kempson v Camm*

A mere enquiry will not amount to acceptance and it will not cause the offer to terminate.

*Stevenson Jaques v McLean*

**(c) Conditional acceptance**

Acceptance must be unqualified. A conditional assent is not acceptance, as where an offer is accepted 'subject to the preparation of a formal contract', or is 'subject to contract' where no binding contract is intended until the formal contract is executed.

*Masters v Cameron* (see Certainty)

### **3.2.2 Communication of acceptance**

**(a) Generally**

The general rule is that an acceptance has no effect until it is communicated to the offeror or his or her agent.

*Byrne & Co v Leon Van Tienhoven & Co*

Acceptance may be communicated only by the offeree or his or her agent.

*Powell v Lee*

Silence is not acceptance.

*Felthouse v Bindley*

However an offeror may waive the need for acceptance to be communicated.

*Carlill v Carbolic Smoke Ball Co*

Where no particular method of communication is prescribed, the method to be adopted will depend upon the nature of the offer and the method of communication used to make the offer. The court will look at the surrounding circumstances to determine what a reasonable method is.

*Quenerduaine v Cole* (the court held that acceptance by post to an offer by telegram was not valid).

*In a unilateral contract, the promisee accepts the offer by performing the required act. In a unilateral contract context that act is also the communication of acceptance and the consideration*

*Carlill v Carbolic Smoke Ball Co*

The general rule that acceptance must be communicated and that it is incomplete until it is received by the offeror applies to contracts made when the parties are in the presence of each other, or are using the telephone or some other method of communication which is virtually instantaneous, *e.g.* email or fax.

E.g. an acceptance not received if the phone cuts out and they do not hear it.

*Hampstead Meats v Emerson & Yates*

*Entores Ltd v Miles Far East Corporation*

However, this depends upon the circumstances since such communications may be sent and received outside business hours. For example, a person who sends an email acceptance at midnight may not reasonably expect anyone to be on the other end, meaning that 'received' may denote actually coming to the other persons attention rather than reaching their computer: *Brinkibon Ltd v Stahag Stahl GmbH*.

Where an offer and/or acceptance is sent by email, the electronic transactions legislation is relevant to issues of contract formation. See *Electronic Transactions Act 2001* (Qld) which provides as follows:

#### **24 Time of receipt**

- (1) Unless otherwise agreed between the originator and the addressee of an electronic communication—
  - (a) the time of receipt of the electronic communication is the time the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee; or
  - (b) the time of receipt of the electronic communication at another electronic address of the addressee is the time when both—
    - (i) the electronic communication has become capable of being retrieved by the addressee at that address; and
    - (ii) the addressee has become aware that the electronic communication has been sent to that address.
- (2) For subsection (1), unless otherwise agreed between the originator and the addressee of the electronic communication, it is to be assumed that the electronic communication is capable of being retrieved by the addressee when it reaches the addressee's electronic address.

#### **(b) Postal acceptance rule**

The one major exception to the rule that acceptance is only effective when it is communicated is the 'postal acceptance rule'. The postal acceptance rule may be stated as follows: where it was within the contemplation of the parties that, according to the ordinary usages of mankind, the post would be used as a means of communicating the acceptance of an offer, or that the post was prescribed by the offeror as the method of communication of acceptance, acceptance is complete as soon as it is posted.

*Adams v Lindsell*

As its name suggests, the rule only applies to the **post** i.e. acceptance by way of a letter inside a stamped envelope and sent through the postal system.

The effect of the rule is that acceptance is complete as soon as the letter is properly posted and it is immaterial that it is later delayed or lost in the post.

See per Lord Herschell in *Henthorn v Fraser*

Compare per Dixon CJ and Fullagar J in *Tallerman Pty Ltd v Nathan's Merchandise Pty Ltd*

The postal rule can be excluded, e.g. by setting a time for receipt of acceptance.

*Bressan v Squires*

### (c) Revocation of acceptance

It would seem that an acceptance may be revoked before it is effectively communicated, although this would unlikely in a case where the postal acceptance rule applies.

*Nunin Holdings Pty Ltd v Tullamarine Estates Pty Ltd*

*Weinkheim v Arndt*

*Cf Dunmore (Countess) v Alexander*

Revocation by post is ineffective until it reaches the offeree – *Byrne v Van Tienhoven.*

### Prescribed Case

#### ***Carlill v Carbolic Smoke Ball Co***

##### Facts:

The Carbolic Smoke Ball Co produced the 'Carbolic Smoke Ball' designed to prevent users contracting influenza or similar illnesses. After seeing this advertisement Mrs Carlill bought one of the balls and used it as directed. She subsequently caught the flu and claimed the reward. The company refused to pay. Mrs Carlill sued for the reward.

##### Held:

Mrs Carlill was entitled to the reward. There was a unilateral contract comprising the offer (by advertisement) of the Carbolic Smoke Ball company) and the acceptance (by performance of conditions stated in the offer) by Mrs Carlill.

- There was a **valid offer**
  - An offer can be made to the world
  - This was not a mere sales puff (as evidenced, in part, by the statement that the company had deposited £1,000 to demonstrate sincerity)
  - The language was not too vague to be enforced
- Although as a general rule **communication of acceptance** is required, the offeror may dispense with the need for notification and had done so in this case. Here, it was implicit that the offeree (Mrs Carlill) did not need to communicate an intention to accept; rather acceptance occurred through performance of the requested acts (using the smoke ball)
- There was **consideration**; the inconvenience suffered by Mrs Carlill in using the smokeball as directed was sufficient consideration. In addition, the Carbolic Smoke Ball received a benefit in having people use the smoke ball.
- An offer can be made to the whole world and need not be directed to a particular person.