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THE PARLIAMENT OF THE COMMONWEALTH

OF AUSTRALIA

THE SENATE

CHEQUES BILL 1985

(Amendments and new Part
to be moved on behalf of the Government)

EXPLANATORY MEMORANDUM

(Circulated by the Minister representing

the Attorney-General,

Senator the Honourable Gareth Evans, Q.C.)

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(Amendments and New Part to be moved
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GENERAL OUTLINE

These amendments will amend the Cheques Bill 1985:

- To give limited recognition to non-bank financial institutions in relation to the cheque payment system by conferring on these institutions the benefit of certain protective provisions currently available only to banks and by imposing a duty on non-bank financial institutions to ensure the prompt presentment of cheques lodged with them for collection on behalf of their customers.

- To allow, in effect, non-bank financial institutions to issue cheque forms with a specification on each cheque form of the maximum value for which the cheque may be drawn.

- To make it clear that a bank may designate a place as a central place for the presentment of cheques without having to designate the same place as a central place to which queries in relation to cheques may be sent.

- To make it clear that, when a bank pays one of its own bank cheques, the bank cheque is discharged even though the payment has been made by the person who is technically also the drawer of the cheque.

EXPLANATORY MEMORANDUM

Amendment No. (1): Interpretation (clause 3)

Amendment: Clause 3 will be amended by inserting a definition of 'non-bank financial institution' in sub-clause (1). The expression will be defined to mean a building society or credit union within the meaning of the Financial Corporations Act 1974, or such other registered corporation within the meaning of that Act.

2. Rationale: The term 'non-bank financial institution' is being inserted in the Bill for the purposes of the provisions being included in the Bill (see Part VIA) which will have the effect of conferring certain protections, and imposing certain obligations, on non-bank financial institutions where their customers lodge cheques with them. By specifying building societies and credit unions, the definition will recognize the existing arrangements between building societies and banks and credit unions and banks whereby banks act on behalf of these bodies in the cheque clearing system. At the same time, any other financial corporation registered under the Financial Corporations Act 1974 with which cheques are lodged for collection will be covered by the legislation.

Amendment No. (2): Certain rights, duties and liabilities under Act may be altered by agreement (clause 6)

3. Amendment: Clause 6 will be amended by including in sub-clause 6(2) a reference to clauses 96A and 96B.

4. Rationale: Sub-clause 6(1) of the Bill provides that nothing in the Bill may prevent two or more persons altering by agreement their rights, duties and liabilities under the Bill in relation to one another.

5. Sub-clause 6(2) specifies certain exceptions to this general rule and gives paramount force to these exceptions by providing that they have effect notwithstanding any agreement to the contrary. It is considered essential that protections conferred, and the obligations imposed, under the Bill on non-bank financial institutions where cheques are lodged with them by their customers should not be derogated from. This will mirror the position that exists under the Bill with respect to banks.

Amendment No. (3): Order to pay a sum certain (clause 15)

6. Amendment: Clause 15 will be amended by omitting sub-clause (4) and substituting a new sub-clause which will provide that, where an instrument contains an order to pay a specified sum and an order to pay not more a specified sum, the instrument will be taken to require the payment of the lesser of those two sums.

7. Rationale: The intended effect of the current sub-clause 15(4) was to make it clear that words on the face of a cheque, in addition to the actual amount of the cheque, stating that a specified amount is to be the maximum for which the cheque may be drawn does not make the cheque a conditional order and, therefore, invalid.

8. However, as presently drafted, sub-clause 15(4) could be read as permitting a cheque to merely specify, for example, 'not more than $100.00'. This is not the intended effect of the sub-clause and the new sub-clause will clarify the position.

Amendment No. (4): Presentment by bank (clause 62)

9. Amendment: Clause 62 will be amended by inserting a reference to a non-bank financial institution in sub-clause 62(1).

10. Rationale: The amendment is consequential upon the provisions being inserted in the Bill dealing with non-bank financial institutions.

Amendment No. (5): Designated place (clause 65)

11. Amendment: Sub-clause 65(2) will be revised by omitting paragraph (a) and substituting a new paragraph which will provide that a place may be prescribed as a designated place for the purposes of any one or more of the following:

- the presentment of cheques (sub-clause 62(1));
- the furnishing of requests by drawee banks in relation to cheques (sub-clause 62(6)); or
- the furnishing by collecting banks of further particulars in relation to cheques or the cheques themselves (sub-clause 62(9)).

12. Rationale: As presently drafted, sub-paragraph 65(2)(a)(i) has the effect that a place could, among other things, only be prescribed for the purposes of both sub-clauses 62(1) and (9). As a practical matter, it is not appropriate that a place be prescribed for the purposes of both the physical presentment of cheques and the receiving of particulars in relation to cheques, given that a place may merely be a computer centre which is ill equipped to deal with physical presentment.

13. The amendment will overcome this anomoly.

Amendment Nos. (6) to (11) inclusive: How paid cheque to be dealt with (clause 68)

14. Amendments: Clause 68 will be amended by the inclusion in sub-clauses (2) and (3) of a reference to a non-bank financial institution. Consequential changes will also be made to sub-clauses (3) and (4).

15. Rationale: These amendments are consequential upon the new provisions being inserted in the Bill dealing with non-bank financial institutions.

Amendment No. (12): Effect of payment by drawer or indorser (clause 87)

16. Amendment: Clause 87 will be amended by the addition of a sub-clause which will provide that the reference in clause 87 to the drawer of a cheque will not include a reference to the drawer of a cheque who is also the relevant drawee bank.

17. Rationale: Clause 87 provides that a cheque is not discharged where it is paid by the drawer of the cheque. The operation of clause 87, as presently drafted, will cause uncertainty in the case of bank cheques and bank drafts where the drawer and the drawee bank are the same entity. Although it is arguable that clause 87 would be read subject to clause 78 (which provides that a cheque is discharged if it is paid in due course by the drawee bank), it is desirable for the Bill to be amended so that clause 87 does not apply to bank cheques or bank drafts.

Amendment No. (13): Insertion of new Part relating to non-bank financial institutions (Part VIA)

18. Amendment: The Bill will be amended by the insertion of a new Part (Part VIA) containing provisions (clauses 96A, 96B and 96C) relating to the processing of cheques lodged with non-bank financial institutions by non-bank customers. Details of these provisions are as follows:

Clause 96A: Non-bank financial institution to ensure cheques presented promptly

19. This clause will impose on non-bank financial institutions substantially similar obligations that a bank has under clause 66 to a holder of a cheque who lodges the cheque with a bank for collection. Subject to the circumstances where presentment may be dispensed with (see clause 59), a non-bank financial institution will, in respect of a cheque lodged with it, be required to ensure that the cheque is duly presented for payment as soon as is reasonably practicable and, if it fails to do so, will be liable to the holder for any loss that the holder thereby suffers. (Sub-clause 96A(1)).

20. Rationale: The duty imposed on non-banks under sub-clause 96A(1) is consistent with one of the most important principles underlying the Bill - the need to ensure that a cheque is processed promptly when lodged by the holder of the cheque. The duty has been cast in a form that attempts to balance the interests of the holder in having the cheque processed promptly and the interests of the non-bank in performing its duty within a reasonable time, hence the regard that must be had to what is reasonably practicable in the circumstances of the case.

21. Where, in relation to a cheque lodged with a non-bank, the drawee bank makes a request for further particulars in relation to the cheque (see sub-clause 62(5)), the cheque will be deemed not to have been presented until the request has been complied with (sub-clause 96A(2)).

22. As with the position under the Bill with respect to banks (see sub-clause 66(3)), sub-clause 96A(3) will specify the considerations to be taken into account in determining whether a non-bank financial institution has ensured that a cheque has been duly presented for payment on its behalf as soon as is reasonably practicable. The list of considerations is similar to that specified in relation to deposit banks in sub-clause 66(3) (a) to (f).

Clause 96B: Protection of non-bank financial institution collecting cheques for customers

23. Clause 96B will provide protection to non-bank financial institutions, when cheques are lodged with them by their customers, along the lines of that which is conferred on banks under clause 95.

24. Rationale: It is considered equitable that non-banks should have the same protections as banks where cheques are lodged with non-banks by non-bank customers.

25. Where a non-bank financial institution, in good faith and without negligence, receives payment of a cheque for a customer or receives payment of a cheque and, before or after receiving payment, credits a customer's account with the sum ordered to be paid by the cheque, and the customer has no title, or has a defective title to the cheque, the non-bank will not incur any liability to the true owner by reason only of having received payment of the cheque (sub-clause 96B(1)). This provision mirrors that which applies to banks under sub-clause 95(1).

26. For the purposes of this protective provision, the non-bank financial institution will not be treated as having been negligent by reason only of its failure to concern itself with the absence of or irregularity in, any indorsement of the cheque by the customer provided that:

(a) the non-bank receives payment of the cheque for the customer or credits the customer's account with the sum ordered to be paid by the cheque;

(b) the cheque is payable to order and has not been transferred by negotiation; and

(c) the name specified in the cheque as the name of the payee is the same as the name of the customer, a business name or trade name of the customer or is so similar to that

name that it is reasonable, in all the circumstances, for the non-bank to have assumed that the customer was the person intended by the drawer to be the payee (sub-clause 96B(2)). This provision mirrors sub-clause 95(2).

27. It is unnecessary to mirror sub-clauses 95(3) and (4) in relation to non-banks as those provisions only apply to the situation where a bank receives payment of a cheque from another bank.

Clause 96C: Rights of non-bank financial institution collecting order cheque not indorsed by payee

28. Clause 96C will provide that, where the payee of a cheque payable to order, without indorsing the cheque, lodges the cheque with a non-bank financial institution for collection for the payee, and the non-bank gives value for, or has a lien on, the cheque, the non-bank will have such rights (if any) as it would have had if, before the lodgement of the cheque with the non-bank, the payee had indorsed the cheque in blank.

29. Rationale: As with clause 96B, it is appropriate that non-banks be afforded the same protection that is afforded banks under the Bill in respect of cheques lodged by non-bank customers. The provisions of clause 96C will mirror clause 96.