

1986

THE PARLIAMENT OF THE COMMONWEALTH

OF AUSTRALIA

THE SENATE

CHEQUES BILL 1985

(Amendments and new Parts and Schedule  
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.)



## CHEQUES BILL 1985

(Amendments and New Parts and Schedule  
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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 them the benefit of certain protective provisions presently available under the Bill only to banks and by imposing on them an equivalent duty to ensure the prompt presentment of cheques lodged with them for collection.
- . to provide for a new negotiable instrument called a payment order which would be identical in all significant respects to a cheque except that it would be drawn on a non-bank financial institution rather than a bank.
- . to regularise the use of certain 'agency' cheques by ensuring:
  - (a) that a non-bank financial institution's liability as the drawer of such a cheque is, in effect, transferred to a customer if the customer signs the cheque; and
  - (b) that the customer has the same rights in relation to the cheque as regards the non-bank financial institution as a bank customer would have as regards the drawee bank.
- . to make other miscellaneous clarifying amendments.

FINANCIAL IMPACT

The amendments will have no direct impact on Commonwealth revenue or expenditure. However, it is intended that equivalent taxes and duties levied in respect of cheques also be levied in respect of payment orders.

EXPLANATORY MEMORANDUM

Amendment No. (1): Short title (clause 1)

1. Amendment: Clause 1 will be amended by adding the words 'and Payment Orders' so that the short title of the Bill will read Cheques and Payment Orders Act 1985.

2. Rationale: The new short title is a more accurate description of the legislation.

Amendment No. (2): Commencement (clause 2)

3. Amendment: Clause 2 will be omitted and substituted with a new clause which will provide for the Bill to come into operation on such day as is, or on such respective days, as are fixed by Proclamation.

4. Rationale: The clause will enable greater flexibility with respect to commencement of the legislation. For example, it may be necessary to delay commencement of Part VIB pending passage of amendments to legislation dealing with taxation/stamp duty in respect of payment orders.

Amendment No. (3): Interpretation

5. Amendment: Clause 3 will be amended by inserting definitions of 'building society' and 'credit union' in s.cl.3(1). These terms will have the same meaning as in the Financial Corporations Act 1974.

6. Rationale: These terms are being inserted in the Bill for the purposes of new provisions dealing with non-banks (in particular, s.cls.96 G(2) and 96 H(3)).

Amendment No. (4): Interpretation (clause 3)

7. Amendment: Clause 3 will be amended by inserting a definition of 'financial institution' in s-cl 3(1). The expression will be defined to mean a bank or a non-bank financial institution (hereinafter referred to as 'non-bank').

8. Rationale: The term 'financial institution' is being inserted in the Bill for the purposes of, and is consequential upon the insertion of, new provisions in the Bill dealing with non-banks (ie. clauses 96A to C).

Amendment No. (5): Interpretation (clause 3)

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

10. Rationale: The term 'non-bank financial institution' is being inserted in the Bill for the purposes of the new provisions in clauses 96A to C which will have the effect of conferring certain protections, and imposing certain obligations, on non-banks when their customers lodge cheques with them. The term is also being inserted for the purposes of the new clauses dealing with 'agency' cheques and payment orders (clauses 96D - Q).

11. It is envisaged that the Treasury, in co-operation with the Reserve Bank, would play a role in the determination of which financial corporations, or which classes of financial corporations, should be prescribed for the purposes of the second limb of the definition.

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

12. Amendment: Clause 6 will be amended by including in s-cl 6(2) a reference to clauses 96A, 96B and 96D.

13. Rationale: S-cl 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.

14. S-cl 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 appropriate that protections conferred, and obligations imposed, under the Bill on non-banks where cheques are lodged with them by their customers should not be derogated from (Clauses 96A and 96B). This will mirror the position that exists under the Bill with respect to banks. Similarly, it is considered appropriate that the rights, duties and liabilities of the parties in relation to 'agency' cheques not be derogated from (clause 96D).

Amendment Nos. (7) and (8): Order addressed to a bank (clause 13)

15. Amendments: Sub-clause 13(2) will be amended by leaving out the words 'drawee bank' and inserting the words 'bank on which the instrument containing the order is drawn'. The words 'containing the order' will also be deleted.

16. Rationale: This is a minor technical drafting improvement. Because the definition of 'drawee bank' in clause 3 refers to a 'cheque' it was not considered appropriate to use this term in clause 13.

Amendment No. (9): Order to pay a sum certain (clause 15)

17. Amendment: Clause 15 will be amended by omitting s-cl (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.

18. Rationale: Current s-cl 15(4) provides that a limitation on the face of a 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. However, as the provision did not make it clear which of the specified sums was to be paid, a technical drafting improvement was considered necessary.

Amendment No. (10): Presentment by bank (clause 62)

19. Amendment: Clause 62 will be amended by inserting a reference to a financial institution in s-cl 62(1).

20. Rationale: The amendment is consequential upon the provisions being inserted in the Bill dealing with non-banks (ie clauses 96A to C).

Amendment No. (11): Designated Places (clause 65)

21. Amendment: S-cl 65(1) will be amended by inserting the words 'in relation to cheques' after the words 'a designated place'.

22. Rationale: The purpose of the amendment is to make it clear that places designated pursuant to clause 65 are designated in relation to cheques whereas places designated pursuant to clause 96M are designated in relation to payment orders.



Amendment No. (12): Designated place (clause 65)

23. Amendment: S-cl 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 one or more of the following:

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

24. Rationale: As presently drafted, sub-paragraph 65(2)(a)(i) has the effect that only one place could be prescribed for the purposes of both s.-cls.62(1) and (9). As a practical matter, it is not sufficiently flexible to require that a place be prescribed for the purposes of both the physical presentment of cheques (sub-clause 62(1)) and the receiving of particulars in relation to cheques (sub-clause 62(9)). The amendment will overcome this anomaly.

Amendment Nos. (13) to (18) inclusive: How paid cheque to be dealt with (clause 68)

25. Amendments: Clause 68 will be amended by the inclusion in s-cl(2) and (3) of a reference to a financial institution. Consequential changes will also be made to s-cl(3) and (4).

26. Rationale: These amendments are consequential upon the new provisions being inserted in the Bill dealing with non-banks (in particular clauses 96A to C).

Amendment No. (19): Effect of payment by drawer or indorser  
(clause 87)

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

28. 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 expressly does not apply to bank cheques or bank drafts.

Amendment No. (20): Insertion of new parts VIA and VIB  
relating to non-bank financial institutions.

29. Amendment: The Bill will be amended by the insertion of two new parts (Parts VIA and VIB) and a Schedule containing provisions relating to the processing of cheques lodged with non-banks by non-bank customers (clauses 96A, 96B and 96C); 'agency' cheques (clause 96D); and payment orders (clauses 96E to 96Q).

Part VIA      Special provisions relating to non-bank  
                 financial institutions.

Division 1    Presentment and collection of cheques by  
                 non-bank financial institutions.

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

30. This clause will impose on non-banks obligations substantially similar to those 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 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 (s-cl 96A(1)). Because non-banks, at present, have only indirect access to the cheque clearing system, they cannot present cheques for payment on their own behalf. For this reason a non-bank is required to ensure that a cheque is duly presented on its behalf promptly rather than being required itself to present the cheque promptly.

31. Rationale: The duty imposed on non-banks under s-cl 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 which 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 requirement that regard shall be had to what is reasonably practicable.

32. 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 s-cl 62(5)), the cheque will be deemed not to have been presented until the request has been complied with (s-cl 96A(2)).

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

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

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

35. Rationale: It is considered appropriate that non-banks have similar protections as banks where cheques are lodged with non-banks by non-bank customers.

36. Where a non-bank, 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 s-cl 95(1).

37. For the purposes of this protective provision, the non-bank 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 (s-cl 96B(2)). This provision mirrors s-cl 95(2).

38. It is unnecessary to mirror s-cl 95(3) and (4) in relation to non-banks as those provisions only apply where a bank receives payment of a cheque for another bank.

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

39. 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 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.

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

Division 2 - 'Agency' cheques

Clause 96D: 'Agency' cheques

41. This clause will, in effect, transfer the liability of a non-bank as drawer of an 'agency' cheque to the customer signing the cheque so far as holders or indorsers of the cheque are concerned. The clause also ensures that customers of non-banks in such cases have the same rights on the cheque vis-a-vis their non-bank as those available to drawers.

42. S-cls 96D(1)(c) and (f) ensure that a customer cannot be made liable on an 'agency' cheque unless the customer signs the cheque.

43. Rationale: It is considered appropriate for a non-bank customer to have the same rights and liabilities in respect of an 'agency' cheque as a drawer of an 'ordinary' cheque. The clause will remove the possibility of the non-bank drawer of an 'agency' cheque being liable on the cheque to a holder or indorser. For example, in a situation where an 'agency' cheque had been dishonoured by the bank because of insufficient funds in the non-bank customer's account, the non-bank may have been liable as the drawer to the holder of the cheque.

44. Where a non-bank is the drawer of a cheque which has been provided to a customer to be filled up and the cheque is signed by the customer, the customer will be taken to have drawn the cheque and to have signed the cheque as drawer as regards a holder or indorser and will therefore be subject to the same rights, duties and liabilities vis a vis a holder or indorser as a drawer of a cheque (s-paras 96D(1)(a) and (b) and (2)(a)).

45. In relation to a customer using an 'agency' cheque in these circumstances, the non-bank will be subject to the same duties, and have the same rights and liabilities in relation

to the cheque, as if it were the drawee bank (s-cl 96(D) (2)(b)). This would mean that, for example, where payment has been made on an 'agency' cheque by the drawee bank contrary to a countermand of payment issued by the customer to the non-bank, the non-bank would not be entitled to debit the customer's account. The same would apply to stale and post-dated cheques.

46. Nothing in clause 96D is intended to alter the relationship of banker and customer that exists between the non-bank as drawer and the drawee bank in respect of 'agency' cheques.

#### Part IVB - Payment orders

##### Division 1 - General

#### Clause 96E: Payment order defined

47. Clause 96E creates a new form of negotiable instrument called a 'payment order'. A payment order is defined in the same way as a cheque except that it is required to be addressed to a non-bank, and must clearly bear the words 'payment order' on the front. With these two exceptions, this clause mirrors clause 10 of the Bill in respect of cheques.

48. Rationale Clause 96E would enable a non-bank to offer its customers its own negotiable instrument having similar characteristics to a cheque. The non-bank would be the drawee of the instrument.

#### Clause 96F: Form of payment orders

49. Clause 96F requires that payment orders follow similar requirements as to form as cheques by providing that clauses 11 to 15 (inclusive) and s.cl 16(3) of the Bill apply as if:

- (a) references in those provisions to a bank were references to a non bank; and

- (b) the reference in s.cl 16(3) to a cheque were a reference to a payment order.

50. Rationale: It is considered desirable for payment orders to follow as far as possible, the same requirements as to form as cheques.

Clause 96G : Application of the rules of common law

51. S-cl 96G(1) expressly applies the rules of the common law applicable to cheques to payment orders.

52. S-cl 96G(2) provides that for the purposes of the application of the rules of common law in relation to payment orders, a member of a building society or credit union shall be taken to be a customer of the building society or credit union, as the case may be.

53. Rationale Because of the similarity between payment orders and cheques it is considered desirable that the common law developed in respect of cheques, which are established instruments with a history of usage, be made applicable to payment orders.

54. S-cl (2) ensures that members of a building society or credit union accessing a share account are treated in the same way, for the purposes of payment orders, as customers of banks accessing deposit accounts.

Clause 96H: Application of Bill to payment orders

55. Clause 96H makes it clear that the provisions of the Bill, other than those specified, will apply to payment orders, subject to the modifications in the Schedule, so that references to a 'cheque' would be read as references to a 'payment order' and references to a 'bank' would be read as references to a 'non-bank financial institution'.



56. S-cl 96H(2) makes it clear that provisions in the Bill relating to the validity as cheques of inchoate instruments (i.e. s-cl 7(4) and clause 18) apply to payment orders in the same manner.

57. S-cl 96H(3) ensures that for the purposes of the application of the Bill to payment orders, in accordance with s cl (1), a member of a building society or credit union shall be taken to be a customer of the building society or credit union as the case may be.

58. Rationale: This clause, together with the Schedule, facilitates the application of the Bill's provisions to payment orders, and, for the sake of simplicity, obviates the necessity to repeat word for word, the provisions of the Bill as they apply to payment orders.

#### Division 2 - Presentment of payment orders

##### Clause 96I: Presentment of payment orders defined.

59. Clause 96I mirrors clause 61 in respect of cheques so that a payment order will be duly presented for payment if a demand for payment of the payment order is made in accordance with clause 96J or 96K on the drawee non-bank, by or on behalf of, the holder.

60. S-cl 96I(2) deals with post-dated payment orders in the same way as s-cl 61(2) deals with post-dated cheques.

##### Clause 96J: Presentment of payment order by financial institution.

61. Clause 96J mirrors clause 62 in respect of cheques. However, it should be noted that both banks and non-banks will be able to present a payment order for payment on behalf of a customer, another financial institution or otherwise, by making a demand on the drawee non-bank.

62. As with s-cl 62(2), s-cl 96J(2) places no restriction on the means that may be used to demand payment of a payment order and the collecting bank or non-bank (i.e. the 'collecting financial institution') will be able to choose any means to effect presentment of a payment order.

Clause 96K: Presentation by person other than financial institution.

63. Clause 96K mirrors clause 63 in respect of cheques and permits a person, other than a financial institution (i.e. a bank or non-bank), to present a payment order for payment by exhibiting the payment order, in person, to the drawee non-bank at the proper place in relation to the payment order.

Clause 96L: Proper place.

64. Clause 96L mirrors clause 64 in respect of cheques so that the proper place in relation to a payment order is defined in terms of the place of business of the drawee non-bank specified in the payment order, or, where no place is specified, in terms of the place of business of the branch of the drawee non-bank at which the account on which the payment order is drawn is maintained.

Clause 96M: Designated places

65. Clause 96M mirrors clause 65 in respect of cheques. However, it enables both a bank and a non-bank to specify a place as a designated place in relation to payment orders.

66. Because a bank may be acting as agent of a non-bank, it is considered desirable to allow banks, as well as non-banks, to specify a designated place in relation to payment orders.

Clause 96N: Deposit financial institution to present payment orders promptly

67. Clause 96N mirrors clause 66 in respect of cheques by placing certain obligations on both banks and non-banks in relation to a holder who lodges a payment order with one or the other for collection. Financial institutions are under a duty to present a payment order promptly and, failing that, are liable to the holder for any consequential loss.

68. In determining whether the deposit financial institution has complied with its duty of prompt presentment, regard should be had to the same matters as apply to deposit banks under clause 66 in respect of cheques.

Clause 96P: Drawee non-bank financial institution to pay or dishonour payment orders promptly

69. Clause 96P mirrors clause 67 in respect of cheques. Once a payment order has been presented, a drawee non-bank will be under a duty to either pay or dishonour the payment order as soon as reasonably practicable. If it fails to do so the non-bank, unless it has become aware of a defect in the holder's title or that the holder has no title to the payment order, may not dishonour the payment order and will be liable to pay the payment order to the holder.

70. The matters to be taken into account in determining whether a non-bank has paid or dishonoured a payment order as soon as reasonably practicable are similar to those under clause 67 in respect of cheques.

Clause 96Q: How paid payment orders to be dealt with

71. Clause 96Q mirrors clause 68 in respect of cheques except that it takes into account the fact that both banks and non-banks may be presenting payment orders for collection.

Amendment No. (21): Schedule

72. Amendment: A schedule has been inserted for the purposes of the payment order provisions.

73. It is necessary that the modifications set out in the Schedule be read in conjunction with the provisions of clause 96H.

74. The Schedule, together with the provisions of clause 96H, facilitates the application of provisions of the Bill to payment orders and effectively results in a 'reading in' of appropriate modifications to the provisions on cheques so that they apply to payment orders.

Clause 5: Bank cheques

75. The modifications made by the Schedule to clause 5 result in the application of the Bill's provisions dealing with bank cheques and bank drafts to their payment order equivalent (ie payment orders drawn by a non-bank on itself or on another branch of the non-bank).

Clause 6: Certain rights, duties and liabilities under Act may be altered by agreement

76. The Schedule modifies s-cl 6(2) so that it applies in respect of payment orders by ensuring that clauses 5, 6(2), 7 to 9 (inclusive), 11 to 16 (inclusive), 19 to 24 (inclusive), 30 to 32 (inclusive), 39 to 41 (inclusive), 43 to 45 (inclusive), 53 to 57 (inclusive), 79, 88, 90 to 95 (inclusive), 96E to 96G (inclusive), 96I, 96J, 96L to 96P (inclusive), 99 and 100 have effect notwithstanding any agreement to the contrary. These overriding provisions are equivalent to the provisions that operate in respect of cheques with the addition of provisions inserted in the Bill dealing with payment orders.

Clause 54, paragraph 60(3)(b), clause 92, sub-clause 93(1), paragraph 93(2)(c) and (d), paragraph 94(1)(a), paragraph 94(2)(a), Heading to Division 2 of Part VI, clause 95, clause 96

77. The Schedule modifies the application of these provisions to payment orders by substituting the word 'bank' with the words 'financial institution'.

78. Paragraph 60(3)(b) The Schedule modifies para 60(3)(b) so that the usage of both banks and non-banks in relation to the presentment of payment orders will be a relevant matter in determining whether a payment order has been presented within a reasonable time.

79. Clauses 54 and 92, s-cl, 93(1), para 93(2)(c) and (d), paragraph 94(1)(a), paragraph 94(2)(a) The Schedule modifies these provisions so that a drawee non-bank will receive the benefit of the relevant protections if it pays the payment order to either a bank or a non-bank. This reflects the fact that both banks and non-banks may be involved in the collection of payment orders.

80. Heading to Division 2 of Part VI, Clause 95, Clause 96 For the purposes of the collection of payment orders both banks and non-banks will be placed on the same basis. Since both banks and non-banks will be involved in the collection of payment orders, it is appropriate that they should both receive the benefit of protections conferred by the provisions of the Bill.





