



Miles and Dowler, *A Guide to Business Law 21st edition*

Study Aid – Chapter summaries

Chapter summary – ch 7 – cheques and associated transactions

A. Negotiable instruments

1. The “nemo dat rule” applies to personal property and states that you cannot pass on a better title to goods than you have yourself. The purchaser of goods cannot obtain any better ownership to them than the seller has at the time of the sale. Negotiable instruments can (in some situations) be an exception to the nemo dat rule.
2. A negotiable instrument is a document that carries with it a legal right to receive payment of a sum of money and which is transferable by delivery or by delivery and indorsement. A negotiable instrument has these characteristics:
 - It is transferable by delivery or by delivery and indorsement.
 - There is no need to inform debtor of the transfer of the debt.
 - Holders of the instrument can sue in their own names.
 - There are presumptions of good faith and consideration.
 - Holders of the instrument in due course take free of defects in title.
3. Definitions:

Delivery means handing over.

Indorsement means signature on the instrument, usually on the back.
4. Examples of a negotiable instrument are cheques and bills of exchange.

B. Codes of practice

1. The Australian Bankers Association established a code (*Code of Banking Practice 2013*) for best banking practices which set standards for the Australian Banking Ombudsman to measure.
2. The *ePayments Code* (formerly the *EFTPOS Code of Conduct*) regulates the right and obligations of those involved in paperless transfer of funds.
3. The *Financial Services Reform Act 2001* requires the licensing of financial providers and uniform regulation of all financial products.



C. Cheques

1. Definitions and messages

The applicable statute is the *Cheques and Payment Orders Act 1998* (the *Cheques Act*).

- (a) A *cheque* is an unconditional order in writing addressed by a person to a financial institution directing them to pay on demand a certain sum in money. Remember that a cheque is a specialised bill of exchange and subject to the rules as to bills of exchange except where the Cheques Act provides differently.
- (b) The paying bank is the bank which is directed to make payment. The collecting bank is the bank which collects a cheque on behalf of the holder.
- (c) The definitions given above in respect of bills of exchange generally apply to cheques.
- (d) Cheques can contain messages to different people and it is important to differentiate between these messages:
 - A cheque “payable to bearer” authorises the paying bank to pay the cheque to the bearer without further enquiry.
 - An “order cheque” instructs the paying bank to only pay the cheque to the payee or the rightful indorsee.
 - A “crossing” on a cheque instructs the paying bank not to pay cash, to only pay to another bank.
 - The words “not negotiable” on a cheque reimpose the nemo dat rule. They alert any person taking the cheque that they will not get a better title than that of the person from whom they are taking it.
 - The words “account payee only” impose a duty on the collecting bank to only collect it for the payee.

2. Difference between a bill of exchange and a cheque

Bill of exchange	Cheque
can be drawn on anyone	must be drawn on a bank
can be payable on demand or at a future time	can only be payable on demand
there is provision for acceptance of a bill by the drawee, who becomes liable on the bill by signing	there is no provision for acceptance of a cheque by the drawee bank



Bill of exchange	Cheque
it	

A bearer cheque may be transferred simply by delivery and an order cheque is transferred by endorsement and delivery.

3. Presentment and dishonour

- (a) The paying bank has a contractual duty to pay the cheque promptly if there are sufficient funds to cover it. The paying bank is not an acceptor of the cheque and has no liability to the payee.
- (b) The holder of a cheque should present it for payment within a reasonable time.
- (c) A cheque is no longer automatically “stale” after 15 months. A paying bank may pay it **unless** the customer has specifically issued a countermand of payment.

4. Liability of the parties to a cheque

- (a) The guiding principle is that only a party signing a cheque can be liable for payment of the cheque.
- (b) The drawer, by signing, promises the payee and all subsequent holders that the cheque will be paid on presentation.
- (c) An indorser, by signing, promises the indorsee and all subsequent holders that the cheque will be paid on presentation and all previous signatures are genuine.
- (d) Forgery of a signature is no signature at all and will break the chain of liability.

5. Relationship between paying bank and drawer

- (a) The paying bank has a duty to the drawer to:
 - pay the cheque promptly if funds are available;
 - pay only according to instructions; and
 - not to pay out on a forged or substantially altered cheque: see *NAB v Hokit Pty Ltd* and *Tai Hing Cotton v Liu Chong Bank*.

Failure by the bank to comply with its duty is negligence.

- (b) The customer owes the bank a duty to advise it of any known forgeries. The bank can raise the customer's failure to do this as an estoppel.

Verbal assurances by a customer to their bank that cheques are suitable for



payment may stop the customer later denying the validity of the cheques:
see *Tina Motors v ANZ Bank*.

- (c) The customer also has a duty to draw cheques in such a way as to reduce the possibilities of alteration. Failure by the customer to comply with this duty allows the bank to plead contributory negligence.
- (d) The cases suggest that there is no strict legal duty on the customer to take care of their cheque book apart from exercising reasonable precautions. It is unlikely to protect a bank which pays a forged cheque: see *Westpac v Metlej*.
- (e) In relation to bank accounts generally, there is a duty on the bank to ensure that only its customers may make withdrawals from their accounts. In *Fried v NAB*, *Citibank v Ueckermann* and *Simonovski v Bendigo Bank*, the court found all three banks liable for allowing unauthorised parties to withdraw funds from their customers' accounts.

6. Remedies of the true owner of the cheque

- (a) The true owner of a cheque can sue in conversion any person who has misappropriated the cheque.
- (b) The Act does not define the true owner but:
 - the payee of an order cheque is the true owner unless and until he or she indorses the cheque to another;
 - the holder of a lawfully acquired bearer cheque is the true owner;
 - the drawer of a cheque is the true owner until delivery to the payee; and
 - the *postal rule* (see Chapter 5) is not relevant to the law of cheques.

7. Defences of the holder in due course

- (a) The holder in due course of a cheque can defend any action for conversion by the true owner of the cheque.
- (b) The Act defines a holder in due course as a holder who takes a cheque that appears to be complete and regular, in good faith, for value, without notice of defects or dishonour, and which does not contain a “not negotiable” marking. It follows that there cannot be a holder in due course of a “not negotiable” cheque.

8. Defences of the paying bank

- (a) The paying bank can plead breach of duty or estoppel in any action by the drawer of the cheque: see *Greenwood v Martins Bank* and *Commonwealth Trading Bank v Sydney Wide* above.



(b) The bank also has statutory defences available. Sections 92 and 94 protect a bank that pays out on an irregular indorsement or wrongly on a crossed cheque where the bank acts in good faith and without negligence. Good faith means “done honestly”.

(c) Defences based on the nature of the cheque.

9. Defences of the collecting bank

The true owner of a cheque can sue the collecting bank in conversion where it wrongfully collects a cheque for a customer. Section 95 protects the bank against liability where it:

(a) collects on behalf of a customer;

(b) acts in good faith; and

(c) acts without negligence.

Collection on behalf of a customer

A customer is a person who “has an account of his own at the bank”. The duration of the relationship is not important.

In good faith

The Act defines “good faith” as acting honestly: s 3(2) of the Cheques Act.

Without negligence

The test of acting negligently is whether the bank acted in the ordinary course of business. The courts will look at ordinary banking practices in applying this test.

Note that the cases of *Cary v Rural Bank* and *Bennett & Fisher v CBA* occurred before the enactment of the *Financial Transactions Reports Act 1988* which imposed specific identification procedures for banks to follow when customers opened new accounts.

Bankers are only liable for negligence where they are aware of circumstances which may affect a customer's ability to repay see *Politarhis v Wesptac Banking Corporation* [2009] SASC 96.

10. Payment orders and agency cheques

(a) A payment order must state on the face of it that it is a payment order.

(b) Generally the law of cheques applies to payment orders.

Agency cheques are cheques that are in the name of a building society but drawn on a bank.



11. Reporting of financial transactions

- (a) The purpose of the *Financial Transactions Reports Act 1988* (Cth) is to restrict tax avoidance and to help the fight against crime.
- (b) The Act requires significant cash transactions to be reported by cash dealers (including banks, building societies and other financial institutions) to the Australian Transaction Reports and Analysis Centre (AUSTRAC) which passes on these reports to taxation and law enforcement authorities, including the Australian Customs Service, Federal Police and the Australian Securities and Investments Commission.
- (c) A cash transaction is a transaction involving the physical transfer of currency from one person to another. A significant cash transaction is a cash transaction involving the transfer of currency of the value of \$10,000 or more.
- (d) A cash dealer must also report any suspect transactions whether in cash or otherwise where there are reasonable grounds to suspect that there is tax evasion or criminal activity involved or that the transaction may be the proceeds of crime.
- (e) Excluded from the need to report are routine cash transactions such as payroll transfers, routine transactions with established retail customers and public authorities and transactions between financial institutions. The institution must, however, keep a register of these exempt transactions.
- (f) Members of the public must provide proper identification when opening a bank account and must report taking or sending of \$5,000 (in Australian currency or equivalent) into or out of Australia.
- (g) It is an offence for a cash dealer to open an account without the required identification procedures.

Similar reporting procedures are required by the *Financial Transactions Reports Act 1992* (NSW), including a new service AUSTRAC Online.

12. New money laundering laws

See text for a detailed explanation of these provisions at [7.610].