



THE LAW SOCIETY  
OF NEW SOUTH WALES

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Dear Dr Popple,

### **Winding down Australia's cheques system**

Thank you for the opportunity to provide input to the Law Council of Australia for its submission to the Treasury's Consultation Paper, *Winding down Australia's cheques system*. The Law Society's Property Law, Litigation Law and Practice, Rural Issues, Business Law, and Elder Law, Capacity and Succession Committees have contributed to this submission, along with input from the Law Society's Trust Account Department.

Our feedback on relevant questions in the Consultation Paper is provided below, together with some additional matters for consideration.

### **12. Are there any other drivers for the current use of personal cheques in Australia?**

On pages 15 and 16, the Consultation Paper identifies three key drivers for the current use of personal cheques: personal preference/ habit, digital inclusion and digital distrust. We agree that these factors are the main drivers for the current use of personal cheques, based on our members' interactions with older members of the community. We note that the Consultation Paper identifies that 80 per cent of personal cheques are written by those over the age of 65. Our members offer their further insights into the use of cheques by older members of the community below.

#### **Ease of use for older customers**

The Consultation Paper identifies that cheques enable a degree of "financial independence". Older customers may have the confidence to use a cheque book, but not have the same level of trust or confidence in relation to electronic banking. The winding down of cheques may mean that older customers move sooner to granting a power of attorney to assist with their financial affairs. The process enabling an attorney to have access to a principal's bank account can be challenging. The bank will quite often need to "see" the customer face to face, which can be difficult if they are bed bound (but may still have capacity), or the local bank branch is a significant distance away, especially in regional or rural areas where branch numbers have declined.

We appreciate that rigorous identification processes are necessary, but there may need to be consideration given to alternative processes, such as the use of audio-visual identification. In our members' experience, it can sometimes take over four weeks to obtain bank approval for an attorney to access a principal's bank account.

#### Elder financial abuse

We also suggest that the phasing out of cheques may potentially facilitate elder financial abuse, as many in the cohort of older Australians do not have sufficient digital skills to manage their bank accounts online. In the experience of our members, elder abuse has been observed as a result of adult children operating their parent's internet banking services without their supervision or knowledge.

In one instance, an elderly client was unaware of the fact that she had lent a large amount to a family member because she could no longer access paper bank statements, after her adult son switched her bank statements to online only. The transactions were only detected as a result of subsequent legal intervention.

The risk of financial abuse is further exacerbated by local branch closures, as local bank staff and managers formerly played a more proactive role in detecting unauthorised transactions by perpetrators of abuse.

#### **17. Is internet and mobile access still a substantial hurdle to winding down the cheques system? Are there any other substantial barriers for consumers to transition from cheques?**

Yes, access to alternative forms of payment for those who do not have reliable internet, or do not utilise services such as internet banking, will be a significant hurdle in our view, particularly in rural and regional areas where substantial bank branch closures have occurred. The affordability of internet and mobile services also acts as a hurdle, as identified in the Consultation Paper.

Another barrier for the transition from cheques is ready access to cash, and its acceptance as an alternative form of payment to cheques, although we note this has fairly limited applications. Our members note that with bank branches closing in rural areas, cheques have become a more common way to purchase items and pay bills, for those not comfortable with online banking or unable to easily access cash, as the local bank branch has closed.

We note the Government's commitment to maintaining access to cash as referenced on page 15. The Bank@Post initiative (outlined on page 12 of the Consultation Paper) between Australia Post and 80 of the 122 banks and financial institutions operating in Australia, which provides basic banking services, including cash withdrawals, may assist to address these issues, particularly for bank customers who are unable or unwilling to use internet banking. However, as the Consultation Paper notes, further consideration needs to be given to the level of services, staff training and infrastructure upgrades that may be required. This will need to be closely monitored and supported if it is to play a significant role in the transition from cheques. Community education about the service will also be critical to ensuring it plays the intended role in assisting the transition from cheques.

Another barrier for the transition away from cheques may be the limits on internet banking for significant transfers. Our members have sometimes observed that the daily limits on internet banking can result in clients opting to use cheques instead of an internet banking transfer. For example, cheques are often a convenient way for clients to provide a significant sum of money to a lawyer for deposit to the lawyers' trust account for an electronic conveyancing matter, as it can eliminate issues associated with internet banking limits which may otherwise require the customer to make payments over many days. The lifting of an internet banking limit may also

require attendance at a bank branch, which can be inconvenient and sometimes challenging with branch closures. People are often hesitant to have high limits permanently set for security reasons, but it can be hard to raise and lower limits with some institutions, and this matter could be given broader consideration with the winding down of cheques.

**19. Are there other reasons why cheques are being used in an institutional or commercial setting? If so, please provide more detail.**

There are various legal settings where cheques are used by lawyers to complete transactions or effect payments. The phasing out of cheques will require adaptation to new procedures and processes, and some instances will be more challenging than others to establish an alternate process with a similar risk profile.

In some legal settings, the use of cheques has become an established practice due to convenience. The Consultation Paper identifies these as an “entrenched practice to fulfill obligations”. Other potentially challenging legal settings are the transactional settings not covered by electronic conveyancing. These transactions essentially involve the handing over of a cheque, (usually a bank cheque) in exchange for title documents. The key reason that cheques are used in these settings is that they preserve the “delivery versus payment principle”, which essentially means that there is no point in time in the transaction where a party holds both the purchase funds and the title documents. This was a key design feature in the development of electronic conveyancing, and is an important concept to bear in mind when considering alternatives to using cheques for commercial transactions outside electronic conveyancing.

In response to the first paragraph on page 2 of your Memorandum, we comment on some of the instances where cheques may be used in a legal setting, the prevalence of the practice, and some suggestions about potential ways to reduce the dependency on cheques in these settings.

*Business sales, where there is no transfer of land component*

As noted in your Memorandum, business sales where there is no transfer of land component cannot be transacted using electronic conveyancing. Conversely, it is useful to note that where a transfer of land (usually a transfer of lease) is part of a sale of business, payment for the other assets such as stock, plant and machinery can be made using electronic conveyancing. It will be important that this continues to be the case with the phasing out of cheques.

In business sales where there is no land component, for example, the sale of a business that involves the sale of plant and equipment and motor vehicles, a bank cheque is usually handed over to the vendor by the purchaser in exchange for ‘the keys’ and title papers being handed over. Once cheques are no longer available, there will need to be a new process adopted for such settlements which is acceptable to both parties, and allows one party to electronically transfer funds to another party prior to goods being released, noting that a vendor will not want to release goods prior to receipt of cleared funds.

Where such a transaction is effected through lawyers, difficulties may be addressed by an agreed process where the funds are transferred into trust upon various undertakings by the parties and then once acted upon, funds are transferred electronically. Each stage of such a process, as opposed to a simultaneous physical exchange of a bank cheque for physical goods (including titles/transfers), is a point of additional risk. Such risks include the risk of a breach of an undertaking, or the risk of bank account fraud/mistake. There are also additional compliance risks with the increased use of the trust account.

Another challenge to manage for commercial transactions outside electronic conveyancing, is the process for release of security by the vendor’s outgoing bank and the taking of security by

a purchaser's incoming bank. While lawyers may be able to come to an agreement for the settlement of the transaction through the use of undertakings and holding items in escrow, the release and taking of security in a transaction introduces another layer of complexity. In our members' experiences, in current sale of business transactions which occur outside electronic conveyancing, there may be reluctance by an incoming bank to provide funds to an outgoing bank without securities being released, but the outgoing bank won't release securities without receipt of funds from the incoming bank. This can result in a stalemate if parties won't accept undertakings from the other party in relation to these items. In our view, this issue is likely to be exacerbated with the phasing out of cheques.

We suggest that further consideration and industry consultation is warranted as to the approach to be taken to commercial transactions outside electronic conveyancing. Such discussions must include financial institutions.

#### Sale of company title apartments

It should also be noted that the sale of a company title unit, the precursor to strata title, commonly involves payment of the purchase money by bank cheque at settlement. Where a company has title to the land and owns the building containing apartments on that land, shareholders in that company may be granted exclusive use and occupation of their apartment in accordance with the company's constitution and the shareholding. It is these rights that are effectively sold and there is no change in ownership of the land. Such transactions are therefore outside the scope of electronic conveyancing and, like business sales with no transfer of land component, these transactions will require a different approach once cheques are no longer available.

#### Sale of rural property (i.e. involving sale of a water allocation, stock/cattle and machinery)

As mentioned above, if a transaction involves the sale of land together with other assets, it can be transacted using electronic conveyancing. The sale of rural land with a water access licence, stock/cattle and machinery is an example of this type of transaction. However, the sale of a water access licence without land cannot be done using electronic conveyancing, and raises the same issues as the sale of business without a land component, including in relation to the release and taking of security.

#### Litigation - conduct money

In addition to the examples identified in the Consultation Paper and your Memorandum, one prevalent area of ongoing cheque use is for the provision of conduct money in litigation matters. Conduct money is routinely tendered by cheque when serving subpoenas on third parties. This practice arose from the need to meet the requirements of Rule 33.6(1) of the *Uniform Civil Procedure Rules 2005* (NSW) ("UCPR"):

An addressee need not comply with the requirements of a subpoena to attend to give evidence unless conduct money has been handed or tendered to the addressee a reasonable time before the date on which attendance is required.

A legal practitioner often has had no previous contact with the third party when serving a subpoena, and will not be aware of any digital banking details for the addressee, making the use of cheques an attractive option. It is a further example of an "entrenched practice to fulfill obligations" as referred to on page 20 of the Consultation Paper.

With the phasing out of cheques, a legislative amendment to the UCPR (and similar procedural requirements in other Australian jurisdictions) may be required to facilitate electronic payment systems as an alternative to cheque usage for tendering conduct money and to ensure subpoena compliance. Where the issuing party has served a subpoena to attend and indicated an intention to pay conduct money by way of an electronic payment system, the addressee may opt to provide the necessary bank account or other details requested by the issuing party

to make the funds available to the addressee, or arrange some other convenient method of payment. Where details are not provided to enable payment to be made a reasonable time before attendance, the addressee should not be released from the obligation to comply with the subpoena. However, the addressee should remain entitled to compensation by way of orders for costs and expenses of compliance to attend court.

In short, we believe this issue can be satisfactorily addressed, but may require minor changes to be made to the procedural rules in various Australian civil jurisdictions.

*Litigation - payment of the settlement amount upon the conclusion of litigation*

In our members' experience, the predominant means of settlement payment is by way of electronic systems such as electronic funds transfer ("EFT"). Deeds of settlement generally provide for payment by way of EFT to specified bank accounts. In our view, therefore the impact of discontinuing cheques is likely to be minor in this context.

*Payments to beneficiaries of deceased estates (discussed at page 20 of the Consultation Paper).*

We note that the Law Council has sought specific feedback on whether the phasing out of cheques will significantly impact how payments are made to beneficiaries of deceased estates. In the experience of our members, such payments are frequently made to beneficiaries by direct deposit through EFT, and the impact of discontinuing cheques is likely to be minor. There may be some instances where beneficiaries are reluctant to provide bank account details, but this is likely to be transitional in our view.

**20. How significant are the barriers to reducing commercial uses of cheques? What timeframes, support or legislative change is required for businesses transitioning away from cheque use?**

The barriers identified highlight the need for education, guidance and collaboration in relation to the impacted areas. In our view, the barriers are not insurmountable, but do require further targeted consultation and collaboration.

More generally, despite the current impetus to identify areas impacted by the winding down of cheques, there will inevitably be gaps and grey areas identified once the decommissioning of cheques is fully implemented. Support for businesses by way of regular monitoring and post-implementation reviews will be important for a successful transition from cheque usage.

**Use of PayID and BPAY for payments from a law practice's trust account**

In response to page 3 of your Memorandum, the Law Society is aware of an inconsistent approach being adopted by Australian Authorised Deposit-taking Institutions ("AADIs") in NSW, in relation to the use of PayID and BPAY for trust account payments. Where permitted by the relevant AADI, we are aware that some law practices are using both BPAY and PayID for payments from trust accounts. Where an AADI has identified system restrictions preventing payment technologies being adopted from trust accounts, we will need to work with that respective AADI to resolve those barriers.

The Law Society is strongly supportive of incorporating new payment technologies which are safe, resilient, have appropriate customer protections, promote competition and address risks posed by money laundering and terrorism financing. We would be pleased to be involved in any further discussions that may be arranged by the Law Council on these issues, including in relation to the use of PayID, BPAY, and other secure forms of payment from a law practice's trust account.

We look forward to further involvement in this ongoing issue. Any questions in relation to this letter should be directed to Gabrielle Lea, Senior Policy Lawyer, at [gabrielle.lea@lawsociety.com.au](mailto:gabrielle.lea@lawsociety.com.au) or on (02) 9926 0375.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Brett McGrath', with a stylized, sweeping flourish at the end.

Brett McGrath  
**President**