REPORT OF THE COMMITTEE APPOINTED BY THE COMMONWEALTH GOVERNMENT TO REVIEW THE BILLS OF EXCHANGE ACT 1909-1958†

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PRELIMINARY

The origin of the Commonwealth's Bills of Exchange Act 1909 is a guarantee of its efficiency. By the 1870's the merchants of the United Kingdom had worked out for themselves, with the help (and occasionally subject to the hindrance) of the courts and Parliament, a remarkably effective system of conducting commercial transactions by means of bills of exchange, cheques and promissory notes.[1] The seeker after the relevant law had, however, to find his needle in a stack of some 2,500 cases and seventeen statutes.[2] He was helped in his labours by such treatises as those of Chitty and Byles[3] and, from 1878, the Digest published by Mackenzie Chalmers,[4] who subsequently was entrusted with the drafting of the Bill which became the Bills of Exchange Act 1882. The Act was substantially a codification of the law relating to bills of exchange, cheques and promissory notes, and has been called 'the best drafted Act of Parliament ever passed'.[5] Its excellence was widely recognized,[6] and it became the pattern for similar codes in most of the English-speaking world,[7] including the Australian Colonies.[8] When the Parliament of the Commonwealth enacted the Bills of Exchange Act 1909 it made 'in the main a transcript of the English Act of 1882'.[9]

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† The Committee (The Honourable Mr Justice Manning, Mr L. B. Evans, C.B.E., Mr D. Farquharson, Professor H. A. J. Ford, Mr J. W. Peden) reported to the Attorney-General on 1 May 1964; its report is hereinafter cited as '*Report*'. In the Fourth Schedule to the *Report* is a draft Bill for a proposed Cheques Act which is hereinafter cited as '*Draft Bill*'.

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[1] The history of the development of the law relating to these instruments has now been fully explored by Dr J. Milnes Holden in his absorbing and scholarly book *The History of Negotiable Instruments in English Law* (1955).

[2] *Chalmers on Bills of Exchange* (13th ed. 1964) xli.

[3] See Holden, *op. cit.* 203.

[4] *Ibid.* 199.

[5] *Bank Polski v. K. J. Mulder and Company* [1942] 1 K.B. 497, 500 *per* MacKinnon L.J.; 'After a decent interval the draftsman was made a County Court judge. There are things even in this world which are exactly what they should be': Birrell, *The Duties and Liabilities of Trustees* (1920) 2.

[6] Sir John Paget, however, was far from being transported with delight about some of its provisions: *e.g.* of one he said that it was 'a shocking piece of legislation': *Paget's Law of Banking* (6th ed. 1961) 174-175. It cannot be denied that the Act contains occasional inelegancies and obscurities: *e.g.* s. 72 (3); but it is less open to criticism than most statutes.

[7] *Chalmers on Bills of Exchange* (11th ed. 1947) xxxvii-xxxviii, xlvii-xlviii.

[8] For these statutes see the Bills of Exchange Act 1909-1958 (Cth), First Schedule.

[9] *Stock Motor Ploughs Limited v. Forsyth* (1932) 48 C.L.R. 128, 137 *per* Dixon J.

Compared with the multitude of commercial transactions that have been governed by the provisions of the Bills of Exchange Act, the number of judicial decisions that have been required for the interpretation of the legislation is small and testifies to its draftsmanship.

Since the end of the nineteenth century there has, however, been a striking change in commercial practice: the use of bills of exchange in domestic and international transactions has declined;[10] and the use of cheques has increased enormously.[11] As the Act deals primarily with the bill of exchange, and with the cheque as a particular species of bill,[12] so that the law as to cheques is to be found partly in a dozen sections which deal specifically with cheques and partly embedded in more than ninety sections which deal with bills, it may be said that the Act now faces, as it were, the wrong way.

Furthermore, banking and commercial practice has not remained static, and in some ways development has created difficulty. In particular, the adoption by bankers of the practice of insisting that the payee shall indorse an order cheque paid into his own bank account, coupled with the vast increase in the use of cheques, has caused considerable embarrassment and has led to substantial legislative amendment of the law in the United Kingdom and New Zealand and to the appointment—presumably as a prelude to legislation—of the Manning Committee in Australia.

Nothing in the law seems to require that the payee of a cheque payable to his order shall indorse it when he pays it to the credit of his own bank account. Nor is his indorsement necessary to make available conclusive evidence that he has received the proceeds. Why then is it insisted upon by bankers? There is a combination of several reasons.[13] Suppose that, as often happened in earlier times, a cheque payable to John Doe or order is presented to a banker, who does not know John Doe, for payment over the counter. If the banker pays, and in fact pays to John Doe, all is well. If he pays, but pays to someone fraudulently impersonating John Doe, he cannot debit his customer with the amount, because he has not obeyed the mandate. Getting the impersonator's indorsement will not protect him, because a forged or unauthorized signature is inoperative. However, the legislature comes to his aid by enacting that,

[10] Between the wars, ' [t]he inland commercial bill " was hurriedly vanishing from the face of the earth "; and the international commercial bill followed close on its heels ': Holden, *op. cit.* 301.

[11] About 289 million cheques were stamped in the United Kingdom in 1915-1916; by 1952-1953 the number had risen to about 713 million: Holden, *op. cit.* 307. It is estimated that more than 300 million are drawn each year in Australia: *Report*, para. 27.

[12] ' A cheque is a bill of exchange drawn on a banker payable on demand ': Bills of Exchange Act 1882 (U.K.), s. 73, reproduced as s. 78 (1) of the Australian Act.

[13] See the *Report of the Committee on Cheque Endorsement* (The ' *Mocatta Report* '), 1956 (Cmnd 3), paras 9-14. (It is curious that some writers are not satisfied to adopt the Act's spelling of ' indorsement '.)

if he pays on an indorsement purporting to be John Doe's, that indorsement shall be sufficient authority to him to pay the bearer of the cheque.[14] So he always takes an indorsement. The legislature then makes a similar provision,[15] applicable to cheques only, but giving him protection only if he pays in good faith and in the ordinary course of business. He always acts in good faith ; and he has made it the ordinary course of his business, when an order cheque is presented to him, to demand an indorsement. So he will go on doing so. Meanwhile, payees of order cheques are more and more commonly paying them into their own bank accounts for collection; and collecting bankers also are requiring their indorsements, for more than one reason—because they know that the paying bankers will do so; in order that they may themselves in certain circumstances become holders for value; and in order not to jeopardize the protection given to a banker who in good faith and without negligence collects a crossed cheque for a customer who lacks a good title to it.[16]

This was all very understandable. But by 1956, six hundred million cheques needing indorsement were being issued each year in the United Kingdom and not only that, but thirteen million indorsements a year required confirmation:[17] no doubt mainly because the payee of an order cheque does not always know that when he is wrongly designated, or his name is misspelt, by the drawer the correct drill is to indorse in accordance with the drawer's description, adding his proper signature if he think fit.[18] The collective burden on payees and bankers had clearly become very great; and when also 97 *per cent* of the cheques drawn each year were not negotiated to third persons but were paid into the payees' bank accounts or cashed over the counter[19] it was obvious that a partial remedy was to do away with the necessity for the indorsement of order cheques paid into payees' accounts.

The Mocatta Committee was accordingly appointed to consider whether it was ' desirable to reduce the need for the endorsement of order cheques and similar instruments received for collection by a bank '.[20] Discussion of its report was followed by the enactment of the Cheques Act 1957, which is to be construed as one with the Bills of Exchange Act 1882.[21] It did not abolish indorsements, but it had the effect of making them worthless in certain cases. It provides[22] that a banker who in good faith

[14] Stamp Act 1853 (U.K.), s. 19, which applied not merely to cheques but to ' any draft or order drawn upon a banker for a sum of money payable to order on demand '.

[15] Bills of Exchange Act 1882 (U.K.), s. 60; 1909-1958 (Cth), s. 65.

[16] Bills of Exchange Act 1882 (U.K.), s. 82; 1909-1958 (Cth), s. 88.

[17] *Mocatta Report*, para. 20.

[18] Bills of Exchange Act 1882 (U.K.), s. 32 (4); 1909-1958 (Cth), s. 37 (d).

[19] *Mocatta Report*, para. 7.

[20] *Ibid.* para. 1.

[21] Cheques Act 1957 (U.K.), s. 6 (1).

[22] *Ibid.* s. 1 (1).

and in the ordinary course of business pays a cheque drawn on him shall not incur any liability by reason only that it is not indorsed or is irregularly indorsed, and shall be deemed to have paid it in due course. It also has the effect[23] that a collecting banker is not to be treated as negligent, so as to forfeit his statutory protection, by reason only of his failure to concern himself with absence of or irregularity in indorsement.

So to dismiss the *Mocatta Report* and the Cheques Act 1957 is to pay them—especially the former—scant respect; but their relevance here is that they, and the passing in New Zealand of a similar Cheques Act in 1960, moved the Commonwealth Government to appoint the Manning Committee in 1962. Its terms of reference were wider than those of the Mocatta Committee: it was required ' to consider the provisions of the *Bills of Exchange Act* 1909-1958 and to recommend any alterations to that Act that may be thought desirable ' and ' in particular to consider whether any of the changes effected in the British law by the Cheques Act, 1957, should be adopted in Australia '.[24] The whole field was opened. The Committee considered written and oral submissions, and delivered its report on 1 May 1964.

The greater part of the *Report*, and the Committee's most far-reaching proposals, relate—as might have been expected—to cheques.

CHEQUES

Separate Acts

A fundamental recommendation of the Committee is that a new Act should be brought in to redress the balance of the old: that all the law relating to cheques should be contained in a Cheques Act, and that the Act of 1909-1958 should undergo the excision necessary to leave it as the repository of the law relating to bills and notes only. This recommendation is entirely praiseworthy; but the Committee has expressed the effect of its conclusions as to cheques in a draft Bill for a Cheques Act about the form of which it is possible to be less enthusiastic, notwithstanding the Committee's disarming assertion[25] that it has lacked the skill and experience necessary to enable it to do a parliamentary draftsman's job.

It is not mere pedantry to urge that the statutory law of cheques should be expressed not only with precision but without inelegance. Innumerable students of banking and accountancy will have to master the new Act, which may be expected to operate with little amendment for many years. It should therefore be such a model of expression as to give them no encouragement to acquire the facility with which their seniors clothe

[23] *Ibid.* s. 4.
[24] *Report*, para. 2.
[25] *Report*, para. 45.

thoughts not understood everywhere in an English not spoken anywhere. The *Draft Bill* falls regrettably short of this ideal.[26]

For instance, no fewer than fifty-six times does it use the word ' such ', in the manner described by Fowler as illiterate, instead of ' the ', ' that ', *etcetera*. This usage is sometimes, perhaps by undue reverence, imported from the Act: one provision[27] has in seven lines nine examples, all contained in the original[28]; but there is a one-in-three chance of spotting an entirely new provision by its presence.

Occasionally—not, it may gratefully be observed, very often—clumsiness of expression shades into obscurity. For example,[29] clause 28 (1) provides that when a cheque is received by a holder or by a bank for collection the (no, ' such ') holder or bank may cross it with or without the words ' not negotiable '. Sub-clause (2) then provides—' Any such crossing placed upon the cheque by the holder or bank pursuant to the provisions of this section shall be effective from the time of being so placed as if placed thereon by the drawer '. Does this mean that if a crossing is put on a cheque pursuant to sub-clause (1) it shall thereafter have the same effect as if the drawer had put it on the cheque? If so, why not say so—in those words?

These, however, are defects that can be remedied—as, indeed, the Committee contemplates—by the Parliamentary Draftsman. Having expressed the hope that they will have his consideration, one may now turn to the substance of the *Report*.

A non-transferable instrument

About 77 *per cent* of the cheques drawn each year in Australia are neither negotiated to third persons nor cashed, but are deposited to the accounts of the payees;[30] and it is natural that a desire should have grown up that maximum safety should be ensured for the transferring of amounts due from debtors to creditors by the introduction of a new type of cheque that would be absolutely non-transferable.[31] The facility at present offered by section 13 (1) of the Act[32] of making a cheque non-transferable and very safe by drawing it uncrossed and payable to

[26] The rest of this article will however demonstrate the author's utter disagreement with the Committee's own description of it in para. 311 (with the collaboration of the Government Printer) as the ' daft ' (*sic*) Bill.

[27] Cl. 39 (e).

[28] Bills of Exchange Act 1909-1958 (Cth), s. 79 (a), (c).

[29] Other examples are cll. 74 (1) and 77 (1). Some words have perhaps been inadvertently omitted from the latter: it is improved if read ' . . . or when *any act or thing is* required . . . '.

[30] *Report*, para. 55. *Cf. Mocatta Report*, para. 7.

[31] *Cf.* Holden, *op. cit.* 315-320.

[32] Where, as elsewhere when dealing with bills, the Act uses ' negotiable ' to mean ' transferable '. This misuse is scrupulously avoided in the *Report*: see paras 54, 89 (3) (where ' acceptable ' should be read as ' capable '), 184 and 185.

'A only' is practically never used,[33] not only because customers do not know about it but also, no doubt, because bankers do know about it and are not likely to instruct customers in the use of a cheque that is not within any of the protective sections of the Act.[34]

The Committee points out[35] that, because the payee is imprecisely named in innumerable cheques, a real problem of identifying the payee of a non-transferable cheque would often arise; but it was not merely for this reason that it decided against the introduction of such an instrument. There were two basic opposing arguments on the merits: one, that the drawer should have the right to make his cheque non-transferable if he wants to; the other, that the payee or holder should have the right to deal with it as he sees fit.[36] The drawer, however, can get considerable protection from the Act as it stands, even apart from section 13 (1); on the other hand, many of those who receive cheques—for example, in payment of social services benefits and taxation refunds—do not have bank accounts, and want to transfer their cheques to the local storekeeper. On balance, the Committee so much favoured the second argument that, so far from encouraging the proposed form of cheque, it seeks in its *Draft Bill*[37] to nullify the application of the present section 13 (1) to cheques by providing that words of non-transfer in a cheque shall be ineffective.

Indorsement of cheques

The Committee declined to recommend any change in the requirement that an order cheque must be indorsed when it is negotiated or presented uncrossed to a bank for cashing,[38] but it agreed, as did the Mocatta Committee, with the proposition that indorsement should not be required when an order cheque is paid to the credit of the payee's account; and clause 63 of its *Draft Bill* provides in effect[39] that a bank may lawfully receive payment for a customer (or for itself, if it has credited the customer with the appropriate amount) of a crossed or uncrossed cheque drawn in favour of that customer or order, notwithstanding that the cheque is not indorsed or bears an irregular or unauthorised indorsement.

The Bill then goes on[40] to deal with the problem of the cheque in which the payee is incorrectly designated. The Cheques Act 1957 leaves the banker to obtain a proper indorsement[41] if he wants full protection

[33] *Report*, para. 50.
[34] Ss. 65, 86 and 88.
[35] *Report*, para. 58.
[36] *Ibid.* para. 59.
[37] Cl. 11 (1) (where 'indicate' would be better than 'indicating').
[38] *Report*, paras 115-118.
[39] Cl. 63 (1), which is misprinted as '63 (4)'.
[40] Cl. 63 (2).
[41] Bills of Exchange Act 1882 (U.K.), s. 32 (4); 1909-1958 (Cth), s. 37 (a).

in such a case, thus to some extent stultifying the main provision. The solution adopted by the Manning Committee is to provide that the cheque shall be deemed to have been drawn in favour of a particular customer when the name of the payee appearing on the cheque, although not corresponding with the name of the customer, '*reasonably and sufficiently* identifies the customer' ; [42] the question whether it does so to be a question of fact. The decision whether identification is adequate is one for the banker to make, and he will have to accept this ordinary commercial risk.[43] There will perhaps be doubt as to the meaning of the quoted expression until there is a judicial ruling on the obvious argument that two separate and different things are required—that the name on the cheque shall *reasonably* identify the customer, and that it shall *sufficiently* identify him. Probably the answer would be that it must identify him 'with reasonable sufficiency'. This may be what the Committee intends. If so, there is little, if any, difference in principle between this requirement and that of section 12 (1) that in a bill not payable to bearer 'the payee must be named or otherwise indicated . . . with reasonable certainty'; and it would perhaps be more satisfactory (and the draft clause could be considerably improved) if the proposed provision were made available 'provided that (a) the cheque is payable to order and (b) the customer is therein named with reasonable certainty as payee'.

Protection of banks

The Committee then turned its attention to the protection which should be given to banks, especially in view of its proposal for dispensing with indorsement.

The collecting bank

The Committee proposes the removal of the historical anomaly by which the protection of section 88 is given only when the banker is collecting a cheque which is crossed before it comes into his possession,[44] and its draft clause 62 accordingly extends that protection to all cheques. It declined, however, to accede to the bankers' proposal that a banker should not be regarded as receiving payment for himself (rather than 'for a customer') merely because he has cashed, or allowed the customer to draw against, an unpaid cheque, or because the customer's account is overdrawn. The Committee could not see why a collecting banker who has an interest of his own in a cheque should be entitled to be in a better

[42] *Draft Bill*, cl. 63 (2) ; italics added.

[43] *Report*, para. 112.

[44] Holden, *op. cit.* 320-321; *Capital and Counties Bank, Limited v. Gordon* [1903] A.C. 240. 'it is not within the control of bankers whether cheques reach them crossed or uncrossed and they exercise the same care in dealing with either': *Mocatta Report*, para. 105.

position *vis-à-vis* the true owner than any other member of the community, and it refused to suggest the enlargement of the present concession which enables a banker alone to plead lack of negligence as a defence to an action for conversion.[45]

Having decided in favour of dispensing with the indorsement of an order cheque paid into the payee's account, and having in its draft clause 63, already mentioned,[46] explicitly made it lawful to collect unindorsed or defectively indorsed cheques pursuant to the new principle, the Committee then provides[47] that so collecting a cheque to which the customer lacks a good title shall in the prescribed circumstances—but only in those circumstances—not amount to negligence. It is then made clear[48] that if the banker gives value for, or has a lien on, an unindorsed order cheque given to him for collection by the payee he has such rights (if any) as he would have had if the payee had given it to him indorsed in blank. Finally, it is expressly stated[49] that a collecting banker remains responsible for seeing to the regular indorsement of an order cheque to which clause 63 does not apply.

The paying bank

Section 65 (1) of the Act enables a paying banker who has acted in good faith and in the ordinary course of business to claim that he has obeyed his customer's mandate in paying the payee or order even though a purported indorsement is forged or unauthorized. He obtains a good discharge in relation to his customer, and thus the common law denies the true owner of the cheque an action of conversion against him.[50] But the banker does not achieve this position if he has not concerned himself to see whether or not the cheque is indorsed at all: failing to exact a correct indorsement is not acting in the ordinary course of business.[51]

The Committee recommends that the paying banker should be relieved of concern as to the presence or absence of indorsement only where he pays the cheque to a collecting bank.[52] It therefore suggests that the new Act should contain two separate provisions as to the paying banker's position in relation to indorsements. One [53] deals with the payment of order cheques otherwise than to a collecting bank: it reproduces the substance of the existing section 65 (1) and extends it by enacting the common law principle that compliance with the section gives immunity

[45] *Report*, paras 130-133.
[46] *Supra*, nn. 39-40.
[47] *Draft Bill*, cl. 63 (3), (4).
[48] *Ibid.* cl. 63 (5).
[49] *Ibid.* cl. 64.
[50] *Report*, para. 139, citing *Charles v. Blackwell* (1876) 1 C.P.D. 548.
[51] *Slingsby v. District Bank, Limited* [1931] 2 K.B. 588, 598.
[52] *Report*, para. 140.
[53] *Draft Bill*, cl. 65 (2).

not only from the payee but also from the true owner. The other,[54] dealing with payment to a collecting banker, is new. It goes further than the first provision by relieving the banker who pays to a collecting banker in good faith and in the ordinary course of business from the need to consider whether there is any indorsement; it enables him to meet his customer's allegation that the mandate has been disobeyed; and it relieves him from liability to any other person, thus also enacting the common law principle. Where one bank is both collecting bank and paying bank it is, as paying bank, to have the benefit of this provision.[55]

The Committee noted the curious distinction under existing requirements that protection for a paying banker depends on his acting ' in good faith and in the ordinary course of business ' whereas for a collecting banker it depends on his acting ' in good faith and without negligence '— so that the former need not act without negligence or the latter in the ordinary course of business; but it declined to reconsider the well-settled rules.[56]

Crossing of cheques

Sir John Paget, who regarded the ' Account Payee Only ' crossing as an excrescence[57] about which it was ' difficult to write with reticence '[58] would have heartily concurred in the Committee's recommendations (a) that this crossing should be refused the statutory recognition which it now lacks, and (b) that the law should be so amended as to have the effect of causing its use to be discontinued.[59]

The crossing does not make a cheque non-transferable or affect its negotiability, and a cheque so crossed is in practice often paid to the credit of an account other than the payee's.[60] On the other hand, it is always *prima facie* and usually conclusive evidence of negligence in a collecting banker that he has without sufficient inquiry taken a cheque so crossed for an account other than that indicated in the crossing. The Committee considered, however, that the drawer was not substantially better protected if he crossed his cheque ' Account Payee Only ' than if he crossed it ' Not Negotiable '. If it were wished to make the former crossing more protective of the drawer than the latter, it would have to be provided that a cheque bearing the former crossing could not be accepted for the credit of the account of anyone but the payee.[61] This

[54] *Ibid.* cl. 65 (1).
[55] *Ibid.* cl. 65 (3).
[56] *Report*, paras 149-150.
[57] Paget, *op. cit.* 222.
[58] *Ibid.* 366.
[59] *Report*, paras 86-87.
[60] *Ibid.* paras 69, 74-75.
[61] *Ibid.* para. 80.

would mean the introduction of a non-negotiable and non-transferable cheque, which the Committee had already decided against.

The Committee's view is ' that a collecting bank must act with substantially equal care and make the same type of inquiry in both the case of a cheque crossed " account payee only " and in (*sic*) the case of a cheque crossed " not negotiable " if it is to obtain the protection of section 88 of the present Act '.[62] This no doubt reflects the current practice of bankers; if so, it is interesting that they have not founded themselves upon Sir John Paget's conclusion of law, which he supported by half-a-dozen arguments, that ' the " not negotiable " crossing has nothing to do with the collecting banker or he with it '.[63] It is entertaining to contemplate the double possibility that the Committee's recommendations will be adopted and that Sir John Paget's conclusion will subsequently be upheld by the Courts.

The recommendations[64] as to other forms of crossing seek simplification and standardization. The sole method of crossing so as to require payment to a collecting bank only is to be the use of two parallel transverse lines: the obsolete additions of ' bank ' and ' and company ' are to be abolished. The words ' not negotiable ' are to continue to mean only that the person taking the cheque shall not have or be capable of giving a better title than the person from whom he took it had, and the cheque is to remain transferable; and the controversy as to the effect of those words when they appear (as in practice they seldom do) on an uncrossed cheque is to be resolved by enacting that they may be used only with two parallel transverse lines. Special crossings are to be abolished: they are of no great value to customers or parties; and the collecting banker, who is the principal user of them, will be just as well off by being allowed to cross cheques ' not negotiable '.

The form of a cheque

The Act[65] at present defines a cheque as a bill of exchange drawn on a banker payable on demand. It is trite to say that, expanded, this means that a cheque is an unconditional order in writing, addressed by one person (the drawer) to another (the drawee), the latter being a banker, signed by the drawer, requiring the drawee to pay on demand a sum certain in money to or to the order of a specified person or to bearer.

The Committee's *Draft Bill* not only writes in the present definition substantially as expanded above but also desirably clarifies the law and brings it in some respects more into line with current commercial practice.

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[62] *Ibid.* para. 77.

[63] Paget, *op. cit.* 363-366 ; *cf.* Chorley, *Law of Banking* (4th ed. 1960) 111-112; Jones, *Gilbart Lectures on Banking* (1949) 18-19.

[64] *Report*, paras 88-90; *Draft Bill*, cll. 27-30.

[65] S. 78 (1).

The main recommendations may conveniently be considered by reference to various elements of the definition.

Unconditional order

Business houses are increasingly adopting a system designed to make the cheques which they draw serve also as receipts signed by the payees. Sometimes an order cheque form contains a statement by the drawer that indorsement of the cheque shall be a sufficient receipt, or the only receipt required. Sometimes it incorporates a form of receipt to be signed by the payee. Each of these forms of cheque raises the question whether the payee signs *animo indorsandi*, so that his signature constitutes a proper indorsement. In addition, the presence of the receipt form on the cheque may deprive the document of the character of a cheque and thus diminish the banker's protection. This will happen if the order to the banker to pay is made conditional on the receipt being signed, but not if the condition is addressed to and affects only the payee and not the banker.[66] The distinction is, as Paget says, a somewhat shadowy one. These difficulties are in practice overcome by the customer who draws such cheques giving his drawee banker an indemnity under which, as between them, every such instrument is a cheque and the banker is entitled to regard the payee's signature, wherever it appears on the cheque, as an indorsement but is not bound to see that the receipt form is signed or stamped.

The Committee provides for the continuance of the practice but proposes that it be facilitated by an enactment removing the doubt whether the instrument is a cheque.[67] Further, it recognizes, and proposes statutory recognition of, the value of a paid cheque as evidence that the payee has received the cheque.[68] The recent English[69] and New Zealand[70] Acts give evidentiary value to all unindorsed paid cheques. In the United Kingdom at any rate banks normally print their cheque forms payable to order rather than to bearer as in Australia,[71] and bankers suggested to the Committee that though a provision similar to the English one should be introduced it should be confined to order cheques. If, as the Committee recommends, it becomes unnecessary to indorse an order cheque on payment into the payee's account, the fact that a paid order cheque lacks an indorsement will indicate that the payee's account has been credited with the amount ; and the evidence of receipt will be stronger than where the cheque is payable to bearer.[72] The Committee

[66] Paget, *op. cit.* 168-169, 191-192.

[67] *Report*, paras 151-170; *Draft Bill*, cl. 8 (5).

[68] But the Committee rejected the suggestion that legislative provision should be made for banks to return paid cheques to drawers: *Report*, paras 171-181.

[69] Cheques Act 1957 (U.K.), s. 3.

[70] Cheques Act 1960 (N.Z.), s. 4.

[71] *Report*, paras 100, 162.

[72] *Ibid.* para. 163.

recommends[73] therefore that a paid order cheque, whether indorsed or unindorsed, shall be *prima facie* evidence of receipt by the payee. This will probably mean that more cheques than before will be drawn payable to order, but if indorsement is dispensed with to the extent proposed there will be very little additional work for payees or bankers.[74]

The other matter to note under this heading is that the Committee proposes that an order to pay within a specified time shall not be an unconditional order.[75] It does this because it disapproves of the practice adopted by some drawers of noting on a cheque that it shall be void unless presented within a certain time. Under the present law it might be argued that such a document is not a cheque because it is 'expressed to be payable on a contingency' within the meaning of section 16; but the word 'expressed' would perhaps defeat the argument,[76] and in any event section 16 is not reproduced in the *Draft Bill*.

Addressed by the drawer to a banker

For many years writers have poured scorn on the present provision[77] that 'In this Act ... "Banker" includes a body of persons, whether incorporated or not, who carry on the business of banking'.[78] The Manning Committee has sensibly leaned on the Commonwealth's banking legislation, and proposes the definition that '"Bank" means any corporation duly authorized under the law of the Commonwealth to carry on banking business in Australia and includes authorized savings banks'.[79] The form '"Bank" ... includes ... savings banks' may be open to criticism, but the meaning is clear enough and the principle is sound. The *Draft Bill* speaks throughout not of a 'banker' but of a 'bank': perhaps this change accords with modern practice and is inevitable, but it will be regretted by many to whom a bank officer is still a person and not an accounting machine.

The Committee considered the problem of the bank cheque and the bank draft.[80] The former especially has achieved a special status, and is regarded as the equivalent of cash for the purposes of many conveyancing and other transactions; yet, because the drawer and the drawee are not different persons, neither instrument is a cheque as defined by the Act. The present Act[81] nevertheless extends to both of them its

[73] *Ibid.* para. 164; *Draft Bill*, cl. 75.
[74] *Report*, para. 166.
[75] *Ibid.* para. 192; *Draft Bill*, cl. 8 (3).
[76] *Cf. Orbit Mining and Trading Co. Ltd v. Westminster Bank Ltd* [1963] 1 Q.B. 794, 811, 821-822.
[77] Bills of Exchange Act 1882 (U.K.), s. 2; 1909-1958 (Cth), s. 4.
[78] *E.g.* Paget, *op. cit.* 4 *et seq.*; Chorley, *op. cit.* 22-24.
[79] *Report*, para. 188; *Draft Bill*, cl. 4.
[80] *Report*, paras 258-263.
[81] S. 81A.

provisions, including its protective provisions, as to crossed cheques. The Committee recommends that this principle should be continued and its application made certain. It was asked by bankers to go further and to ensure that the whole of the law relating to cheques should be made applicable to bank cheques and bank drafts; but it declined to do so, on the ground that the result might be the development of an attitude towards bank cheques undesirably different from the present view of them as instruments which are not subject to the restrictive provisions affecting cheques but are certain to be paid without conditions or restrictions of any kind.

Signed by the drawer

It is of course common practice now for cheques to bear ' signatures ' imprinted by mechanical means, but the sufficiency under the Act of such a signature or of a signature by rubber stamp is not established beyond doubt and the practice is therefore the subject of special agreement between banker and customer. The Committee recommends[82] that the proposed Act should authorize these signatures. Bankers submitted that it should go further and guard them against the possibilities for abuse inherent in mechanical signature by providing them with a statutory indemnity; the Chartered Institute of Secretaries, on the other hand, proposed that this should be left for negotiation and contract between banker and customer. The Committee agreed with the latter view, thinking that a customer would be more likely to look to his security measures if the need for them was specifically brought to his mind by his having to enter into a special arrangement with his bank.[83]

The relevant recommended legislative provision is[84] in the form ' subject to agreement between the bank and the customer any signature may be affixed by a stamp or other mechanical means '. There is room for argument that this is ambiguous, and perhaps there should be clarification by a choice between, for instance, ' in the absence of any agreement to the contrary ... any signature may ... ' and ' if the bank and the customer so agree, and subject to the terms of their agreement, any signature may ... '.

The Committee proposes also to resolve another problem relating to signatures of indorsers as well as drawers of cheques—namely, the conflict between the immunity from liability given by section 28 of the Bills of Exchange Act to anyone who does not sign a bill as drawer, indorser or acceptor and the liability imposed by the Companies Acts of States on a company officer who on behalf of the company signs instruments on which its name does not appear. The solution proposed

[82] *Report*, para. 256.
[83] *Ibid.* para. 257.
[84] *Draft Bill*, cl. 76.

is to enact that nothing in the new equivalent of section 28 shall affect any such liability of any person under a Companies Act.[85]

A sum certain in money

The amount of a cheque is generally expressed both in words and in figures, though the Act does not so require; and if two different amounts are stated the amount denoted by the words is that which is payable,[86] though in practice the lesser of the two is sometimes paid.[87] Cheque-writing machines are now in common use, but it seems that the march of science has not been able to devise one to which a statement of the amount in anything but figures is palatable. The Committee proposes clarification of the law, and aid to the machine, by an enactment that the amount may be stated 'in words or in figures or both' (*sic*), and that if the drawer, whether human or mechanical, states two or more differing amounts the instrument will nevertheless be a cheque and the least of these amounts shall be payable.[88]

The Committee would also have it made clear that the law regards the drawer of a cheque as owing a duty to the paying banker to take reasonable care not to draw his cheque in such a way as to facilitate the making of an unauthorized addition or alteration such as the raising of the amount.[89] It recognizes, however, that this duty is based on the contractual relationship of banker and customer, and it refused the plea that the drawer should be burdened with a similar duty to the collecting bank.[90]

To or to the order of a specified person

The Committee proposes that a deal of good clean fun be suppressed by an enactment allowing cheques to be drawn payable to impersonal payees such as 'cash' or 'wages'. This is a common-sense practical proposal. Instruments naming such objects as payees are at present not cheques, because the payees are not persons;[91] yet there is no real reason why bankers should not have the appropriate protection when dealing with them. The Committee therefore recommends in effect that an instrument shall not be denied the character of a cheque merely because it is payable 'to an object which does not purport to specify a person or to an object which does not purport to specify a person or order, or to the order of an object which does not purport to specify a person',

[85] *Ibid.* cl. 19 (4).
[86] Bills of Exchange Act 1909-1958 (Cth), s. 14 (2).
[87] *Report*, para. 194.
[88] *Ibid.*; *Draft Bill*, cl. 12.
[89] *Draft Bill*, cl. 13.
[90] *Report*, paras 241-244.
[91] *Orbit Mining and Trading Co. Ltd v. Westminster Bank Ltd* [1963] 1 Q.B. 794.

and that a cheque so payable shall be deemed to be a cheque payable to bearer.[92]

Now that is a terrifying description of an impersonal payee. It invites two criticisms. First, the Committee has insisted (as it has insisted when dealing earlier in the clause with the present phrase ' to or to the order of a specified person ') in spelling out the fact that there is no difference between ' pay to the order of X ' and ' pay to X or order '.[93] This seems unnecessary. Secondly, ' an object which does not purport to specify a person ' surely says nothing that would not in the context be said by ' an impersonal payee ' or ' an object not a person '. It is suggested that the Parliamentary Draftsman might well think it adequate to deal with this constituent of the definition of a cheque by saying that a cheque orders payment ' (i) to the bearer or (ii) to or to the order of a specified person or (iii) to or to the order of an impersonal payee '—or, alternatively to (iii), ' (iii) to or to the order of an object not a person '—and to enlarge the list of cheques payable to bearer contained in clause 11 (2) by adding to it cheques described in (iii).

Miscellaneous

It remains to mention several miscellaneous matters relating to cheques considered by the Committee.

Infants

A courageous attempt was made to persuade the Committee that infants should be made fully liable in respect of their cheques, or alternatively that infants should be allowed to operate cheque accounts only on terms that their banks accepted liability for their cheques. The Committee, not surprisingly, would have none of this.[94]

Stale cheques

Those who habitually take until April to accustom themselves to the passing of the old calendar year will be mildly interested in the Committee's proposal[95] that the period which must elapse before a cheque becomes stale should be lengthened from twelve to fifteen months.

Post-dated cheques

The Committee leaves bankers to their own contractual devices for dealing with post-dated cheques, which they—in the Paget tradition—deplore and want outlawed but which merchants find useful.[96]

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[92] *Report*, para. 190; *Draft Bill*, cl. 8 (1), (4).

[93] A cheque expressed to be payable to the order of a specified person, and not to him or his order, is nevertheless payable to him or his order at his option: Bills of Exchange Act 1909-1958 (Cth), s. 13 (5); *Draft Bill*, cl. 11 (3).

[94] *Report*, paras 196-199.

[95] *Ibid.* para. 203; *Draft Bill*, cl. 50.

[96] *Ibid.* paras 205-207; *Draft Bill*, cl. 14 (2).

Limitation of actions

Bankers find it hard that a customer has six years in which to sue in respect of payment of a forged cheque. They say also that if the customer were to study the statement of his account and notify his banker promptly of any irregularity loss could often be avoided while yet the wrongdoer could be traced. They therefore sought a recommendation the effect of which would be to fix a customer with the debit raised by payment of a forgery unless he gave notice within twelve months thereafter or within three months of getting his statement, which ever period ended earlier. The Committee thought, however, that the period of limitation should be the same for bankers as for others under the general law, and that the solution of the banker's problem lay, if anywhere, in contract with their customers.[97]

The Committee proposes[98] an enactment, codifying the existing law, that if a cheque is not otherwise discharged the drawer's liability endures according to the appropriate law governing limitation of actions.

Lost cheques

Under the present law,[99] if the holder loses a bill before it is overdue he may apply to the drawer for another, giving security if required against the lost bill being found, and if the drawer refuses to give a duplicate bill he may be compelled to do so. This is an unsatisfactory provision, because it does not give a similar right against the acceptor or any indorser of the bill, and because the method of compulsion is not specified. The Committee proposes to remedy these defects. So far as cheques are concerned it proposes[1] to give the loser a right to apply to the drawer for a new cheque and to any indorser of the lost cheque for an appropriate indorsement, and a right on refusal to apply to a Court (to be prescribed by the Governor General) of competent jurisdiction for a mandatory order. If the order is made and not complied with, the Court is to have power to appoint one of its officers to do what the order requires the recalcitrant party to do.

Dishonour and notice of dishonour

The Committee proposes a set of rules relating to the dishonour of cheques[2] which has several interesting features.

First, a time-table is proposed. Each step must be taken ' as soon as reasonably practicable ', but for each a specified time is also stated for

[97] *Report*, paras 246-248.
[98] *Ibid.* para. 249; *Draft Bill*, cl. 60.
[99] Bills of Exchange Act 1909-1958 (Cth), s. 74.
[1] *Report*, paras 250-255; *Draft Bill*, cll. 69-71.
[2] *Report*, paras 208-240.

'other than exceptional cases'.[3] (Presumably in the 'exceptional' case the specified time may be exceeded but the step must be taken 'as soon as (is) reasonably practicable' having regard to the circumstances which make the case 'exceptional'.) Thus, the collecting bank must send the cheque to the paying bank within twenty-four hours from the time when it is deposited.[4] If the cheque is dishonoured, the paying bank must give notice of dishonour to the collecting bank or the person who presented it and must do so not later than *the day following* that on which it was presented.[5]

It is curious that in the bad old days before banks became so efficient this notice would have been given on *the day* on which the cheque was presented for payment: the delay of one day has been caused by the adoption of the system of 'deferred posting' by which the paying bank does not post today's transactions to its ledgers until tomorrow (but dates them as of today);[6] but the Committee's view is that the system and allied progressive procedures are praiseworthy[7] and that the customer must put up with the delay in the cause of efficiency and economy of operation.[8]

To return to the time-table: the collecting bank which has received notice of dishonour must itself on the same day send notice of dishonour to its customer.[9] Not later than the day following that on which he receives that notice, he must give notice to all other parties to the cheque whom he seeks to make liable.[10]

The other proposed rules as to the giving of notice, as to delay and as to dispensing with notice[11] are similar to those at present in the Act.[12]

The Committee has concerned itself with the paying banker's well-known dilemma—pay and risk wrongful payment, or dishonour and risk wrongful dishonour. It thinks that it is reasonable in the interests of the commercial community that he should have no *locus inquirendi*,[13] and it would require him to pay or refuse payment forthwith; but it

[3] *Cf.* s. 54 (*l*) of the Act, which provides that notice must be given within a reasonable time after dishonour and 'in the absence of special circumstances ... is not deemed to have been given within a reasonable time unless' certain times are kept.

[4] *Draft Bill*, cl. 42.

[5] *Ibid.* cl. 43.

[6] *Report*, paras 215-219.

[7] *Ibid.* para. 223.

[8] *Ibid.* para. 222.

[9] *Draft Bill*, cl. 44.

[10] *Ibid.* cl. 45.

[11] *Ibid.* cll. 46-48.

[12] Ss. 54-55.

[13] Such as would have been given by Mauley J.: *Robarts v. Tucker* (1851) 16 Q.B. 560, 577-578: 117 E.R. 994, 1001—but not by Lord Macnaghten: *Bank of England v. Vagliano Brothers* [1891] A.C. 107, 157.

would borrow from the law relating to trustees and provide[14] that he may be relieved from liability if he proves that he acted honestly and reasonably and ought in the circumstances fairly to be excused. This suggestion is an eminently reasonable amelioration of the position of bankers. It also covers adequately other cases of possible embarrassment as to which the Committee refused to make special recommendations, such as those caused by a banker receiving notice that a bankruptcy petition has been issued against a person whose name is identical with that of a customer.

BILLS OF EXCHANGE

It is possible to deal fairly succinctly with the Committee's recommendations as to bills of exchange other than cheques. The approach has been conservative, because of a laudable desire to maintain the uniformity of the Australian law of bills with the laws of other countries of the British Commonwealth.

The Committee proposes that similar changes in the law should be made for bills to those which are suggested for cheques in relation to—the mode of expression of the sum payable,[15] the conflict with Companies Acts,[16] and lost instruments.[17]

Some recommendations as to cheques are not regarded by the Committee as necessary or desirable for bills. It considers[18] that no change should be made in the definition of a bill; and it is particularly pleasing that, by refusing[19] to recommend prescription of the material on which bills may be written, the Committee has not added to the obstacles put by the stamp laws in the way of those exuberant souls who occasionally write them on eggs, pigs, *etcetera.* It does not wish to put on the acceptor of a bill a burden, similar to that proposed for his equivalent the drawer of a cheque, to avoid facilitating the alteration of a bill.[20] It suggests no alteration at present to the rules for dishonour of bills: the question can be reconsidered after the new Cheques Act has been observed in action.[21] Because the use of bills has not increased correspondingly with the use of cheques, it sees no warrant for altering the law as to indorsement of bills.[22]

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[14] *Report*, paras 225-229; *Draft Bill*, cl. 74, which is disfigured by the opening words 'Where a bank upon which a cheque is drawn does not honour *such* cheque *which* the customer was entitled to require it to honour . . . ', italics added.

[15] Bills of Exchange Act 1909-1958 (Cth), s. 14 (2); *Report*, para. 194; *Draft Bill*, cl. 12.

[16] *Draft Bill*, cl. 19 (4).

[17] Bills of Exchange Act 1909-1958 (Cth), s. 74; *Report*, paras 250-255; *Draft Bill*, cll. 69-71.

[18] *Report*, paras 283-284.

[19] *Ibid.* para. 285.

[20] *Ibid.* paras 297-300.

[21] *Ibid.* para. 304.

[22] *Ibid.* paras 308-310.

The Committee declined to make any recommendation for the abolition of days of grace,[23] or as to bank hours and holidays.[24]

There are few positive recommendations for changes solely in the law of bills, apart from changes that would be consequential on the passing of a new Act for cheques. The Committee thinks that there should be statutory recognition of the well-established practice of drawing a bill for a sum certain plus (bank) charges.[25] It recommends that section 14 should be amended accordingly and also so as to provide that any of the permitted additions to 'a sum certain' may be used in combination with any other or others.[26] It would reconcile the opening words of section 37 with the definition of 'indorsement' in section 4 by amending the former to read 'An indorsement, in order to operate as a *step in* negotiation . . .'.[27] It would enlarge the times allowed by section 56 for noting and protest.[28]

PROMISSORY NOTES

There is no significant reference to promissory notes in the Committee's *Report*.

CONCLUSION

The Committee has produced an admirable report. Perhaps the outstanding quality of it is balance. The needs of the various sections of the mercantile community—and their enthusiasms—have been weighed with care and common sense one against the other, and the scales have been kept level. Much of the interest of the *Report* lies in what the Committee declined to recommend, but a commendably cautious approach has not ignored developments in commercial practice and procedures, and has not inhibited boldness where boldness was needed.[29] Legislation on a topic such as this is apt to take a leisurely course, but the Committee's labours and its thoughtful report deserve that the Commonwealth Parliament should 'as soon as reasonably practicable' produce seemly legislation in accordance with the recommendations.

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[23] *Ibid.* paras 292-294.
[24] *Ibid.* paras 315-317.
[25] *Ibid.* paras 286-288.
[26] *Ibid.* para. 289.
[27] *Ibid.* paras 301-303.
[28] *Ibid.* paras 306-307.
[29] Nor, it is gratifying to note, did the Committee feel hampered by such concern for stamp-duty revenue as was the subject of submissions by the Premiers of two States and an Under Secretary of a third: *Report*, paras 264-273.