

1985

THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CHEQUES BILL 1985

EXPLANATORY MEMORANDUM

(Circulated by Authority of the Honourable Lionel Bowen
Deputy Prime Minister and Attorney-General)

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ABBREVIATIONS

The following is a list of abbreviations used:

- | | | |
|-------------------------|---|--|
| Anderson | - | Uniform Commercial Code (3rd ed.) |
| BEA | - | <u>Bills of Exchange Act</u> 1909 |
| Bill | - | Cheques Bill 1985 |
| Byles | - | <u>Byles on Bills of Exchange</u> (25th ed. 1983) |
| Chalmers | - | <u>A Digest of the Law of Bills of Exchange</u> (13th ed.) |
| Dicey & Morris | - | <u>The Conflict of Laws</u> (10th ed. 1980) |
| Falconbridge | - | <u>Banking and Bills of Exchange</u> (7th ed. 1969) |
| Manning and Farquharson | - | <u>The Law of Banker and Customer in Australia</u> (1947) |
| Holden | - | <u>The Law and Practice of Banking : Vol. 1 Banker and Customer</u> (1970) |

- Indian BLC Report - Report on Negotiable Instruments
Law of the Banking Laws Committee
(Government of India) (1975)
- Manning Report - Report dated 1 May 1964 of the
Committee appointed by the
Commonwealth Government to review
the BEA
- MD - Draft Bill for proposed Cheques Act
set out in the Fourth Schedule to
Manning Report
- Nygh - Conflict of Laws in Australia (4th
ed. 1984)
- Paget - Paget's Law of Banking (8th ed.)
- Rajanayagam - The Law Relating to Negotiable
Instruments in Australia (1980)
- Riley - Riley's Bills of Exchange in
Australia (3rd ed.)
- Russell and Edwards - The law relating to Bills of
Exchange in Australia (2nd ed.)
- UCC United States Uniform Commercial Code
: 1972 official text with comments
- Weaver and Craigie - The Law Relating to Banker and
Customer in Australia (1975)

CHEQUES BILL 1985

GENERAL OUTLINE

The Cheques Bill 1985 provides for a separate law relating to cheques.

2. The purpose of the Bill is to revise the provisions of the applicable to cheques, to clarify the law in areas of existing uncertainty and to make certain substantive changes to the law on cheques, the majority of which are based on recommendations of a Committee, chaired by the late Mr. Justice Manning of the New South Wales Supreme Court, which reviewed the BEA.

3. Part I of the Bill deals with various preliminary matters such as the interpretation of words and expressions, used in the Bill and the application of the Bill. Part II contains provisions that expand upon the general definition of a cheque contained in clause 10 as well as provisions relating to order and bearer cheques, the delivery of cheques, the capacity to incur liability on cheques, signature and consideration. Part III of the Bill deals with the negotiability of cheques and includes provisions relating to the transfer of cheques and crossings on cheques. Part IV contains the provisions in the Bill dealing with presentment and dishonour of cheques. Part V deals with the liability of the parties to a cheque and also contains provisions that relate to the discharge of the parties to a cheque. The duties and liabilities of both the drawee (paying) bank and the collecting bank are set out in Part VI of the Bill. Part VII of the Bill contains various miscellaneous provisions such as those dealing with conflict of laws questions and the general regulation making power.

4. The legislation has no financial implications.

CHEQUES BILL 1985 - NOTES ON CLAUSES

5. The Bill is divided into the following parts:

PART I - PRELIMINARY

PART II - CHEQUES

PART III - NEGOTIABILITY OF CHEQUES

PART IV - PRESENTMENT AND DISHONOUR

PART V - LIABILITIES ON CHEQUES

PART VI - DUTIES AND LIABILITIES OF BANKS

PART VII - MISCELLANEOUS

6. The remainder of this explanatory memorandum deals, sequentially, with each clause of the Bill.

BILL : PART I : PRELIMINARY

7. Part I of the Bill (cls. 1 to 9) deals with various preliminary matters.

Cl. 1 : Short title

8. When enacted, the Bill will be cited as the Cheques Act 1985 (Bill cl. 1 - based on MD cl. 1).

9. The long title of the Bill also refers to 'certain other negotiable instruments' to indicate that the subject matter of the Bill is not limited to cheques. The Bill contains provisions that deal with other negotiable instruments that are not cheques at common law, under the BEA or under the Bill e.g.:

- (a) inchoate instruments (see Bill cl. 18);
- (b) bank cheques and bank drafts (see e.g. Bill cl.5); and
- (c) dividend warrants (see Bill cl. 102).

Cl. 2 : Commencement

10. The Bill will come into operation on a day to be fixed by the Governor-General by Proclamation (Bill cl.2). Commencement will coincide with:

- (a) consequential amendments proposed to be made to the BEA; and
- (b) certain Regulations that are to be made under the Bill when enacted.

Cl. 3 : Interpretation

11. Various interpretation provisions are included for the purposes of the Bill (Bill cl. 3):

- (a) defined terms (see Bill s-cl. 3(1));
- (b) acts done in good faith (see Bill s-cl. 3(2));
- (c) defects in title (see Bill s-cl. 3(3) and 3(4));
- (d) stale cheques (see Bill s-cl. 3(5));
- (e) signatures or indorsements without authority (see Bill s-cl. 3(6));
- (f) exhibition of cheques (see Bill s-cl. 3(7)); and
- (g) material alteration of cheques (see Bill s-cl. 3(8)).

12. Defined terms. The terms discussed below are defined (Bill s-cl. 3(1)) for the purposes of the Bill unless the contrary intention appears.

13. Action. The term 'action' will include a counter-claim and set-off (same definition as in MD cl. 4 - cf. definition in UCC sec. 1-201).

This term is used in the following provisions of the Bill, among others:

Bill cls. 51 and 100.

14. Australia. The term 'Australia' will include the external Territories as the Bill extends to every external Territory (see Bill cl. 8). This term is used in Bill cl. 101, among others.

15. Acceptance. The term 'acceptance' is not defined, in accordance with the approach of the MD. Acceptance of a cheque by the bank upon which it is drawn is very unusual (Riley p. 52 and Chalmers p. 139 and pp. 249-250). It would seem, however, that it is theoretically possible under the BEA for a bank to accept a cheque drawn upon it. If the bank were to accept such a cheque, the bank could be liable on the cheque as an indorser (see Bill cl. 75).

16. Bank. It is intended that the provisions of the Bill should apply to all banks, however formed or incorporated. Specifically, the term 'bank' will cover:

- (a) the Reserve Bank of Australia (see ss. 26 and 27 of Reserve Bank Act 1959);
- (b) a body corporate authorized under the Banking Act 1959 to carry on banking business in Australia (see definition of 'bank' in s. 5 of Banking Act 1959);
- (c) State banks (para. (c) of the definition follows para. 51(xiii) of the Constitution); and
- (d) a person (other than a person referred to in para. (a), (b) or (c) above) who carries on the business of banking outside Australia.

17. The following comments are made on the definition of 'bank':

- (a) Weaver and Craigie (pp. 27-28) have pointed out that the application of the definition of 'banker' in the BEA to Australian 'banks' is, in many cases, somewhat uncertain - the definition in Bill s-cl. 3(1) should overcome this problem;

- (b) if a bank operated by or on behalf of a Territory were to be established, it would be a bank of the kind to which para. (b) of the definition applies unless steps were taken to exclude it from the application of the Banking Act 1959. The special treatment given in para. (c) of the definition to a person who carries on State banking arises from the fact that State banking (other than State banking extending beyond the limits of the State concerned) is specifically excluded from the banking power in placitum 51(xiii) of the Constitution. It is for this reason that State banks are not banks within the meaning of the Banking Act 1959. No such exclusion exists in the case of 'Territory' banks;
- (c) the meaning of the expression 'the business of banking' in para. (d) of the definition has been considered in a number of cases (see Riley pp. 16-18; Rajanayagam pp. 137-143 and Weaver and Craigie pp. 24-28). Isaacs J. has commented that:

'The essential characteristics of the business of banking ... may be described as the collection of money by receiving deposits on loan, repayable when and as expressly or impliedly agreed upon, and the utilization of the money so collected by lending it again in such sums as are required. These are the essential functions of a bank as an instrument of society. It is, in effect, a financial reservoir receiving streams of currency in every direction, and from which there issue outflowing streams where and as required to sustain and fructify or assist commercial, industrial or other enterprises or adventures.'

(Commissioners of the State Savings Bank of Victoria v. Permewan, Wright and Co. Ltd (1915)
19 C.L.R. 457 at pp. 470-471)

The term has been qualified in the Bill to make it clear that it applies only to persons, not being banks, who carry on the business of banking outside Australia. The qualification is considered necessary so that it cannot be argued that the expression applies to non-banks which carry on the business of banking in Australia.

18. Bank cheque. The expression 'bank cheque' and 'bank draft' are used in the Bill without definition (though see Bill cl. 5 for a statement on the extent to which the provisions in the Bill apply to bank cheques and bank drafts).

19. It would appear that the meaning of both expressions is well established in Australia and that the terms, at least where it is not sought to draw a distinction between bank cheques and bank drafts, need not be defined. In Fabre v. Ley (1973) 127 C.L.R. 665 the High Court said (at pp 670-671):

'It appears that for a considerable number of years there has been a practice in Australia of bankers issuing what have come to be known as "bank cheques" at the request of customers who have some reason to provide cash or its equivalent in commercial transactions - see Union Bank of Australia v. McClintock [1922] 1 AC 240, at p. 245 and Manning and Farquharson: Banker and Customer in Australia (1947), p. 38. These are drafts drawn by a bank usually on itself but occasionally upon another bank: in either case they are issued in the form of cheques. It has been questioned whether a draft of this kind is a cheque within such a provision as s.78 of the Bills of Exchange Act. The question arose because the definition of cheque incorporates that of a bill of exchange and a cheque drawn by a bank upon itself is not "addressed by one person to another" within the latter definition (which is now contained in s.8(1) of the Bills of Exchange Act): see McClintock v. Union Bank of Australia Ltd. (1920) 20 S.R. (N.S.W.) 494. In 1932, S.88A was inserted in the Bills of Exchange Act making a banker's draft payable on demand drawn by or on behalf of a bank upon itself a cheque for the purpose of the crossed cheque provisions of the Bills of Exchange Act. However, although it may be more accurate to refer to a bill of exchange drawn by a bank on itself as a banker's draft, the nomenclature "bank cheque" is,

and has for long been, used in Australia to describe instruments of this kind. Such instruments are in common use by solicitors in the settlement of transactions, including real property transactions, in cases where it is inconvenient to carry currency and cash or its equivalent is required on a settlement. The expression "banker's cheque" may be somewhat wider in meaning than "bank cheque" in that it may include a cheque drawn by a bank upon another bank as well as a "cheque" drawn by a bank upon itself, but it is clear that both expressions, "banker's cheque" and "bank cheque", refer only to a "cheque" which is drawn by a bank'.

20. Bearer. The word 'bearer' has been defined to mean the person in possession of a cheque payable to bearer (this definition is to the same effect as in BEA and MD - but cf. UCC s-sec. 1-201(5)).

21. This term is used in the following provisions of the Bill, among others:

Bill cls. 20, 22, 40(3) and 77(1).

22. Delivery. The term 'delivery' in relation to a cheque will mean the transfer of possession of the cheque from one person to another. Cf.:

(a) BEA and MD, which include the words 'actual or constructive' (but see also the definition of 'possession'); and

(b) UCC s-sec 1-201(14) which limits the term to a voluntary transfer.

23. The term 'delivery' is used in the following provisions of the Bill, among others:

Bill cls. 25, 26, 27, 28, 42, 77 and 80.

24. Drawee bank. A 'drawee bank' will mean the bank upon which the cheque is drawn. There is no equivalent provision in the BEA or MD.

25. The term 'drawee bank' is used in the following provisions of the Bill, among others:

Bill cls. 61, 62, 63, 68, 90, 91 and 93.

26. Holder. The term 'holder' will mean:

- (a) the payee or indorsee of a cheque payable to order who is in possession of the cheque as a payee or indorsee; and
- (b) the bearer of a cheque payable to bearer.

27. The term 'holder' has been recast when compared with the BEA (or the MD):

- (a) the definition deals separately with cheques payable to order and cheques payable to bearer. The BEA definition covers the payee or indorsee of a cheque payable to bearer both under the description of payee or indorsee and again under the description of bearer; and
- (b) the definition makes it clear that the payee or indorsee of a cheque payable to order is the holder of the cheque only if he is in possession of the cheque as the payee or indorsee of the cheque.

28. The term 'holder' is used in the following provisions of the Bill, among others:

Bill cls. 28, 40, 42, 45, 49, 50, 51, 52 and 71.

29. Indorsement. The term 'indorsement' is not defined in the Bill as it is in BEA s.4. The latter provision states that 'indorsement' means an indorsement completed by delivery.

There is no equivalent provision in the Bill as it is considered that:

- (a) where 'indorsement' is used in the sense defined in BEA s.4 it is quite clear, from the context, that the term means the act of indorsing a cheque completed by delivery (see e.g. Bill s-cl. 30(4), 60(2) and 74(1));
- (b) in the vast majority of cases the term 'indorsement' is used in the Bill to mean simply the signing of a cheque by an indorser (see e.g. Bill cl. 24, s-cl. 16(1), cls. 25 and 26, s-cl. 31(4), cl. 41, paras. 45(a) and (c) and cls. 47 and 48.

30. Issue. The term 'issue', in relation to a cheque, will mean the first delivery of the cheque to a person who takes the cheque as the holder of the cheque (to same effect as BEA - no such definition in MD). This term is used in Bill cl. 101, among others.

31. The requirement in the BEA that the cheque be 'complete in form' has not been retained. The following comments are made in relation to the expression:

- (a) the definition of 'issue' in UCC sec. 3-102 omits this requirement apparently because it was thought to be inconsistent with the inchoate instrument provisions of the UCC (see Anderson, V. 5, p. 182);
- (b) the effect of the requirement would seem to be that the delivery of a cheque to the payee is not the issue of the cheque if the cheque is not complete in form at that time. This could mean that the first transfer by negotiation of the

cheque after the cheque has been completed also serves as the issue of the cheque or, alternatively, that the subsequent completion of the cheque operates retrospectively so as to make the earlier delivery of the cheque to the payee the issue of the cheque. On the first of these alternatives there could be a transfer by negotiation of a cheque before its issue. This would seem to be conceptually inconsistent with the principles underlying the BEA (see Rajanayagam p. 62 and Anderson V. 5, pp. 185-186). On the second of these alternatives a cheque that is discharged (see Bill cl. 78) before its completion could never be said to have been issued;

- (c) the requirement causes difficulty in applying some of the provisions of the Bill to cheques that are incomplete in form. For example, the requirement causes difficulty in applying Bill cl. 27 (which provides that delivery may be shown to have been conditional or for a special purpose) to cheques that are incomplete in form;
- (d) the meaning of the requirement is itself unclear. Can there be a 'cheque' before it is 'complete in form'? In other words, is the requirement merely superfluous?.

32. It should be noted also that the Indian BLC Report (p. 67) recommended that the UCC approach of omitting the reference to completeness in form should be adopted.

33. Person. The term 'person' is undefined (cf. BEA and MD which both had such a definition). It is not necessary to define this term (see s. 22 of the Acts Interpretation Act 1901).

34. Possession. The term 'possession' will mean, in relation to a cheque, both actual and constructive possession. 'Possession' is not defined separately in the BEA or the MD but appears in the definition of 'delivery'. There are various references in the Bill to a person in possession of a cheque (e.g. Bill cls. 18, 56 and 57). There seems to be no reason why the term 'possession' in these provisions should not, as in the definition of 'delivery' in the BEA, mean actual or constructive possession. The meaning given to the term by the definition would appear to be the meaning currently given to the term in the BEA (see Chalmers p. 7).

35. Value. The term 'value' will mean valuable consideration as defined in Bill cl. 35 (same as BEA and MD except that there is now a specific cross-reference).

Other interpretation provisions

36. There are various other interpretation provisions contained in the Bill.

37. Acts done in good faith. A reference to an act or thing being done in good faith will be a reference to the act or thing being done honestly, whether or not the act or thing is done negligently (Bill s-cl. 3(2) - based on BEA s. 96 and MD cl. 73).

38. The concept of doing an act or thing in good faith is used in the following provisions of the Bill, among others:

Bill cls. 50 and 51.

39. Defects in title. Where a person obtains a cheque by fraud, duress or other unlawful means or for an illegal consideration, the person's title to the cheque will be defective (Bill s-cl. 3(3) - cf. BEA s-sec. 34(2) and MD s-cl.

25(2)). This provision will not limit by implication the circumstances in which the title of a person to a cheque is defective (Bill s-cl. 3(4) - no corresponding provision in BEA or MD).

40. The provisions of Bill s-cl. 3(3) are of general application but will have particular application to the provisions dealing with:

- (a) transfer of stale or dishonoured cheque (see Bill s-cl. 46(1) and (2));
- (b) rights of holder (see Bill s-cl. 49(2) and (3));
- (c) a holder in due course (see Bill s-cl. 50(1));
and
- (d) payment in due course (see Bill cl. 79).

41. Stale cheque. The term 'stale cheque' will mean a cheque that appears, on its face, to have been drawn for more than 15 months (Bill s-cl. 3(5)). This definition is based on that in the BEA (s-sec. 80(2)) except that:

- (a) the period of time has been extended from 12 to 15 months. This was recommended by the Manning Committee (para. 203 - MD s-cl. 50(2)) to overcome what it felt was an inconvenience under the present law that:

'At the beginning of a new calendar year drawers of cheques may inadvertently refer to the year just ended when dating their cheques'; and

- (b) the definition of 'stale cheque' makes use of the concept of a cheque appearing, on its face, to have been 'drawn' and not, as in the case of the BEA, to the cheque having been 'in

circulation' for the relevant length of time. The concept of a cheque having been 'in circulation' is not used elsewhere in the Bill and seems to be used in the definition as a colloquial way of saying that a stale cheque is a cheque that appears, on its face, to have been issued more than 15 months ago (see Riley p. 194; Rajanayagam p.109 and Weaver and Craigie pp. 278, 338 and 367). However, the concept of a cheque becoming stale 15 months after its 'issue' is not used in the Bill because of possible difficulties in identifying when a cheque is in fact issued i.e., when the drawing is completed by delivery. The date on which a cheque is drawn will, on the other hand, be able to be easily identified because it will be conclusively presumed to be the date of the cheque (see Bill s-cl. 7(2)).

42. Placement of signature or indorsement without authority. A reference to a signature or indorsement being written or placed on a cheque without authority will extend to a forgery (Bill s-cl. 3(6) - no corresponding provision in BEA or MD).

43. This interpretation provision relates to the provisions dealing with:

- (a) unauthorized signature (see Bill cl. 32); and
- (b) the protection of a bank paying a cheque that lacks an indorsement or has an irregular or unauthorized indorsement (see Bill paras. 94(1)(b) and (2)(b)).

44. References to cheques being exhibited. A reference to a cheque being exhibited will include a reference to a cheque being delivered (Bill s-cl. 3(7)). This interpretation provision is intended to overcome any doubt that exhibiting a cheque may not involve a transfer of possession, and relates to provisions dealing with:

- (a) presentment by a bank (see Bill cl. 62);
- (b) presentment by a person other than a bank (see Bill cl.63); and
- (c) paid cheques (see Bill cl. 68).

45. Material alterations. A reference in the Bill to a material alteration will be a reference to an alteration that alters, in any respect, a right, duty or liability of the drawer or an indorser of a cheque or of the bank on which the cheque is drawn. (Bill s-cl. 3(8)). This provision relates to clauses in the Bill that deal with the discharge of a cheque. (see Bill cl. 78(2)).

46. The draft of the Bill exposed for public comment in February 1984 dealt with material alterations differently to the approach taken in the present Bill. In the exposure draft, material alteration was defined by enumerating, though not exhaustively, the instances where an alteration could be regarded as material. This approach followed that taken in the BEA (see s-sec. 68(1)).

47. In the explanatory paper that accompanied the exposure draft of the Bill it was pointed out that it appears that there are three possible approaches that can be taken in relation to determining what constitutes a material alteration:

- (a) to enumerate the particular circumstances in which an alteration has been held to be material (this is the approach adopted by the BEA and the exposure draft Bill);
- (b) to combine a statement of the general principle or principles to be applied in determining whether or not an alteration is material with either -
 - (i) an enumeration of the particular circumstances in which an alteration has been held to be material; or
 - (ii) an enumeration of circumstances in which an alteration is likely to be a material alteration.

(The Indian BLC Report (see pp. 48-50) basically adopts approach (b) (ii) UCC 3-407(1) also specifies some changes that may be material); or

- (c) to provide a statement of the general principle or principles to be applied in determining whether or not an alteration is material (this, basically, is the UCC approach - see s-sec. 3-407 (1) and is the approach taken in the present Bill).

48. Approach (a). Approach (a) has been criticized for its harshness (eg. see Holden p. 163) and has been substantially departed from in the UCC. The approach is harsh as it does not take account of the intentions of the parties to a cheque. For example, it may, in a particular case, be that an alteration to the date of a cheque is made innocently. In such a case, the alteration would, under the BEA, be 'material' and the cheque would be 'avoided'. Such a result

has been criticized in the recent decision in Heller Factors Pty. Ltd. v Toy Corporation Pty Ltd. (1984) 1 NSWLR 121. The present Bill would overcome such cases.

Approach (b). The difficulty with approach (b) is that it would still retain the harshness of approach (a). Moreover, it would appear to be conceptually difficult to mix the strict test of approach (a) with a statement of general principles.

49. Approach (c). Approach (c) provides a general guiding principle rather than a miscellany of separate instances. UCC s-sec. 3-407(1), upon which the provision in the present Bill is based, adopts what may be called the 'contract test' and provides that any alteration of an instrument is material if it changes the ~~contract of any party~~ to the instrument in any respect. The 'contract test' is well supported by authority (see Hirschfeld v. Smith (1866) L.R. 1 C.P. 340, 353; Suffell v. Bank of England (1882) 9 Q.B.D. 555, 565, 567-568, 571, 574; Koch v. Dicks (1933) 1 K.B. 307, 320-321, 323; Automobile Finance Company of Australia Ltd. V. Law (1933) 49 C.L.R. 1, 13-14). Perhaps the pithiest judicial exposition is that of the Court of Common Pleas in Hirschfeld v. Smith, op. cit., (see also Suffell v. Bank of England, op. cit., at page 565, per Jessel M.R. and Koch v. Dicks, op. cit., at pages 320-321 per Scrutton L.J.). The Court said:

'[A]lterations of an instrument containing a contract, having the effect of varying the rights and liabilities of the parties to that contract, render the instrument void.'

Other, perhaps more general, tests have also been suggested in the cases. In Gardner v. Walsh (1855) 4 El. & Bl. 83, 89; 119 E.R. 412, 415, Lord Campbell C.J. delivering the judgment of the Court of Queen's Bench said:

'[The defendant] ... is discharged from his liability if the altered instrument ... would operate differently from the original instrument, whether the alteration be or be not to his prejudice.'

In Suffell v. Bank of England, op. cit., at p. 568, (see also Slingsby v. District Bank Ltd. [1931] 2 K.B. 588, pp. 598-599) Brett L.J. said:

'Any alteration of an instrument seems to me to be material which would alter the business effect of the instrument if used for any ordinary business purpose for which such an instrument or any part of it is used.'

50. In that case Cotton L.J. said (at p. 573):

'[T]he alteration must be such an alteration of the instrument as would make it substantially different, and which although it would not affect the contract, would affect the rights of the parties in other matters.'

51. In Sim v. Anderson [1908] V.L.R. 348, 351-352 Cussen J. put the test as follows:

'[Y]ou have to consider whether the alteration makes the instrument a different instrument. If it makes it operate differently then it is a material alteration ... The question is: Does it make it a different document?'

52. In Koch v. Dicks, op. cit., at p. 328, Slesser L.J. said:

'I take the word "material" ... to mean ... any ... alteration which would produce a change in the legal nature of the instrument.'

53. In Automobile Finance Co. of Australia Ltd. v. Law (1933) 49 C.L.R. 1, 14, Evatt J. thought that s. 125 of the American Negotiable Instruments Law, which provided that any change or addition which altered the effect of the instrument was a material alteration, correctly represented the law.

54. It would appear that all the above pronouncements essentially point to the same test: does the relevant alteration alter the rights, duties or liabilities of the parties to a cheque? If 'yes', the alteration is to be regarded as 'material'. The approach in Bill s-cl 3(8), substantially follows that taken in the UCC and reflects the judicial pronouncements cited above.

Cl. 4: Application of rules in bankruptcy, laws of States and Territories and rules of the common law

55. Rules in bankruptcy. Nothing in the Bill will affect the application to cheques of 'the rules in bankruptcy' under the Bankruptcy Act 1966 or the law of an external Territory (Bill s-cl. 4(1)) and see ss. 124 and 125 of the Bankruptcy Act 1966).

56. The phrase 'the rules in bankruptcy' (used in BEA s-sec. 5(1)) has been used in preference to the phrase 'the law of bankruptcy' (used in MD s-cl. 5(1)). The Bankruptcy Act 1966 creates a law of bankruptcy that applies only to the bankruptcy of natural persons. Although s-sec. 438(2) of the Companies Act 1981 applies certain of the rules in bankruptcy to the winding up of insolvent companies, it does not apply the law of bankruptcy, as such, to the winding up of companies (but see s-sec. 438(1) Companies Act 1981 which makes all debts payable on a contingency and all claims admissible to proof against the company in every winding up 'subject in the case of insolvent companies to the application in accordance with the provisions of the [Companies] Act or the Bankruptcy Act 1966').

57. Application of laws of the States and the Territories and the common law. The laws of the States and Territories and the rules of the common law (including the law merchant) will continue to apply to cheques except in so far as they are inconsistent with express provisions of the Bill (Bill s-cl. 4(2) - of the same effect as BEA s-sec. 5(2) and MD s-cl. 5(2)).

58. Bill s-cl. 4(2) has two effects:

- (a) it will preserve the operation of State and Territory laws applicable to cheques (such as certain State and Territory criminal laws);

- (b) it and will not apply where there are express provisions in the Bill inconsistent with the rules of the common law and, for example, will preserve the common law doctrine of estoppel and the rules of private international law.

Cl. 5: Bank cheques and bank drafts

59. Unless the contrary intention appears in the Bill, a reference in the Bill to a cheque includes a reference to a bank cheque or bank draft (Bill s-cl. 5(1)). The following provisions of the Bill, among others, will be applicable to bank cheques and bank drafts:

- (a) definition, interpretation and application provisions (see Bill cls. 3, 4, 6 and 7);
- (b) provisions dealing with delivery, capacity, signature and consideration;
- (c) the negotiability of cheques;
- (d) certain of the presentment and dishonour provisions;
- (e) liability on cheques.

60. Some of the provisions of the Bill that apply to cheques have not been expressed to apply to bank cheques or bank drafts. Bank cheques and bank drafts are, in some important respects, different to ordinary cheques, eg., the drawer of a bank cheque and the drawee bank are one and the same person. Accordingly, the provisions in the Bill that are peculiar to cheques (such as those relating to the 'form' of a cheque (cls. 10 to 15) and certain of the presentment provisions will not apply to bank cheques or bank drafts.

61. Nothing in the Bill (other than cls. 92 and 94) will affect any liability that a bank would otherwise have in relation to a bank cheque or bank draft that is drawn upon the bank (Bill s-cl. 5(2)).

Cl. 6: Rights, duties and liabilities under Bill may be altered by agreement

62. Subject to s-cl. 6(2), the Bill will not prevent persons altering certain of their own rights, duties or liabilities by agreement (Bill s-cl. 6(1) - no equivalent in BEA or MD.).

63. The purpose of s-cl. 6(1) is to correct an impression which may be otherwise gained that such an alteration is not possible. The provision should enable the courts to give direct effect to the intentions of the parties. The provision can be regarded as a particular instance of the preservation of the rules of the common law in relation to cheques (see Bill s-cl. 4(2)) and would not seem to represent a change from the law applying under the BEA.

64. Sub-clause 6(2) outlines the exceptions to the rule in s-cl. (1) and gives paramount force to certain provisions of the Bill by providing that they have effect notwithstanding any agreement to the contrary. These overriding provisions deal with:

- (a) the application of the Bill, its extension to external Territories and its binding of the Crown (cls. 7, 8 and 9)
- (b) the form that cheques may take (cls. 10 to 15 inclusive)
- (c) order and bearer cheques (cls. 19 to 24 inclusive)

- (d) capacity to incur liability on a cheque (cl. 30)
- (e) matters relating to signature (cls. 31 and 32)
- (f) transfer by negotiation (cls. 39, 40 and 41)
- (g) indorsement of cheques (cls. 43, 44 and 45)
- (h) crossing of cheques (cls. 53, 54, 55, 56 and 57)
- (i) presentment of cheques (cls. 61, 62 and 64 to 67 inclusive)
- (j) payment in due course (cl. 79)
- (k) a cheque not being an assignment of funds (cl. 88)
- (l) termination of a bank's authority to pay (cl. 90)
- (m) protection of banks paying and collecting cheques (cls. 91 to 95 inclusive);
- (n) replacement of lost or destroyed cheques (cl. 99).

65. Position under BEA. Although the BEA appears to contain a complete and authoritative code relating to the rights, duties and liabilities of parties on bills of exchange, the cases show that parties in direct relationship with each other may negate, invert or otherwise vary the rights, duties and liabilities established by the BEA. A particular example concerns the right of parties to a bill to alter their rights, duties and liabilities arising out of an indorsement.

66. Indorsement. Contrary to the impression gained from a reading of BEA s-sec. 60(2), it is open to parties to a bill to alter, by agreement, the rights, duties and liabilities created by an indorsement of the bill (see Falconbridge pp. 770-771).

67. Perhaps the clearest judicial exposition of this principle is to be found in the judgment of the Privy Council delivered by Sir William Maule in Castrique v. Buttigieg ((1855) 10 Moo. P.C. 94, 108-109; 14 E.R. 427, 433) where he said:

' The liability of an indorser to his immediate indorsee arises out of a contract between them, and this contract in no case consists exclusively in the writing popularly called an indorsement, and which is indeed necessary to the existence of the contract in question, but that contract arises out of the written indorsement itself, the delivery of the Bill to the indorsee, and the intention with which that delivery was made and accepted, as evinced by the words, either spoken or written, of the parties, and the circumstances (such as the usage at the place, the course of dealing between the parties and their respective situations) under which the delivery takes place: thus a Bill, with an unqualified written indorsement, may be delivered and received for the purpose of enabling the indorsee to receive the money for account of the indorser, or to enable the indorsee to raise money for his own use on the credit of the signature of the indorser, or with an express stipulation that the indorsee, though for value, is to claim against the drawer and acceptor only, and not against the indorser, who agrees to sell his claim against the prior parties, but stipulates not to warrant their solvency. In all these cases the indorser is not liable to the indorsee, and they are all in conformity with the general law of contracts, which enables parties to them to limit and modify their liabilities as they think fit, provided they do not infringe any prohibitory law.' (emphasis added)

68. In McDonald v. Whitfield (1883) 8 A.C. 733, at 744-745 Lord Watson, delivering the judgment of the Privy Council, put the matter as follows:

'Their Lordships see no reason to doubt that the liabilities inter se of the successive indorsers of a bill or promissory note must, in the absence of all evidence to the contrary, be determined according to the ordinary principles of the law-merchant. He who is proved or admitted to have made a prior indorsement must, according to these principles, indemnify subsequent indorsers. But it is a well established rule of law that the whole facts and circumstances attendant upon the making, issue and transference of a bill or note may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it, either as makers or as indorsers; and that reasonable inferences, derived from these facts and circumstances, are admitted to the effect of qualifying, altering, or even inverting the relative liabilities which the law-merchant would otherwise assign to them. It is in accordance with that rule that the drawer of a bill is made liable in relief to the acceptor, when the facts and circumstances connected with the making and issue of the bill sustain the inference that it was accepted solely for the accommodation of the drawer. Even where the liability of the party, according to the law-merchant, is not altered or affected by reference to such acts and circumstances, he may still obtain relief by shewing that the party from whom he claims indemnity agreed to give it him; but in that case he sets up an independent and collateral guarantee, which he can only prove by means of a writing which will satisfy the Statute of Frauds.' (emphasis added)

69. Similar views have been expressed in a number of other cases (see Steele v. M'Kinlay (1880) 5 A.C. 754, 778-9 per Lord Watson and Durack v. Western Australian Trustee Executor & Agency Co. Ltd. (1944) 72 C.L.R. 189, 207-208 per Starke J., 212 per McTiernan J. and 221. per Williams J.). The principles enunciated in the passages quoted above form the basis of the decision in a number of other cases. See, for example -

- Ferrier v. Stewart (1912) 15 C.L.R. 32
- McDonald v. Nash [1924] A.C. 625
- National Sales Corporation, Ltd. v. Bernardi [1931] 2 K.B. 188
- McCall Brothers, Ltd. v. Hargreaves [1932] 2 K.B. 423

- Lombard Banking Ltd. v. Central Garage and Engineering Co. Ltd. [1963] 1 Q.B. 220
- Yeoman Credit, Ltd. v. Gregory [1963] 1 All E.R. 245
- H. Rowe & Co. Pty. Ltd. v. Pitts [1973] 2 N.S.W.L.R. 159

70. Position under UCC. The Bill provision, although somewhat differently expressed, would seem to have much the same effect as UCC s-sec. 1-102(3) which provides that, with certain exceptions, the effect of its provisions can be varied by agreement:

'(3) The effect of provisions of this Act may be varied by agreement, except as otherwise provided in the Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.'

71. The rationale of the UCC approach seems to be that it is appropriate, given the nature of commercial law, for parties to have the freedom to modify or vary the effect of the Code on their rights and liabilities.

72. However, unlike UCC s-sec. 1-102(3), the Bill provision does not itself authorize persons to vary, by agreement, their rights, duties and liabilities under the Bill: the clause merely ensures that the Bill will not be read as preventing variation of personal rights, duties and liabilities so long as there is no variation of the effect of the paramount provisions of the Bill. Thus, the clause would not, for example, authorize the making of an agreement that was otherwise prohibited by law and would not affect the operation of statutory and common law rules that lie outside the Bill, e.g., the parole evidence rule (see Falconbridge pp. 779-787) and the Statute of Frauds.

73. Application of provision to a bank. The Bill provision is not restricted to the parties to a cheque nor to rights, duties and liabilities arising on a cheque. It makes it clear, for example, that a bank, so far as its customers are concerned, will be able to contract out of its duty as a paying bank not to pay a stale cheque (cl. 89).

Cl. 7: Application of Act

74. The Bill will only apply to cheques drawn on or after the commencement of the Bill (Bill s-cl. 7(1)). This provision is based generally on BEA sec.6 and MD cl. 6 except that:

- (a) it has been recast to put it in a positive, rather than a negative, form; and
- (b) it does not refer to the 'issue' of a cheque. MD cl. 6 had the effect of applying the Bill only to cheques drawn or issued after the commencement of that draft Bill. As a cheque cannot be issued until it has been drawn, Bill cl. 7 achieves the same result as MD cl. 6, but in a less complicated way.

75. Presumptions. For the purposes of the application of the Bill, there will be two presumptions:

- (a) a cheque will be presumed conclusively to have been drawn on its date (Bill s-cl. 7(2) - no equivalent in BEA and MD); and
- (b) where a cheque is undated, the cheque will be presumed to have been drawn on or after the day on which the Bill comes into operation (Bill s-cl. 7(3) - no equivalent in BEA or MD). This deeming provision will, in practice, only apply in relation to a cheque whose date of issue is

known, but whose date of drawing is unknown.
Without this provision, the date of an undated
cheque would have to be determined as a question
of fact.

76. Inchoate instruments. Where, after the commencement
of the Bill, a signed instrument lacking a material particular
is delivered for the purpose of completing the instrument, the
Bill will apply to the completion of that instrument (Bill
s-cl. 7(4) - no equivalent in BEA or MD). This provision is
intended to clarify the application of the Bill to inchoate
instruments.

Cl. 8: Extension of Bill to external Territories

77. The Bill will extend to every external Territory
(Bill cl. 8):

- Australian Antarctic Territory
- Christmas Island
- Cocos (Keeling) Islands
- Territory of Heard Island and McDonald Islands
- Coral Sea Islands Territory.

78. The Bill will apply to the Territory of Ashmore and
Cartier Islands by virtue of s-sec. 6(1) of the Ashmore and
Cartier Islands Acceptance Act 1933.

79. To maintain uniformity, it is proposed that the BEA
will be amended, in due course:

- (a) to remove references from the Act to Fiji and New Zealand; and
- (b) to apply the Act to every external Territory.

Cl. 9: Act to bind Crown

80. The Bill will bind the Crown in right of the Commonwealth, of each of the States, of the Northern Territory and of Norfolk Island (Bill cl. 9). See also:

- (a) Bradken Consolidated Ltd v. Broken Hill Proprietary Co. Ltd. (1979) 145 C.L.R. 107; and
- (b) Northern Territory (Self-Government) Act 1978 (s. 51).

Operation of other legislation

81. There is no provision in the Bill corresponding to MD cl. 7 which provides as follows:

'7. Nothing in this Act shall affect the operation of any Act or State Act or Territorial Ordinance or instrument enacted or made prior to the commencement of this Act on the basis that a cheque is a type of bill of exchange and the provisions of this Act are not to be construed as in any way altering or varying the provisions of such Act, State Act, Territorial Ordinance or instrument.'

82. It would not be appropriate for a Commonwealth Act to purport to enact interpretative provisions affecting State laws. It would, having regard to the stage of constitutional development reached in the Northern Territory, also be inappropriate to enact interpretative provisions affecting Northern Territory laws. In any event, it is difficult to see what purpose would be achieved by such a provision as MD cl.7.

A cheque will, after the enactment of the Bill, continue to be a type of bill of exchange. Although the BEA will be amended to ensure that its provisions cease to apply to cheques, a cheque will still continue to meet the definition of 'bill of exchange' in the BEA.

BILL : PART II - CHEQUES

83. Part II of the Bill (cls. 10 to 38) deals with cheques as such and is divided into the following Divisions:

- Division 1 - Form
- Division 2 - Order and bearer cheques
- Division 3 - Delivery
- Division 4 - Capacity
- Division 5 - Signature
- Division 6 - Consideration.

Division 1 - Form

84. Division 1 of Part II of the Bill (cls. 10 to 18 inclusive) deals with the form of cheques.

85. The basic structure of the initial provisions in the Division is that a cheque is:

- (a) an order to pay (see Bill cl. 11);
- (b) that is unconditional (see Bill cl. 12);
- (c) in writing (see Bill cl. 10);
- (d) addressed by a person to a bank (see Bill cl. 13);
- (e) signed by the person giving it (see Bill cl. 10);
- (f) requiring the bank to pay on demand (see Bill cl. 14); and
- (g) a sum certain in money (see Bill cl. 15)

86. In specifying the formal conditions with which an instrument must comply if it is to be a cheque, the Bill departs somewhat from the structure of the BEA and the MD:

- (a) the Bill begins (in s-cl. 10(1)) with a simple definition of a cheque and, in subsequent provisions, largely by using the concept of an instrument containing 'an order to pay', expands upon the various ingredients of the definition. This approach avoids the difficulties involved in the BEA provisions where a 'bill' is often referred to in the provisions that are applied in determining whether a particular instrument is, in fact, a bill;

- (b) this approach has the effect of strengthening the implication that a cheque must be drawn on paper, parchment or a similar substance (see Chalmers p. 12). It should be noted that this inference is already contained in the BEA (see, e.g., s-sec. 10(2) and s-secs. 16 and 25);
- (c) the Bill, like the BEA, does not require that the person addressing the order to the bank must be a customer of the bank. However, Paget (pp. 211-212) suggests that it is difficult to imagine a case where a cheque would be drawn otherwise than by a customer and also points out that there are expressions in the BEA provisions relating to cheques that are not easily reconciled with the existence of any other type of cheque (see, however, Paget p. 36).

Cl. 10: Cheque defined

87. A cheque has been defined in the Bill as an unconditional order in writing addressed by a person to another person (being a bank), signed by the person giving it, requiring the bank to pay on demand a sum certain in money (Bill s-cl. 10(1) - cf. BEA s-secs 8(1) and 78(1) and MD s-cl. 8(1) - see also para. 76 of this explanatory memorandum).

88. Unlike the BEA, Bill cl. 10 does not require the order to pay to specify a payee. If the order (cheque) does purport to specify a payee, it will need to comply with the provisions of Bill cl. 19. If it complies with that provision, the cheque will be regarded as being payable to order (see Bill cl. 21). All other cheques will be regarded as being payable to bearer (see Bill cl. 22).

89. An instrument that does not comply with this definition or that orders any act to be done in addition to

the payment of money, will not be a cheque (Bill s-cl. 10(2) - based on BEA s-sec. 8(2) and MD s-cl. 8(2)).

Cl. 11: Order to pay

90. An order to pay must be more than an authorization or request to pay (Bill cl. 11 - based on definition of 'order' in UCC s.sec. 3-102(1)(b)). This provision is declaratory of the position at common law (see Chalmers p.14; Riley p. 25; Rajanayagam p. 15 and Falconbridge p. 468) and fills a small gap in the BEA.

Cl. 12: Unconditional order to pay

91. Payment on a contingency. An order to pay on a contingency will not be an unconditional order (Bill s-cl. 12(1) - based on the second sentence in BEA s.16 - no equivalent provision in MD). It would seem, in principle, that the provision is capable of applying to bills payable on demand (see Riley pp. 45-46 and Chalmers p. 32). An example of such a bill would be one that required payment of \$10 to X if he is married when he presents the bill for payment.

92. Matters that can be disregarded when determining whether an order is unconditional. An order to pay will not be taken to be an unconditional order to pay by reason only that it is coupled with any or all of the following (Bill s-cl. 12(2)):

(a) the account to be debited; or

(b) the transaction giving rise to the order;

(Bill paras. 12(2)(a) and (b) - based on BEA s-sec. 8(3) and MD s-cl. 8(3)) (cf UCC s-sec. 3-105(1) which makes it clear that a wide range of matters may be included in a 'cheque' without affecting its nature as an unconditional order to pay.

While the Indian BLC Report (pp. 28-29) favoured the UCC approach, Megrahn (co-editor of Paget), thought that such a provision was unnecessary (see pp. 311-312 of the Report).

93. Payment out of a particular account. The Bill does not contain any equivalent to the opening words of BEA s-sec. 8(3) (see also MD s-cl. 8(3)). These words state that an order to pay out of a particular fund (e.g. the proceeds of a sale) is not an unconditional order to pay. It is to be contrasted with BEA para. 8(3)(a) which states that an order is unconditional even though it indicates a particular fund or account out of which the drawee is to re-imburse himself. It is considered that although these provisions might cover different fact situations so far as bills of exchange other than cheques are concerned, confusion would be inevitable if they were both to be included in the Bill. For example, in the case of a cheque drawn on a 'John Jones No. 3 Account', it would be very difficult for a court to determine whether this was a (non-permissible) order to pay out of a particular account or a (permissible) indication of a particular account to be debited by the bank to which the order was addressed.

94. Receipts. The MD contained a draft provision that attempted to deal exhaustively with problems that arose from the presence on a cheque of a form of receipt (see MD s-cl. 8(5)). The placing of receipt forms on cheques seems to have gained popularity at a time when banks, as a matter of fact, required their customers to indorse all cheques lodged for collection. With the amendments of Part III of the BEA in 1971, this practice has ceased and cheques lodged for collection are now indorsed only in special cases. As the practice of providing receipt forms on cheques has fallen into disuse, the Bill does not make provision with respect to it.

Cl. 13: Order addressed to a bank

95. To be taken to be addressed to a bank, an order to pay must meet three requirements:

- (a) it must be addressed to a bank and to no other person (Bill para. 13(1)(a);
- (b) it must be addressed to one bank only (Bill para 13(1)(b)). This requirement is contrary to that in the BEA s-sec. 11(2). It would seem to be implicit in the relationship between banker and customer that a cheque should always have only one drawee and that that drawee should be a bank. This provision makes it clear that an instrument containing an order addressed to 2 or more banks is not to be treated as a cheque. The use of pre-stamped, printed cheque forms means that it is extremely unlikely that a person would attempt to draw a cheque otherwise than in accordance with the paragraph; and
- (c) it must name the bank or otherwise indicate it with reasonable certainty (Bill para 13(1)(c)). This requirement is based on BEA s-sec. 11(1) but redrafted to make it clear that the words 'with reasonable certainty' qualify the words 'otherwise indicated' and not the word 'named'.

96. An order to pay may be an order to pay addressed to a bank notwithstanding that a person other than the drawee bank, the payee or the drawer is specified in the instrument containing the order (Bill s-cl. 13(2)).

97. This provision has been included in the Bill to make it clear that, provided an order to pay an instrument is addressed only to a bank, the instrument will be a valid

cheque notwithstanding that the name of another person, such as a non-bank financial institution, also appears on the face of the instrument.

Cl. 14: Order to pay on demand

98. When an order is an order to pay on demand. An order to pay will be an order to pay on demand if -

- (a) the order is expressed to require payment on demand, at sight or on presentation; or
- (b) no time for payment is expressed in the instrument containing the order.

(Bill s-cl. 14(1) - based on BEA s-sec. 15(1) - no equivalent provision in MD)

99. When an order not an order to pay on demand. An order will not be an order to pay on demand if it is expressed to require, or requires by implication, either of the following:

- (a) payment otherwise than on demand etc. (Bill s-cl. 14(2) - no equivalent provision in BEA or MD). This provision has been included in the Bill:
 - (i) to explain, in a negative way, the requirements of an order to pay on demand. Bill s-cl. 14(2) it makes it clear that Bill s-cl. 14(1) provides a comprehensive specification of the requirements of an order to pay on demand; and

(ii) to reinforce the point that the post-dating of an instrument does not make the instrument not payable on demand for the purpose of determining whether it is a cheque; or

(b) Payment only -

(i) at or before a particular time (Bill para. 14(3)(a) - based on MD s-cl. 8(3)); or

(ii) if presentation is made at or before a particular time (Bill para. 14(3)(b) - based on Manning Report para. 192).

It would seem, on the reasoning of the Manning Committee, that both kinds of cheques are equally objectionable. The Committee took the view 'that the drawer of a cheque should be required to accept the ordinary rules as to limitation and should not be permitted to impose conditions of this kind for his own greater protection at the expense of the payee or a holder'.

Cl. 15: Order to pay a sum certain

100. Reasonable certainty. Subject to the situation where there is a discrepancy between sums specified (dealt with in Bill s-cl. 15(2) - see para. 102 below) an order to pay will not be an order to pay a sum certain unless that sum is specified or ascertainable with reasonable certainty from the instrument containing the order (Bill s-cl. 15(1)).

101. The Manning Committee recommended (para. 194) that there should be a provision stating expressly that the amount of a cheque could be expressed in words, figures or both. The

recommendation was prompted by information given to the Committee that the mechanised preparation of cheques works best if the amount payable is expressed only in figures. It would seem that, with the technological changes that have occurred since 1964, this is no longer the case. Accordingly, the Bill does not attempt to state how the amount of a cheque should be expressed.

102. Discrepancies. Where there is a discrepancy in the sums stated in a cheque, effect will be given to the smallest sum (Bill s-cl. 15(2)). This is consistent with MD s-cl. 12(3) which has been given effect to by making Bill s-cl. 15(1) subject to Bill s-cl. 15(2). Compare, however:

- (a) BEA s-sec. 14(2) which gives effect to the words rather than the figures if there is a discrepancy between the two; and
- (b) UCC sec. 3-118 where conflicts are required to be resolved in accordance with the following rules:

words which are unambiguous control
figures, figures control ambiguous words,
handwritten terms control typewritten and
printed terms and typewritten terms control
printed terms.

It is considered that adoption of this approach could lead to confusion and may also be criticised on the ground that it assumes a degree of accuracy of handwritten terms which is greater than that of typewritten and printed terms.

103. BEA para. 14(1)(a) provides that a sum payable is a sum certain even though the sum is required to be paid with interest. The Manning Committee recommended that sec.14 be amended to also permit a cheque to be drawn for a sum certain together with bank charges. The BEA will be amended to give effect to this recommendation. However, having regard to the desire to streamline as much as possible the processing of cheques by banks, it is considered that, so far as cheques are concerned, an exact sum should be shown on every cheque drawn. Accordingly, the Bill does not:

- (a) mirror the provisions of para. 14(1)(a); or
- (b) so far as cheques are concerned, give effect to the Manning Committee recommendation with regard to bank charges.

However, the Bill does permit a cheque to require the sum ordered to be paid by the cheque to be specified according to a rate of exchange (Bill s-cl. 15(3)). This is consistent with the approach taken in the BEA.

104. An order to pay may be an order to pay a sum certain notwithstanding that the order is expressed to require a sum not exceeding a specified sum to be paid (Bill s-cl. 15(4)). This provision has been included in the Bill to make it clear that the addition of words on the face of an order stating that a specified amount is to be the maximum for which the order may be drawn does not make the order a conditional order and, therefore, invalid. The effect of the provision will be to allow a cheque to contain a phrase such as 'not more than x' dollars where 'x' is a named sum of money. However, the provision will not have the effect of permitting a drawer to limit his liability on a cheque at large (see Bill cl. 17). Such an annotation is undesirable and would render the cheque invalid as a cheque.

Cl. 16: Date of cheque, etc.

105. Presumed date. A date on a cheque, or on an indorsement on a cheque will, unless the contrary is proved, be presumed to be the day on which the cheque was drawn or the indorsement made (Bill s-cl. 16(1) - based on BEA s-sec. 18(1) and MD s-cl. 14(1)).

106. When not invalid. A cheque will not be invalid by reason only that it is not dated, is antedated or post-dated, or the date it bears is a Sunday (Bill s-cl. 16(2) - based on BEA s-secs. 8(4) and 18(2) and on MD s-cl. 14(2)).

107. Post-dated instruments. For the purpose of determining whether a post-dated instrument is a cheque, the fact that it is post-dated will be disregarded (Bill s-cl. 16(3)). This provision will ensure that a post-dated cheque is a valid cheque. This is in accordance with the Manning Report (see paras. 205-207 where the Manning Committee rejected a submission by the Australian Bankers' Association that the use of post-dated cheques be discouraged). The present status of post-dated cheques is far from clear (see Riley pp. 47 - 48; Chalmers p. 35; Weaver and Craigie pp. 276-278; Paget p. 223-226 and Rajanayagam pp. 100-101 and 215-216). With the enactment of a separate Cheques Act, the position would be even more confused if there were no provision such as Bill s-cl. 16(3) and post-dated cheques might continue to fall within the ambit of the BEA and not the new Act. This is considered to be undesirable.

108. A cheque will not be regarded as incomplete or irregular merely because it is post-dated even if the date of the cheque has not yet arrived (Bill s-cl. 16(4)). This provision has been included because there seems to be some doubt as to whether a post-dated cheque is complete and regular (see Chalmers p.35; Riley p.48; Paget p. 226; Falconbridge pp. 497-498 and Rajanayagam pp. 100-101). If Bill

s-cl. 16(4) were not included, there could be some doubt as to whether there could be a holder in due course of a post-dated cheque (see Bill s-para. 50(1)(a)(i)).

Cl. 17: Optional stipulations

109. Drawer. The drawer of a cheque will be able to waive, as regards the drawer, the right to presentment of the cheque.

(Bill s-cl. 17(1) - based on BEA para. 21(b)).

110. The Bill, following the MD, attempts, as far as possible, to put the drawer of a cheque in the same position as the acceptor of a bill of exchange that is not a cheque. Because of the drawer's primary liability on a cheque, the drawer is not given the right under cl. 17 to negative or limit his liability on the cheque. Nor may he alter the right of the drawee bank to demand presentment of a cheque at the branch at which the relevant cheque account is maintained (see Bill cl. 64).

111. Indorser. An indorser of a cheque will be able to negative or limit the indorser's liability on the cheque or waive the indorser's right to presentment of the cheque.
(Bill s-cl. 17(2) - based on BEA s. 21 and MD cl. 15).

112. The rights, duties and liabilities of the drawer and the drawee bank in relation to one another are not to be taken as affected by a stipulation of the kind referred to in s-cl. (1) written on a cheque. Although it is implicit from other provisions of the Bill (see the definition of 'drawee bank' in s-cl. 3(1) and also cls. 61 to 64) s-cl. 17(3) has been included in cl. 17 to make it clear that the right of the drawee bank to demand presentment of a cheque at the branch on which it is drawn is preserved.

Cl. 18: Inchoate instruments

113. Bill cl. 18 deals with inchoate instruments, that is, instruments signed but otherwise wanting in a material particular.

114. Instruments wanting in a material particular. Where the drawer of an instrument that is signed but is otherwise deficient in any material particular necessary for it to be a complete cheque delivers the instrument to another person in order that it may be completed as a cheque, any person in possession of the instrument shall be presumed, unless the contrary is proved, to have authority to complete the instrument as a cheque in any way that the person sees fit (Bill s-cl. 18(1)). This provision is based on BEA s-sec. 25(2) and MD s-cl. 16(1) except that:

- (a) the Bill spells out in detail in s-cl. 18(1) what is meant by the phrase 'in like manner' in BEA s-sec. 25(2). It has been assumed that the phrase means that there must be a delivery of the instrument by the drawer in order that the instrument may be filled up as a complete cheque;
- (b) MD cl. 16 seems to have attempted to deal not only with a cheque that lacks a material particular but also with a cheque that lacks a non-material particular. The addition for which this extended authority may have been sought is the date of a cheque. However, Griffiths v. Dalton [1940] 2 K.B. 264 is clear authority that BEA s. 25 permits the insertion of a date in an undated cheque. That decision does not seem to have been called in question in any later case. Even in the absence of authority, it would seem to be clear that the date of a cheque may be a material particular of the cheque since it affects the determination of the point in time when a cheque becomes a stale cheque; and

- (c) it has been made clear that the completeness with which the provision is concerned is the completeness of a cheque on its face. It would appear to be possible for an instrument to contain all the elements necessary for meeting the definition of a cheque in s-cl. 10(1) and yet appear to be incomplete on its face. An example of such a cheque is one that lacks a date or one in which the sum is specified in figures but with the space provided for the sum to be written in words being blank. This clarification brings Bill s-cl. 18(1) more closely into line with s-para. 50(1)(a)(i) which provides that a holder will be a holder in due course if, among other things, the cheque 'was complete and regular on the face of it'.

115. Enforceability against prior parties. The provisions in relation to inchoate instruments will not be enforceable against the drawer or a person who becomes an indorser of the instrument before the instrument is completed unless the instrument is completed within a reasonable time (Bill s-cl. 18(2) - based on BEA s-sec. 25(3) first sentence). The question of reasonableness will be a question of fact (Bill s-cl. 18(3) - based on BEA s-sec. 25(3) second sentence).

116. It is noted that UCC sec. 3-115 is drafted on the assumption that provisions like those contained in Bill s-cl. 18(2) and (3) are unnecessary in that every authority given to an agent must be exercised in accordance with the authority given and expires after a reasonable time unless a time limit is fixed (see Anderson V. 5, p. 316). However, the provisions in the Bill are considered useful in that they make the code provided for in the Bill that much more complete.

117. When completion with authority will be presumed.

Where an instrument has been completed as a complete cheque, it will be conclusively presumed, as regards a holder in due course, that:

- (a) the instrument was delivered to another person in order that it might be filled up as a complete cheque; and
- (b) that completion was made within a reasonable time and was strictly in accordance with the authority given.

(Bill s-cl. 18(4) - based on the proviso to BEA s-sec. 25(3)) except that reference is expressly made to a presumption of delivery.

118. Relationship with provisions dealing with delivery.

Bill cls. 25 to 27 (inclusive) will apply in relation to a cheque that was, at an earlier stage of its existence, an inchoate instrument. For example:

- (a) the drawer of a 'cheque' may deliver the 'cheque' to a stakeholder with the sum payable being left blank on the understanding that the stakeholder will insert the sum payable at a later stage and deliver the 'cheque' to another person;
- (b) if the 'cheque' were to be filled up by the stakeholder in accordance with the drawer's instructions but were stolen before the stakeholder could deliver it to the other person, Bill cl. 25 (delivery essential for drawing or indorsement) would apply with the effect that the drawing of the 'cheque' was not completed by delivery; and

- (c) in such a situation, delivery of the instrument to the stakeholder would certainly be sufficient for the purposes of Bill cl. 18 to authorise the instrument to be filled up as a complete cheque, but Bill cl. 25 would still retain an area of operation in relation to the delivery of the instrument to give effect to the drawing.

119. Bill cl. 28 (presumption of effective delivery) will not, however, apply in relation to a delivery for the purposes of Bill cl. 18 (see Bill s-cl. 28(3)). It is well established that not only may the delivery of an inchoate instrument be shown not to have been for a purpose that would satisfy Bill cl. 18, but that such a delivery must be established to bring Bill cl. 18 into operation (see Riley pp. 58 - 59; Byles p. 34; Rajanayagam pp. 65-67; Falconbridge p. 526 and pp. 535 - 539 and Holden p. 141). Moreover, delivery must be established to make the signer of the instrument liable even to a holder in due course (see Baxendale v. Bennett (1878) 3 Q.B.D. 525 (note, however, that this case was decided before the BEA (U.K.) equivalent of cl. 18 came into operation) and Smith v. Prosser [1907] 2 K.B. 735). Indeed, this is one of the few cases in which the title of a holder in due course may be impeached. Accordingly, Bill cl. 28 makes it clear that the presumptions provided for in that clause apply only in relation to the delivery of a cheque for the purpose of completing the drawing, or an indorsement, of the cheque. Under UCC sec.3-115 neither non-delivery nor unauthorised completion is a defence against a holder in due course. This approach is consistent with the operation of Bill cl. 28 in relation to a cheque that is stolen after completion and the operation of Bill cl. 18 itself in relation to the unauthorised completion of an inchoate instrument. Moreover, it would seem more consistent with the approach taken generally in the BEA, that the loss should fall upon the party whose conduct in signing the blank paper has made the fraud possible rather than upon the innocent purchaser.

120. Blank instruments. The Bill, like MD and UCC sec. 3-115, does not provide for the 'blank instrument' case - cf. BEA s-sec. 25(1) which provides that delivery of a stamped, signed, blank instrument for the purpose of converting the instrument into a bill operates as prima facie authority to complete the instrument as a bill. This omission has been made on the basis that:

- (a) it is extremely rare for a cheque to be drawn these days otherwise than on a pre-printed form and, accordingly, the utility of a provision equivalent to BEA s-sec. 25(1) is doubtful i.e. it is unlikely that a person would ever sign a blank piece of paper intending that it be completed as a cheque; and
- (b) the practice of signing blank instruments affords obvious opportunity for fraud, and should not be sanctioned in the Bill.

121. Duty of customer. There is no provision in the Bill corresponding to MD cl. 13 which provides as follows:

'A customer of a bank, who draws a cheque on such bank, owes a duty to the bank to take reasonable care in drawing such cheque so as not to facilitate the making of an unauthorized addition or alteration thereto.'

122. Having regard to the decision of the High Court in Commonwealth Trading Bank of Australia v. Sydney Wide Stores Pty. Ltd. (1981) 35 ALR 513, such a provision would not seem necessary. Indeed, such a provision would not make the common law duty any clearer as what constitutes 'reasonable care' will, in any event, be determined on the facts of each case.

Cl. 19: Meaning of specification of person in cheque as payee or indorsee

123. In order for a person to be taken to be specified as payee or as indorsee of a cheque (thereby making the cheque an order cheque - see Bill cl. 21) the person must:

- (a) be named, or otherwise indicated with reasonable certainty, in the cheque; and
- (b) not be a fictitious or non-existing person.
(Bill s-cl. 19(1))

124. The provision uses the words 'not a fictitious or non-existing person' to describe real persons. It is based, as regards the payee, on BEA s-secs 12(1) and 12(2) but revised to make it clear that the words 'with reasonable certainty' in BEA s-sec. 12(1) qualify the words 'otherwise indicated' and not the word 'named'. As regards an indorsee, the provision is based on BEA s-secs 39(2) and 39(3). There is no equivalent provision in the M.D.

125. The holder of an office for the time being will be taken to be named as payee or indorsee where a cheque specifies such person as payee or indorsee. (Bill s-cl. 19(2)). This provision is based on BEA s-sec. 12(2) and a similar provision is found in the UCC (para. 3-110(1)(f)).

Cl. 20: Cheques either payable to order or to bearer

126. A cheque will be payable either to order or to bearer (Bill cl. 20 - based on BEA s-sec. 13(2) - no equivalent provision in M.D.).

Cl. 21: Cheques payable to order

127. When cheques payable to order. A cheque will be payable to order if it is expressed (whether originally or by indorsement) to require the drawee bank to pay the sum ordered to be paid by the cheque to or to the order of, and only to or to the order of, a person specified as payee or indorsee (Bill para. 21(a)) or to two or more persons specified, either jointly or in the alternative) as payee or indorsee (Bill para. 21(b)).

128. The approach of MD s-cl. 11(2) was to define the cheques that were payable to bearer and then to provide that all other cheques were payable to order. The Bill adopts the alternative approach of the BEA in defining the kinds of cheques that will be regarded as being payable to order. All other cheques will be regarded as being payable to bearer (see Bill cl. 22).

129. The effect of cl. 21, when read with s-cl. 19(1), is to exclude from the definition of a cheque payable to order any cheque drawn 'pay to order'. Such cheques appear to have been regarded as payable to the order of the drawer (see Chamberlain v. Young [1893] 2 Q.B. 206) although the matter has been not beyond doubt. Cl. 21 resolves the doubt by requiring a cheque payable to order to specify (see cl. 19(1)) a payee or indorsee.

Clause 22: Cheques payable to bearer

130. Where a cheque is not payable to order -

(a) the cheque is a cheque payable to bearer (Bill para. 22(a)); and

(b) the drawee bank is required to pay the sum ordered to be paid to the bearer of the cheque (Bill para. 22(b)).

131. Cl. 22 provides that all cheques that are not drawn payable to order are bearer cheques. The combined effect of cls. 19, 20, 21 and 22 will include in the category of bearer cheques the following:

- (a) cheques expressed to be payable to or to the order of bearer;
- (b) cheques expressed to be payable to or to the order of a payee specified in the cheque or to bearer;
- (c) cheques expressed to be payable to a fictitious or non-existing person, to an impersonal thing or to the purpose for which the cheque is drawn.

132. The approach adopted in cl. 22 differs, to some extent, from that taken in the BEA:

- (a) under the BEA, a cheque payable to the order of bearer would seem to be a cheque payable to order at least if the identity of the bearer is ascertainable from the cheque (see Chalmers p. 28 and Riley p. 41);
- (b) cheques expressed to be payable to or to the order of a payee specified in the cheque or to bearer are treated the same way in cl. 22 as they are under the BEA (see Chalmers p. 28 and Riley p. 41) and under the UCC s. 3-111.

133. It should be noted that the UCC treats an instrument drawn payable to the order of a fictitious or non-existing person as a cheque payable to order rather than a cheque payable to bearer (see UCC secs. 3-110 and 3-111). In order to facilitate the transfer by negotiation of such cheques, the UCC authorizes any person to indorse the cheque in the name of

the fictitious or non-existing person (see sec. 3-405). Thus, under the UCC, a cheque that is expressed to be payable 'to the order of XYZ' may be transferred by negotiation by any person in possession of the cheque indorsing the cheque 'XYZ'. The UCC approach does have the advantage that there will appear, on the face of the cheque, to be a regular chain of title; for each payee or indorsee there will be an indorsement on the face of the cheque. An unindorsed cheque payable to the order of a fictitious or non-existing person is patently irregular and is, as Falconbridge (p. 487) points out, as negotiable as a banknote marked counterfeit. If these cheques were not to be regarded as payable to bearer, the cheque would not be capable of being transferred by negotiation because all the payees would be required to indorse the cheque (see Bill cl. 43). It appears that the failure of the BEA to require indorsement of an instrument payable to a fictitious or non-existing person was the result of mere oversight (see Chalmers p. 24 and Falconbridge pp. 486-487). The Indian BLC Report (p. 77) recommended the adoption of UCC sec. 3-405 although Megrah (p. 309 of the Report) was troubled by this proposal in that it purports to give effect to what, in some circumstances, will be a forgery.

Cl. 23: Conversion of cheque payable to bearer into cheque payable to order

134. A 'bearer' cheque will be able to be converted into an 'order' cheque by the holder indorsing the cheque and clearly indicating on the front of the cheque that the cheque is payable to order. (Bill s-cl. 23(1) - no BEA or MD equivalent). The form of indorsement required to convert a cheque is laid down in para. 23(1)(a) which provides that the indorsement must be such that the cheque is expressed to require the drawee bank to pay the sum ordered to be paid to, or to the order of, a person, or two or more persons jointly or in the alternative, as indorsee. The indication on the

front of the cheque may be made by the striking out of any reference to the cheque being payable to or to the order of bearer or otherwise (para. 23(1)(b)).

135. The dual requirement in Bill s-cl. 23(1) that the conversion of a cheque may be effected by indorsing the cheque and indicating the conversion on the front of the cheque is considered desirable because the conversion should be apparent on the face of the cheque as well as from an indorsement on the back. This will remove the burden of banks having to check the back of all cheques lodged for collection.

Cl. 24: Cheques payable to order of specified person

136. Where a cheque is expressed (whether originally or by indorsement) to be payable to the order of a person specified in the cheque as payee or indorsee and not to or to the order of the person, the cheque will be taken to be payable to the specified person or to his order at the person's option (Bill cl. 24 - based on BEA s-sec. 13(5) and MD s-cl. 11(3)).

Division 3 - Delivery

137. Division 3 of Part II of the Bill (cls. 25 to 29) deals with the requirements of delivery of a cheque (cf. BEA s. 26).

138. BEA approach. The general approach of the BEA to delivery is as follows:

- (a) sec. 4 defines delivery as the transfer of possession, actual or constructive, from one person to another;
- (b) sec. 26 then makes provision of both a substantive and evidentiary nature with respect to delivery, in particular setting out the conditions that must be complied with for an effective delivery of a Bill;

- (c) in making delivery necessary to complete an indorsement or issue, sec. 26 overlaps to some extent with the definitions of 'indorsement' and 'issue' in sec. 4 and with s-sec. 36(3) which provides that a bill payable to order is negotiated by the indorsement of the bill completed by delivery; and
- (d) the operation of sec. 26 on many provisions of the Act is also far from clear (see, e.g., sec. 25 (quaere delivery of an inchoate instrument) and sec. 67 (quaere delivery to give effect to a renunciation)).

139. Bill approach. The Bill follows the BEA fairly closely in its treatment of delivery:

- (a) the BEA sec. 4 definition of delivery has, in effect, been adopted (see s-cl.3(1)); and
- (b) the overlap in the BEA between the provisions that deal with delivery has been reproduced in the Bill. Indeed, it is difficult to see how such overlap could be avoided without departing radically from the structure of the BEA.

140. General differences between Bill and BEA. The Bill does, however, attempt to make some improvements in relation to BEA sec. 26:

- (a) Bill cls. 25 to 28 (inclusive) draw out the various elements of BEA sec. 26 and present them in a more orderly way;

- (b) Bill cls. 25 to 28 attempt to overcome any confusion of expression that may arise because BEA sec. 26 uses various forms of expression, including 'effectual', 'valid' and 'valid and unconditional' to express what appears to be a single concept. This usage gives rise to difficulties, especially in relation to the application of the section to a holder in due course. A holder in due course, as holder in due course, is conclusively presumed by s-sec. 26(2) to derive his title through valid (but not valid and unconditional) deliveries by all prior parties, but, as a mere holder, is prima facie presumed by s-sec. 26(3) to derive his title through valid and unconditional deliveries by all prior parties;
- (c) it is not completely clear whether the proviso to BEA s-sec. 26(2) is intended to apply to holder in due course as against all prior parties to the cheque or as against all prior parties except the party from whom he took the cheque. The Bill has been drafted on the assumption that it is not open to a party who transfers a cheque to a holder in due course to claim that he transferred the cheque conditionally or for a special purpose only and not for the purpose of transferring property in the cheque; and
- (d) as these provisions have application beyond the provisions of Division 1 of Part II, they have been placed in a separate Division.

141. Agency. In some places, the BEA specifically refers to acts or things done on behalf of a person by what may, for convenience, be called 'an agent' and at other places makes no such provision. It is difficult to see whether any legal significance is intended by this differential treatment. As a general rule, whenever a person has power to do something himself he may do it by means of an agent (see Halsbury's Laws of England (4th ed., Vol. 1 : Agency, para. 703). There seems to be little point therefore in specifically providing throughout the Bill that acts or things permitted by the Bill may be done by an agent. The only reason for making such provision might be that the act or thing involved is one that would normally be expected to be done personally and not through an agent. However, it is doubtful whether this reason applies in the case of many of the BEA provisions that specifically refer to an act or thing being done by an agent. For example, BEA sec. 26 specifically refers to delivery (an act that one would expect would frequently not be done personally) being made by or under the authority of a party to a cheque and yet BEA sec. 67 in dealing with the renunciation by a party of his rights on a cheque (an act that one would expect would not normally be done by an agent) makes no provision.

142. The approach taken in the Bill has been to not specifically refer to acts being done by agents except where it is considered that the relevant act would not normally be done by an agent. Thus, for example, Bill cl. 26, unlike BEA sec. 26, does not refer to delivery being made by or under the authority of a party to the cheque.

Cl. 25: Delivery essential for drawing or indorsement

143. A contract arising out of the drawing, or indorsement, of a cheque will be incomplete and revocable until delivery of the cheque (Bill cl. 25 - based on BEA s-sec. 26(1) first three lines and on MD s-cl. 17(1) except that in both cases the BEA and MD words 'in order to give effect thereto' are picked up in Bill cl. 26).

144. It is considered that the protective provisions of the Bill would still apply for the benefit of a drawee bank that paid a cheque which had not been delivered in accordance with Bill cl. 25 (e.g. because the cheque was stolen from the drawer before he had delivered it).

Cl. 26: Requisites for effective delivery

145. A contract arising out of the delivery of a cheque will not be effective unless the delivery is made by the drawer or indorser with the intention of giving effect to the drawing or indorsement (Bill cl. 26). While the Bill does not specify that delivery must be unconditional, it would seem that a cheque cannot be delivered conditionally if it is delivered with the intention of giving effect to the drawing or indorsement of the cheque (see Smith v. Prosser [1907] 2 K.B. 735).

Cl. 27: Drawing or indorsement may be shown to be ineffective

146. Subject to the presumptions as to effective delivery (see Bill cl. 28), it will be possible to show that the delivery of a cheque was conditional or for a special purpose only and not in order to issue the cheque or transfer it by negotiation e.g., delivery to a stakeholder (Bill cl. 27).

Cl. 28: Presumption of effective delivery

147. Drawer. There will be a presumption of effective delivery by the drawer of a cheque which will be:

- (a) conclusive as regards a holder in due course; and
- (b) rebuttable as regards a holder who is not a holder in due course.

(Bill s-cl. 28(1))

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Notes:

- (a) this provision has been drafted on the basis that the payee of a cheque cannot be a holder in due course (see also Bill cl. 50); and
- (b) it is considered that it should be open to the person from whom a holder in due course took his cheque to claim that he transferred the cheque conditionally or for a special purpose only and not in order to give effect to his indorsement of the cheque. This approach is consistent with Bill s-cl. 49(2), which frees a holder in due course from mere personal defences available to prior parties against one another, but does not free a holder in due course from mere personal defences that are available to prior parties against him. Such defences may have arisen because of the dealings between the holder in due course and prior parties. There would always, of course, be dealings between the holder in due course and his immediate transferor out of which such defences may have arisen. Accordingly, the presumption of effective delivery against the immediate transferor of the holder in due course has been made a rebuttable one.

149. Indorser. There will be a presumption of effective delivery by an indorser of a cheque, so as to complete the indorser's contract on the cheque, which will be:

- (a) rebuttable as regards a holder who is not a holder in due course;
- (b) rebuttable as regards a holder in due course who took the cheque from the indorser; or

- (c) conclusive as regards a holder in due course who did not take the cheque from the indorser.

(Bill s-cl. 28(2))

Cl. 29: Delivery of cheque payable to bearer

150. If the holder of a 'bearer' cheque delivers it to another person, the cheque will be transferred by negotiation, irrespective of whether:

- (a) the holder indorses the cheque; or
- (b) the holder intended to transfer the cheque by negotiation.

(Bill cl. 29 - based on BEA s-sec. 36(2) and MD s-Cl. 31(2)).

151. It should be noted that if the holder of a bearer cheques does indorse the cheque before delivering it to someone else, his liability as an indorser will not arise unless the delivery is made in order to give effect to the indorsement (see Bill cls. 25 and 26 and BEA s-sec. 26(1)). However, Bill cl.29 provides that there may be an effective transfer by negotiation of an indorsed bearer cheque even though there was no intention that the delivery give effect to the indorsement.

Division 4 - Capacity

152. Division 4 of Part II of the Bill (cl. 30) deals with capacity to incur liability on a cheque.

Cl. 30: Capacity to incur liability on cheque

153. Capacity. Capacity to incur liability on a cheque will be co-extensive with capacity to contract (Bill s-cl. 30(1) - based on BEA s-sec. 27(1) (first two lines) and on MD s-cl. 18(1)).

154. Corporations. A corporation will not be able to incur liability on a cheque if it would not otherwise have the capacity to incur liability on the cheque (Bill s-cl. 30(2) based on BEA s-sec. 27(1) proviso and MD s-cl. 18(2)).

155. The proviso to BEA s-sec. 27(1) was originally enacted at a time when the doctrine of ultra vires was in full force in relation to corporate acts. In Australia, this situation has since been modified to a considerable extent by the provision that now appears as s. 68 of the Companies Act 1981. There is now considerable doubt as to the application of the doctrine of ultra vires to cheques (see Chalmers p. 65; Riley p. 71 and Rajanayagam pp. 34-36).

156. A person without capacity to incur liability on a cheque will nevertheless be able to effectively draw, issue or indorse a cheque (Bill s-cl. 30(3) and (4)). These s-cl. are a re-statement of what is understood to be the meaning of the concluding words of BEA s-sec. 27(2).

Division 5 - Signature

157. Division 5 of Part II of the Bill (cls. 31 to 34) deals with signatures.

Cl. 31: Signature essential to liability on cheque

158. Signature as drawer or indorser. Subject to certain exceptions (in Bill s-cl. 31(2) to (4) and in Bill cl. 75 - the latter dealing with the indorsement of a cheque by a

stranger), a person will not be liable as the drawer or an indorser of a cheque unless he signs the cheque as such (Bill s-cl. 31(1)). This provision is based on BEA s-sec. 28(1) and MD s-cl. 19(1) except that words 'subject to the provisions of this Act' have been replaced by a specific listing of the other provisions to which this provision will be subject (see Paget pp. 221-222 for an example of the problems caused by the BEA practice).

159. Signature in business etc. name. Where a person signs a cheque in the person's business or trade name or a name other than the person's real name, the person will be liable as if the person had signed it in the person's own name (Bill s-cl. 31(2)). This provision is based on BEA s-sec. 28(2) and on MD s-cl. 19(2) except that:

- (a) the Bill includes a reference to 'business name', the modern equivalent for the older term 'trade name'; and
- (b) the Bill has been revised to make it clear that the person signing a cheque is not personally liable under the s-cl. unless he signs in his business name or trade name.

160. Signature of firm. The signature on a cheque of the name of a firm will be deemed to be the signature by the person signing of all the names of all persons liable as partners in the firm (Bill s-cl. 31(3) - based on BEA s-sec. 28(3) and on MD s-cl. 19(3), except that the words 'equivalent to the signature' have been replaced by the words 'shall be deemed to be the signature'). The question as to which persons would be liable has been left to be determined by the common law.

161. Companies. The general requirement (in Bill s-cl. 31(1)) that a signature will be essential to liability will not affect the liability of a person who signs, issues or authorizes to be signed or issued on behalf of a company a cheque, or an indorsement on a cheque, on which the name of the company does not appear in legible characters (Bill s-cl. 31(4)).

162. The effect of this provision will be to ensure that such a person remains liable to the holder of the cheque unless the amount is paid by the company as provided in s-sec. 218(3) of the Companies Act 1981 and in the corresponding provisions of the Companies Code of each State.

163. Sub-clause 31(4) of the Bill is based on MD s-cl. 19(4) except that:

- (a) the words 'on which the name of the company does not appear in legible characters' have been added to follow the language of s-sec. 218(3) of the Companies Act 1981 as closely as possible; and
- (b) it is made clear that the provision only applies in relation to an Australian law.

Cl. 32: Unauthorized signature

164. Where a drawer's signature is unauthorized, the signature will be wholly inoperative as that of the drawer unless the person against whom it is sought to assert a right on the cheque is stopped from denying the genuineness or authority of the signature or the signature is subsequently ratified by the drawer (Bill s-cl. 32(1)). In such a case, the signature operates as that of the person who wrote or placed it on the cheque in favour of any person who, in good faith and without notice, pays the cheque or takes it for value.

Although the latter is probably implicit from the operation of cls. 31(2) and 75, it has been included in s-cl. 32(1) to put the matter beyond doubt. It follows UCC s-sec. 3-404 (1).

165. Where a signature on a cheque other than that of the drawer's is unauthorized, the rule set out in Bill s-cl. 32(1) will be subject to certain exceptions. The exceptions are the provisions dealing with the following matters:

- (a) estoppels against indorser (see Bill cl. 74);
- (b) protection of bank paying crossed cheque in accordance with crossing (see Bill cl. 92);
- (c) protection of bank paying crossed cheque otherwise than in accordance with crossing (see Bill s-cl. 93(2));
- (d) protection of bank paying a cheque on which an indorsement has been placed without authority (see Bill s-cl. 94(1)); and
- (e) protection of bank collecting a cheque for customer (see Bill cl. 95).

Riley (p. 76) suggests that BEA s. 29 is also subject to s-sec. 12(3) and sec. 30 of that Act. However, this view would not, it is submitted, seem to be correct.

166. The provisions dealing with unauthorized signatures are based on BEA s.29 and on MD cl. 20 except that:

- (a) the rule that an unauthorized drawer's signature is wholly inoperative has been expressed to apply irrespective of any other provisions in the Bill (cf. BEA sec.29 which expresses its general rule concerning all unauthorized signatures on bills to be 'subject to the provisions of this Act');

- (b) there is now a specific list of the exceptions which apply to the rule concerning unauthorized signatures of persons other than the drawer of the cheque (cf. the opening words of BEA sec.29);
- (c) the Bill (paras. 32(1)(a) and 32(2)(a)) uses the term 'estopped' in preference to the term 'precluded', which was inserted into the Bills of Exchange Act 1882 (U.K.) because 'estoppel' was a term unknown to Scottish law (see Riley p. 76);
- (d) the Bill does not say that an unauthorized signature leads to there being no right, under the signature, to retain the cheque, give a discharge for the cheque or enforce payment of it. It is considered that the statement that an unauthorized signature is 'wholly inoperative' is sufficiently wide to cover these other results;
- (e) there are amendments to ensure that the provision can be applied to disputes involving persons who are not parties to the relevant cheque. It is, however, unlikely that such disputes will occur in practice;
- (f) the provision contains no specific reference to a forgery. There is some difficulty in defining 'forgery'. The original common law concept of forgery has been considerably altered by statute both in the United Kingdom and Australia and, in Australia, is further complicated by the diverse provision made by Commonwealth, State and Territory law in relation to forgery (see Chalmers p. 74; Paget pp. 50, 400-401 and 458 and Weaver and Craigie pp. 390-396). As a

result, it is almost impossible to determine with any degree of certainty what forgery now means in the BEA. It is considered that a better approach is to avoid defining the word by treating a forged signature as merely a particular kind of unauthorized signature. Such an approach is taken in the UCC secs 1-201 and 3-404. Bill s-cl. 3(6) makes it clear that a reference to an unauthorized signature includes a reference to a forged signature; and

- (g) the provision, unlike the BEA, permits in effect, the ratification of a forged signature. This follows the UCC approach (s-sec. 3-404(2)).

167. UCC s-sec. 3-404(2) makes it clear that the ratification of an unauthorized signature is permitted only for the purposes of the relevant article of the UCC and that the ratification does not of itself affect any rights of the person ratifying against the actual signer. The provision was apparently included to ensure, among other things, that the ratification of a forged signature did not affect the criminal liability of the signer (see Anderson, V. 6, p. 142). The concern on this matter was apparently prompted by the retroactive operation of ratification. It is not considered that there is a need for a specific provision to ensure that the criminal liability of the signer is not affected by ratification.

Cl. 33: Person signing as agent or in representative capacity

168. Agents etc. not liable. A person signing a cheque for or on behalf of a principal or in a representative capacity will not be personally liable on the cheque if:

- (a) he adds words to his signature indicating that he signs for or on behalf of a specified principal or in a stated representative capacity; and
- (b) the person for whom the signer signs the cheque is named or otherwise indicated with reasonable certainty in the cheque.

(Bill s-cl. 33(1))

This provision is based on BEA s-sec. 31(1) up to semi-colon and on the corresponding words in MD s-cl. 22(1) except that it has been made clear that, for the agent to escape personal liability, he must specify the name of his principal or the person or body he is representing. The distinction between the opening words of BEA s-sec. 31(1) and the proviso to those words is, accordingly, made clearer.

169. Addition of words not conclusive. A person signing a cheque will not escape personal liability on the cheque if the person merely adds words to the cheque describing himself as an agent or as having a general representative capacity or if the person adds such words and does not in fact sign for or on behalf of the principal or in that representative capacity or if the person for whom the signer signs the cheque is not named or indicated with reasonable certainty (Bill s-cl. 33(2)). This provision is based on BEA s-sec. 31(1) and MD s-cl. 22(1) except that, among other things the word 'exempt' in the BEA and the MD has been replaced by the word 'prevent'. It would seem somewhat unusual to say that an addition to a signature does not 'exempt' the signer from personal liability.

170. Nothing in Bill cl. 33 will alter the common law rules relating to the liability of agents who act in excess of their authority.

Cl. 34: Procuration signature

171. Where an agent places a signature by procuration on a cheque, the signature will operate as notice that the agent has only a limited authority and the principal will not be bound by the signature unless the agent in signing the cheque acts within the limits of the agent's actual authority (Bill cl. 34 - based on BEA s. 30 and MD cl. 21). The abbreviations 'per proc.' or 'p.p.' following a signature upon a bill of exchange indicate that a signatory signs only as agent.

Division 6 - Consideration

172. Division 5 of Part II of the Bill (cls. 35 to 38) deals with consideration.

Cl. 35: Valuable consideration defined

173. Valuable consideration. Valuable consideration for a cheque will be able to be constituted by any consideration sufficient to support a contract or by an antecedent debt or liability (Bill s-cl. 35(1) - based on BEA s-sec. 32(1) first sentence and on MD s-cl. 23(1)).

174. Antecedent debt or liability. An antecedent debt or liability will be able to constitute valuable consideration for a cheque whether or not the cheque is post-dated (Bill s-cl. 35(2)).

175. This provision is based on BEA s-sec. 32(1), concluding sentence (no equivalent provision in MD). It seems that the sentence was inserted in the U.K. Bills of Exchange Act to meet a point in some doubt before the enactment of that Act as a result of the dissent by Lord Coleridge L.C.J. in Currie v. Misa (1875) L.R. 10 Ex. 153; on appeal (1876) 1 App. Cas. 554, namely, whether an antecedent debt or liability could constitute valuable consideration for a bill of exchange

payable on demand (see Riley p. 85). In the light of this, it would seem desirable to provide (as is provided in s-cl. 35(2) of the Bill) that an antecedent debt or liability may constitute valuable consideration for a cheque whether or not the cheque is post-dated.

Cl. 36: Presumption of value

176. Unless the contrary is proved, the drawer and each indorser of a cheque will be presumed to have received value for the cheque (Bill cl. 36). This provision is based on BEA s-sec. 35(1) and MD s-cl. 26(1) except that:

- (a) the provision is now a presumption rather than a deeming as it was in the BEA.
- (b) the words 'received value for the cheque' replace the BEA words 'become a party thereto for value'.
- (c) the provisions will now extend to the drawer of a cheque.

177. Purpose. The purpose of Bill cl. 36 is to create a rebuttable presumption that every person liable on a cheque has received value, i.e. consideration has been given, for his becoming liable on the cheque and thereby remove the need for a person who seeks to enforce the cheque to prove that consideration was given.

178. Relationship with holder in due course. The presumption of value (in Bill cl. 36) has no relevance to the definition of a holder in due course (see Bill cl. 50):

- (a) unless the contrary is proved, the holder of a cheque will be presumed to be a holder in due course (including the element of having taken the cheque for value see Bill s-cl. 51(1));

- (b) however, where, in an action on a cheque, it is admitted or proved that the drawing or issue, or a transfer by negotiation, of the cheque is effected by fraud, duress or illegality, the holder of the cheque will be required to prove that, after the alleged fraud, duress or illegality, value was, in good faith, given for the cheque (see Bill s-cl. 51(2));
- (c) for this purpose, it would seem that the holder must actually prove that value was given and cannot take advantage of the presumption of value (provided by Bill cl. 36 - see Riley p. 95; Chalmers p. 99; Rajanayagam pp. 105-106; and Falconbridge pp. 635-636).

Cl. 37: Holder taking cheque for which value has been given

179. The holder of a cheque for which value has been given will be conclusively presumed to have taken the cheque for value (Bill cl. 37 - based on BEA s-sec. 32(2) and MD s-cl. 23(2) except that the Bill refers throughout to a person taking a cheque for value rather than being a holder for value as in the BEA).

Cl. 38: Holder having lien

180. The holder of a cheque who has a lien on the cheque will, to the extent of the amount for which the holder has the lien, be conclusively presumed to have taken the cheque for value (Bill cl. 38 - based on BEA s-sec. 32(3) and MD s-cl. 23(3)).

181. Accommodation parties and accommodation cheques. BEA s-sec. 33(1) defines an accommodation party to a bill as one who has signed it as drawer, acceptor or indorser, without receiving value for it and for the purpose of lending his name

as surety. An accommodation party is liable on the bill to a holder for value (BEA s-sec. 33(2)). An accommodation bill is one accepted or indorsed without value being received to accommodate the drawer or some other person i.e., the party accommodated may raise money upon it, or otherwise make use of it (Byles p.245).

182. The Bill does not make provision for either accommodation parties or accommodation cheques as:

- (a) the concept of an accommodation cheque is apparently unknown to banking practice; and
- (b) in the case of a bill of exchange, the object of the accommodation signature was to facilitate the discount of the instrument. It is not considered there is a market for the discount of cheques.

BILL PART III - NEGOTIABILITY OF CHEQUES

183. Part III of the Bill (cls. 39 to 57) deals with the negotiability of cheques.

184. Part III is divided into the following Divisions:

- Division 1 - Transfer by negotiation (Bill cls. 39 to 49);
- Division 2 - Holder in due course (Bill cls. 50 to 52); and
- Division 3 - Crossings (Bill cls. 53 to 57).

Division 1 - Transfer by negotiation

185. Division 1 of Part III of the Bill (cls. 39 to 49) deals with transfer by negotiation.

Cl. 39: Every cheque transferable by negotiation

186. Transferable by negotiation until discharged. Every cheque will be able to be transferred by negotiation until it is discharged (Bill s-cl. 39(1) - cf MD s-cl. 11(1), s-cl. 30(2) and cl. 35).

187. It would seem that the Manning Committee (para. 60 of Report) intended that every cheque should be transferable in its origin (cf BEA s-sec. 13(1)), and should remain transferable until the rights of the parties on the cheque are discharged (cf BEA para 41(1)(a)), notwithstanding any attempt by the parties, or any of the parties, to the cheque to limit the transferability of the cheque. This provision gives effect to that intention.

188. Matters not affecting transferability. The provision relating to transferability by negotiation will have effect notwithstanding:

- (a) anything written or placed on the cheque (Bill s.cl. 39(2)). This will include:
 - (i) stipulations or indications by parties to a cheque; and
 - (ii) attempts to limit the transferability of a cheque by other persons (e.g. a transferor by delivery of a cheque payable to bearer); and
- (b) the crossing of a cheque (Bill s-cl. 39(3)) - although this provision is not legally necessary (being a particular instance of something written or placed on the cheque), it would seem to have some presentational advantages and may assist to remove some of the confusion commonly caused by 'not negotiable' crossings.

189. Transferability otherwise than by negotiation not affected. Nothing in the provisions set out above (i.e. s-cl. 39(1) to (3)) will affect the transferability of a cheque otherwise than by negotiation, e.g. transfer by assignment (Bill s-cl. 39(4) - no equivalent in BEA or MD). This provision has been included to reinforce the term of 'transfer by negotiation' as a form of transfer and to provide a statement that the transferability of a cheque according to the law merchant does not affect the transferability of the cheque according to the general law.

190. Stale cheques. The MD (cl. 35) provides that a cheque continues to be negotiable or transferable until it has been discharged or becomes a stale cheque. In providing that a cheque may be transferred until it becomes a stale cheque, the MD may have confused the two senses of 'negotiation'. There seems to be no reason why a stale cheque should not be capable of being transferred by negotiation. However, an entirely separate issue is whether a person who takes a stale cheque can become a holder in due course and thus take the cheque free from equities. The Bill provides that:

- (a) a person who takes a stale cheque cannot become a holder in due course (see Bill s-cl. 50(1));
and
- (b) a person who takes a stale cheque takes it subject to any defect of title affecting it when it became a stale cheque (see Bill s-cl. 46(1)).

191. The rationale for this result is that a person who takes a cheque that has been in circulation for the period necessary for the cheque to become a stale cheque, is a holder with notice because the cheque on the face of it is one which ought to have been paid (see Riley pp. 102-103). In its treatment of stale cheques, the Bill follows the BEA. It is implicit in the BEA (s-sec. 41(1)) that the fact that a bill has become overdue does not affect the transferability of the bill. However, a person who takes an overdue bill cannot become a holder in due course (BEA s-sec. 34(1)) and takes the bill subject to any defect of title affecting it when it became overdue (BEA s-sec. 41(2)). A cheque that has become stale is overdue (Rajanayagam p. 80) and the Bill, therefore, equates a stale cheque with an overdue bill.

Cl. 40 : Transfer of cheque by negotiation

192. Meaning of transfer by negotiation. A transfer by negotiation will be defined as a transfer in such a manner as to constitute the transferee the holder of the cheque (Bill s-cl. 40(1)).

193. This provision is based on BEA s-sec. 36(1) and MD s-cl. 31(1) except that:

- (a) the provision has been cast in an interpretative or explanatory form. All provisions in BEA sec. 36 and MD cl. 31 are in a form addressed to the method by which a cheque is transferred by negotiation. Casting Bill s-cl. 40(1) in an interpretative or explanatory form overcomes a potential confusion as to the purpose of s-cl. (1) on the one hand and s-cl. (2) and (3) on the other. It is only the latter two s-cl. that are actually concerned with the method by which a cheque is transferred by negotiation; and
- (b) the reference to the transfer of a cheque 'from one person to another' has been changed to 'from the holder to another person'. Strictly speaking, the delivery of a cheque to the payee is the issue of the cheque (see definition of 'issue' in Bill s-cl. 3(1)) not a transfer by negotiation of the cheque, so that 'from one person' in BEA s-sec. 36(1) means 'from a holder', especially in view of BEA s-sec. 36(3) (see Falconbridge p. 642).

194. Order cheque. A cheque payable to order will be transferred by negotiation if the cheque is indorsed by the holder of the cheque and the cheque is delivered in such

manner as to complete the contract arising out of the indorsement (Bill s-cl. 40(2) - based on BEA s-sec. 36(3) and on MD s-cl. 31(3)).

195. Bearer cheque. A cheque payable to bearer will be transferred by negotiation if it is delivered by the holder of the cheque to another person (Bill s-cl. 40(3)).

Cl. 41 : Requisites for indorsement

196. Effectiveness of indorsement. An indorsement of a cheque will not be effective to transfer the cheque by negotiation unless:

- (a) the indorsement is written or placed on the cheque and signed by the indorser; and
- (b) the indorsement is an indorsement of the entire cheque.

(Bill s-cl 41(1))

197. Allonge. An indorsement written or placed on an allonge will be taken to be written or placed on the cheque (Bill s-cl. 41(2) - based on BEA para 37(a)).

198. An allonge is a slip of paper annexed to a bill of exchange for indorsements when there is no room for them on the bill itself:

- (a) the word 'allonge' is a technical term whose usage is well established and accepted (see Chalmers p. 113; Riley p. 98; Byles p. 92 and Falconbridge p. 646);
- (b) although UCC s-sec. 3-202(2) provides for the use of allonges, it does not use the term as such.

199. Although allonges do not seem to be widely used in common law countries (see Byles p. 92) (and it may be that banks experience practical difficulties in handling cheques to which they are attached), it is considered that the Bill should expressly provide for their use:

- (a) since there is, theoretically, no limit to the number of indorsements that there may be of a cheque, it is possible that there may be insufficient room to write them all on the cheque itself; and
- (b) it would be inconsistent with the policy of ensuring that cheques cannot be rendered non-negotiable for the Bill not to provide for the possibility of a cheque being indorsed so many times that the space available on the cheque itself is exhausted.

200. Requirements for an effective 'allonge'. Falconbridge (p. 646) points out that some foreign codes contain provisions to prevent fraud, for example, a provision that the first indorsement on the allonge must begin on the bill and end on the allonge - otherwise an allonge might be taken from one bill and attached to another. UCC s-sec. 3-202(2) requires that an indorsement must be written on the instrument itself or 'on a paper so firmly affixed thereto as to become a part thereof'.

201. Indorsements on 'copies'. The Bill does not deal with indorsements on 'copies' (see BEA para 37(a)):

- (a) it is assumed that the Bill, when enacted, will apply almost exclusively to cheques in domestic circulation; and

- (b) it may also be that these 'copies' are obsolete. It appears that 'copies' of bills are not used in England, Canada or the United States and that their use in Europe is restricted to bills of exchange that are not cheques (see Falconbridge p. 646).

202. Simple signature. A mere signature on a cheque will be, in point of form, sufficient for an indorsement of the cheque (Bill s-cl. 41(3) - based on BEA para. 37(a)(second sentence) and on MD para. 32(a)(second sentence)).

203. Indorsement of part. An indorsement will not be effective to transfer a cheque by negotiation if it purports to transfer part only of the sum ordered to be paid by the cheque (Bill s-cl. 41(4) - based on BEA para 37(b) except that it refers to 'the sum ordered to be paid by the cheque' rather than 'the amount of the cheque'. This change has been made to bring the paragraph more closely into line with other provisions of the Bill, e.g., cl. 15).

204. Words of assignment etc. UCC s-sec. 3-202(4) provides that words of assignment, condition, waiver, guarantee, limitation or disclaimer of liability and the like accompanying an indorsement do not affect its character as an indorsement. Words of condition have been dealt with in Bill cl. 45.

205. Receipts as indorsement. MD s-cl. 8(5) provides, amongst other things, that, where a cheque requires indorsement, the signature of the payee appearing on a form of receipt shall be a sufficient indorsement. An equivalent provision has not been included in the Bill because of the decision not to give recognition to the use of receipts (see para. 94 above).

Cl. 42 : Transfer of order cheque without indorsement

206. Where the holder of a cheque payable to order transfers the cheque for value without indorsing the cheque, the transferee will:

- (a) receive the title that the holder had in the cheque; and
- (b) acquire the right to have the holder indorse the cheque to the transferee. Like BEA s-sec. 36(4), the Bill does not specify how this right is to be enforced (contrast the treatment of lost or destroyed cheques in Bill cl. 99).

(Bill s-cl. 42(1))

207. This provision is based on BEA s-sec. 36(4) and MD s-cl. 31(4) except that Bill s-cl. 42(1) requires, for the provision to apply, that the transferor must have delivered the cheque in order to give effect to the transfer. This requirement is not expressly stated in the BEA but seems to exist at common law (see, e.g., Good v Walker (1892) 61 L.J.Q.B. 736).

208. Representative capacities. Where a person is under an obligation to indorse a cheque as an agent or in a representative capacity, the person will be able to do so in terms negating the person's liability on the cheque (Bill s-cl. 42(2)).

209. This provision is based on BEA s-sec. 36(5) and on MD s-cl. 31(5) except that it has been made clear that the sub-clause does not, by implication, preclude a transferor from availing himself of Bill cl. 17 to negative or limit his liability on the cheque.

Cl. 43 : Indorsement of order cheque payable jointly to 2 or more persons

210. Where an order cheque requires the drawee bank to pay the cheque jointly to 2 or more payees or indorsees who are not partners, all those persons will be required to indorse the cheque in order to transfer the cheque by negotiation unless the person(s) indorsing the cheque has (have) authority to sign for the person(s) not indorsing (Bill cl. 43 - based on BEA para. 37(c) and on MD para. 32(c)).

Cl. 44 : Indorsement where payee or indorsee misdescribed

211. Where, in a cheque payable to order, the payee or an indorsee is wrongly designated or the name is misspelt, the payee or indorsee may indorse the cheque in accordance with his designation or spelling in the cheque and, if he does so, shall also add his proper signature (Bill cl. 44).

212. This provision is based on BEA para 37(d) and on MD para 32(d) except that:

- (a) the words 'as therein described' have been replaced by the words 'in accordance with the designation, or spelling'; and
- (b) the adding of the proper signature has been made mandatory.

The latter requirement has been included in, cl.44 as, if the addition of the payees or indorsees proper signature were merely optional, it could be argued that the cheque is not 'complete and regular on its face', thereby giving use to the possibility that a subsequent holder is not a holder in due cause. This would be an undesirable result.

213. Cf UCC. UCC sec. 3-203 provides that if an instrument is made payable to a person under a misspelt name or one other than his own he may indorse the instrument in that name or his own or both. However, signature in both names may be required by a person paying or giving value for the instrument.

Cl. 45 : Conditional indorsement

214. Three rules will be laid down where an indorsement on a cheque purports to be conditional (Bill cl. 45). These rules relate to:

- (a) the effectiveness of the indorsement;
- (b) the rights of the person paying the cheque;
and
- (c) the status of a holder of a cheque which
has been conditionally indorsed.

215. Indorsement effective. The first rule is that the indorsement will be effective as an indorsement whether or not the condition is fulfilled (Bill para. 45(a)). As it is intended that under the Bill a cheque is to be transferable by negotiation until it is discharged, it would seem that a conditional indorsement of a cheque should not affect the transferability of the cheque by negotiation. UCC s-sec. 3-202(4) provides that words ,inter alia, of condition accompanying an indorsement do not effect its character as an indorsement.

216. An indorsee of a cheque who takes the cheque under a conditional indorsement becomes (by virtue of Bill para. 45(a)) a holder of the cheque, whether or not the condition is fulfilled. His ability to further transfer the cheque by negotiation would also seem to be quite clear. The other

rights of a person holding a cheque under a conditional indorsement would not, however, seem to be as clear. Under the BEA, a conditional indorsement is effective as between the indorser and his indorsee and, if an indorsee takes a bill under a conditional indorsement, he holds the bill, or its proceeds, subject to the rights of the indorser. In practice, this means that an indorsee who receives payment pursuant to a conditional indorsement that has not been fulfilled holds the proceeds in trust for the indorser (see Chalmers p. 116; Riley p. 92; Falconbridge p. 649 and Weaver and Craigie pp. 309-310). The same principles would also seem to be applicable as between the conditional indorser and subsequent holders. Thus s. 39 of the American Negotiable Instruments Law provided that 'any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally'. It would, therefore, seem that under the BEA neither an indorsee who takes under a conditional indorsement nor any subsequent holder of the cheque can become a holder in due course; at least if the condition has not been fulfilled. Under UCC s-sec. 3-206(3), any transferee under a conditional indorsement (except an 'intermediary bank') must pay or apply any value given by him for or under security of the instrument consistently with the indorsement and to the extent he does so he becomes a holder for value and the transferee of such an instrument is a holder in due course if he meets the other requirements of being a holder in due course.

217. Rights of person paying the cheque. The second rule is that the person paying the cheque will be able to disregard the condition and pay the cheque to the indorsee or a subsequent holder whether or not the condition is fulfilled (Bill para. 45(b)).

218. This rule is based on parts of BEA sec. 38 and of MO cl. 33 except that:

- (a) MO cl. 33 permits a conditional indorsement of a cheque to be disregarded only by the bank on which the cheque is drawn. As it is possible that a person other than the bank upon which a cheque is drawn to pay a cheque, para. 45(b) follows BEA sec. 38 in permitting a conditional indorsement to be disregarded by any person paying the cheque;
- (b) a cheque that has been conditionally indorsed will be able to be paid to the indorsee, whether or not the condition is fulfilled. It would seem that this is what is meant by the reference in BEA sec. 38 to payment to the indorsee being 'valid'; and
- (c) the paragraph applies also to payment to a subsequent holder. There would seem to be no reason why Bill para. 45(b) should be restricted, as is BEA sec. 38, to payment to the indorsee.

219. Holder in due course. The third rule is that the fact that an indorsement purports to be conditional will be disregarded for the purpose of determining whether a holder is a holder in due course (Bill para. 45(c)).

220. A holder of a conditionally indorsed cheque may, accordingly, become a holder in due course notwithstanding that the condition is unfulfilled and despite the fact that he did not enquire as to whether it had been fulfilled.

Cl. 46 : Transfer of stale or dishonoured cheque by negotiation

221. Stale cheque. Where a stale cheque is transferred by negotiation the transferee takes the cheque subject to any defect of title and does not receive and is not capable of

giving a better title to the cheque (Bill s-cl. 46(1)). This provision will complement the definition of a holder in due course (see Bill s-cl. 50(1)) by specifying the consequences of a holder of a stale cheque failing to attain the status of a holder in due course, namely, that he takes the cheque subject to any defect of title affecting the cheque at the time when it became a stale cheque.

222. The provision about stale cheques is based on BEA s-sec. 41(2) (no equivalent in MD) except that :

- (a) the language in relation to receiving and giving title has been brought into line with the language of Bill cl. 55 (effect of taking cheque crossed 'not negotiable'); and
- (b) the BEA term 'overdue bill' has been replaced by the term 'stale cheque'.

223. Dishonoured cheque. Where a dishonoured cheque is transferred by negotiation, a person who takes the cheque with notice of the dishonour will also take subject to any defect of title affecting the cheque at the time of the dishonour (Bill s-cl.46(2)). This provision will also complement the definition of holder in due course (see Bill s-cl. 50(1)).

224. The provision about dishonoured cheques is based on BEA s-sec.41(5) (no equivalent provision in MD) except that the Bill does not include the BEA provision expressly saving the rights of a holder in due course. The provision seems unnecessary (see Bill s-s-para. 50(1)(b)(iii)(A) and Bill s-cl 53(2)) and it has not been reproduced in the Bill.

225. Presumption as to timing. Where a cheque has become stale, every transfer by negotiation of the cheque will be presumed to have been effected before the cheque became a stale cheque (Bill s-cl. 46(3)).

226. This provision is based on BEA s-sec. 41(4) (no equivalent provision in MD) except that:

- (a) the BEA concept of an overdue bill has been replaced by the concept of a stale cheque; and
- (b) the BEA wording 'is prima facie deemed' has been replaced by the wording 'shall, unless the contrary intention is proved, be presumed'.

Cl. 47 : Transfer by negotiation back to drawer or indorser

227. Transfer back to drawer. Where a cheque is transferred by negotiation back to the drawer, the drawer:

- (a) may strike out any indorsements on the cheque; and
- (b) will be able, unless the cheque has been discharged, to re-issue the cheque, but will not be entitled to enforce payment against any intervening party to the cheque to whom he was previously liable.

(Bill s-cl. 47(1))

228. Transfer back to an indorser Where a cheque is transferred by negotiation back to a prior indorser, that indorser:

- (a) will be able to strike out his own and subsequent indorsements; and
- (b) will be able to further transfer the cheque by negotiation, but will not be able to enforce payment against any intervening party to the cheque to whom he was previously liable.

(Bill s-cl. 47(2))

229. These provisions are based on BEA s. 42 and MD cl. 36 except that:

- (a) the provisions deal separately with negotiation back to the drawer and negotiation back to an indorser. This has been done because 're-issue' is only appropriate in the case of the drawer and 'further transfer by negotiation' is only appropriate in the case of a prior indorser. It also allows the language of the clause to be simplified and avoids the necessity of distinguishing between 'persons' and 'parties';
- (b) the right of a drawer and an indorser to strike out intervening indorsements has been expressly stated; and
- (c) the words 'subject to the provisions of (the) Act' have been omitted. The relevant provision of the BEA to which sec. 42 would seem to be subject are those relating to restricted indorsements and discharge (see Riley p. 104 and Chalmers p. 126). Restrictive indorsements are, however, no longer to be permitted.

Cl. 48 : Order of indorsements

230. Where there are 2 or more indorsements on a cheque, the indorsements will be presumed to have been made in the order in which they appear on the cheque (Bill cl. 48).

231. This provision is based on BEA para. 37(e) and MD para. 32(e) except that the provision speaks in the plural. When one is looking at the order of a number of indorsements

on a cheque, a particular indorsement cannot be looked at in isolation from the other indorsements. Each indorsement achieves its position in the order of indorsements on the cheque only because of its relationship with the other indorsements.

Cl. 49 : Rights acquired by transfer by negotiation

232. Suing in own name. The holder of a cheque will be able to sue on the cheque in the holder's own name (Bill s-cl. 49(1) - based on BEA para. 43(1)(a) and MD para. 37(1)(a)).

233. Rights of holder in due course. A holder in due course:

(a) will hold the cheque free from -

(i) any defect in the title of prior indorsers to the cheque; and

(ii) mere personal defences available to the drawer and prior indorsers against one another; and

(b) will be able to enforce payment of the cheque against any person liable on the cheque

(Bill s-cl. 49(2) - based on BEA para. 43(1)(b) and on MD para. 37(1)(b) except that MD words 'whether the cheque is negotiable or not' have been omitted).

234. Title of holder defective. Where the title of the holder of a cheque is defective, a holder in due course to whom the cheque is transferred by negotiation receives a good and complete title to the cheque.

(Bill s-cl. 49(3) - based on BEA para. 43(2)(a) and on MD para. 37(2)(a)).

235. The Bill does not contain any equivalent to BEA para. 43(2)(b) which provides that if payment of a bill is made in due course to a holder who has a defective title, the person who pays the holder gets a valid discharge for the bill. The paragraph is not considered necessary in view of the provisions of Bill para. 78(1)(a) which state that payment in due course by the drawee bank discharges the cheque. Moreover, the bank upon which the cheque is drawn has no liability on the cheque that could be said to be 'discharged' when the cheque is paid by the bank.

Division 2 - Holder in due course

236. Division 2 of Part III of the Bill (cls. 50 to 52) deals with a person who is a holder in due course. The Bill creates a new Division in the Part dealing with the negotiability of cheques to contain the main provisions relating to holders in due course. In the BEA and the MD, these provisions appear in the Division dealing with consideration. The provisions relating to holders in due course have an effect that extends well beyond the area of consideration.

Clause 50 : Holder in due course defined

237. Prerequisites for being a holder in due course. The requirements for being a holder in due course will be of two kinds:

- (a) the requirements relating to the cheque itself.
These are that the cheque was transferred by negotiation to the holder and:

- (i) is complete and regular on the face of it (this requirement appears in both BEA s-sec. 34(1) and MD s-cl. 25(1));
 - (ii) is not a stale cheque (this requirement does not appear in the MD); and
 - (iii) does not bear a crossing consisting of 2 parallel transverse lines with the words 'not negotiable' between the lines. This last requirement, which does not appear in either the BEA or the MD, has been included to complete the statement in Bill cl. 55 as to the effect of taking a cheque crossed 'not negotiable' and to make it clear the holder cannot be a 'holder in due course' and thereby gain the benefit of the provisions that give special advantages (other than unimpeachable title) to a 'holder in due course' (see Bill s-cl. 28(1), cl 72, para. 74(1)(a) and para. 82(3)(b).
- (b) The requirements relating to the holder of the cheque (most of these requirements appear in both the BEA and the MD). These are that the holder takes the cheque -
- (i) In good faith;
 - (ii) for value; and
 - (iii) without notice (see also Bill s-cl. 50(2)) -

- (A) of any dishonour of the cheque; or
- (B) of any defect in title of the person who transferred the cheque to him or that the person who transferred the cheque to the holder had no title to the cheque.

(Bill s-cl. 50(1))

238. Payee as holder in due course. It has been well established since the decision in R.E. Jones, Ltd v. Waring and Gillow Ltd. [1926] A.C. 670 that under the BEA the payee of a cheque cannot be a holder in due course of the cheque unless, it would seem, the cheque is transferred by negotiation back to him (see Ferrier v. Stewart (1912) 15 C.L.R.32, 37; see also R.E. Jones Ltd v. Waring and Gillow Ltd [1926] A.C. 670, 687). It would appear that the same result would be reached under the Bill on the basis of the implication to be drawn from s-s-para. 50(1)(b)(iii)(B) and also, perhaps, s-cl. 27(1) (see R.E. Jones Ltd v. Waring and Gillow Ltd [1926] A.C. 670, 680, 685, 687, 695 and 699). The position under the BEA has, accordingly, been preserved (see Bill para. 50(1)(a)). It is noted, however, that UCC s-sec. 3-302(2) expressly provides that the payee may be a holder in due course (see Anderson V.5 p. 514, for examples of situations in which a payee can become a holder in due course under the UCC).

239. What constitutes notice of a defect. Notice of a defect will include notice that the person who transferred the cheque did so in breach of faith or in circumstances amounting to fraud (Bill s-cl. 50(2)).

Cl. 51 : Presumption that holder is holder in due course

240. Presumption. Subject to an exception for fraud, duress and illegality, the holder of a cheque will be presumed to be a holder in due course, unless the contrary is proved (Bill s-cl 55(1)).

241. This provision is based on the first clause of BEA s-sec 35(2) and of MD s-cl. 26(2) except that the BEA and MD words 'is prima facie deemed' have been replaced by the words 'shall be presumed.'

242. Fraud, duress or illegality. Where it is proved in an action or proceeding on a cheque that the drawing etc is affected by fraud, duress or illegality, the holder shall not be presumed to be a holder in due course unless he proves that after the alleged fraud, duress or illegality, value was given in good faith for the cheque (Bill s-cl. 51(2)).

243. This provision is based on the proviso to BEA s-sec. 35(2) and MD s-cl. 26(2) except that:

- (a) the provision has been revised to clarify its operation in relation to the basic presumption in Bill s-cl. 51(1). Bill s-cl. 51(2) now refers to the holder of the cheque not being presumed, by virtue of Bill s-cl. 51(1), to be a holder in due course unless and until he proves certain things rather than the burden of proof being shifted on to the holder unless and until he proves those things;
- (b) the BEA and MD words 'acceptance, issue or subsequent negotiation' have been replaced by the words 'drawing or issue, or a transfer by negotiation'; and

- (c) the BEA and MD words 'fraud, duress, or force and fear, or illegality' have been replaced by the words 'fraud, duress or illegality'.

Cl. 52 : Holder deriving title through holder in due course

244. A holder of a cheque who derives his title through a holder in due course and who is not a party to any fraud, duress or illegality affecting the cheque will have all the rights of the holder in due course as regards the drawer and the indorsers prior to the holder in due course.

(Bill cl. 52)

245. This provision is based on BEA s-sec. 34(3) and MD s-cl. 25(3) except that:

- (a) the BEA and MD words 'whether for value or not' have been expanded to 'whether or not the holder took the cheque for value;
- (b) the Bill also includes 'duress' along with fraud or illegality; and
- (c) the BEA and MD words 'all parties to the bill/cheque' have been replaced with the word 'indorsers'.

Division 3 - Crossings

246. Division 3 of Part III of the Bill (cls. 53 to 57) deals with crossings (cf. MD Part II Div. 4 - cls. 27 to 30).

Cl. 53 : Crossing and crossed cheque defined

247. The addition of 2 parallel transverse lines. A cheque will be a crossed cheque if it clearly bears on the front of the cheque:

- (a) 2 parallel transverse lines; or
- (b) 2 parallel transverse lines with the words 'not negotiable' either completely or substantially between the lines.

(Bill s-cl. 53(1) - based on MD s-cl. 27(1)).

248. Nothing else will be a crossing. Nothing written or placed on a cheque, other than the addition of two transverse parallel lines (with or without the words 'not negotiable'), will be effective as a crossing of a cheque (Bill s-cl. 53(2)). Moreover, in accordance with the Manning Committee recommendation (see para. 86), no statutory recognition will be given to 'account payee only' crossings.

249. This provision can be compared with MD s-cl. 27(2) which provides as follows:

'(2) The addition of any other words purporting to constitute a crossing or to vary or add to the types of crossing authorized by the previous sub-section shall be void and of no effect whatever'.

250. The following comments can be made on the comparison:

- (a) the MD provision would seem to entitle a bank handling a cheque bearing a non-permissible crossing to totally disregard the words of the non-permissible crossing for all purposes, even in circumstances where the words of the crossing, either alone or in conjunction with other circumstances known to the bank, are sufficient to put the bank on inquiry. This seems an extreme approach to deal with

non-permissible crossings. There does not seem to be any reason why a bank should be able to totally disregard words on a cheque simply because they are in the form of a purported crossing rather than in some other form. For example, the words 'account payee only', while not affecting the transferability of a cheque, should nevertheless put a collecting bank on notice to make inquiries if a person other than the payee lodges the cheque for collection. For considerations such as these, Bill s-cl. 53(2) denies a non-permissible crossing the status of a crossing, but does not affect any other operation that the words of a non-permissible crossing may have;

- (b) the words 'written or placed' have been used (as in Bill para. 39(2)(b) which provides that every cheque may be transferred by negotiation notwithstanding anything written or placed on the cheque). This will remove any basis for arguing that a particular unauthorized crossing of a cheque is something other than an addition to the cheque and, therefore, not caught by Bill s-cl. 53(2).

251. 'Not negotiable'. The addition of the words 'not negotiable' other than between, or substantially between, 2 parallel traverse lines will not be an effective crossing of the cheque (Bill s-cl. 53(3)).

Cl. 54: Effect of crossing on payment of cheque

252. A crossing of a cheque has effect as a direction by the drawer to the drawee bank not to pay the cheque otherwise

than to a bank (Bill cl. 54). Although there is no equivalent BEA provision, the prohibition was included in legislation before the Bills of Exchange Act 1882 (U.K.) (see Paget p. 240ff) and is implicit in BEA secs. 85 and 86.

Cl. 55 : Effect of taking cheque crossed 'not negotiable'

253. Where a cheque that is crossed 'not negotiable' is transferred by negotiation to a person, that person will not receive, and will not be capable of giving, a better title to the cheque than the title that the person from whom he took the cheque had (Bill cl. 55).

254. This provision is based on BEA sec. 87 and on MD s-cl. 30(1) except that the concept of taking the cheque in BEA and MD has been replaced by the concept of transfer. This brings the provision more closely into line with Bill cl. 46. The BEA or MD provisions are capable of applying to the payee of a cheque, because it could be said that the payee of a cheque 'takes' the cheque when he gets possession of it.

Cl. 56 : Persons who may add crossing to cheque

255. A crossing will be able to be added to a cheque by the drawer or any other person in possession of the cheque (Bill cl. 56 - based on BEA sec. 83 and on MD s-cl. 28(1)).

256. The corresponding BEA provision (sec. 83) refers in a number of places to the 'holder' of a cheque. There appears to be doubt as to whether 'holder' for the purposes of the section means a holder of a cheque as defined by BEA sec. 4 or simply a person in possession of a cheque (see Riley p. 198; Chalmers p. 265 and Paget p. 246). Bill cl. 56 has been drafted on the basis that the drawer of a cheque or any other person in possession of the cheque should be permitted to add a crossing to the cheque. If a more restrictive approach were to be taken, the bank upon which the cheque is drawn would not

know, without inquiry, whether the cheque had been crossed by a holder (as defined by Bill cl. 3). To all outward appearances, the cheque would appear to be a crossed cheque (as defined by Bill s-cl. 53(1)) and, if a bank were to treat the cheque as an uncrossed cheque, it would do so at its peril (see Bill cl. 93).

Cl. 57 : Multiple crossings

257. A person in possession of a cheque will be able to:

- (a) add a crossing to a cheque even if it already contained a crossing when it came into his possession (Bill s-cl. 57(1)); and
- (b) add the words 'not negotiable' to a crossing that merely consists of two parallel transverse lines on the face of the cheque (Bill s-cl. 57(2)).

258. The clause is not restricted in its operation to a holder or a bank (see also Bill cl. 56).

BILL : PART IV - PRESENTMENT AND DISHONOUR

259. Part IV of the Bill (cls. 58 to 68) deals with the presentment and dishonour of cheques.

Cl. 58 : Drawer and indorsers of cheque not liable unless cheque presented

260. Except where presentment is dispensed with (see Bill cl. 59; Riley p. 116 and Chalmers p. 142), the drawer and any indorser of a cheque will not be liable on the cheque unless the cheque is duly presented for payment (Bill cl. 58).

261. Although it is implicit in Bill cls. 71 and 73 that due presentment for payment is necessary to render the drawer and indorsers of a cheque liable on the cheque, it seems highly desirable for the Bill to contain an express statement to that effect. This provision is in accordance with a recommendation of the Indian BLC Report (see p. 112).

262. Comparisons with BEA and MD. This provision should be compared with:

(a) BEA s-sec. 50(1); and

(b) MD cl. 38.

263. S-sec. 50(1) of the BEA, in speaking of the drawer and indorsers being discharged, does not appear to be consistent with BEA s-secs. 60(1) and (2) of the BEA. Unlike the absolute liability of an acceptor of a bill of exchange, the liabilities of the drawer and indorsers, of a cheque are conditional. The drawer of a cheque promises that, on due presentment for payment, the cheque will be paid and that, if the cheque is dishonoured he will compensate the holder and any indorser who is compelled to pay. The undertaking of an indorser is similar. Thus, the better view of the effect of

BEA s-secs 60(1) and (2) would seem to be that the drawer and indorsers of a cheque do not become liable on the cheque unless the cheque is presented for payment. It would, therefore, seem to be misleading to suggest, as BEA s-sec. 50(1) does, that the drawer and indorsers of a cheque are discharged if the cheque is not duly presented for payment: they simply do not become liable on the cheque and there is no liability to be discharged.

264. MD cl. 38, which follows only the first sentence of BEA s-sec. 50(1), is more poorly worded than that s-sec. in that it merely states that a cheque must be presented for payment, but fails to state what consequences follow from a failure to present a cheque for payment.

Cl. 59 : When presentment dispensed with

265. Presentment of a cheque will be dispensed with in three different situations (Bill cl. 59).

266. This provision is based generally on BEA s-sec. 51(2):

- (a) like BEA s-sec. 51(2), the provision uses the term 'dispensed with'. The BEA uses the term dispensed with in s-secs. 51(2) and 55(2), while the term 'excused' is used in s-secs. 46(2), 51(1) and 55(1). Both terms are used in BEA sec. 56(2). It has been suggested (Byles p. 120) that, in the context of BEA s-sec. 51(2), the two terms are interchangeable. The UCC uses only the term excused (see Anderson v. 6, p. 512). It would seem, however, that the term 'dispensed with' is more apt in relation to Bill cl. 59 as, in a case to which Bill cl. 59 applies, the obligation under Bill cl. 58 to duly present a cheque for payment is completely removed;

- (b) cls. 71 and 73 require due presentment for payment of a cheque as a condition precedent to the drawer's and an indorser's respective liabilities on the cheque. The clauses will operate subject to the provisions of Bill cl. 59;
- (c) the provision makes it clear that a party to a cheque may waive only his own right to presentment and not the right that any other party has to presentment of the cheque (see Rajanayagam p. 112). This point does not appear to be clear in BEA para. 51(2)(e);
- (d) as a cheque must be drawn upon a bank (see Bill cls. 10 and 13)), an equivalent of BEA para. 51(2)(b) has not been included.

When presentment dispensed with

267. Cheque cannot be presented. Presentment will be dispensed with where the cheque cannot, with the exercise of reasonable diligence, be duly presented (Bill para. 59(a)). This provision is based on the first sentence of BEA para. 51(2)(a) except that an ambiguity has been removed.

268. BEA provision. At least two constructions of BEA para. 51(2)(a) would seem possible:

- (a) the paragraph could be interpreted as meaning that presentment of a cheque for payment is dispensed with if it can be demonstrated that, regardless of the steps that have in fact been taken, it is not possible to effect due presentment of the cheque with the exercise of reasonable diligence. On this construction, if presentment is completely impossible (e.g.

because of war or illegality - see Cornelius v. Banque Franco - Serbe [1942] 1 K.B. 29, esp. pp. 34-35), presentment is dispensed with and no steps need to have been taken to attempt to effect presentment (see Riley p. 117); or

- (b) the paragraph could also be interpreted as meaning that presentment of a cheque is dispensed with if presentment has not been effected after reasonable diligence has, in fact, been exercised. On this second construction, steps would need to be taken to attempt to effect presentment even if presentment is impossible (but see Riley p. 117) and if the steps taken are reasonable the inquiry is at an end.

269. Bill para. 59(a) has been drafted on the assumption that the first of these two constructions is the correct one.

270. Drawer. Presentment will be able to be dispensed with as regards the drawer:

- (a) where the drawer's bank is not under an obligation to pay (e.g. where there are insufficient funds in the drawer's account) and the drawer had, at the time of issue, no reason to believe that the cheque would be paid; and
- (b) where the drawer has waived his right to presentment.

(Bill para. 59(b))

271. This provision is based on BEA paras. 51(2)(c) and (e) except that BEA para. 51(2)(c) refers to the drawee not

being bound to accept or pay the bill, whereas s-s-para. 59(b)(i)(A) of the Bill follows BEA s-para. 55(2)(c)(iv) in referring to the drawee bank as not being under an obligation to pay the cheque.

272. Indorser. Presentment will be dispensed with as regards the indorser where he has waived his right to presentment (Bill para. 59(c)).

273. An equivalent to BEA para. 51(2)(d) has not been included because of the decision not to provide for accommodation cheques in the Bill (they are not known in current banking practice). BEA para. 51(2)(d) provides that presentment is dispensed with as regards the indorser where the cheque was drawn for his accommodation and he has no reason to believe it would be paid if presented.

274. Bill para. 59(c) is based on BEA para. 51(2)(e).

Cl. 60 : Effect of failure to present within reasonable time

275. If presentment is not made within a reasonable time and, after the issue of the cheque, the drawee bank becomes insolvent thereby depriving the drawer of funds to meet the cheque, the drawer may make a written assignment to the holder of the cheque of the drawer's rights against the drawee bank in respect of those funds. The drawer will be discharged from his liability on the cheque to the extent of that assignment (Bill s-cl. 60(1)).

276. This provision is based on UCC para. 3-502(1)(b).

277. Discharge of drawer. To be compared with s-cl. 60(1) is BEA sec.79. The latter provision provides in effect that where presentment is delayed, a drawer of a cheque is discharged to the extent to which he is a creditor of the drawee bank for a greater amount than he would have been if

the cheque had been presented and paid in the normal course of events. BEA sec.79 will only operate, however, if the following conditions are met:

- (a) the cheque is not presented for payment within a reasonable time after its issue;
- (b) the drawer has the right, at the time the cheque ought to have been presented to have the cheque paid; and
- (c) the drawer suffers actual damage through the delay (normally this would occur because of an intervening insolvency (BEA para. 79(a))).

278. The approach in BEA sec. 79 has not been followed because of the difficulties that have been identified with that provision:

- (a) it is not clear how the extent of the damage suffered by the drawer could be identified before the liquidation of the bank has been finalized;
- (b) the interaction in BEA para. 79(a) between the phrase 'the extent of such damage and the phrase 'to the extent to which such drawer ... is a creditor of such banker to a larger amount than he would have been had such cheque been paid" is unclear. It could be that the latter phrase defines the meaning 'actual damage' is to bear in the paragraph. On this view 'actual damage' is both a condition precedent to the operation of the paragraph and the measure of the extent of the drawer's discharge. Usually there is, however, a difference between damage as a condition precedent to a cause of action and the

measure of the 'damages' payable if the cause of action is established;

- (c) the meaning of the requirement that the drawer must suffer actual damage 'through the delay' is unclear; and
- (d) unless the drawer is compelled by the holder to pay the cheque, it is difficult to see how it could be said the drawer has suffered actual damage.

279. Discharge of indorser. An indorser is discharged if presentment is not made within a reasonable time after indorsement (Bill s-cl. 60(2) - based on BEA para. 50(2)(b) as well as on UCC para. 3-502(1)(a).

280. Reasonable time. In determining what is a reasonable time for the purposes of Bill s-cl. 60(1) and (2) regard will be had to three matters:

- (a) the fact that the instrument is a cheque and that it is reasonable to expect it to be presented promptly (Bill para. 60(3)(a)). BEA para. 50(2)(b), which deals with the drawer of a bill of exchange that is not a cheque (see Paget pp. 221-222) and the indorser of any bill of exchange (including a cheque), refers to 'the nature of the bill', whereas BEA para. 79(b), which deals with the drawer of a cheque, refers to 'the nature of the instrument'. MD para. 39(f), which was applicable to both the drawer and indorsers of a cheque, followed BEA para. 79(b). UCC s-sec. 3-503(2) also refers to 'the nature of the instrument'. The Bill adopts a simple form of words which removes any doubt which may arise if the words 'bill' or

'instrument' were used. For clarity the term 'cheque' replaces the alternatives.

(b) usage, including the usage of trade and banks, in relation to the presentment of cheques (Bill para. 60(3)(b)). BEA para. 50(2)(b) refers to 'usage of trade with regard to similar bills' whereas BEA para. 79(b) refers to 'the usage of trade and of bankers'. MD para. 39(f) followed BEA para. 79(b). UCC s-sec. 3-503(2) refers to 'any usage of banking or trade'. The Bill closely follows these provisions;

(c) the facts of the particular case including:

- (i) the nature of the cheque, particularly, but not confined to, the date of the cheque and the sum ordered to be paid;
- (ii) whether the delay in presentment was caused by circumstances beyond the control of the holder and not imputable to any default, misconduct or negligence by the holder.

(Bill para. 60(3)(c))

This provision is a combination of the reference in BEA para. 50(2)(b) to 'the facts of the particular case' and of the first sentence of BEA s-sec. 51(1). The relationship between these two BEA provisions has never been clear. It would seem that any circumstance that would operate by virtue of BEA s-sec. 51(1) to excuse delay in presentment would also be taken into account under BEA para. 50(2)(b) determining whether or not a cheque had been presented within a reasonable time. Thus, for example, if all means of communication were to break down for three days, that would, under BEA para. 50(2)(b) affect the determination of what is a reasonable time for the purposes of that paragraph; it would also constitute

an excuse for the delay under BEA s-sec. 51(1). Moreover, BEA s-sec. 51(1) suggests that the circumstances in which delay is excused are very limited whereas BEA para. 50(2)(b) suggests that any circumstance may extend the period that would otherwise be a reasonable period for the purposes of the general rule that presentment be made within a reasonable time whether or not the circumstances would excuse delay under BEA s-sec. 51(1).

Cl. 61 : Due presentment defined

281. Main requirements of due presentment. Subject to the special provisions in relation to post-dated cheques (see Bill s-cl. 61(2)), a cheque will be duly presented for payment if the following requirements are met (Bill s-cl. 61(1)):

- (a) if a demand for payment of the cheque is made:
Under Bill s-cl. 61(1), presentment of a cheque is, in essence, a demand for payment of the cheque. This approach follows the approach used in the UCC (see s-sec. 3-504(1)). It is to be contrasted with the BEA approach where exhibition of the cheque is necessary (see s-sec. 57(4)) and presentment as a demand for payment appears only by implication (BEA s-sec. 57(4) refers to 'the person from whom he demands payment'). The UCC approach has obvious advantages in dealing with forms of presentment that do not involve exhibition of the cheque;
- (b) if there is compliance with:
 - (i) cl. 62 in the case of banks; or
 - (ii) cl. 63 in the case of other persons;

- (c) if the demand is made on the drawee bank: the demand is not expressed to be required to be made on the 'branch of domicile'. The Bill takes the approach that the demand is made on the bank as a legal entity and that the significance of the 'branch of domicile' is in the place at which the demand is to be made on the bank. This approach is consistent with Atkin L.J.'s statement in Joachimson v. Swiss Bank Corporation [1921] 3 K.B. 110, 127 of the banker/customer relationship:

'The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such, written orders may be outstanding in the ordinary course of business for two or three days. It is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice ... I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of this balance until he demands payment from the bank at the branch at which the current account is kept.' (emphasis added);

- (d) if the demand is made by or on behalf of the holder of the cheque:

Bill cl. 61 allows presentment to be made on behalf of the holder. Rather than leave the question of the rights of agents to act on behalf of parties to a cheque for determination by the common law in this case, the Bill adopts the approach of BEA para. 50(2)(c). See also paras. 141 and 142 above.

282. Post-dated cheques. Where a demand for payment of a cheque is made before the date of the cheque, the cheque will not, by reason of the demand, be taken to have been duly presented for payment (Bill s-cl. 61(2)).

283. This provision has been included to make it clear that a demand for payment of a post-dated cheque made before the date of the cheque cannot operate as due presentment of the cheque. In the absence of the sub-clause there could be some doubt on the point. The s-cl. would seem to achieve the same result in relation to post-dated cheques as is achieved by BEA para. 50(2)(a). Bill s-cl. 61(2) points to one difficulty in having an arbitrary standard time limit for banks under Bill cl. 66. Such a time limit would, in the absence of a special provision, presumably run against a collecting bank from the time of lodgment of a cheque even though the cheque, if post-dated, could not be legally presented until its date arrives.

Cl. 62 : Presentment by bank

284. A bank will be able to present a cheque for payment by making, at a reasonable hour on a day on which the drawee bank is open for business, a demand for payment on the drawee bank at:

- (a) the 'proper place' in relation to the cheque (see Bill cl. 64); or
- (b) a designated place in relation to the cheque (see Bill s-cl. 65(1)).

(Bill s-cl. 62(1))

285. Unlike BEA para. 50(2)(c) and MD para. 39(a), Bill cls. 62 and 63 do not require 'presentment of a cheque' on a 'business day'. This is because it was not considered possible

to have a general definition of 'business day' which dealt adequately with holidays in particular localities. MD s-cl. 77(3) and (4) definition of 'business day' was not considered satisfactory because:

- (a) MD s-cl. 77(3) has the effect of treating Saturday as a business day;
- (b) MD s-cl. 77(4) treats part-holidays as whole holidays which is presumably not an intended effect; and
- (c) the provisions do not deal with the problem of variations in business days between different localities.

286. The above difficulties have been overcome by the device of referring simply to a day on which the drawee bank is open for business. It is not thought that this expression could lead to any difficulties in interpretation.

287. The demand for payment of a cheque may be made by the collecting bank on the drawee bank by exhibiting the cheque to the drawee bank or by any other means (Bill s-cl. 62(2)). Presentment of a cheque by mail or through a clearing-house would seem to be presentment by delivery of the cheque. Although the cheque must be present at the place where presentment occurs, it is not necessary for the person effecting the presentment to be present (see Griffin v. Weatherby (1868) L.R. 3 Q.B. 753, 760). There would, therefore, seem to be no reason for expressly mentioning presentment by post or through a clearing-house in Bill cl. 62.

288. Bill s-cl. 62(2) places no restriction on the means that may be used to demand payment of a cheque otherwise than by delivering the cheque to the drawee bank. Thus, the demand could be made by, for example, exhibition of a facsimile copy

of the cheque, transmission of a copy of the cheque or transmission of particulars of the cheque. It would seem highly desirable to leave the means that may be used to effect presentment completely open.

289. Although the collecting bank will be able to choose any means to effect presentment of a cheque, the means chosen by the collecting bank will be taken into account in determining whether it has fulfilled its duty under Bill cl. 66 (see s-cl. 66(3)).

290. Where the cheque is not delivered to the drawee bank, the demand for payment of the cheque will have to identify the cheque with reasonable certainty and be in a form that is intelligible to, or readily decipherable by, the drawee bank (Bill s-cl. 62(3)).

291. It should be noted that the effect of the provisions is that presentment is effected at the time when the relevant demand for payment is made on the drawee bank, that is, the time when the relevant demand reaches the drawee bank at the proper place or designated place for presentment, whether or not the drawee bank understands the demand at that time. Thus, for example, if the demand is encoded on a magnetic tape that is delivered to the drawee bank (the magnetic tape being encoded in a form that is readily decipherable by the drawee bank), it would seem that the demand is made on the drawee bank at the time the magnetic tape is delivered to the drawee bank and not at the time the magnetic tape is deciphered by it.

292. A demand will be taken to have identified a cheque with reasonable certainty if it contains the following particulars:

- (a) the sum ordered to be paid by the cheque;
- (b) the cheque number;

(c) the account against which the cheque is drawn;
and

(d) the place that is, by virtue of Bill cl. 64, the
proper place in relation to the cheque.

(Bill s-cl. 62(4))

293. If one or more of the matters specified in Bill s-cl. 62(4)) is or are not contained in a demand for payment of a cheque, it is a question of fact whether the cheque is, nonetheless, identified with reasonable certainty in the demand.

294. It should be noted that Bill s-cl. 62(4) enables the matters specified in the s-cl. to be set out in a demand which is in encoded form.

295. Where a cheque is presented for payment otherwise than by exhibiting it to the drawee bank, the drawee bank will be able, by any means, to request the collecting bank to supply further particulars in relation to the cheque and may also ask that the cheque, or a copy of it, be exhibited. (Bill s-cl. 62(5) and (6)). The making of the request will be one of the matters to be taken into account in determining whether or not the drawee bank has fulfilled its duty under Bill cl. 67 (see s-cl. 67(2)). If, for example, it requests exhibition of the cheque itself when transmission of a facsimile copy would have sufficed, it may be prevented from dishonouring the cheque and be liable to pay the sum ordered to be paid by the cheque to the holder of the cheque (see Bill s-cl. 67(2)).

296. UCC. Under UCC sec. 3-505 a party to whom presentment is made (including a bank) may, in addition to requiring exhibition of the cheque, request:

- (a) reasonable identification of the person making presentment and evidence of his authority to make it if made for another;
- (b) production at the proper place;
- (c) a signed receipt on the cheque; and
- (d) its surrender on full payment.

297. Bill s-cl. 62(5) does not prevent a drawee bank from making more than one request under the sub-clause in relation to a cheque, but the drawee bank would, of course, need to keep in mind its duty under cl. 67.

298. A request under Bill s-cl. 62(5) in relation to a cheque may be made to the collecting bank at a designated place (see Bill s-cl. 65(1)) at a reasonable hour on a business day - this is designed to enable requests, for example, to be made by transmission of encoded information to a data processing centre (Bill s-cl. 62(6)). It is understood that all banks will designate a place for this purpose. If, however, this does not occur a drawee bank would have to send the notice to the presenting bank at its actual address.

299. Bill s-cl. 62(7) requires a request under Bill s-cl. 62(5) to identify the relevant cheque with reasonable certainty and be in a form that is intelligible to, or readily decipherable by, the collecting bank. The former requirement will be taken to have been met if the request specifies the matters listed in Bill s-cl. 62(8) in so far as information on those matters is available to the drawee bank.

300. A response to a request under Bill s-cl. 62(5) may be made to the drawee bank:

- (a) at a designated place (see Bill s-cl. 65(1)); or

- (b) at the proper place in relation to the cheque
(see Bill cl. 64),

at a reasonable hour on a day on which the drawee bank is open for business at the relevant place (Bill s-cl.62(9)). In making its response, the collecting bank may furnish the requested particulars or exhibit the cheque or a copy of it (Bill s-cl. 62(9) and (10)). The collecting bank may supply requested particulars by any means but in doing so it must identify the request with reasonable certainty (Bill s-cl. 62(11)).

301. Bill s-cl. 62(12) has been included to make it clear that, where a cheque is 'presented by particulars', the drawee bank is subject to the same liabilities in respect of the cheque to which it would have been if the cheque had been physically presented. This would, in any case, appear to be implicit from other provisions of the Bill.

Cl. 63 : Presentment by person other than bank

302. A person other than a bank will be able to present a cheque at the proper place in relation to the cheque (see Bill cl. 64).

(Bill cl. 63)

Cl. 64 : Proper place

303. The proper place for presentment of a cheque will be:

- (a) the drawee bank's place of business specified in the cheque (Bill para. 64(a)); or
- (b) if no such place is specified in the cheque, the place where the relevant account is kept (Bill, para. 64(b)).

304. It is important to distinguish the significance of presentment for the parties to a cheque from the significance of presentment for the drawee bank. Presentment is, for the parties to a cheque, a condition precedent to their liabilities on the cheque and, to the extent that presentment is made impossible or difficult, the rights of the holder of the cheque are thereby extinguished or impaired unless, of course, presentment is dispensed with. For the drawee bank, on the other hand, presentment is the production to it of a document that may or may not be a mandate that it is required, by its contract with its customer, to comply with. If presentment is made at the place where the relevant account is maintained, the drawee bank must decide whether to pay or dishonour. If presentment is made otherwise than at the place where the relevant account is maintained, the drawee bank would seem to be entitled, as against its customer, to dishonour the cheque forthwith. The drawee bank has no responsibility on the cheque to parties other than its customer. There is nothing inconsistent in a presentment that is effective so far as the parties are concerned being ineffective to put the drawee bank under an obligation to pay (compare the situation of the presentment of a cheque drawn on an account that is exhausted).

305. Bill para. 64(b) has been included to make it clear that, in a case where no place of business of the drawee bank is specified (e.g. blank cheque forms made available by clubs or other organisations to their members), 'due presentment' can only take place at the branch of the drawee bank at which the relevant account is kept. This is consistent with the principle that a bank is obliged by the mandate from its customer to pay the cheque only where the cheque is presented, the branch at which the customer's account is maintained.

Cl. 65 : Designated places

306. Designated places. A bank will, by notice in a form prescribed by the Regulations and published in the Commonwealth of Australia Gazette, be able to specify a place as a designated place for the purposes of the Bill i.e. a designated place for presentment (see Bill s-cl. 62(1)), requests (see Bill s-cl. 62(6)) or responses to requests (see Bill s-cl. 62(1)).

(Bill s-cl. 65(1))

307. A notice of a designated place will have to specify:

(a) either or both of the following, namely:

(i) the cheques in relation to which the place is to be a designated place for the purpose of s-cl.s 62(1) and (9);

(ii) the cheques in relation to which the place is to be a designated place for the purposes of s-cl. 62(6) (Bill para.65(2)(a));

(b) the days on which, and the hours during which, the bank will be open for business at that place (Bill para. 65(2)(b)); and

(c) the means by which communications may be made to the bank at the place (Bill para. 65(2)(c)).

It should be noted that Bill para. 65(2)(a) has been drafted in such a way as to make it clear that any one notice does not have to specify all the matters referred to in that paragraph.

308. A notice under Bill cl. 65 will be able to be revoked or varied (see Acts Interpretation Act 1901, s-sec. 33(3)).

309. Time from when notice has effect. A notice specifying a designated place will have effect on and from the day on which the notice is published in the Gazette or such later date as is specified in the notice (Bill s-cl. 65(3)). This will enable a notice under Bill s-cl. 65(1) to operate from a future specified date.

Cl. 66 : Deposit banks to present cheques promptly

310. A bank (in cl.66 referred to as the 'deposit bank') will be under certain obligations in relation to a holder who lodges a cheque with it for collection (Bill cl. 66 - cf. MD cl. 42). This provision sets out:

- (a) the initial duty of the deposit bank and the consequences of its failure to comply with that duty (Bill s-cl. 66(1));
- (b) the effect of the drawee bank making a request under Bill s-cl. 62(5); and
- (c) the considerations to be taken into account in determining whether the deposit bank has presented a cheque as soon as was reasonably practicable (Bill s-cl. 66(3)).

311. Duty of deposit bank to holder who lodges cheque for collection. Subject to the circumstances where presentment can be dispensed with (see Bill cl. 59), a deposit bank will be required to duly present the cheque for payment itself, or ensure that the cheque is duly presented for payment, as soon as is reasonably practicable and, if it fails to do so, it will be liable to the holder for any loss that the holder thereby suffers (Bill s-cl. 66(1)).

312. The duty of the deposit bank has been cast in a form that attempts to balance the interests the holder of the cheque and the interests of the bank in performing its duty to effect presentment; an immediacy tempered, however, by regard to what is reasonably practicable in the circumstances of the particular case. For example, it is not envisaged that the clause would not prevent a deposit bank presenting cheques in 'batches' i.e. it would not be required to present a cheque as soon as it was collected. The habit of 'batching' would appear to be part of normal bank practice and accordingly within para. 66(3)(d).

313. Prompt response to requests. Where the bank upon which the cheque is drawn makes a request (see Bill s-cl. 62(5)) in relation to the cheque, the cheque will be deemed not to have been duly presented for payment unless, and until, the request is complied with (Bill s-cl. 66(2)).

314. This provision is designed to ensure that a deposit bank responds promptly to any request under Bill s-cl. 62(5). The s-cl. has the effect of nullifying the initial presentment so far as the deposit bank's duty under Bill cl. 66 is concerned. The making of the request, and related matters, are, however, factors to be taken into account in determining whether or not the deposit bank duly presented the cheque for payment, or ensured that the cheque was duly presented on its behalf as soon as was reasonably practicable (see para. 66(3)(e)).

315. Standard time for presentment. The clause does not provide an arbitrary standard time limit within which presentment must, in the absence of exceptional circumstances, be effected. The usefulness of such a time limit is doubtful. Any such time limit would have to apply not only in relation to the existing means by which presentment may be effected, but also in relation to the means of presentment that will become available in the future. Any time limit that is

appropriate for the existing means of presentment would be likely to be excessively long in relation to future means of presentment, because the time limit would need to be set having regard to the slowest of the presently available means of presentment. Moreover, even after the transitional period that will be necessary for banks to change over to the new means of presentment (a period that would present special problems in relation to an arbitrary standard time limit), there will always be a certain number of cases in which an arbitrary standard time limit could not be met. This could happen, for instance, by reason of geography. Not all these cases could properly be described as exceptional cases. There would also be machinery problems in providing an arbitrary standard time limit. An arbitrary standard time limit would, for example, have to take account of the effect of requests under Bill s-cl. 62(5) and post-dated cheques (see Bill s-cl. 61(2)).

316. Considerations as to whether presentment as soon as reasonably practicable. Instead, the Bill in s-cl. 66(3)) adopts the alternative approach of specifying the considerations to be taken into account in determining whether a bank duly presented a cheque for payment as soon as was reasonably practicable. The list of considerations specified in Bill s-cl. 66(3) is comprehensive. The considerations cover three kinds of matters:

- (a) the means of presentment chosen, the reasonableness of the choice and the usage of banks (Bill paras. 66(3)(a) to (d) inclusive);
- (b) the making of a request under Bill s-cl. 62(5) (if any) and the response (if any) to the request (Bill para. 66(3)(e)); and
- (c) any other facts of the particular case (para. 66(3)(f)).

317. The inclusion of the usage of banks in the relevant considerations (see Bill para. 66(3)(d) and Bill s-para. 66(3)(e)(viii)) will provide an objective standard (and, it is considered, the only relevant objective standard) against which the actions of a bank in a particular case may be judged and thereby ensure that the concept of a deposit bank duly presenting a cheque for payment, or ensuring that the cheque is duly presented on its behalf, as soon as reasonably practicable will achieve a considerable measure of certainty in practice. The inclusion of the usage of banks in the relevant considerations will, however, ensure that the concept of presentment being made as soon as is reasonably practicable will be sufficiently flexible to deal both with existing means of presentment and with those that will become available in the future. It will also be sufficiently flexible to ensure that different standard times are available at any given time for the different means of presentment that are available at that time and also to take account of the circumstances that, given the adoption of a particular means of presentment, will affect the time taken to effect presentment. It should, in addition, enable an orderly transition to be made from the existing means of presentment to new means of presentment, for example, presentment by particulars.

318. Action required of deposit banks. The action that Bill cl. 66 requires the deposit bank to perform as soon as is reasonably practicable is presentment of the relevant cheque for payment or ensuring that presentment is effected on its behalf. The cl. does not deal with the concept of dispatching a cheque (see MD cl. 42). The use of this other concept would introduce unnecessary complexity into the presentment process and would only blur the true nature of the deposit bank's duty. The clear duty of the deposit bank should be to either effect presentment or to ensure that presentment is effected on its behalf. If a cheque is dispatched but presentment is not effected and the cheque is returned to the deposit bank,

it should be under an obligation to take further steps to effect presentment. It should not be able to assert that it dispatched the cheque and that its obligation to its customer was thereby fulfilled.

Cl. 67 : Drawee bank to pay or dishonour promptly

319. Once a cheque has been presented, a drawee bank will be under a duty to either pay or dishonour the cheque as soon as is reasonable practicable. If it fails to do so the bank, unless it has become aware of a defect in the holder's title or that the holder has no title to the cheque:

(a) may not dishonour the cheque; and

(b) will be liable to pay the cheque to the holder.

(Bill s-cl. 67(1))

320. The drawee bank's duty has been cast in a form that attempts to balance the interests of the holder of the cheque in having the cheque paid or dishonoured at the earliest possible time and the interests of the bank in ensuring that payment of the cheque is not made without, for example, its customer's mandate and funds to meet the cheque.

321. The cl. suggests a strong degree of immediacy in the banks' duty to pay or dishonour without specifying an actual time limit; an immediacy tempered, however, by the need to allow the bank adequate opportunity to properly discharge its duty to its customer and protect its own interests.

322. Under s-cl. 67(1), time runs against the bank from the moment of presentment. If a cheque is presented, for example, by particulars and a request is made by the drawee bank under Bill s-cl. 62(5), the drawee bank must still pay or dishonour the cheque as soon as is reasonably practicable after the initial presentment by particulars. This means that,

if the drawee bank unreasonably makes a request under Bill s-cl. 62(5) for unnecessary particulars, it may fail to fulfill its duty under Bill s-cl. 67(1).

323. The making of the request, the means by which the request is made and the time taken by the collecting bank to comply with the request and the nature of the particulars furnished are accordingly matters taken into account under Bill para. 67(2)(f), in determining whether or not the drawee bank paid or dishonoured the cheque as soon as was reasonably practicable.

324. It has been decided not to impose an arbitrary standard time limit for the payment or dishonour of a cheque for the same reasons it was decided it would be inappropriate to require a collecting bank to present a cheque within a specified time. MD s-cl. 43(2) requires, in other than exceptional cases, a notice of dishonour to be dispatched within a day of the cheque being presented for payment.

325. The considerations to be taken into account in determining whether a bank has paid or dishonoured a cheque as soon as was reasonably practicable are set out in Bill s-cl. 67(2) (no equivalent in BEA or MD). These considerations fall generally into the following groupings:

- (a) the means by which the cheque was presented and that were available for paying or dishonouring the cheque;
- (b) the usage of banks in relation to the payment and dishonour of similar cheques;
- (c) the circumstances surrounding the making of, and the response to, a request under s-cl. 62(5); and
- (d) any other facts of the particular case.

Cl. 68 : How paid cheque to be dealt with

326. A drawee bank will have the right to possession of a paid cheque in the following circumstances:

- (a) where a cheque has been presented to it for payment - the right to possession operates against the person presenting the cheque (Bill s-cl. 68(1)); and
- (b) where the bank has made a request under Bill s-cl. 62(5) for delivery of a cheque - in this case the right to possession operates against the collecting bank and any bank on whose behalf the collecting bank duly presented the cheque (Bill s-cl. 68(2)).

327. A collecting bank or other bank (referred to in cl.68 as the 'relevant bank') will be required to retain possession of a paid cheque for a prescribed period where it has effected presentment of the cheque by particulars (Bill s-cl. 68(3)).

328. However, even in these circumstances a drawee bank will be entitled to possession of the cheque if, during the prescribed period, it asks the relevant bank to deliver the cheque to it (Bill s-cl. 68(4)). At the end of the prescribed period, the relevant bank will be required to deal with the cheque in accordance with the Regulations.

329. The right of a drawee bank to possession of a cheque will not affect the right of a person to claim possession of the cheque from that bank. BEA s-sec. 57(4) provides that, where the holder of a bill presents it for payment, he shall exhibit it to the person from whom he demands payment, and when the bill is paid, the holder shall forthwith deliver it

up to the party paying it. In the vast majority of the situations that will be covered by Bill s-cl. 68(1) and (2) the cheque will, in fact, already be in the physical possession of the drawee bank when it is paid. This will be the case where, for example, the cheque was presented to the drawee bank through a clearing house. In such circumstances, it would seem strange to require, as BEA as s-sec. 57(4) does, the holder of the cheque to deliver it up to the drawee bank. The delivery would have to be a constructive delivery if there were to be a delivery effected at all.

330. Bill s-cl. 68(1) and (2), therefore, adopt the approach of entitling the drawee bank, as against the person who presented the cheque for payment or the relevant bank, to possession of the cheque. If the cheque is exhibited to the drawee bank without the bank gaining possession of the cheque, the drawee bank could, by virtue of whichever of the s-cl. is applicable, demand that the relevant bank deliver the cheque up to it. If the cheque is exhibited to the drawee bank in such a way that the drawee bank gains physical possession of the cheque, the clause entitles the drawee bank, as against the person who presented the cheque or the relevant bank, as the case may be, to retain possession of the cheque.

331. If a person other than the drawee bank pays a cheque then the person paying will, as against the person paid, have the right to possession of the cheque (Bill s-cl. 68(6)).

332. Bill cl. 68 does not deal with a drawer's rights in relation to paid cheques. The Bill leaves those rights to be governed by the common law. At common law the drawer is entitled to ownership of a cheque once it has been paid - see Charles v. Blackwell (1977) 2 C.P.D. 151 at pp. 162-63).

Cl. 69 : Dishonour defined

333. A cheque is dishonoured if:

- (a) the cheque is duly presented for payment and payment is refused; and
- (b) the refusal is communicated by the drawee bank to the holder or the person who presented the cheque on the holder's behalf.

(Bill cl. 69)

334. The clause is based on BEA para. 52(1)(a) and MD para. 41(1)(a). However, cl. 69 does not follow the BEA or MD provisions in defining dishonour as occurring in a situation in which a cheque is duly presented for payment and payment 'cannot be obtained'. Under the Bill, if the drawee bank fails either to pay or dishonour the cheque as soon as is reasonably practicable, it may not dishonour the cheque and is liable to pay the sum ordered to be paid by the cheque to the holder of the cheque (Bill s-cl. 67(1)).

335 Where payment is not made by the drawee bank as soon as is reasonably practicable and there is no action or statement by the drawee bank that amounts to a refusal to pay, Bill s-cl. 67(1) will ensure that payment of the cheque can be obtained by the holder. In such a case, Bill s-cl. 67(1) will achieve a result (payment) opposite to the result (dishonour) that would be achieved by BEA para. 52(1)(a) and MD para. 41(1)(a) (see also para. 3-507(1)(a) of the UCC).

336. Like the MD, the Bill does not contain any equivalent to BEA para. 52(1)(b). This provision states that dishonour occurs if presentment is excused and the bill is overdue and unpaid. There are a number of difficulties with including a similar provision in the Bill.

337. Firstly, the concept of an 'overdue' bill would seem to be inapplicable to bills of exchange payable on demand, including cheques (see Mackenzie v. Rees (1941) 65 C.L.R. 1 at pp. 15-17 for the rationale for the requirement in relation to bills that are not payable on demand). It is to be noted that BEA sec. 19, which deals generally with when a bill is due, does not apply in relation to a bill that is payable on demand. Such a bill is due from the time when it is issued. BEA s-sec. 41(13), however, contains a special provision as to when a bill payable on demand is overdue for the purpose of determining the rights acquired upon the transfer of the bill by negotiation. It would seem that it is only for this purpose that an overdue bill should be equated with a stale cheque. Moreover, inclusion of the requirement in the Bill is undesirable on practical grounds. It would have the effect of requiring the holder of a cheque which met the other requirements of the provision to wait until the cheque became a stale cheque (which could take up to 15 months) before he could give notice of dishonour and enforce payment of the cheque;

338. Secondly, the meaning of the term 'excused' in BEA para. 52(1)(b) is unclear. The para. could be construed as applying only in cases in which presentment is 'dispensed with' under s-sec. 51(2), only in cases in which delay in presentment is 'excused' under sec. 51(1) or in cases of both kinds. The first construction of para. 52(1)(b) would seem to be the correct one. It is possible, however, that that s-sec. may also have been intended to apply in cases in which delay in presentment is 'excused' (see Byles p. 120 where the suggestion seems to be made that the terms 'dispensed with'

and 'excused' are used interchangeably in the BEA). It is difficult to see why the para. should, as a matter of principle, apply in cases in which delay in presentment is 'excused'. As a cheque to which the para. applies is to be treated as having being dishonoured, it would seem that, if it applies in cases in which delay in presentment is 'excused', the result may be that that presentment of the cheque is in fact 'dispensed with'. In other words, BEA para. 52(1)(b) may have the effect of turning the excusing of delay in presentment into a complete dispensing with presentment. It is difficult to see any justification for such a result and it is not consistent with the express provision made by the last sentence in BEA s-sec. 51(1) to the effect that, when the cause of the delay ceases to operate, the cheque is to be presented for payment as soon as is reasonably practicable. When delay occurs the holder should either be required to persevere or be entitled to treat the cheque as having been dishonoured: the Bill should not require him to do the former and permit him to do the latter.

Manning Bill cl. 74

339. The Bill contains no equivalent to MD cl. 74 which provides:

'74 - (1) Where a bank upon which a cheque is drawn does not honour such cheque which the customer was entitled to require it to honour and it appears to the Court before which any proceedings in relation thereto are taken that such bank is or may be liable in respect thereof, but that it has acted honestly and reasonably and that having regard to all the circumstances of the case it ought fairly to be excused for not honouring the cheque, the Court may relieve it either wholly or partly from its liability upon such terms as the Court thinks fit.

(2) The burden of providing the matter referred to in the preceeding sub-section shall be upon the bank.'

340. MD cl. 74 was apparently included in the MD to offset the effect of the strictness of the rule in MD s-cl. 43(2) that a drawee bank must give notice of dishonour as soon as is reasonably practicable after presentment and, in other than exceptional circumstances, must be despatched by the day after the day of presentment (see Manning Report paras. 230-240).

341. As the Bill does not impose such strict a time limit within which a cheque must be dishonoured (see Bill s-cl. 67(1) and as it allows a wide variety of circumstances to be taken into account in determining whether a cheque has been dishonoured as soon as is reasonably practicable, it is not considered an equivalent to MD cl. 74 is necessary.

Cl. 70 : Drawer and indorsers of cheque liable whether or not given notice of dishonour

342. A drawer or an indorser of a cheque that has been dishonoured will be liable on the cheque whether or not the person is given notice by any person of the dishonour.

(Bill cl. 70)

343. Notice of dishonour There is no provision in the Bill requiring that notice of dishonour be given to the drawer or indorser of a cheque in order to render the drawer or indorser liable on the cheque. As Paget points out, it is anomalous that the drawer of a cheque be entitled to notice of dishonour as it is the drawer himself who gives the undertaking that his cheque will be paid or that he will pay the amount of the cheque when it is presented (unless presentment is excused). To require notice to be given in order to give effect to that undertaking is to diminish the value of the primary undertaking.

344. It is also considered that notice to indorsers is both undesirable and unnecessary. The following considerations are relevant to the dispensing of notice in relation to indorsers of cheques:

- (i) the holder will normally go to the indorser for payment once the cheque is dishonoured as it is the indorser who will be the party indebted to the holder and therefore the indorser will receive notice;
- (ii) a small percentage of cheques are actually indorsed; and
- (iii) there appear to be no substantial reasons to retain the notice provisions for the indorser when he is not under an obligation to give notice to the drawer, i.e. the indorser's rights against the drawer will no longer depend upon him giving notice and therefore he will not be disadvantaged by not receiving formal notice himself.

BILL : PART V - LIABILITIES ON CHEQUES

345. Part V of the Bill (cls. 71 to 87) deals with liabilities on cheques.

346. The Part is divided into the following Divisions:

- (a) Division 1 - Liabilities of parties; and
- (b) Division 2 - Discharge of liabilities of parties.

Division 1 - Liabilities of parties

347. Division 1 of Part V of the Bill (cls. 71 to 77) deals with the liabilities of the parties to a cheque.

Cl. 71 : Liability of drawer

348. Subject to certain provisions of the Bill (cls. 17(1), 50, and 60(1)), the drawer of a cheque, by drawing the cheque, will undertake:

- (a) that, on due presentment, the cheque will be paid according to its tenor as drawn; and
- (b) that if:
 - (i) the cheque is dishonoured when presented; or
 - (ii) presentment is dispensed with by virtue of Bill para. 59(a) and the cheque is unpaid after its date has arrived,

the drawer will compensate the holder of the cheque or an indorser who is compelled to pay the cheque.

(Bill cl. 71)

349. This provision is based on BEA para 60(1)(a) and MD para 52(1)(a) except that the words 'as drawn' have been added after 'tenor'. It may be queried how the words 'as drawn' will apply in cases where the cheque starts out as an inchoate instrument or is altered after it has been drawn with the agreement of the drawer. It is assumed that, in such a case, the words 'its tenor as drawn' will be construed as meaning 'its tenor as at the time of signing by the drawer and as completed or altered in accordance with the Bill'.

Cl. 72 : Estoppel against drawer

350. The drawer of a cheque, by issuing it, will be estopped from denying to a holder in due course that the cheque was, when the drawer issued it, a valid cheque.

(Bill cl. 72)

351. The provision uses the term 'estopped' rather than 'precluded' as in BEA para. 60(1)(b) which provides for estoppel against a drawer.

352. The BEA approach regarding estoppel against a drawer has not been followed in the Bill. Rajanayagam (pp. 82-83) says of the BEA provision:

'Section 60(1)(b) merely reinforces what is covered elsewhere in the Act. It will be recalled that by s. 12(3) where the payee is fictitious or nonexistent, the bill will be regarded as being payable to bearer and the existence of a forged indorsement in such a case can be disregarded. It will be remembered also in determining whether the payee is fictitious or nonexistent, the intention of the drawer is crucial. The purpose of this provision is to prevent a drawer attempting to avoid liability by raising the defence of the nonexistence of the payee.'

353. Although Rajanayagam would seem to be correct in his analysis of the intended purpose of the provision (see Chalmers p. 185, citing Collis v. Emett (1790) 1 H.Bl. 313; 126 E.R. 815; Phillips v. Im Thurn (1865) 18 C.B. (N.S.) 694, 701; 144 E.R. 617, 620 and Chamberlain v. Young [1893] 2 Q.B. 206, per Bowen L.J.), it is difficult to see what would be achieved by the attainment of the purpose. If a cheque is drawn to the order of a non-existent person, it is arguable that the 'holder' of the cheque would wish to prove that the payee was non-existent so as to make the cheque payable to bearer and thereby establish his title to the cheque. In such a case, it would seem to be strange for the drawer to be estopped from asserting something that not only was not to the prejudice of the 'holder' but was rather something that it was essential for the 'holder' to establish in an action on the cheque against the drawer. This is particularly so when the non-existence of the payee is a matter of the drawer's intention. It could be that what was sought to be achieved by the para. was to prevent the drawer from denying that what he brought into existence was intended to be a valid cheque (see Bill para. 74(1)(b)). It could be argued that, if the drawer specifies a non-existent person as payee, it may be that he did not intend to draw a valid cheque at all.

354. For the foregoing reasons, the Bill adopts the approach of merely providing that a drawer is estopped from denying to a holder in due course the validity of the cheque when issued.

Cl. 73 : Liability of indorser

355. Subject to certain provisions of the Bill (cls. 17(2), 59, and 60(2)), an indorser of a cheque, by indorsing the cheque, will undertake:

- (a) that, on due presentment, the cheque will be paid according to its tenor as indorsed by the indorser; and
- (b) that if:
 - (i) the cheque is dishonoured when presented; or
 - (ii) presentment is dispensed with by virtue of Bill para. 59(a) and the cheque is unpaid after its date has arrived,

the indorser will compensate the holder of the cheque or a subsequent indorser who is compelled to pay the cheque.

(Bill cl. 73)

356. This provision is based on BEA para. 60(2)(a) and MD para. 52(2)(a) except that:

- (a) the provision will be subject to various other provisions in the Bill, e.g. for an indorser of a cheque to negative or limit the indorser's liability on the cheque (Bill para. 17(2)(a));
- (b) the words 'as indorsed by the indorser' have been added after the word 'tenor'. This change will clarify the meaning of BEA para. 60(2)(a) as some debate has arisen as to whether the words 'according to its tenor' refers to the tenor of the bill as drawn or at the time of its indorsement. Chalmers inclines to the latter view (p. 186)

357. Bill para. 73(b) will make it clear that the Chalmers view is the correct one.

Cl. 74 : Estoppels against indorser

358. An indorser of a cheque, by indorsing the cheque, will be estopped:

- (a) from denying to a holder in due course the genuineness and regularity of the drawer's signature and all previous indorsements; and
- (b) from denying to the indorsee to whom the indorser indorsed the cheque, a subsequent indorsee or to a holder who is not an indorsee that the cheque was, at the time when the indorser indorsed it, a valid and undischarged cheque and that the indorser had, at that time, a good title to the cheque.

(Bill s-cl. 74(1))

The reference in this provision to a holder in due course of the cheque will include a reference to a person who, but for a signature being written or placed on the cheque without the authority of the person whose signature it purports to be, would be a holder in due course (Bill s-cl. 74(2)).

359. Bill cl. 74 is based on BEA paras. 60(2)(b) and (c) and on MD paras. 52(2)(b) and (c) except that:

- (a) the provision uses the term 'estopped' rather than the BEA and MD term 'precluded';
- (b) the BEA and MD word 'then' has been changed to 'at that time';
- (c) the new provision makes it clear that the term 'a holder in due course' in Bill para. 74(1)(a) would include a person who would be a holder in

due course but for the fact the cheque contained an unauthorized signature (see Bill s-cl.74(2)); and

- (d) unlike BEA para.60(2)(c), the estoppel created by Bill cl. 74 will be available to any subsequent holder of a cheque, i.e., including the indorsees and bearers of cheques. The BEA provision was restricted to indorsees of cheques.

Cl. 75 : Stranger signing cheque liable as indorser

360. Background. The BEA provisions dealing with a stranger (sec.61 - see also MD cl. 53) have been the subject of a considerable number of cases that have expanded and developed the somewhat cryptic statement of the law contained in the sec. (see Riley pp. 142-146 Byles pp. 184-189 and Rajanayagam pp. 88-92). In view of these developments, it is considered that it would be misleading to simply reproduce the BEA provision in the Bill. Accordingly, the Bill attempts (in cl. 75) to restate some of the main principles that have been developed in the cases.

361. Stranger. Where a person signs a cheque, otherwise than as drawer or indorser, intending to become liable on the cheque, the provisions of the Bill (other than cls. 25, 26, 27 and 28(2)) will apply, mutatis mutandis, to the person as if that person were an indorser and the signature were an indorsement (Bill s-cl. 75(1)).

362. Presumption of intention. For the purpose of Bill s-cl. 75(1), a simple signature on a cheque will create an irrebuttable presumption in favour of a holder in due course and a rebuttable presumption in favour of a holder who is not a holder in due course that the person who signed the cheque did so intending to become liable on the cheque (Bill s-cl. 75(2)). Under the cl., a stranger to a cheque who signs the

cheque with such an intention will incur the liability of an indorser of the cheque. The result produced by the cl. would seem to be in accordance with the principles underlying the BEA, although it would seem that the better view is that BEA sec. 61 itself only applies in relation to a holder in due course (see H. Rowe Co. Pty. Ltd. v. Pitts [1973] 2 N.S.W.L.R. 159, 168). It is difficult to see any justification for limiting the cl. to a holder in due course.

363. S-cl. 75(2) uses the test of apparentness that is used in Bill para. 78(1)(c). The use of this test gives effect to the intention behind the clause, namely, that a person taking a cheque that a stranger has indorsed can safely act on the assumption that the stranger is liable to that person as an indorser unless it is apparent, from the cheque itself, that the stranger is not liable on the cheque, e.g. the signature is merely that of a witness.

Cl. 76 : Measure of damages on dishonour

364. Where a cheque is dishonoured, the holder of the cheque will be able to recover damages from any person liable on the cheque (Bill s-cl. 76(1)). This provision is subject to Bill s-cl. 76(2) which provides that, where an action or proceeding is brought for the recovery of damages under s-cl. 76(1), the court may, in its discretion, direct that interest payable under s-cl. 76(1) be withheld in whole or in part.

365. Measure of damages. The measure of damages in respect of a cheque dishonoured in Australia will be the sum ordered to be paid by the cheque together with any prescribed interest, unless the court exercises its discretion under s-cl. 76(2) to order that the payment of interest be withheld (Bill s-cl. 76(1)).

366. BEA para. 62(a) provides that, if a cheque is dishonoured in Australia, the sum ordered to be paid by the

cheque (together with interest) may be recovered as damages. BEA para. 62(b) provides that, if a cheque is dishonoured outside Australia, the amount of the re-exchange of the cheque (together with interest) may be recovered as damages. Bill para. 76(1)(b) follows the BEA approach in respect of cheques dishonoured outside Australia. The para. is also subject to the court's discretion under Bill s-cl. 76(2).

367. The 'amount of re-exchange' is the amount of Australian currency needed to purchase the required amount of foreign currency on the day of the dishonour plus the expenses of the purchase of that currency (see Suse v. Pompe (1860) 8 C.B.(N.S.) 538, at pp. 563-565).

368. Regulations. The Bill provides for the Regulations to deal with the interest component of damages. It is expected that the Regulations will specify the period in respect of which interest will be payable and the interest rate applicable to that period. It is probable that that period will be from the date of dishonour of the cheque to the date on which judgment is given in the relevant court action.

Cl. 77 : Transferor by delivery

369. Definition. A transferor by delivery will be defined as a holder of a cheque payable to bearer who transfers the cheque by negotiation without indorsing it (Bill s-cl. 77(1) - based on BEA s-sec. 63(1) and on MD s-cl. 55(1)).

370. Not liable. A transferor by delivery will not be liable on the cheque (Bill s-cl. 77(2) - based on BEA s-sec. 63(2) and on MD s-cl. 55(2)).

371. Where a transferor by delivery transfers a cheque to a transferee for value, the transferor by delivery will be taken to warrant:

- (a) that the cheque is what it purports to be;
- (b) that the transferor by delivery has a right to transfer it; and
- (c) that the transferor by delivery is not aware of any fact that renders the cheque valueless.

(Bill s-cl. 77(3) - based on BEA s-sec. 63(3) and on MD s-cl. 55(3))

Division 2 - Discharge of liabilities of parties

372. Background. Division 2 of Part V of the Bill (cls. 78 to 87) deals with the discharge of the liabilities of the parties to a cheque.

Cl. 78: When cheque discharged

373. Discharge of any cheque. A cheque will be discharged if one of three conditions is met:

- (a) firstly, if the cheque is paid in due course by the bank on which the cheque is drawn (Bill para. 78(1)(a));
- (b) secondly, if the holder of the cheque absolutely and unconditionally renounces (see Bill cl. 80) the holder's rights against the drawer or all persons liable on the cheque (Bill para. 78(1)(b)). This provision is based on BEA s-sec. 67(1) except that:
 - (i) the renunciation must be of rights 'against the drawer or all persons liable on the cheque' rather than 'against the acceptor'; and

- (ii) the holder will be able to renounce his rights at any time.

Cf UCC sec. 3-605 which expressly provides that the cancellation and renunciation of an instrument may be made without consideration; also seems to require the relevant instrument to be surrendered in order for the cancellation or renunciation to be effective; and

- (c) thirdly, if the holder intentionally cancels (see Bill cl. 82) the cheque or the drawer's signature on the cheque and the cancellation is apparent from the cheque (Bill para. 79(1)(c)). This provision is based on BEA s-secs. 68(1) and (2) except that:

- (i) there is no reference to cancellation by the holder's agent (agency relationships are left to be governed by the common law); and

- (ii) the BEA provides that the cancellation must be apparent 'on the face of the cheque'. These words do not seem very apt in the case of a cheque that is cancelled by being destroyed, e.g., by being torn up (see Ingham v. Primrose (1859) 7 C.B. (N.S.) 82; 141 E.R. 745). Accordingly, the para. has been revised to require that the cancellation be apparent 'from the cheque'.

374. A cheque will also be discharged if it is fraudulently and materially altered by the holder. What constitutes a material alteration is set out in cl. 3(8) (Bill cl. 79(2)).

375. This provision is based on the first two lines of BEA s-sec. 69(1) except that:

- (a) a cheque will be 'discharged' as opposed to the BEA concept of being 'avoided'; and
- (b) the provision introduces the concept of fraud in determining whether a cheque is discharged on the grounds of material alteration. This brings the provision into line with the UCC approach in this area.

376. Nothing in Bill cl. 78 will affect the discharge of a cheque otherwise than in accordance with that cl. (Bill s-cl. 78(3)).

377. It should be noted in relation to the operation of Bill cl. 78 that MD cl. 60 provides that 'if a cheque is not otherwise discharged, the drawer's liability endures according to the appropriate law governing limitation of actions'. It is arguable that that draft cl. is misconceived. The cl. appears to be based on the assumption that a cheque is discharged when, by virtue of the appropriate law relating to limitation of actions, the drawer is no longer 'liable' on the cheque. This is not, however, correct. Generally speaking, the effect of the expiration of a limitation period upon a legal right is that the ability to enforce the right by action or set-off is taken away; the right itself remains unaffected and can be enforced by any other available means (see Halsbury's Laws of England (4th ed.), Vol. 28, p. 290 and Weaver and Craigie pp. 155-156).

378. The Bill does not, therefore, include a provision along the lines of MD cl. 60.

Cl. 79 : Payment in due course

379. A cheque will be paid in due course if:

- (a) the cheque is paid;
- (b) to the holder of the cheque;
- (c) in good faith; and
- (d) without notice of any defect in the title of the holder or that the holder had no title to the cheque.

(Bill cl. 79 - based on second sentence of BEA s-sec. 64(1) and MD s-cl. 56(1) except that equivalent words to those in the BEA provision ('at or after the maturity of the bill') have not been included as there would not seem to be any reason why, in principle, the drawer of a cheque should not, in paying a post-dated cheque before its date, be taken to pay the cheque in due course (but see Chalmers p. 202). The position of a bank is quite different. If a bank pays a post-dated cheque before its date, it is arguable that it would breach the mandate conferred on it by its customer).

Cl. 80 : Renunciation of rights against drawer or all persons liable on cheque

380. The renunciation by the holder of a cheque of the holder's rights against the drawer or all persons liable on the cheque, will not discharge the cheque unless the renunciation is completed by the delivery of the cheque to the drawer by the holder in order to give effect to the renunciation.

(Bill cl. 80)

381. A renunciation will be able to be either in a written or an oral form so long as it is completed by delivery of the cheque to the drawer and the delivery is made with the requisite intention.

382. This provision is based on BEA s-sec. 67(2) except that it has been drafted in similar terms to Bill para. 78(1)(b) to permit the holder of the cheque to renounce his rights against all persons liable on the cheque as well as against the drawer of the cheque.

Cl. 81 : Cancellation of cheque or drawer's signature

383. The cancellation of a cheque, or of the drawer's signature on a cheque, will not discharge the cheque if the cancellation is made under a mistake of fact.

(Bill s-cl. 81(1))

384. Where a cheque, or the drawer's signature on a cheque, has been cancelled, the cancellation will, unless the contrary is proved, be presumed:

(a) to have been made intentionally by a holder of the cheque; and

(b) not to have been made under a mistake of fact.

(Bill s-cl. 81(2))

385. Bill s-cl. 81(1), which is based on the first part of BEA s-sec. 68(3), does not follow that provision in including a statement to the effect that an unintentional cancellation is inoperative. Such a statement is considered unnecessary. An unintentional cancellation would not meet the requirements of Bill para. 78(1)(c) and would, therefore, be inoperative. Similarly, the s-cl. does not include a statement to the

effect that a cancellation made without the authority of the holder is inoperative.

386. Bill s-cl. 81(2) does not adopt the phrase 'appears to have been cancelled' used in BEA s-sec. 68(3). There would appear to be no reason why the presumption in the s-cl. should be brought into operation unless the cheque, or the drawer's signature on the cheque, is cancelled, that is, bears the physical appearance of cancellation. The matters to which the presumption relates are the other (non-physical) requisites for an effective cancellation.

387. Bill s-cl. 81(2) has been put in the form of a presumption rather than a provision relating to burden of proof. This has been done for consistency with other provisions of the Bill, e.g. Bill s-cl. 46, 48 and 51.

388. Bill s-cl. 81(2) does not specifically mention that the cancellation of a cheque, or the drawer's signature on a cheque, is presumed to be made with the authority of a holder (see the comments made above in relation to Bill para. 78(1)(c) on the subject of cancellation by an agent). Bill para. 78(2)(a) creates a presumption that a cancellation of a cheque, or the drawer's signature on a cheque, has been intentionally cancelled by a holder of the cheque. It is not limited to the current holder of the cheque. The presumption would not be of much substance if it were limited to the current holder and, in any case, it is difficult to see how, in the absence of special circumstances, it could be presumed that a cancellation was made by a particular holder.

Cl. 82 : Effect of discharge of cheque

389. Effect of discharge. Subject to s-cl. (2), (3) and (4), when a cheque is discharged under s-cl. 78(1) or (2), all rights on the cheque will be extinguished (Bill s-cl. 82(1)).

390. BEA. Although the BEA sets out fairly exhaustively the circumstances in which a bill of exchange is discharged, it does not, with one exception, state what effects flow from the discharge of a bill. The exception is BEA para. 41(1)(b) which provides that a bill of exchange that is negotiable in its origin continues to be negotiable until it is discharged. Consequently, a bill of exchange that has been discharged may no longer be transferred by negotiation. The same result is achieved by Bill s-cl. 39(1).

391. UCC. The UCC approach to discharge is as follows:

- (a) UCC sec. 3-601 does not refer to the discharge of a bill of exchange but refers only to the discharge of parties on the bill. The rationale for the UCC approach is that a negotiable instrument is in itself merely a piece of paper bearing writing, and strictly speaking incapable of being discharged (see *Anderson v. 6*, p. 524); and
- (b) the UCC largely avoids the detailed provisions of the BEA dealing with the discharge of a bill of exchange. The UCC s-sec. 3-601(3) provides that the liability of all parties is discharged when any party who has himself no right of action or recourse on the instrument either re-acquires the instrument in his own right or is discharged under a provision of the Code. The principle underlying this provision is that all parties to an instrument are discharged when no party is left with rights against any other party on the instrument (see *Anderson v. 6* p. 524).

392. Holder in due course. Discharge of a cheque by renunciation of a holder's rights against the drawer or all persons liable on the cheque will not, however, affect the rights of a person who, but for the discharge, would be a holder in due course, being a person who has no notice of the renunciation. (Bill s-cl. 82(2)).

393. BEA. The position under the BEA of 'a holder in due course' of a bill of exchange that has been discharged is somewhat uncertain. Chalmers (p. 198) takes the view that, if a discharged bill comes into the hands of a holder in due course, he acquires no right of action on the instrument. It has, however, been argued (see Kadirgamar (1959) 22 M.L.R. 146) that Chalmers' view is incorrect in at least some cases. The better view would seem to be that Chalmers' view is correct, although perhaps not for the reasons given by him. Under BEA para. 41(1)(b), a bill of exchange ceases to be capable of being transferred by negotiation when it is discharged. Under BEA s-sec. 34(1), a person can only become a holder in due course of a bill of exchange if he takes the bill by transfer by negotiation (see Bill cl. 50). As a person who takes a bill of exchange that has been discharged cannot take it by transfer by negotiation, he cannot become a holder in due course. The position is perhaps even clearer under the Bill because, unlike the BEA, it is not possible to have a cheque that cannot be transferred by negotiation.

394. UCC. The UCC sec. 3-602 provides that the discharge of a party under the Code is not effective against a subsequent holder in due course unless the holder in due course has notice of the discharge when he takes the instrument. The section is based on the principle that any discharge of a party under the UCC is a personal defence of the party, which is cut off when a subsequent holder in due course takes the instrument without notice of the defence (see Anderson v.6 p. 535).

395. Rights of a holder. A cheque which has been fraudulently and materially altered by the holder is discharged (see cl.78(2)). A person who would be the holder of a cheque but for the discharge by virtue of the alteration will maintain the right to enforce payment, according to the tenor of the cheque as altered, against:

- (a) the person who made the alteration;
- (b) a person who authorized or agreed to the alteration; or
- (c) a person who indorsed the cheque after such alteration.

(Bill para. 82 (3)(a))

396. This provision is based on the exception in BEA s-sec. 69(1) except that:

- (a) the provision has been paragraphed to make it more readable; and
- (b) the provision separates the case of a person who actually makes an alteration from the clearly distinct case of a person who authorizes or agrees to a material alteration made by another person.

397. Rights of a holder in due course. Where a cheque has been discharge by virtue of an alteration of the cheque and the alteration is not apparent, a holder in due course may enforce payment of the cheque, according to its original tenor, against any person as if the cheque had not been discharged.

(Bill para. 82(3)(b))

The provisions of s-cl. 82(1) will not impliedly limit the effects of the discharge of a cheque (Bill s-cl. 82(4)).

Cl. 83 : When indorser discharged

398. Discharge from liability. An indorser will be discharged from liability on the cheque if:

- (a) the holder of the cheque, at any time, absolutely and unconditionally renounces the holder's rights against the indorser. This is subject to the requirement that the renunciation by the holder must be in writing signed by the holder (Bill cl. 84) (Bill para. 83(1)(a) - based on BEA s-sec. 67(3) and MD s-cl. 57(3)); or
- (b) the holder of the cheque intentionally cancels the signature of the indorser on the cheque and the cancellation is apparent from the cheque. This is subject to the requirement that the cancellation by the holder not be made under a mistake of fact (Bill s-cl. 85(1)) (Bill para. 85(1)(b) - based on BEA s-sec. 68(2) (first sentence) and MD s-cl. 58(2)).

399. Position of indorser. Where an indorser of a cheque is discharged from liability on the cheque by cancellation, any indorser who would have had a right of recourse against the indorser first mentioned will also be discharged from liability on the cheque (Bill s-cl. 83(2) - based on second sentence of BEA s-sec. 68(2) and MD s-cl. 58(2)).

400. Savings. Nothing in Bill cl. 83 will affect the discharge of an indorser otherwise than in accordance with the clause (Bill s-cl. 83(3)).

Cl. 84 : Renunciation of rights against indorser

401. The renunciation of the holder's rights against an indorser will not discharge the indorser unless the renunciation is in writing signed by the holder.

(Bill cl. 84 - based on BEA s-sec. 67(3) and MD s-cl. 57(3))

402. Although BEA s-sec. 67(3) refers to a renunciation under that s-sec. being made 'in like manner' to a renunciation under BEA s-sec. 67(1), it would seem that a renunciation under BEA s-sec. 67(3) cannot be made by delivery of the cheque (see Riley p. 168 and Byles p. 145).

Cl. 85 : Cancellation of indorser's signature

403. Mistake of fact. The cancellation of a signature of an indorser of a cheque will not discharge the indorser if the cancellation is made under a mistake of fact (Bill s-cl. 85(1)).

404. Presumption. Where the signature of an indorser on a cheque has been cancelled, there will be a presumption that such cancellation was made intentionally by a holder and not under a mistake of fact (Bill s-cl. 85(2)).

Cl. 86 : Effect of discharge of indorser

405. Where an indorser of a cheque is discharged under Bill s-cl. 83(1) or (2), all rights on the cheque against the indorser will be extinguished (Bill s-cl. 86(1)).

406. In addition to this, where an indorser is discharged by the renunciation of the holder's right against the indorser or by the renunciation of the holder's rights against an indorser against whom the first - mentioned indorser would have had a right of recourse and a person takes the cheque

without notice of the renunciation, a person may enforce payment of the cheque as if the first-mentioned indorser had not been discharged (Bill s-cl. 86(2)).

Cl. 87 : Effect of payment by drawer or indorser

407. Where a cheque is paid by a drawer or an indorser, the cheque will not be discharged. Furthermore, if that cheque:

(a) is a cheque payable to order; and

(b) is not indorsed to the drawer or an indorser,

the drawer or indorser will acquire the right to have the person who was paid indorse the cheque to the drawer or indorser so as to transfer the cheque by negotiation to the drawer or indorser.

(Bill cl.87 - sec BEA s-sec. 64(2) and MD s-cl. 56(2))

BILL : PART VI - DUTIES AND LIABILITIES OF BANKS

408. Part VI of the Bill (cls. 88 to 96) deals with the duties and liabilities of banks (see Bill cl. 3 for definition of 'bank').

409. Part VI has the following Divisions:

(a) Division 1 - The drawee bank; and

(b) Division 2 - The collecting bank;

Division 1 - The drawee bank

410. Division 1 of Part VI of the Bill (cls. 88 to 94) deals with the duties and liabilities role of the drawee bank.

Cl. 88: Cheque not an assignment of funds

411. The mere drawing of a cheque does not amount to an assignment in favour of the payee of funds in the hands of the drawee bank available for payment of the cheque (Bill cl. 88).

412. This provision is based on BEA Sec. 58 and MD cl. 49 and has been included to specifically state the general principle that a cheque is a mere order to deliver money which requires further action to be taken before payment will be made. Thus if a cheque is not acted upon in the lifetime of the drawer it is worth nothing to the holder (see Re Swinburne [1926] Ch. 38). Cls. 89 and 90 cover examples of situations in which the mandate of the drawee bank to pay funds is withdrawn.

Cl. 89: Stale cheque

413. Where a cheque becomes a stale cheque, the duty and authority of the drawee bank to pay the cheque will be terminated (Bill s-cl. 89(1)).

414. However, this provision will not apply in relation to a cheque if:

- (a) the bank is obliged, by an agreement with the drawer of the cheque, to pay the cheque notwithstanding that it is a stale cheque; or
- (b) the drawer of the cheque directs the bank to pay the cheque notwithstanding that it is a stale cheque.

(Bill s-cl. 89(2))

415. Bill cl. 89 is based on BEA s-sec. 80(1) except that:

- (a) the two situations of agreement with the drawer and direction from the drawer have been separated; and
- (b) instead of providing that a bank 'may' refuse to pay a stale cheque as in the BEA provision, the Bill provides that the 'duty' and 'authority' of the bank to pay a stale cheque is 'terminated'.

416. Apart from the numerous cheques drawn in the first week or so of January that have obviously been dated as of the previous year by inadvertence, it appears that it is general banking practice at present for stale cheques not to be paid (see Weaver and Craigie p. 367). Accordingly, a bank that pays a stale cheque may not be acting in 'the ordinary course of business' for the purposes of the protective provisions of the Bill.

Cl. 90 : Countermand of payment and notice of death or mental incapacity

417. The duty and authority of a bank to pay a cheque drawn upon it will be terminated by:

- (a) countermand of payment;
- (b) notice of the drawer's mental incapacity to incur liability on the cheque; or
- (c) notice of the drawer's death.

(Bill s-cl. 90(1) - based on BEA sec. 81 and MD cl. 51 except that the Bill provides an additional circumstance (drawer's mental incapacity - see UCC sec. 4-405) in which the drawee bank's duty and authority to pay a cheque will be terminated. Moreover, Bill cl. 90 uses the word 'terminated' rather than 'determined' as in BEA sec. 81 as it is considered that the latter expression is somewhat dated).

418. Bill cl. 90, and BEA sec. 81 on which it is based, is perhaps somewhat cryptic. It refers to countermand of payment without specifying who is entitled to give the countermand or how the countermand is to be communicated to the bank. Similarly, it refers to notice of the customer's death without specifying the origin or form of notice to the bank. Consideration was given as to whether the cl. could be revised in order to make it less cryptic. However, as a considerable body of law has arisen on BEA sec. 81 (see Riley pp. 194-195; Paget pp. 313-317; Weaver and Craigie pp. 369-373; Rajanayagam pp. 168-172 and Falconbridge pp. 869-874), the BEA model has been adopted in the Bill so as not to inadvertently affect any established rules of law.

419. Bill para. 90(1)(c) will not apply in relation to a cheque if:

- (a) not more than 10 days has elapsed since the day on which the drawee bank received notice of the customer's death; and

- (b) the bank has not received a countermand of payment from a person who claims to be currently or prospectively entitled to administer the drawer's estate or a beneficiary of the drawer's estate.

(Bill s-cl. 90(2))

420. The Indian BLC Report (pp. 150-153) recommended that a bank should be able to pay a cheque, notwithstanding that the drawer of the cheque has died, for a period of 10 days after the bank learns of the customer's death. Sec. 4-405 of the UCC contains a similar provision, except that the period runs from the date of death rather than from the date of notice of death (note also sec. 75 of the Bills of Exchange Act 1908 (N.Z.)). As is explained in the Indian BLC Report (pp. 151 - 152), the main advantage of such a provision is that creditors who have been paid by cheque can, for a limited time, have the cheque processed as if the drawer were still alive. The alternative, which exists under the BEA, is that creditors must prove against the deceased's estate. This process can, of course, be a protracted one and the avoidance of such convoluted procedures would seem desirable. Bill cl. 90, therefore, allows for such a 'transitional' provision dealing with cheques that have been issued shortly before a customer's death.

Cl 91 : Protection of bank paying improperly raised cheque

421. Where:

- (a) a cheque is fraudulently altered, so as to increase the sum ordered to be paid by the cheque;
- (b) the alteration is the only material alteration of the cheque made fraudulently; and

- (c) the drawee, in good faith and without negligence, pays the cheque to the holder of the cheque;

the bank without prejudice to any other rights that it may have against the drawer, will be able to debit the drawer's account according to the tenor of the cheque as drawn.

(Bill cl. 91 - no equivalent provision in the BEA or MD)

422. The following points should be noted in relation to this provision:

- (a) Bill para. 91(a) refers to the sum ordered to be paid by the cheque rather than the amount of the cheque. This will bring the para. into line with other provisions of the Bill, e.g. cl. 15;
- (b) Bill para. 91(c) requires the bank to pay in good faith and without negligence rather than in good faith and in the ordinary course of business. It is noted that the Manning Report (see paras. 149-150) seems to suggest that the appropriate requirements for a paying bank to gain the benefit of the protective provisions is that the bank must have acted in good faith and in the ordinary course of business. It appears, however, that this recommendation was based upon the erroneous assumption that the legislation giving protection to banks has at all times required that a paying bank should act 'in good faith and in the ordinary course of business'. This would appear to be incorrect (see BEA sec. 86);

- (c) the cl. (see para. 91(b)) gives protection to bankers in cases in which a cheque that is altered as to the amount payable had previously had a fraudulent material alteration, e.g. a crossing had previously been added to the cheque and
- (d) the drawee bank will be able to take action against the drawer, e.g. for negligence or breach of contract, in addition to being able to debit the drawer's account.

Cl. 92 : Protection of bank paying crossed cheque in
accordance with crossing

423. Where a bank in good faith and without negligence pays a crossed cheque drawn upon it to a bank, the bank will be deemed to have paid the cheque in due course (Bill cl. 92). This provision is subject to Bill s-cl. 32(1) which deals with the effect of the drawer's signature being unauthorized.

424. Bill cl. 92 is based on BEA sec. 86 and MD cl. 66.

Cl. 93: Payment of crossed cheque otherwise than in
accordance with crossing

425. Liability for loss. Where a bank upon which a crossed cheque is drawn pays the cheque otherwise than to a bank, the bank will be liable to the true owner of the cheque for any loss that the true owner suffers as a result of the cheque having been paid otherwise than to a bank (Bill s-cl. 93(1)).

426. This provision is based on BEA s-sec. 85(2) and MD cl. 61.

427. Subject to the provisions of Bill s-cl. 32(1), where a cheque to which a crossing has been added is presented for payment to the drawee bank and the cheque does not appear, on its face, to have been a crossed cheque (that is, the crossing had been obliterated prior to presentment) and the bank pays the cheque in good faith and without negligence, the bank will not be under any liability by reason only of its failure to pay the cheque to a bank and will be deemed to have paid the cheque in due course (Bill s-cl. 93(2)).

428. The s-cl. is based on BEA s-sec. 85(3).

429. The following points should be noted on the operation of Bill s-cl. 93(2):

- (a) Bill para. 93(2)(a) requires that a cheque in relation to which s-cl. 93(2) applies must be a cheque to which a crossing has been added. Although it is not expressly stated in BEA s-sec. 85(3), it would seem clear that the s-sec. only operates in relation to a cheque to which a crossing has been added (see Slingsby v. District Bank Ltd. [1932] 1 K.B. 544, 567, per Romer L.J.);
- (b) Bill para. 93(2)(b) states what is understood to be the effect of BEA paras. 85(3)(a) and (b), namely, that the cheque, at the time of presentation, must not appear to be, or at any time to have been, a crossed cheque;
- (c) BEA s-sec. 85(3) would seem to have the effect of protecting both the paying and receiving bank when a specially crossed cheque is paid in good faith and without negligence to the wrong bank. As the Bill does not allow special crossings, this aspect of BEA s-sec. 85(3) has not been reproduced;
- (d) the extent of the protection given by BEA s-sec. 85(3) is unclear (see Riley p. 201 and Paget pp. 247-48). What is clear is that the s-sec. fully protects a bank that pays a crossed cheque in accordance with the s-sec. - the bank is entitled to debit the drawer's account with the amount of the cheque in spite of the breach of the drawer's mandate and is protected against

liability to the true owner (whether arising under BEA s-sec. 85(2) or at common law). However, it is possible, on what Paget (p. 248) calls 'a somewhat forced construction', to regard BEA s-sec. 85(3) as also protecting the drawer of the cheque. If the s-sec. does not protect the drawer, the drawer's position under the provision is worse than under BEA sec. 65, 86 or 88B. There would seem to be no reason why the drawer's position under Bill s-cl. 93(2) should be worse than under Bill cls. 92 and 94. Accordingly, Bill para. 93(2)(e), following those cls., provides that, where a bank pays a crossed cheque in the circumstances specified in the cl. the bank shall be deemed to have paid the cheque in due course. This will fully protect the bank, as against both the drawer and the true owner, for liability arising at common law and discharge the drawer both as to the cheque and consideration if the cheque has come into the hands of the payee (see the comments made above in relation to Bill cl. 92);

- (e) Bill para. 93(2)(d) has been included to make it clear that the bank is also protected, as against the true owner, for liability arising under Bill s-cl. 93(1) and for consistency with Bill paras. 94(1)(c) and (2)(c);
- (f) Bill cl. 93, unlike BEA s-sec. 85(3) and MD s-cl. 61(2), does not refer to the banker 'receiving payment'. It is submitted that it is difficult to see how a receiving bank could incur liability under the Bill by receiving payment of a crossed cheque - a crossing under the Bill is simply a direction to the bank upon which the cheque is drawn not to pay the cheque

otherwise than to a bank (Bill cl. 54). It may be that the reference to the banker 'receiving payment' was included in BEA s-sec. 85(3) because it was thought that a bank receiving payment of a cheque specially crossed to another bank could thereby incur liability to the true owner. Special crossings are not, however, permitted by the Bill;

- (g) it is probably implicit in Bill s-cl. 93(2) that that provision provides an exception to Bill s-cl. 78(2).

Cl. 94 : Protection of bank paying cheque lacking indorsement
or with irregular or unauthorized indorsement

430. Unauthorized indorsement. Where a bank, in good faith and without negligence, pays a cheque drawn upon it whether to a bank or otherwise and an indorsement has been placed on the cheque without the authority of the person whose indorsement it purports to be:

- (a) the bank will not, in paying the cheque, incur any liability by reason only of the indorsement having been placed on the cheque without the authority of the person whose indorsement it purports to be or its failure to concern itself with the genuineness of the indorsement or the existence of authority for the indorsement; and
- (b) the bank will be deemed to have paid the cheque in due course.

(Bill s-cl. 94(1))

431. This provision is also subject to the requirements of Bill s-cl. 32(1).

432. This provision is based on BEA s-sec. 65(1) except that:

- (a) the Bill deals separately with unauthorized indorsements (Bill s-cl. 94(1)) and with irregular or absent indorsements (see Bill s-cl. 94(2));
- (b) Bill paras. 94(1)(a) and 94(2)(a) have been revised to require the paying bank to have paid the cheque 'in good faith and without negligence' rather than 'in good faith and in the ordinary course of business'; and
- (c) a forged signature is treated as merely a particular kind of unauthorized signature (see also Bill s-cl.3(6)).

433. Lack of indorsement or irregular indorsement. Where a bank, in good faith and without negligence, pays a cheque drawn upon it to a bank and the cheque is either not indorsed or is irregularly indorsed:

- (a) the bank will not, in paying the cheque, incur any liability by reason only of the absence of, or the irregularity in, the indorsement; and
- (b) the bank will be deemed to have paid the cheque in due course.

(Bill s-cl. 94(2))

434. This provision is also subject to the requirements of Bill s-cl. 32(1).

435. Bill s-cl. 94(1) is based on BEA sec. 65, but in structure and language follows BEA sec. 88B. The reference to the 'genuineness' of an indorsement in Bill para. 94(1)(c) has been taken from BEA para. 60(2)(b). Bill s-cl. 94(2) is based on BEA s-secs. 88B(1) and (3). BEA sec. 88B(2) is dealt with, in effect, by the operation of Bill cl. 5. The combination of BEA secs. 65 and 88B into one cl. has removed the overlap (the extent of which is unclear - see Rajanayagam p. 163) that exists in the BEA between those secs.

436. Bill s-cl. 94(1) follows BEA sec. 65 in not requiring payment to be made to a bank in the case of an indorsement that is forged or made without authority, whilst Bill s-cl. 94(2) follows BEA sec. 88B in requiring payment to be made to a bank in a case where an indorsement is lacking or irregular. The reason for this difference seems to be that the fact that an indorsement is forged or made without authority will not necessarily be apparent on the face of the cheque, whilst the fact that an indorsement is lacking or irregular will always be apparent on the face of the cheque.

437. Bill cl. 92 and s-cl. 94(2) have been drafted in such a way that they will apply to a case where a bank is both the paying bank and the collecting bank. This is achieved by reference being made to a bank paying a cheque to 'a bank' rather than to another bank.

Division 2 - The collecting bank

438. Division 2 of Part VI of the Bill (cls. 95 and 96) deals with the role of the collecting bank.

Cl. 95 : Protection of bank collecting cheque for customer or another bank

439. Customer has no title or defective title. Where a bank, in good faith and without negligence (Bill s-cl. 95(2)), 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 bank will not incur any liability to the true owner by reason only of having received payment of the cheque (Bill s-cl. 95(1)).

440. This provision is based on BEA s-sec. 88D(1) except that:

- (a) the BEA words 'for a customer of a cheque' have been reversed to 'of a cheque for a customer';
- (b) the BEA words 'for himself' have been omitted. It has been suggested that the words in the BEA provision could be taken as indicating that the collecting bank must prove that it was the holder of the cheque if it is to fall within that provision: something it cannot do if it acquired its 'title' to the cheque through a forged indorsement (see Paget pp. 429-30 and Weaver and Craigie p. 485);
- (c) it has been made clear that a bank is not required to credit a customer's account before receiving payment of the cheque in question.

441. For the purposes of the protective provision (in Bill s-cl. 95(1)), the 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 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 bank to have assumed that the customer was the person intended by the drawer to be the payee.

(Bill s-cl. 95(2))

442. This provision is based on BEA s-secs. 88D(2) and (3) except that:

- (a) it is expressly stated that the relevant cheque must be one that is drawn payable to order which has not been transferred by negotiation;
- (b) there is a specific provision in the cl. to provide that the name specified in the cheque may be that of a business or trade name of a customer; and
- (c) it is made clear that the treatment in Bill s-cl. 95(2) is for the purposes of Bill s-cl. 95(1).

443. Bank receiving payment for another bank. A bank which, in good faith and without negligence, receives payment of a cheque for another bank will not incur any liability to the true owner simply because it has received payment (Bill

s-cl. 95(3)). This is a new provision designed to cover the situation where a collecting bank uses an agent bank to present a cheque. In this case the agent bank would not be receiving payment of the cheque for a customer and accordingly would not at present have the benefit of BEA s.88D.

444. Where a bank receives payment of a cheque, drawn payable to order which has not been transferred by negotiation, for another bank and pays the other bank the sum ordered to be paid (whether payment is made before or after payment of the cheque is received) the bank acting as agent for the collecting bank will not, for the purposes of s-cl.(3), be treated as having been negligent by reason only that it failed to concern itself with the absence of, or irregularity in, an indorsement of the cheque by the customer. (Bill cl. 95(4)).

Cl. 96 : Rights of bank collecting order cheque not indorsed
by payee

445. Where the payee of a cheque payable to order, without indorsing the cheque, lodges the cheque with a bank for collection for the payee, and the bank gives value for, or has a lien on, the cheque the bank will have such rights (if any) as it would have had if, before the lodgement of the cheque with the bank, the payee had indorsed the cheque in blank (Bill cl. 96).

446. This provision is based on BEA sec. 88E (no equivalent provision in MD).

BILL : PART VII - MISCELLANEOUS

447. Part VII of the Bill (cls. 97 to 103) deals with various miscellaneous matters.

Cl. 97 : Payment of unindorsed order cheque as evidence of receipt by payee

448. A cheque payable to order that has not been indorsed by the payee and that appears to have been paid by the bank upon which it is drawn will be evidence of the receipt by the payee of the sum ordered to be paid by the cheque (Bill cl. 99).

449. This provision is based on BEA s. 88C except that:

- (a) it has been made more readable; and
- (b) for consistency with other cls. of the Bill, the reference to the amount of the cheque has been changed to a reference to the sum ordered to be paid by the cheque.

Cl. 98 : Signature

450. For the purposes of the Bill, a person will be taken to sign a cheque or other instrument if the person's signature is written or placed on the cheque or instrument by another person with or under his authority (Bill cl. 98).

451. This provision is based on BEA s-sec. 97(1) and MD s-cl. 76(1) except that:

- (a) the words 'or placed' have been added (in cl. 74) after the word 'written' to overcome any implication that a signature on a cheque must be only 'written'. This addition should strengthen

the argument that a signature may be placed on a cheque by a stamp or by mechanical means. There would seem to be a large number of cheques issued at present with stamped or mechanically printed signatures (for example Government cheques drawn upon the Reserve Bank). It is at least arguable that these cheques are valid on the present law (see Chalmers p. 285; Byles p. 11 and Rajanayagam, pp. 18-19); and

- (b) because of this addition (in Bill cl. 98), the following words of the MD have been omitted:
'subject to agreement between the bank and the customer any signature may be affixed by a stamp or other mechanical means'.

Cl. 99 : Replacement of lost or destroyed cheque

452. Request for replacement cheque. If an unrepresented and undischarged cheque is lost or destroyed, the drawer may be requested to provide an equivalent replacement cheque (Bill cl. 99).

453. Bill cl. 99 is based generally on BEA sec.74 and MD cl. 69 but significantly expands on the terms of these provisions in the following respects:

- (a) the means for making a request for a replacement cheque are specified - the request must:
 - (i) be in the form of a notice in writing;
 - (ii) be served either personally or by post on the drawer;
 - (iii) clearly identify the original cheque; and

- (iv) contain sufficient information to enable the drawer to draw a new cheque.

(Bill s-cl. 99(1) and (2));

- (b) the time within which a drawer must respond to a request for a replacement cheque is now set out. After receiving a request, a drawer will have 14 days to request an indemnity for any expense he might incur and, if desired, adequate security for that indemnity and, 14 days after receiving such an indemnity or security therefor, to ~~provide~~ provide the replacement cheque. If the drawer does not request an indemnity, he will have 14 days from the receipt of the request to give a replacement cheque to the former holder (Bill s-cl. 99(3) and (4));

- (c) where a former holder receives from the drawer a replacement cheque any indorser may, by notice in writing, be requested to indorse the replacement cheque to the same tenor as the indorser's original indorsement (Bill s-cl. 99(5))

- (d) the provisions relating to a drawer providing a replacement cheque have been applied to a request made to an indorser to indorse a replacement cheque (Bill s-cl. 99(6) and (7));

- (e) the means of compelling a drawer or indorser to comply with a request under Bill cl. 99 are now clearly set out i.e. an appropriate order may be sought from a court of competent jurisdiction who may make the order on such terms and conditions as it thinks just (Bill s-cl. 99(8) and (9));

454. Bill cl. 99 is not limited to cheques which are not stale before they are lost or destroyed (cf. BEA sec.74 and MD cl.69). There would seem to be no reason, in principle, why a stale cheque should not be replaced although, there would, of course, be a high risk of it being dishonoured by the drawee bank because it was stale.

Cl. 100 : Action on lost or destroyed cheque

455. Where an action or proceeding is brought on a cheque that has been lost or destroyed the court will be able, on such terms and conditions as it considers just and equitable, to order that the loss or destruction of the cheque not be set up as a defence (Bill cl. 100).

456. This provision is based on BEA sec. 75 and MD cls. 70 and 71.

457. However, Bill cl. 100 gives a court a wider discretion as to the terms and conditions of an order not to set up the loss or destruction of a cheque than is available under BEA sec. 75. It would be open under the cl. for a court to require the giving of an indemnity of the kind required in all cases by BEA sec. 75 and it could be expected, it is suggested, that a court would normally require the giving of such an indemnity as a condition of an order under Bill cl. 100.

458. There may, however, be cases in which a court would not require the giving of an indemnity, e.g., in a case where the cheque was maliciously destroyed by the drawer.

Cl. 101 : Conflict of laws

459. Application. The provisions dealing with conflict of laws will apply to the ascertainment of the rights, duties and liabilities of the drawer, indorsers and holder of a cheque

where a cheque drawn in one country is payable in another country or is transferred by negotiation in another country (Bill s-cl. 101(1)).

460. Validity. Subject to some qualifications in relation to stamping (see (Bill s-cl. 101(4) and (5)) and to cases where the cheque conforms with Australian requirements as to form (see Bill s-cl. 101(6)), the validity of a cheque as regards requisites in form will be determined in accordance with the law of the place of issue (Bill s-cl. 101(2) - based on the first part of BEA para. 77(a)).

461. Whether a cheque. Without limiting the general provisions in relation to validity as regards requisites in form (see Bill s-cl. 101(2)), the question whether a particular instrument is a cheque will be determined in accordance with the law of the place of issue (Bill s-cl. 101(3)).

462. Stamp duty. A cheque issued outside Australia will not be invalid by reason only that it is not stamped or properly stamped in accordance with the law of its place of issue or any other law (Bill s-cl. 101(4)). This provision is based on BEA para. 77(a) proviso (i) - no equivalent provision in MD.

463. A cheque issued in Australia but payable outside Australia will not be invalid simply because it is not stamped or properly stamped in accordance with Australian law or the law of any other place. Furthermore the cheque will be able to be received in evidence if the applicable duty and penalty are paid (Bill s-cl. 101(5) - based on BEA s.77A).

464. Enforcement of payment. Persons who, within Australia, hold a cheque issued outside Australia or who transfer it or indorse it will be able to enforce payment of it if it is formally valid according to Australian law (Bill s-cl. 101(6) - based on second proviso to BEA para. 77(a)).

The provision has been criticized for the anomalous results it is capable of producing (see Falconbridge, pp. 830-833). For example, where:

- (a) a cheque issued in Japan does not conform to the formal requisites of Japanese law but does conform to the formal requisites of Australian law;
- (b) the cheque is indorsed in Japan to an Australian holder (A); and
- (c) the cheque is further indorsed in Australia by A to another Australian holder (B),

Bill s-cl. 101(6) would have the effect of enabling B to enforce payment of the cheque against A, but would not give A a corresponding right of recourse against the person who drew the cheque or the person who indorsed the cheque to A. This 'partial' validity of the cheque thus leaves some parties without appropriate rights of recourse; a result that could be regarded as anomalous. On the other hand, it could be argued that a person who takes an instrument in Australia that would, if issued in Australia, be a valid cheque according to Australian law should be able to recover on the instrument against any person who has indorsed the cheque in Australia; otherwise a person who indorsed the instrument in Australia intending to be liable on the instrument would be allowed to escape liability.

465. Supervening contracts. The formal validity of a supervening contract on a cheque will be determined by the law of the place where the contract is made (Bill s-cl. 101(7)). A supervening contract includes a contract or warranty arising from an indorsement or a transfer by negotiation of a cheque (Bill s-cl. 101(16)). The reference to warranties has been included to ensure the warranties of a transfer or of a bearer cheque are covered.

466. Effects by transfer by negotiation.. Subject to s-cl. 101(10), the effects of a transfer by negotiation will be determined by the law of the place where the cheque is transferred by negotiation (Bill s-cl. 101(8)).

467. Capacity. The capacity of a person to incur liability on a cheque will be determined in accordance with the law of the place where the contract is made (Bill s-cl. 101(9)).

468. Contract on a cheque. A contract on a cheque will be interpreted in accordance with the law of the place where the contract is to be performed (Bill s-cl. 101(10)). This rule will be subject to provisions dealing with presentment and dishonour procedures (Bill s-cl. 101(13) and (14)); and the date on which a cheque is payable (Bill s-cl. 101(15)).

469. Bill s-cl. 101(10) is based generally on the first part of BEA para. 77(b) but has been redrafted to:

- (a) overcome the problems identified with interpreting BEA para. 77(b) (see Riley p. 188; Nygh pp. 243-244, Dicey and Morris pp. 889-890); and
- (b) apply the law of the place where the contract is to be performed rather than the law of the place where the contract is made. Those two places would, however, normally be the same - see Nygh p. 242. The contract of the drawer or an indorser of a cheque, as regards the holder of the cheque, consists of an undertaking to compensate the holder if the cheque is dishonoured by the bank upon which it is drawn when duly presented for payment and notice of dishonour is duly given. Unlike the liability of the acceptor, the liability of the drawer or indorser of a cheque is merely contingent at the

time when it is incurred; the drawer or indorser will not necessarily know whether he will be called upon to fulfill his contract and, if so, where he will be when he is called upon to do so. It appears, however, that the better view is that, in the absence of special factors, the drawer or indorser of a cheque will be taken to undertake to perform his contract on the cheque at the place where he enters into the contract (see Falconbridge, Essays on the Conflict of Laws, page 291). This is because the drawer and indorsers of a cheque do not contract to pay the cheque at the place at which the bank upon which the cheque is drawn is situated; they only guarantee its payment at that place by the bank and agree that, in default of such payment, to compensate the holder, and any subsequent indorsee who is compelled to pay, at the place where they respectively entered into their contracts.

470. Damages on dishonour. The law of the place where the contract is to be performed will also determine the amount of damages payable on dishonour (Bill s-cl. 101(11)).

471. Dishonour and presentment. Formalities regarding presentment and dishonour and the necessity for presentment will be determined in accordance with the law of the place where the cheque is payable (Bill s-cl. 101(12) and (13)). This provision is based on BEA para. 77(c) except that instead of applying the law of the place where presentment is made or dishonour occurs, it applies the law of the place where the cheque is payable. These places would, of course, always be the same.

472. Date for payment. The date on which a cheque is payable by a drawee bank will be determined by the law of the place where the cheque is payable (Bill s-cl. 101(14) - based on BEA para. 77(e)).

473. Definitions of 'contract' and 'supervening contract'. S-cl. 101(15) defines two expressions for the purposes of cl. 101. The word 'contract' will include:

- (a) a contract or warranty arising out of the drawing of a cheque; and
- (b) a 'supervening contract'.

The latter expression will include a contract or warranty arising out of:

- (a) an indorsement; or
- (b) a transfer by negotiation,

of a cheque.

Cl. 102 : Dividend warrants

474. Dividend warrants covered. References in the Bill to a cheque will include a reference to a dividend warrant (Bill s-cl. 102(1)). This provision is based on BEA s-sec. 101(1) and MD 78(1).

475. The Bill will not affect the validity of any usage relating to dividend warrants or to their indorsement (Bill s-cl. 102(2)).

Cl. 103 : Regulations

476. The Governor-General will be empowered to make regulations under the Cheques Act (Bill cl. 103 - no corresponding power in BEA or MD).

477. This will allow, inter alia, rates of interest to be prescribed for the purposes of the provisions dealing with the measure of damages on dishonour (see Bill cl. 76).

DRAFT CHEQUES BILL 1984 EXPOSED FOR PUBLIC COMMENT :
CHEQUES BILL 1985 -
TABLE OF CHANGES

The attached table details the differences between the exposure draft of the Cheques Bill 1984 released for public comment in February 1984 and the Bill to be introduced into Parliament in the Autumn Session 1985.

Where the comment 'no substantive change' appears opposite a clause number, the clause has been redrafted and the alteration made falls into one of the following categories:

- (i) all references to 'he', 'his', 'him' etc have been replaced with neutral references i.e. references back to the status of the person concerned e.g. 'the drawer' or simply references to 'the person'
- (ii) references to 'parties' have been replaced with references to the 'drawer', 'indorser/s', 'holder/s' or 'persons liable on the cheque' as the case may require
- (iii) clause numbering has changed.

| Cheques Bill Clause No. | Exposure Draft Clause No. | Nature of Change |
|----------------------------|------------------------------|---|
| 1 | 1 | Short title altered to Cheques Act <u>1985</u> . |
| 2 | 2 | No change. |
| 3(1)-3(7) | 3(1)-3(7) | No substantive change. |
| 3(8) | | A new sub-clause 3(8) has been inserted which defines a material alteration of a cheque. |
| 4 | 4 | Sub-clause 4(3) has been deleted. |
| 5 | No equivalent | A new section has been inserted dealing with bank cheques and bank drafts. |
| 6(1) | 5 | The exposure draft permitted all rights, duties and liabilities on cheques to be altered by agreement. The word 'certain' has been inserted in the heading indicating that the capacity to alter by agreement is limited. |
| 6(2) | No equivalent | The new sub-clause qualifies sub-clause 6(1) by giving paramount force to some provisions of the Bill, thereby restricting the ability to alter rights duties and liabilities by agreement. |
| 7 | 6 | Sub-clause 6(5) has been deleted. |
| 8 | 7 | No change. |
| 9 | 8 | No change. |
| 10(1) | 9(1) | The definition of a cheque has been altered by the exclusion of the reference to order or bearer cheques. (Order and bearer cheques are dealt with in clauses 19-24.) |
| 10(2) | 9(2) | No change. |
| 11 | 10 | No change. |
| 12 | 11 | No change. |

| Cheques Bill Clause No. | Exposure Draft Clause No. | Nature of Change |
|----------------------------|------------------------------|---|
| 13 | 12 | Sub-clause 13(2) has been inserted to permit names other than those of the drawee bank, drawer or payee to appear on the cheque provided that the drawee bank is clearly indicated as such on the face of the cheque. |
| 14 | 13 | No substantive change. |
| 15(1)&(2) | 14(1)&(2) | No change. |
| 15(3) | No equivalent | A new sub-clause has been added which mirrors BEA para. 14(1)(d) in treating a cheque as ordering a sum certain to be paid even though it requires a rate of exchange to be used to calculate the sum payable. |
| 15(4) | No equivalent | A new sub-clause has been added which specifies that an order to pay may be an order to pay a sum certain notwithstanding that the order is expressed to require a sum not exceeding a specified sum to be paid. |
| 19 | 15 | <p>The clause has been substantially redrafted. The clause now provides that a person shall not be taken to be specified in a cheque as payee or indorsee unless the person -</p> <p>(a) is named or otherwise indicated with reasonable certainty, in the cheque; and</p> <p>(b) is not a fictitious or non-existing person.</p> <p>The clause now also applies to the specification of a person as indorsee with the rules being the same as those applying in respect of payees.</p> |
| 20 | 16 | No change. |
| 21 | 17 | The clause has been redrafted to replace the concept of a cheque being 'payable' with the concept of a cheque 'requiring a drawee bank to pay'. The new approach defines an order cheque without reference to bearer cheques (these are covered by clause 22) and |

| Cheques Bill Clause No. | Exposure Draft Clause No. | Nature of Change |
|----------------------------|------------------------------|---|
| | | specifically allows two or more payees or indorsees to be named either jointly or in the alternative. |
| 22 | 18 | The clause has been redrafted to provide that any cheque which is not an order cheque is a bearer cheque. |
| 23 | 19 | The clause has been amended by expanding the requirement for effectively converting a cheque from a bearer cheque to an order cheque and now also deals explicitly with the conversion of both indorsed and unindorsed cheques. |
| 24 | 20 | The clause has been slightly amended as a consequence of amendments to cl.19. The effect, however, remains the same. |
| 16 | 21 | No change. |
| 17(1)&(2) | 22(1)&(2) | The references to 'notice of dishonour' have been deleted. |
| 17(3) | No equivalent | A new sub-clause has been added to state that an optional stipulation written in a cheque by the drawer will not affect the rights, duties and liabilities of the drawer and the drawee bank in relation to one another. |
| 18(1) | 23(1) | The words 'has <u>prima facie</u> authority' have been replaced with the words 'shall be presumed, unless the contrary is proved, to have'. The effect is the same. |
| 18(2) | 23(2) | No substantive change. |
| 18(3) | 23(3) | No change. |
| 18(4) | 23(4) | A new presumption has been added so that an inchoate instrument is presumed to have been delivered with the intention that it be filled up as a complete cheque. |
| 25 | 24 | No change. |
| 26 | 25 | No change. |

| Cheques Bill Clause No. | Exposure Draft Clause No. | Nature of Change |
|----------------------------|------------------------------|--|
| 27 | 26 | No change. |
| 28(1)&(2) | 27(1)&(2) | No substantive change. |
| 28(3) | 27(3) | The sub-clause has been cast as being subject also to sub-clause 18(4). The amendment is consequential upon an amendment of sub-clause 18(4). |
| 29 | 28 | No substantive change. |
| 30 | 29 | No change. |
| 31 | 30 | Sub-clause (2) has been amended to replace the words 'assumed name' with the words 'a name other than the person's own name'. |
| 32(1)&(2) | 31(1)&(2) | A qualification has been added to each sub-clause which provides that an unauthorized signature operates as the signature of the person who placed it on the cheque in favour of any person who takes the cheque for value or who pays the cheque where that person does so in good faith and without notice of the lack of authority. |
| 33 | 32 | The clause has been redrafted but the effect is the same. |
| | 32(3) | The sub-clause which provided that, in determining whether a signature placed on a cheque was that of a principal or agent, the construction most favourable to the validity of the cheque was to prevail has been deleted. |
| 34 | 33 | No substantive change. |
| 35 | 34 | No change. |
| 36 | 35 | No substantive change. |
| 37 | 36 | No substantive change. |
| 38 | 37 | No substantive change. |
| 39 | 38 | Sub-clause (2) has been amended to reflect the addition of sub-clause (2) to clause 6 which has the effect that certain provisions in the Bill may not be altered by agreement. |

| Cheques Bill Clause No. | Exposure Draft Clause No. | Nature of Change |
|----------------------------|------------------------------|---|
| 40 | 39 | No change. |
| 41 | 40 | Sub-clause (3) has been reworded. The effect is the same. |
| | 41 | The clause has been deleted. |
| 42 | 42 | No substantive change. |
| 43 | 43 | The clause has been reworded but the effect remains unchanged. |
| 44 | 44 | The clause has been amended by adding an additional requirement that where a name is misspelt etc in a cheque, an indorsement of the cheque must include the relevant person's proper signature. |
| 45 | 45 | No change. |
| | 46 | The clauses dealing with |
| | 47 | indorsements in blank and special |
| | 48 | indorsements have been deleted. |
| | 49 | These provisions were only required in determining whether a cheque was an order cheque or a bearer cheque. The determination of this question is no longer necessary under the revised Bill. |
| 46 | 50 | No substantive change. |
| 47 | 51 | Sub-clauses (1) and (2) have been amended by the deletion of the words in para (b) of each sub-clause 'unless the cheque has been discharged'. Other changes are not substantive. |
| 48 | 52 | No change. |
| 49 | 53 | No substantive change. |
| 50 | 54 | No substantive change. The words 'or that the person who transferred the cheque to the holder had no title to the cheque' have been added at the end of sub-sub-para 50(1)(b)(iii)(8). |
| 51 | 55 | No substantive change. |
| 52 | 56 | No substantive change. |

| Cheques Bill Clause No. | Exposure Draft Clause No. | Nature of Change |
|----------------------------|------------------------------|---|
| 53(1)&(3) | 57(1)&(3) | The sub-clauses have been amended to refer to the front of a cheque rather than its face. |
| 53(2) | 57(2) | The words 'on the face of' have been replaced by the words 'written or placed on'. |
| 54 | 58 | No change. |
| 55 | 59 | No substantive change. |
| 56 | 60 | No change. |
| 57 | 61 | No substantive change. |
| | 62 | This clause has been deleted. |
| 58 | 63 | No substantive change. |
| 59 | 64 | No substantive change. |
| 60(1)&(2) | 65(1)&(2) | No substantive change. |
| 60(3) | 65(3) | Paragraph (b) has been extended to encompass the usage of trade as well as the usage of banks as regards presentment. Sub-paragraph (c)(i) has been extended to expand upon the phrase 'nature of the cheque'. |
| 61 | 66 | No change. |
| 62(1) | 67(1) | A reference to 'another bank' has been inserted in sub-clause (1). Paragraph (c) has been deleted. |
| 62(2)-(10) | 67(2)-(10) | No change. |
| 62(11) | 67(11) | An error has been corrected by replacing the second reference to 'collecting bank' with a reference to 'drawee bank'. |
| 62(12) | No equivalent | The sub-clause has been added to ensure that the drawee bank's liability remains unchanged where the cheque is presented by means other than exhibition of the cheque. |
| 63 | 68 | The clause has been amended by deleting the reference to presentment for payment 'at any place of business of the drawee bank'. |

| Cheques Bill Clause No. | Exposure Draft Clause No. | Nature of Change |
|----------------------------|------------------------------|---|
| 64 | 69 | The clause has been redrafted to include in the definition of 'proper place' in relation to cheque, the place of business at which the account in which the cheque is drawn is maintained. Such a place is only the 'proper place' where no place is specified in the cheque. |
| 65(1)&(3) | 70(1)&(3) | No change. |
| 65(2) | 70(2) | The sub-clause has been redrafted without significantly affecting its operation. |
| 66(1) | 71(1) | References to 'collecting bank' have been replaced with references to 'deposit bank'. The words 'or ensure that the cheque is duly presented for payment on its behalf' have been added. |
| 66(2) | 71(2) | No substantive change. |
| 66(3) | 71(3) | <p>The reference to 'collecting bank' has been substituted with a reference to 'deposit bank'. The words 'or ensure that the cheque was duly presented for payment on its behalf' have been added to the beginning of the sub-clause. The words 'and the means that were available to it for having the cheque duly presented on its behalf' have been added to para (b).</p> <p>Two further sub-paras have been added to para (e).</p> <p>Sub-para (f)(i) has been amended to expand upon the phrase 'nature of the cheque'.</p> |
| 67(1) | 72(1) | The sub-clause has been amended so as to relieve the drawee bank of its duty to pay or dishonour promptly if it has become aware of a defect in the holder's title to the cheque. |
| 67(2) | 72(2) | Paragraph (a) has been amended to specifically state that cheques duly presented are expected to be paid or dishonoured promptly; and new sub-paras (ix) and (x) have |

| Cheques Bill Clause No. | Exposure Draft Clause No. | Nature of Change |
|----------------------------|------------------------------|---|
| | | been inserted in para (f) to take account of the nature of further particulars supplied to the drawee bank following a request under clause 62(5). |
| 68(1) | 73(1) | No change. |
| 68(2) | 73(2) | A reference to any bank on whose behalf the collecting bank duly presented the cheque has been added. |
| 68(3)&(4) | 73(3)&(4) | The sub-clauses have been amended to recognize that cheques may be deposited with a bank other than the collecting bank and then lodged with the collecting bank for due presentment. The purpose of the amendments is to ensure that such cheques are properly dealt with so as to ensure their retention on behalf of drawee banks. A new para has also been added to sub-clause (3). |
| 68(5)&(6) | 73(5)&(6) | No change. |
| 69 | 74 | No substantive change. |
| 70 | 75 | This clause has been substituted with a new clause which provides that a person who is the drawer or an indorser of a cheque that has been dishonoured is liable on the cheque whether or not the person is given notice by any person of the dishonour. |
| | 76-84 | All provisions relating to the necessity of, and the requisites for, giving notice of dishonour in order to render the drawer and indorsers liable on cheques have been deleted. |
| 71 | 85 | The clause has been amended to reflect the deletion of notice of dishonour provisions from the Bill. The remainder of the clause has remained unaltered in effect. Other non-substantive changes have been made. |
| 72 | 86 | No substantive change. |

| Cheques Bill Clause No. | Exposure Draft Clause No. | Nature of Change |
|----------------------------|------------------------------|--|
| 73 | 87 | The clause has been amended to reflect the deletion of notice of dishonour provisions from the Bill. The remainder of the clause has remained unaltered in effect. Other non-substantive changes have been made. |
| 74 | 88 | No substantive change. |
| 75 | 89 | No substantive change. |
| 76 | 90 | No substantive change. |
| 77 | 91 | No substantive change. |
| 78(1) | 93(1) | Paragraph (a) is amended by deleting the reference to 'the drawer'. |
| 78(2) | 102(1) | The sub-clause has been substituted with a new sub-clause which provides that a cheque is discharged if the cheque is fraudulently and materially altered by the holder. (See the definition of 'material alteration' in sub-clause 3(8)). |
| 78(3) | 93(2) | The sub-clause has been reworded to take account of a new sub-clause in the provision. The words 'at any time' have been deleted. |
| 79 | 94 | The words 'or that the holder had no title to the cheque' have been added at the end of the clause. |
| 80 | 95 | No substantive change. |
| 81 | 96 | No change. |
| No equivalent | 102(2),(3),(4) | This clause has been deleted. Sub-clause 3(8) now deals with material alterations. |
| 82(1) | 92(1) | The sub-clause has been amended to take account of the relocation of the previous sub-clause 102(1) into clause 79. |
| 82(2) | 92(2) | The sub-clause has been reworded and amended to take account of the deletion of the reference to 'drawer' in sub-clause 79(1). |

| Cheques Bill Clause No. | Exposure Draft Clause No. | Nature of Change |
|----------------------------|------------------------------|---|
| 82(3) | 92(3),(4) | The sub-clause has been amended to incorporate the two previous sub-clauses and has been reworded. |
| 82(4) | No equivalent | A new sub-clause has been added to state that the effects of discharge of a cheque are not limited by sub-clause (1). |
| 83(1) | 98(1) | No substantive change. |
| 83(2) | 98(2) | The sub-clause has been amended to refer to the discharge of an indorser under sub-para (1)(a) or (1)(b) of the clause. |
| 83(3) | 98(3) | No change. |
| 84 | 99 | No substantive change. |
| 85 | 100 | No change. |
| 86(1) | 97(1) | The sub-clause has been amended to ensure that it operates subject to the redrafted sub-clause (2). |
| 86(2) | 97(2) | The sub-clause has been substantially redrafted. It now refers to 'holder' rather than 'holder in due course' and has been reworded to clarify its operation. |
| 87 | 101 | The clause has been redrafted to take into account the situation where a cheque is paid by the drawer. |
| 88 | No equivalent | A new clause has been added to state that the drawing of a cheque does not operate as an assignment of funds that are available to pay the cheque. |
| 89 | 103 | No change. |
| 90 | 104 | No substantive change. |
| 91 | 105 | The sub-clause has been reworded to make it clear that the drawee bank only has authority to debit the drawer's account for the original amount of the cheque and to take into account the new definition of material alteration. |

| Cheques Bill Clause No. | Exposure Draft Clause No. | Nature of Change |
|----------------------------|------------------------------|---|
| | 106 | As a consequence of the amendment of clause 93(1) this clause has been deleted. |
| 92 | 107 | No change. |
| 93 | 108 | No change. |
| 94 | 109 | No change. |
| 95(1) | 110(1) | Sub-clause (1) is no longer subject to sub-clause 32(1). |
| 95(2) | 110(2) | The final part of the sub-clause has been amended by the insertion of the words 'only of its failure to concern itself with' after the word 'reason'. |
| 95(3) | 110(3) | The sub-clause is no longer subject to sub-clause 32(1). |
| 95(4) | No equivalent | The protection previously afforded against actions for conversion has been extended to cover the situation of banks receiving payment of cheques for other banks (the original protection only related to receiving payment for customers). |
| 96 | 111 | No change. |
| | 112 | This clause has been deleted as bank cheques and bank drafts are now dealt with generally in the Bill by clause 5. |
| 97 | 113 | Sub-clause (2) has been deleted. |
| 98 | 114 | No substantive change. |
| 99(1)&(2) | 115(1)&(2) | No substantive change. |
| 99(3) | 115(3) | The sub-clause has been amended to permit the drawer to require the former holder to provide security for any indemnity demanded. |
| 99(4) | 115(4) | The sub-clause has been amended to take account of the new provision in sub-clause (3). |
| 99(5) | 115(5) | No substantive change. |

| Cheques Bill Clause No. | Exposure Draft Clause No. | Nature of Change |
|----------------------------|------------------------------|---|
| 99(6) | 115(6) | The sub-clause has been amended to permit an indorser to require the former holder to provide security for any indemnity demanded. |
| 99(7) | 115(7) | The sub-clause has been amended to take account of the amendments made to sub-clause (6). |
| 99(8) | 115(8) | The words 'as the case may be' have been changed to 'as the case requires'. |
| 99(9) | 115(9) | The word 'upon' has been changed to 'on'. |
| 99(10) | 115(10) | This sub-clause has been deleted. |
| 100 | 116 | No change. |
| 101(1) | 117(1) | No substantive change. |
| 101(2)-(5) | 117(2)-(5) | No change. |
| 101(6) | 117(6) | No substantive change. |
| 101(7) | 117(7) | No change. |
| | 117(8) | The sub-clause has been deleted. |
| 101(8) | No equivalent | A new sub-clause has been added to determine the law which will govern the effects of a transfer of a cheque by negotiation. |
| 101(9) | 117(9) | No change. |
| 101(10) | 117(10) | The sub-clause has been amended as a consequence of the deletion of sub-clause (12). |
| 101(11) | 117(11) | No change. |
| 101(12) | 117(13) | No change. |
| 101(13) | 117(14) | No change. |
| 101(14) | 117(15) | No change. |
| 101(15) | 117(16) | Paragraph (a) of the definition of 'contract' has been amended by deleting the words 'of the cheque' and adding the words 'in relation to'. Paragraphs (a) and (b) of the definition of 'supervening contract' have been amended by deleting the words 'of the cheque' in each. |

192.

| Cheques Bill Clause No. | Exposure Draft Clause No. | Nature of Change |
|----------------------------|------------------------------|------------------|
| 102 | 118 | No change. |
| 103 | 119 | No change. |

CHEQUES BILL : BILLS OF EXCHANGE ACT 1909 :
MANNING COMMITTEE DRAFT BILL :
COMPARATIVE TABLE

| <u>Cheques Bill</u> <u>Clause Number</u> | <u>Title</u> | <u>BEA</u> <u>Section</u> <u>Number</u> | <u>MO</u> <u>Clause</u> <u>Number</u> |
|---|--|---|---|
| 1 | Short Title | S.1 | Cl.1 |
| 2 | Commencement | 2 | 2 |
| 3 | Interpretation | | |
| .3(1) | | | |
| . | Action | 4 | 4 |
| . | Australia | 4 | - |
| . | Bank | 4 | 4 |
| . | Bearer | 4 | 4 |
| . | Delivery | 4 | 4 |
| . | Drawee Bank | - | - |
| . | Holder | 4 | 4 |
| . | Issue | 4 | - |
| . | Possession | - | - |
| . | Value | 4 | 4 |
| .3(2) | Act being done in good faith | 4 | - |
| .3(3) | Defective title | 34(2) | 25(2) |
| .3(4) | | 35(2) | 25(2) |
| .3(5) | Stale cheque | 80(2) | 50(2) |
| .3(6) | Unauthorised signature | - | - |
| .3(7) | Copy of cheque being exhibited | - | - |
| .3(8) | Material Alteration | 69 | 59 |
| 4 | Application of rules in bankruptcy and of the common law | 5 | 5 |
| 5 | Bank cheques and bank drafts | 65(2), 88A 888(2), 880(4) | 68 |
| 6 | Certain rights, duties and liabilities under Act may be altered by Agreement | - | - |
| 7 | Application of Act | 6 | 6 |
| 8 | Extension of Act to external Territories | - | - |
| 9 | Act to bind Crown | - | - |
| 10 | Cheque defined | 8(1) & 78(1) | 8(1) |
| 11 | Order to pay | - | - |

| <u>Cheques Bill</u> <u>Clause Number</u> | <u>Title</u> | <u>BEA</u> <u>Section</u> <u>Number</u> | <u>MO</u> <u>Clause</u> <u>Number</u> |
|---|---|---|---|
| 12 | Unconditional order to pay | | |
| .12(1) | | 16 | |
| .12(2) | | 8(3) | 8(3) |
| 13 | Order addressed to a bank | 11(1) | - |
| 14 | Order to pay on demand | | |
| .14(1) | | 15(1) | - |
| .14(2) | | - | 8(3) |
| .14(3) | | - | 8(3) |
| 15 | Order to pay a sum certain | | |
| .15(1) | | - | 12(1) |
| .15(2) | | 14(2) | 12(2) |
| | | & (3) | |
| 16 | Date of cheque, &c | | |
| .16(1) | | 18(1) | 14(1) |
| .16(2) | | 8(4)(a); | 14(2) |
| | | 18(2) | |
| .16(3) | | - | - |
| .16(4) | | - | - |
| 17 | Optional stipulations | 21 | 15 |
| 18 | Inchoate instruments | 25 | 16 |
| 19 | Meaning of specification of person in cheque as payee or indorsee | | |
| .19(1) | | 10(1) | 8(1) |
| | | 12(2)&(3) | 9 & |
| | | | 10 |
| .19(2) | | 12(2) | - |
| .19(3) | | 12(1) | - |
| 20 | Cheques either payable to order or to bearer | 13(2) | - |
| 21 | Cheques payable to order | 13(4) | 11(2) |
| 22 | Cheques payable to bearer | 12(2) | 8(4) |
| | | 13(3) | 10 |
| | | | 11(2) |
| 23 | Conversion of cheque drawn payable to bearer into cheque payable to order | - | - |
| 24 | Cheques payable to order of specified person | 13(5) | 11(3) |
| 25 | Delivery essential for drawing or endorsement | 26(1) | 17(1) |

| <u>Cheques Bill</u> <u>Clause Number</u> | <u>Title</u> | <u>BEA</u> <u>Section</u> <u>Number</u> | <u>MD</u> <u>Clause</u> <u>Number</u> |
|---|---|---|---|
| 26 | Requisites for effective delivery | 26(2)(a) | 17(2)(a) |
| 27 | Drawing or indorsement may may be shown to be ineffective | | |
| | | Proviso to | |
| 28 | Presumption of effective delivery | 26(2) | 17(3) |
| 29 | Delivery of cheque payable to bearer | - | - |
| 30 | Capacity to incur liability on cheque | | |
| .30(1) | | 27(1) | 18(1) |
| .30(2) | | 27(1) | 18(2) |
| .30(3) | | - | - |
| .30(4) | | 27(2) | 18(3) |
| 31 | Signature essential to liability on cheque | 28 | 19 |
| 32 | Unauthorized signature | 29 | 20 |
| 33 | Person signing as agent or in representative capacity | 31 | 22 |
| 34 | Procurator signature | 30 | 21 |
| 35 | Valuable consideration defined | 32(1) | 23(1) |
| 36 | Presumption of value | 35(1) | 26(1) |
| 37 | Holder taking cheque for which value has been given | 32(2) | 23(2) |
| 38 | Holder having lien | 32(3) | 23(3) |
| 39 | Every cheque transferable by negotiation | 41(1) | 11(1) 30(2) 35 |
| 40 | Transfer of cheque by negotiation | | |
| .40(1) | | 36(1) | 31(1) |
| .40(2) | | 36(3) | 31(3) |
| .40(3) | | 36(2) | 31(2) |
| 41 | Requisites for indorsement | 37(a)&(b) | 8(5) 32(a)&(b) |

| <u>Cheques Bill</u> <u>Clause Number</u> | <u>Title</u> | <u>BEA</u> <u>Section</u> <u>Number</u> | <u>MD</u> <u>Clause</u> <u>Number</u> |
|---|---|---|---|
| 42 | Transfer of order cheque without indorsement | 36(4)&(5) | 31(4)&(5) |
| 43 | Indorsement of order cheque payable jointly to 2 or more persons | 37(c) | 32(c) |
| 44 | Indorsement where payee or indorsee misdescribed | 37(d) | 32(d) |
| 45 | Conditional indorsement | 38 | 33 |
| 46 | Transfer of stale or dishonoured cheque by negotiation | 41(2), (4) & (5) | - |
| 47 | Transfer by negotiation back to drawer or indorser | 42 | 36 |
| 48 | Order of indorsements | 37(e) | 32(e) |
| 49 | Rights acquired by transfer by negotiation | 43 | 37 |
| 50 | Holder in due course defined | 34(1) | 8(5) & 25(1) |
| 51 | Presumption that holder is holder in due course | 35(2) | 26(2) |
| 52 | Holder deriving title through holder in due course | 34(3) | 25(3) |
| 53 | Crossing and crossed cheques defined | 82 | 27 & 30, 2) |
| 54 | Effect of crossing on payment of cheque | - | - |
| 55 | Effect of taking cheque crossed "not negotiable" | 87 | 30(1) |
| 56 | Persons who may add crossing to cheque | 83 | 28(1) |
| 57 | Multiple crossings | - | - |
| 58 | Drawer and Indorsers of cheque not liable unless cheque presented | 50(1) | 38 |
| 59 | When presentment dispensed with | 51(2) | - |
| 60 | Effect of failure to present within reasonable time | 50(2)(b) & 51(1) | 39(b), (e) & (f); 40 |

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| 62 | Presentment by bank | 50(2)(c) &(d) | 39(a) |
| 63 | Presentment by person other than bank | 50(2)(c) &(d) | 39(a) |
| 64 | Proper place | 50(2)(d) | 39(c) |
| 65 | Designated places | - | - |
| 66 | Deposit bank to present cheques promptly | - | 42 |
| 67 | Drawee bank to pay or dishonour promptly | - | 43(2) |
| 68 | How paid cheque to be dealt with | 57(4) | - |
| 69 | Dishonour defined | 52(1) | 41(1) |
| 70 | Drawer and indorsers of cheque liable whether or not given notice of dishonour | 53&54(k) | 46(K) |
| 71 | Liability of drawer | 60(1)(a) | 52(1)(a) |
| 72 | Estoppel against drawer | - | - |
| 73 | Liability of endorser | 60(2)(a) | 52(2)(a) |
| 74 | Estoppels against endorser | 60(2)(b) &(c) | 52(2)(b) &(c) |
| 75 | Stranger signing cheque liable as endorser | 61 | 53 |
| 76 | Measure of damages on dishonour | 62 | 54 |
| 77 | Transferor by delivery | 63 | 55 |
| 78 | When cheque discharged | 64(1); 67(1); &68(1) | 56(1); 57(1); &58(1) |
| 79 | Payment in due course | 64(1) | 56(1) |
| 80 | Renunciation of rights against drawer or all persons liable on cheque | 67(2) | 57(2) |

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| 82 | Effect of discharge of cheque | - | - |
| 83 | When indorser discharged | 67(3) & 68(2) | 57(3)&(4) & 58(2) |
| 84 | Renunciation of rights against indorser | 67(3) | 57(3) |
| 85 | Cancellation of indorser's signature | 68(2)&(3) | 58(2)&(3) |
| 86 | Effect of discharge of indorser | - | - |
| 87 | Effect of payment by drawer or indorser | 64(2) | 56(2) |
| 88 | Cheque not assignment of funds | 58 | 49 |
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| 90 | Countermand of payment and notice of death or mental incapacity | 81 | 51 |
| 91 | Protection of bank paying improperly raised cheque | - | - |
| 92 | Protection of bank paying crossed cheque in accordance with crossing | 86 | 66 |
| 93 | Payment of crossed cheque otherwise than in accordance with crossing | 85(2)&(3) | 61 |
| 94 | Protection of bank paying cheque lacking indorsement or with irregular or unauthorized indorsement | 65&88B | 65 |
| 95 | Protection of bank collecting cheque for customer or another bank | 88D | 63 |
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| 97 | Payment of unindorsed cheque as evidence of receipt by payee | 88C | 75 |

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