

29 January 2024

Our ref: [LP:MC]

Dr James Popple
Chief Executive Officer
Law Council of Australia
19 Torrens Street
Braddon ACT 2612

By email: [REDACTED]

Dear Dr Popple

Winding down Australia's cheques system

Thank you for the opportunity to provide feedback on the consultation paper "Winding down Australia's cheques system" (**Consultation Paper**).

This response has been prepared with input from a number of Queensland Law Society (QLS) policy committees, including the Banking & Financial Services Law Committee, Property & Development Law Committee, Litigation Rules Committee, Competition & Consumer Law Committee, Succession Law Committee and the Privacy, Data, Technology and Intellectual Property Committee.

Executive Summary

- QLS welcomes the consultation on this key issue which will affect business and members of the community in a range of significant ways.
- QLS recognises that the use of cheques in business and personal commerce has dramatically declined and it is appropriate to prepare for an orderly transition to winding down the cheques system.
- Broadly, QLS considers the Consultation Paper¹ has appropriately identified the six key conditions and principles to guide the winding down of the cheque system.
- However, the Consultation Paper has not accurately identified all scenarios in which our members and their clients use cheques, particularly bank cheques.
- In light of the wide-ranging use of bank cheques, QLS is concerned the proposed 2025 date for discontinuing bank cheques is too early.²

¹ Consultation Paper, page 5.

² Consultation Paper, Figure 1: Potential staged transition plan, page 6

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- A particular challenge with discontinuing bank cheques is resolving an industry-wide accepted practice for releasing security (outgoing mortgagee) in a transaction, in circumstances where the payment price might be scheduled at a later time.
- QLS is also concerned that the proposed date for discontinuing personal cheques is too early.
- QLS considers that the government needs to be circumspect in its approach to setting the timeframes for the winding down of cheques when the feedback that we have received is that digital alternatives put forward by the finance industry are not yet as reliable, efficient, cost effective or secure enough to ensure a smooth transition.
- More work will be needed, in a short timeframe, to identify appropriate alternatives for cheques in a range of common legal transactions. In addition, there needs to be sufficient education and support to enable the community, including the business community, to adopt new digital solutions with the confidence that the new approach is secure, affordable and accessible.
- QLS is also concerned that the alternatives proposed are largely digital and require access to the internet.
- QLS echoes the concerns in the Consultation Paper about the suitability of these alternatives for certain vulnerable groups of the Australian population, including those located in rural and regional areas with poor internet access, older people and First Nations peoples.
- It is critical that any alternatives are accessible, affordable and secure. It may be necessary to consider regulating the cost of alternative payment systems (such as the NPP) to ensure financial service providers deliver appropriate alternatives at an affordable cost for all in the community.
- QLS considers that before ceasing the issuance of any cheques, it is vital that all banks have implemented improved cyber security measures to improve the protection of these vulnerable cohorts. As a minimum, all banks must have completed the new name-checking technology referred to as 'confirmation of payee' system in the recent Australian Banking Association announcement.³
- QLS also recommends consideration be given to implementing a liability-sharing model for all banks, reflecting elements of the United Kingdom's *Financial Services and Markets Act 2023* (UK), under which a reimbursement requirement for APP scams will be introduced for Faster Payments by the end of February 2024.⁴
- As acknowledged in the Consultation Paper, the winding down of cheques coincides with the closure of many regional and rural bank branches. This adds a further complexity to ensuring a smooth transition.

³ Australian Banking Association press release dated 24 Nov 2023 "Banks unite to declare war on scammers"; Australian Banking Association "Keeping Australia Scam Safe: What does the Scam-Safe Accord mean to you?" accessed 19 Jan 2024 at <https://www.ausbanking.org.au/scam-safe-accord/>

⁴ <https://www.psr.org.uk/publications/consultations/cp-23-4-app-fraud-reimbursement-requirement-draft-legal-instruments/>

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QLS has responded to relevant consultation questions below.

General comments

QLS has received inquiries from a range of practitioners and firms about the implications of winding down the cheques system in Australia.

There are broadly five areas of concern for the legal profession:

1. Consequences for clients in litigating, transacting and settling matters, without the availability of bank cheques and trust account cheques
2. Changes to practice and management in operating a trust and general account
3. Adverse effects for wider community, particularly vulnerable members of the community, both as an access to justice issue and in its effect on clients in this cohort
4. Replacement online solutions are unfamiliar to many in the community and/or are perceived as higher risk than cheques or over the counter banking.
5. Legislative reform to ensure flexibility of payment mechanisms

A compounding complication in this discussion is the ongoing closure of regional banks, which is forcing the rollout of technology-based solutions for both personal and business banking.

Chapter 1 – Introduction

1. *Are the conditions to enable a smooth transition, as outlined above, appropriate? Are there any other principles not outlined above that should be prioritised in the transition?*

QLS broadly considers the Consultation Paper⁵ has appropriately identified the six key conditions and principles to guide the winding down of the cheque system.

However, QLS has concerns about the timetable proposed, as discussed below.

2. *Is the sequencing of the transition appropriate? Is there an alternate manner of transition that would better enable a smooth transition? If so, please explain.*

QLS considers that before ceasing the issuance of any cheques, it is vital that all banks have implemented improved cyber security measures to improve the protection of these vulnerable cohorts. As a minimum, all banks must have completed the new name-checking technology referred to as the 'confirmation of payee' system in the recent Australian Banking Association announcement.

QLS also recommends consideration be given to implementing a liability-sharing model for all banks, reflecting elements of the United Kingdom's Financial Services and Markets Act 2023 (UK), under which a reimbursement requirement for APP scams will be introduced for Faster Payments by the end of February 2024.

⁵ Consultation Paper, page 5.

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3. *Is the timing of the sequencing appropriate? Is there an alternate timing of the sequencing that would better enable a smooth transition? If so, please explain.*

The Consultation Paper has not accurately identified all scenarios in which our members and their clients use cheques, particularly bank cheques. We have provided further detail below in relation to “business” use of cheques. .

In light of the wide-ranging use of bank cheques, QLS is concerned the proposed 2025 date for discontinuing bank cheques is too early.⁶ The Consultation Paper has acknowledged that the use of bank cheques has not declined as rapidly as the use of personal cheques, which we consider reflects the ongoing regular use of bank cheques in significant business transactions.

QLS suggests that bank cheques should be continued until at least the end of 2027, given that some banks have indicated that they will discontinue their cheque offerings earlier than any date mandated by government.

4. *What are the roles of government and industry in ensuring a smooth transition?*

Prior to discontinuing the use of cheques, particularly those government bodies that presently insist on payment by cheque, it is imperative to ensure government bodies are technologically equipped and operationally ready to facilitate electronic payments. Furthermore, it is important that the digital alternatives can do this in a manner that easily identifies the payee and matter reference immediately in order to avoid delay. As such, we consider that a comprehensive assessment should be conducted to evaluate government's capacity, infrastructure and workforce capabilities in handling electronic transactions securely and efficiently.

Furthermore, government bodies should collaborate with financial institutions to facilitate the seamless transition from cheques to electronic payment methods. In particular, government bodies should engage in dialogue with banks to understand their decommissioning timelines.

A comprehensive communication strategy should be devised to inform stakeholders, including businesses and the public, about the transition. Clear and concise information should be disseminated regarding the benefits of electronic payments, the timelines involved and the support mechanisms that will be made available during the transition period.

5. *What are the barriers banks and other participants face in ensuring their customers have a smooth transition away from cheque use?*

A smooth transition is dependent on appropriate alternatives being available and on customers having confidence in the security, accessibility (including ease of use) and availability of digital alternatives.

It seems there is a general lack of confidence in digital alternatives, particularly in certain groups of the community. However, there is also a lack of familiarity in the business community as well.

As such, a significant barrier identified by members is the lack of reliability of digital alternatives. It is important that the government considers what safeguards are available to address any

⁶ Consultation Paper, Figure 1: Potential staged transition plan, page 6

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technical and digital failures, especially where timing is critical. QLS would welcome the opportunity to be consulted of any legislative proposals to address this anticipated issue.

The role of the NPP's Fast Payments arrangements (and similar products) will be vital in providing an alternate method for replacing bank cheques and personal cheques. As identified in the Consultation Paper, bank cheques, in particular, are used for high value transactions such as cars and other asset purchases.

These platforms are in the relatively early stages of implementation. Accordingly, it is critical that such platforms are accessible and easy to use by members of the public, particularly those left behind the digital divide.

We understand that banks offering these platforms tend to focus on offering it as a business product and it is currently free to use. The cost to use these platforms must continue to be affordable, if cheques are no longer available.

Relatedly, personal bank transfers are often restricted in high value transactions. It will be important to have clear guidance from banks on how to effect high value bank transfers, effectively and safely. The lack of availability of high value transfers may be exacerbated if bank branches continue to be closed.

There are a number of transaction types that are not enabled on PEXA, which are discussed in further detail below.

Whilst PEXA has been reasonably successful, this platform is frequently impacted in relation to payment outages. In respect to PEXA, these case settlements are not delayed as funds transfers occurs after settlement. However, if NPP is to be relied upon as a part of the settlement transaction, payment outages will interrupt commerce.

In addition to PEXA payment issues for normal transactions, there are a large number of settlements that are not able to be facilitated by PEXA, for instance mortgagee sales, business sales and transfers by direction (which are becoming far more prevalent with off the plan projects in the current market) in Queensland. In instances such as this, legal practitioners are conducting physical settlements via an exchange of cheques. Furthermore, there is currently no work around in PEXA, largely due to Queensland Revenue not supporting duty payments online and requirement for these types of transactions to be paper. These gaps will need to be considered and filled.

A further source of friction that may impede a smooth transition, is the delay that is likely to be experienced as a result of further investigation requirements in order to detect potential scams.

Some further examples of gaps that will need to be addressed include:

- (a) Wills and estates – beneficiaries reluctant to provide bank account details for payments and reliance on cheques for estate distributions.
- (b) State Courts – cheques are required when out of town solicitors lodge court applications. For example, a probate application is still required to be filed in person or by post. Most legal practitioners draw trust cheques from funds paid by the client in anticipation of the application fee, or a business cheque from their own business account. Very rarely is an application fee paid by credit card, and very rarely would a practitioner provide credit

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card details which are secured details usually from a Principal of the practice. Practitioners cannot yet file these applications online and pay an online fee as you can with the Family Court Portal. Until such time as this is available, cheques are a necessity in practice.

In addition, applications for change of name with the Births Deaths and Marriages Registry require cheques in payment of the application fee. There is an alternative to pay online using a credit card however this option is not always available to practitioners or is not an option parties wish to use given the prevalence of online fraud, cyber crime and scams. Again, until a secured portal or a more secured portal is provided, cheques will be required.

- (c) Conduct moneys – the rules requiring the provision of a cheque with a subpoena as conduct money will need to be modified. We note that subpoenas and conduct money is an embedded component of the civil litigation process. Cheques are relied on by practitioners in this space, particularly when there is difficulty in paying conduct money where bank details are refused to be provided by the person or entity being subpoenaed.
- (d) Legislative provisions relating the unclaimed monies require funds to be paid via cheque.

Personal use of cheques (Questions 12 – 18 of Consultation Paper)

As a general comment, there is a lack of familiarity and lack of confidence in the community about the technology-based solutions intended to replace bricks-and-mortar banking.

In our members' experience, this arises not only in the personal use of cheques but also in the business community.

Many of our regional members are also just starting to investigate these alternatives, particularly in circumstances where local bank branches are closing.

It seems the winding down of cheques will accelerate the adoption of technology, but there will need to be support both from banks and from membership organisations like QLS to help legal practices make this transition.

It is also critical that any replacement technology-based solutions are easy and reliable to use, freely available (or no more expensive than the current options) and secure.

Members have also commented that it would be highly beneficial, as an additional form of online protection, if online banking could include verification of both the name and the BSB of the intended payee.

As noted earlier, QLS considers that before ceasing the issuance of any cheques, as a minimum, all banks must have completed the new name-checking technology referred to as the '*confirmation of payee*' system in the recent Australian Banking Association announcement.

If networks go down, or Multi Factorial Authentication devices are lost/inoperative, the ability to visit a branch, as an alternative, to effect a bank transfer may be critical for time-sensitive transactions or matters.

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Commercial use of cheques

One of the key roles of legal practitioners is facilitating the flow of money in transactions.

Bank cheques are regularly used in high value transactions as a secure and certain way of payment, particularly if the payment needs to be exchanged in a settlement for the transfer of ownership of other assets which might involve a range of documentation, keys or other physical items.

Transactions and matters where cheques (particularly bank cheques) are regularly used include:

- Real property transfers - where the transaction is out of scope of an eConveyancing platform such as PEXA. We understand that the scope of available transactions in Queensland is unlikely to expand significantly in the near future.
- Distribution of deceased estates;
- Sale of a business, which typically involves the transfer of many different types of assets, including intellectual property, and will require not only the delivery of a purchase price but also keys, stock and documentation to support the transfer of all assets;
- Settlement of litigation.

The following sale of a business transaction is provided as an example of the type of transaction which is typically settled using cheques.

- The business sale will involve the transfer of:
 - two commercial premises – one owned and one leased by the seller
 - three motor vehicles
 - stock, plant and equipment – some subject to a PPSR registration
 - intellectual property
 - business name
- In Queensland, the transfer of **real property** is generally required to be effected using an eConveyancing platform. However, there are exemptions for certain transactions – see further information **below**. For the purposes of the above scenario, we note:
 - The premises which are owned by the business can likely be transferred to the buyer using PEXA, provided there are no other exemptions which apply to the particular transaction. If so, the purchase price for the land can be paid to the seller using **PEXA**.
 - However, leases cannot be transferred in PEXA in Queensland. This lot will therefore need to be transferred “in paper” and ordinarily this would be effected using a **bank cheque**.
- Motor vehicles require transfer papers to be executed by both parties. This can be achieved online or in paper.

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- The remaining assets are usually transferred as part of the business sale (as part of the purchase price paid by **bank cheque**).
- However, the PPSR registration will also need to be released as part of the sale. Ordinarily, the PPSR registration would be discharged by the payment of a separate amount paid by **bank cheque**.

We expect that the challenges of settling transactions will be increased when the transaction involves more than just the seller and buyer. If a financier is involved for one or both parties, then four parties will need to coordinate the transfer of money to finalise the transaction. Whilst there is some potential for escrow arrangements to play a role, it is unclear whether financiers will be willing to advance funds to a solicitor's trust account several days prior to settlement, to ensure that the funds have cleared in time for settlement to occur.

eConveyancing and PEXA

The Consultation Paper suggests that using eConveyancing platforms like PEXA and Sympli are the alternatives to cheques for settling real estate transactions.

In Queensland, the eConveyancing mandate (commenced on 20 February 2023), requires that some available instruments, known as 'required instruments' must be lodged using eConveyancing, unless a valid exemption applies.

However, despite the mandate and significant majority of transactions which use eConveyancing platforms, there are a number of exemptions to the mandate.

QLS understands that although work continues to increase the scope of transactions within the mandate, it is highly likely that some transactions will always be exempt as it is not feasible to address all of the many permutations in the eConveyancing platform.

At present, the significant exemptions are:

1. **A party is an unrepresented individual:** A party to the instrument, who is a natural person, is not a Subscriber to an Electronic Lodgement Network Operator and is not represented by an Australian legal practitioner or an incorporated legal practice.
2. **Functionality exemption:** As noted by the Department of Resources, "No ELNO (PEXA or Sympli) presently has the functionality to allow for every possible variation that every instrument can be utilised for (in the way that a paper form would)." The functionality exemption applies where the functionality to prepare, lodge or deposit the required instrument does not exist.
 - a. For example, some types of Form 1 – Transfer (e.g. Mortgagee exercising power of sale) cannot be processed through an ELN. Such transfers are therefore exempt from the mandate and are permitted to be lodged in paper form.
 - b. There are a wide range of other permutations of documents which fall within the functionality exemption.⁷

⁷ www.tenantsqld.org.au

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3. **Circumstances beyond control:** When the eConveyancing lodgement was attempted, circumstances beyond the lodger's control prevented the lodgement from proceeding. E.g. internet access issues for the entire day, the Electronic Lodgment Network is unavailable for use for the entire day.
4. **Combined lodgements / instruments:** The instrument is required to be lodged with another instrument that cannot be lodged using eConveyancing. E.g. a transfer that must be lodged with a plan of survey and the plan of survey cannot be lodged using eConveyancing.
5. **Combined lodgements / instruments involving unrepresented individuals:** The instrument is required to be lodged with another instrument which includes a party who is an unrepresented person.
6. **Rejected or withdrawn instruments with an associated financial transaction:** The instrument:
 - a. replaces an instrument that was lodged using eConveyancing and subsequently rejected or withdrawn under section 157 or section 159 of the Land Title Act 1994; and
 - b. for which an associated financial transaction has been completed. E.g. purchase price for the property has been paid; money has been given in return for granting a mortgage or charge over the property; taxes, duty (including transfer duty), fees or charges payable relating to the transaction have been paid.
7. **Duties Act 2001 (Qld) exemption:** The instrument(s) being lodged give effect to a transaction that is not an ELN lodgement or ELN transfer within the meaning of the Duties Act 2001 (Qld) section 156D.

Business and compliance costs for legal practices

QLS is also concerned about the potential increase in the costs of running a business, including compliance costs, for law practices.

For example, whilst telegraphic transfers are an alternative to cheques, this generally involves attending a bank in person to arrange for the transfer. If there is no local bank branch, this will involve significant time and cost for law practices.

We recognise that there are digital solutions available for many payments, but we reiterate that there is a lack of familiarity of and confidence in appropriate alternatives, particularly with respect to the security and risk profile of alternatives.

We suggest that this will be a business-wide issue across Australia, not only for legal practices.

The legal profession will also need to review any template contracts and documents which refer to the use to cheques.

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Consultation questions:

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

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

In response to questions 19 and 20 in the Consultation Paper, we make the following comments.

There are still State-level legislative restrictions that effectively require Queensland solicitors to operate cheque accounts. The issue of permitted payment methods from trust accounts is being considered internally at QLS and it proposed to be raised through the upcoming Call to Parties Statement for the 2024 State Election.

Specifically:

- Legal Profession Act 2007 (Qld) s 250(1) – requires withdrawal of trust money by cheque, unless the law practice has obtained QLS approval to use EFT. (Would be interesting to see stats on how many law practices operate a trust account but do not hold EFT approval.)
- Legal Profession Act (Qld) s 252(1) – equivalent restriction relating to withdrawals from controlled money accounts.

Reform would require amendment of the Legal Profession Act 2007 (Qld) to remove the restriction to cheques as a payment method from the above sections. Consideration would need to be had of the need for a requirement to obtain specific QLS approval to process EFT transactions, given the removal of the cheque option would then inherently require law practices to transact electronically and render a law practice unable to operate a trust account without EFT approval.

Government use of cheques

21. *How significant are the barriers to reducing government use of cheques? What timeframes or support are required for agencies transitioning away from cheque use?*

22. *What coordination is required between the Commonwealth, State and Territory governments to coordinate a transition away from cheques?*

The section in Chapter 4 “Government use of cheques” contains a subsection “State government usage”, which contains what can only be described as a passing reference to state mandates for cheque usage.

We note the Legal Profession Act 2007 (Qld) requires payments to be by cheque by default (s250, 252, 501, 504, 507) in addition to the express provisions of the legal profession regulations at sections 37 and 50 and implied in sections 35, 41 and 42.

We anticipate similar provisions can be found in trust account rules for agents and auctioneers.

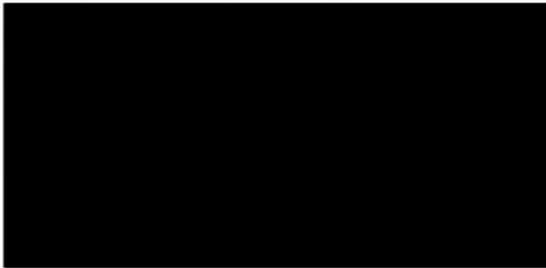
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As mentioned above, the legal profession will need to review a suit of legislative instruments relevant to the legal industry that refer to the use of cheques.

In this regard, some members consider that it would be beneficial to establish a working group to perform the task of reviewing legislative requirements (both express and implied) relating to the use of cheques.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [REDACTED] or by phone on [REDACTED]

Yours faithfully



Rebecca Fogerty
President