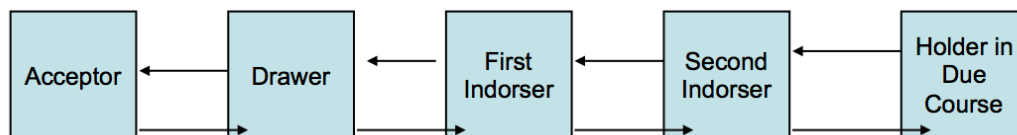


Chain of liability

- According to Professor Goode rights flow backward, and liabilities flow forward
- (Assume an accepted order bill, which has been indorsed twice, is not paid; the chain of liability will work as follows:)



- **Person signing in assumed name liable** as though he or she signed in own name **s 28(2)**
- Under s 29, **a forged or unauthorised signature is wholly inoperative** except:
 - If ratified, or
 - Victim estopped (*Greenwood v Martins Bank*)
- **A forged indorsement breaks the chain of title**
- Holder of bearer bill transferring bill without signing it = 'transferor by delivery' **s 63(1)** (bearer bill only)
- **Transferor by delivery not liable on the bill since did not indorse it**
 - But liable for breach of warranty (e.g. would warrant to transferee for value that the bill is what it purports to be; that transferor has right to transfer, etc.) to **immediate transferee_s 63(3)**
 - Claim against transferor by delivery is for damages not face value of bill (note the difference!)

Lost or Stolen Bills

- The **true owner of a bill is anyone with an immediate right of possession**, not necessarily ownership (*Bute (Marquess of) v Barclays Bank*)
- When **a bill is stolen**, the true owner of the bill:
 - Cannot sue prior parties (as no longer a holder) under the BEA,
 - But can do so under common law for damages or restitution
- The common law action open to the true owner is **Conversion**
- **Tort of Conversion:**
 - Anyone who interferes** with the true owner's immediate right of possession of chattel is liable (*Penfolds Wines Pty Ltd v Elliott*)
 - Intention to deal with chattel required, not necessary for intention to interfere with right of another's control – thus **innocent person who takes chattel from thief is just as liable**

-Conversion remedy extended to negotiable instruments (*Lloyds Bank Ltd v Chartered Bank of India, Australia and China*)

Promissory Note (Note)

- Common uses include to raise finance and as a surety for loans
- They are negotiable instrument by statute
- BEA provisions apply with necessary modifications except where there is a specific provision **s95 (1) BEA**

Definition of a Promissory Note

- Definition in **s 89(1)**
- Key elements:
 1. Unconditional promise
 2. In writing
 3. Made by one person to another,
 4. Signed by the maker,
 5. Engaging to pay, on demand or at a fixed or determinable future time,
 6. A sum certain in money,
 7. To, or to the order, of a specified person, or to bearer

Bill of Exchange vs. Promissory Note

Summary of **key differences:**

- a. **Number of parties:**
 - Bill (3 parties- drawer, drawee, and payee))
 - Note (2 parties – maker and payee)
- b. **Definition:**
 - Bill (unconditional order)
 - Note (unconditional promise)

Validity of a Promissory Note

- An **I.O.U. is an acknowledgement of a debt**, and not a *note* (*Akbar Khan v Attar Singh*)
- Note payable to maker's order **must be indorsed s 89(2)**, or else not a note
- Note is **inchoate and incomplete until delivered to payee / bearer s 90**

BEA Provisions Specific to Notes

- Under **s 95(2)** when applying BEA provisions to notes:
 - Treat the **maker of note as acceptor of bill**
 - **1st indorser as drawer of accepted order bill**
 - **2nd & subsequent indorsers as the indorser of bill**
- Liability of parties:

- Maker is liable under **s 94(1)**, not s 59 (because you use the specific provisions first)
- 1st indorser liable under **s 60(1)**, not 60(2)
- But, subsequent indorsers liable under **s 60(2)**
- Liability of makers **s 91**, if they write:
 - **I promise to pay (joint & several liability)**
 - **We promise to pay (joint liability)**
- Demand note that has been indorsed to be presented within a reasonable time **s 92(1)** (*Scott (SA) Pty Ltd v Dawson*)
- Note payable at a particular place to be presented there **s 93(1)** *Eimco Corp v Tutt Bryant Ltd*

Cheques

- Cheques are governed by the Cheques Act (Cth) 1986 (in December 1998)
- **Section 10 of CA defines a cheque** as:
 - (1)** An unconditional order in writing that:
 - (a) Is addressed by one person to another person, being a financial institution; and
 - (b) Is signed by the person giving it; and
 - (c) Requires the financial institution to pay on demand a sum certain in money.

Definition of a Cheque

- The definitions of cheque and bill of exchange are similar, but not identical
- **A cheque differs from a bill of exchange** in the following ways:
 - Cheque is drawn on 'financial institution'
 - Cheque is payable on demand
 - Cheque is not accepted by bank
 - Cheque is used for payment

Life Cycle of a Cheque

- A cheque must be properly drawn **s 10(1)** and it must be issued before the parties are liable on it **ss 25, 3(1)**
- **Every cheque is transferable by negotiation**, even if crossed **s 39(1)**, but the **method of transfer depends on type of cheque ss 40, 20-22**
- Until a cheque is presented for payment, the drawer/indorser not liable **ss 58-59**. It may be presented in person or through the collecting bank
- A cheque is discharged when it is paid in due course **s 78**
- If the cheque is dishonoured (not paid) the drawee bank must notify presenter; no notice needs to be given to drawer/indorser **s 70**

Crossing Cheques

- Cheques Act recognises two types of crossing:
 - Two parallel transverse lines** across face of cheque **s 53(1)(a)**

- b. Two parallel transverse lines across face of cheque **with 'not negotiable'** between lines s 53(1)(b)
- Nothing else is effective as a recognised crossing s 53(2)
- A crossing is an **instruction to drawee bank to pay to bank only** s 54
- Person taking a cheque with s 53(1)(b) crossing **does not get better title** s 55
- Anyone can cross a cheque and not treated as an alteration under s 78(2), s 56
- **Court recognise third type of crossing** (not in CA):
 - 'Account payee' or 'account payee only' between two lines
 - **Direction to collecting bank to collect for named payee**
 - Collecting bank **ignores this type of crossing at own peril (negligent)** (*House Property Co of London Ltd v London and County Westminster Bank Ltd*)

Dishonoured Cheques: Rights and Liabilities

- Right to sue when cheque dishonoured:
 - **Holder** -HIDC has the greatest rights s 50(1)
 - **Indorser who has paid holder**
- **Signature is essential to liability** s 31
- A forged or unauthorised signature is a nullity s 32
- **The following are liable when cheque not paid, under the following sections of CA:**
 - Drawer s 71
 - Indorser s 73
 - Stranger s 75
 - Transferor by delivery s 77(3)
 - Collecting bank - no liability (only if at fault)
 - Drawee bank – no liability (only if at fault)

Cheques- Forged Signatures

- A forged (without authority) signature is a nullity, subject to two exceptions s 32:
 - **Estoppel**
 - **Ratification**
- **If drawer's signature forged, there is no cheque:**
 - Bank cannot debit account, as it has no mandate from its customer (*National Westminster Bank Ltd v Barclays Bank International*)
 - There can be no conversion of the cheque
- **If an indorsement is forged:**
 - **Person taking cheque is not a 'holder' s 3(1):**
 - Holder in ordinary sense not the same as holder as defined in CA
 - A better way of describing such a person is 'putative holder'

- **The chain of title is broken** (person taking a cheque after it was fraudulently indorsed cannot sue persons who were parties to the cheque before it was fraudulently indorsed)
- However, a **person taking cheque that was fraudulently indorsed is liable to all subsequent indorsees & any person who would be 'holder in due course' but for the forged indorsement ss 73-74**
- The **forger** (but not the person whose signature was forged) is **liable to subsequent indorsees s 32(2)**

Liability of Collecting Bank

- **Bank not obliged to collect third party cheques, but takes a risk if it does**
- **'True owner' may sue collecting bank for conversion to recover cheque value:**
 - **'Conversion'** (*Penfold Wines P/L v Elliot*) - dealing with a chattel in a manner repugnant to the immediate right of possession of the person who has the property or special property in the chattel
 - A cheque being a physical asset can be the subject of an action in conversion and the **bank's liability is the face value of the cheque** (*Australian Guarantee Corp Ltd v Cmrs of the State Bank of Victoria*)
- **Definition of true owner not found in CA**- refers to a person with title or immediate right of possession to the cheque (*Bute (Marquess) v Barclays Bank Ltd*)

True Owner

- Can maintain an action against the person who converted the cheque
- Sometimes there may be **problems identifying the true owner** and case law provides some guidance e
 - **Until a bearer cheque reaches the payee, the drawer is the true owner** (*Hunter BNZ Finance Ltd v ANZ Banking Group*)
 - When a cheque is **posted, the sender remains true owner until it reaches payee** (*Channon v English, Scottish & Australian Bank*)
 - But, **if a payee asked for the cheque to be posted, the payee is the true owner when the cheque is posted**

Collecting Bank Defences

- A bank collecting a cheque for its 'customer' has the following defences:
 - 1. Common law:**
 - Open to all persons
 - Bank is HIDC – if given value
 - 2. Statutory (CA):**
 - **S 95(1) and 95(2)**
- Good faith – to act honestly **s 3(2)**
- Negligence cases:

- Commissioners of Taxation v English, Scottish and Australian Bank*
- NCBC v Robert Bushby*
- Cary v Rural Bank of NSW*
- House Property Co of London Ltd v London County & Westminster Bank*
- Voss v Suncorp-Metway Ltd*

Liability of Drawee Bank

- A drawee (paying) bank faces losses if it:
 - **Wrongfully dishonours cheque** (can be sued by drawer):
 - Defamation (e.g. dishonours cheque on the grounds of 'refer to drawer' or 'not sufficient funds' when there are funds in the account)
 - Breach of contract
 - **Wrongfully pays cheque:**
 - Cannot debit drawer's account;
 - May be sued by true owner of cheque for conversion

Drawee Bank's Defences

- A drawee bank has following defences
 - **Common law:**
 - Customer breaches its duties
 - **Statutory (CA):**
 - Cheque improperly raised **s 91**
 - Paying crossed cheque **s 92**
 - Paying crossed cheque across the counter **s 93(2)**
 - Paying cheque with forged /unauthorised indorsement **s 94(1)**
 - Paying a cheque lacking indorsement/ irregularly indorsed **s 94(2)**
- Good faith & negligence discussed previously
- **All defences are cumulative** (*AMP v Derham*)

Banker-Customer Relationship

- Governed entirely by contract law
- Following amendments to the Banking Act 1959 principles applied to banker-customer relationship are applied to authorised deposit taking institutions (ADIs) as well, as they are authorised to carry on a banking business (*Winterton Constructions Pty Ltd v Hambros Australia Ltd*)

Definition of Bank

- Banks enjoy a special position in the economy and certain privileges therefore only certain corporations can be banks or carry on a banking business

- Offence for a person to hold more than 15% shareholding in a financial sector company
- 1999 term 'bank' deleted from Banking Act 1959
- Now fall under the general term '**ADI**'- **a body corporate authorized to carry on banking business ss 5 & 9(3) Banking Act**
- In the early days of banking, the business of banking was often carried out by wealthy individuals, hence the term 'banker' is often used interchangeably with 'bank'
- For an ADI to call itself a bank it requires **approval from APRA s 66**

Banking Business

- An offence for a person or a body corporate to carry on banking business unless exempted **ss 7 and 8**
- Definition of 'banking business' therefore crucial
- **Under s 5, 'banking business' means:**
 - a) A business that **consists of banking within the meaning of paragraph 51(xiii) of the [Australian] Constitution; or**
 - b) A business that is carried on by a corporation to which paragraph 51(xx) of the [Australian] Constitution applies and that consists, to any extent, of:
 - i. Both taking money on deposit (otherwise than as part-payment for identified goods or services) and making advances of money; (adoption of common law definition) or
 - ii. Other financial activities prescribed by the regulations for the purposes of this definition (provides an element of flexibility- to accommodate changing nature of banking business)
- **The definition is not exhaustive**
- **Legal cases providing guidance on definition of banking business:**
 - *Commissioners of State Savings Bank v Permewan, Wright & Co* – Isaacs J held that the essential characteristics of banking business were:
 - The **collection of money by receiving deposits upon loan;**
 - The **repayment of money when and as expressly or impliedly agreed upon;** and
 - The **utilisation of money so collected by lending it again on such terms as are agreed** (became s 5(b)(ii) of *Banking Act*)
 - *United Dominions Trust Ltd v Kirkwood* (UK case) - Lord Denning held that the usual characteristics of banking business were:
 - Acceptance of cash and cheque deposits;**
 - The **honour of cheques and other payment orders drawn on them by their customers;** and
 - The **maintenance of current accounts or accounts of a similar nature**
- **The definition of banking business is not static but dynamic:**
- Privy Council's comments in *Bank of Chettinad v Commissioners of Income Taxation Colombo*: