



Law Council
OF AUSTRALIA

Winding down Australia's cheques system: Consultation Paper

Treasury

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2024 are:

- Mr Greg McIntyre SC, President
- Ms Juliana Warner, President-elect
- Ms Tania Wolff, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Mr Lachlan Molesworth, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council thanks the following Constituent Bodies for their contributions in the preparation of this submission:

- Law Society of the Australian Capital Territory
- Law Society of New South Wales
- Law Society of South Australia
- Queensland Law Society

The Law Council is also grateful for the contributions of the following Committees:

- National Elder Law and Succession Law Committee
- National Electronic Conveyancing System Committee
- Rural, Regional and Remote Committee
- Business Law Section's Financial Services Committee
- Legal Practice Section's Australian Property Law Group

Introduction

1. The Law Council of Australia welcomes the opportunity to respond to the Treasury in relation to its December 2023 Consultation Paper, *Winding down Australia's cheques system*.
2. The Law Council commends the Treasury on its comprehensive Consultation Paper, which effectively articulates the economic rationale for dispensing with cheques as a method for making payments in Australia, as well as the likely associated impacts and consequences.
3. The Law Council recognises that the use of cheques in business, and personal commerce, has declined significantly, and that it is appropriate to prepare for an orderly transition to winding down the cheques system nationwide. However, there remains a lack of familiarity in the community regarding the technology-based solutions that are intended to replace bricks-and-mortar banking. The discontinuance of cheques in Australia will, therefore, affect businesses and individuals in a variety of ways, and will require a considered, well-communicated and nationally coordinated approach.
4. The Law Council's Constituent Bodies have, in recent months, received enquiries from legal practitioners and their practices about the implications of winding down the cheques system in Australia. There are, broadly, five areas of concern for the Australian legal profession, as follows:
 - consequences for clients in litigating, transacting and settling matters, without the availability of bank cheques and trust account cheques;
 - changes to practice and management in operating a trust and general account;
 - adverse effects for the wider community, particularly vulnerable members of the community;
 - replacement online solutions are unfamiliar to many in the community and/or are perceived as higher risk than cheques or over-the-counter banking; and
 - the need for legislative reform to ensure flexibility of payment mechanisms.
5. A compounding complication in this discussion is the ongoing closure of bank branches, particularly in regional, rural and remote (**RRR**) areas,¹ which is exacerbating the need for technology-based solutions for both personal and business banking and diminishing access to in-person financial services,² despite poor connectivity and prolonged network outages in some RRR areas.³
6. As the winding down of cheques accelerates the adoption of technology, there must be sufficient support provided by financial institutions and membership organisations—including the Law Council's Constituent Bodies—to assist legal practices and their clients to make this significant transition. It is also critical that

¹ This is currently the focus of a Senate Inquiry. See Rural and Regional Affairs and Transport References Committee, *Bank closures in regional Australia* (Web Page, 2024) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Rural_and_Regional_Affairs_and_Transport/BankClosures>.

² Treasury, *Winding down Australia's cheques system* (Consultation Paper, December 2023) 16.

³ See, e.g., Gary-Jon Lysaght, *Five-day 3G, 4G outage in remote community caused by rodents sparks calls for tailored services*, ABC News (Online, 23 January 2021) <<https://www.abc.net.au/news/2021-01-23/call-for-better-remote-internet-after-rats-cause-outage/13072896>>; *Australia's digital divide means 2.8 million people remain 'highly excluded' from internet access*, ABC News (Online, 16 October 2022) <<https://www.abc.net.au/news/2022-10-16/australia-digital-divide-millions-cannot-access-internet/101498042>>.

any replacement technology-based solutions are affordable, secure, reliable and easy to use, and that information campaigns are developed to educate the public about these solutions.

7. More generally, despite the current impetus to identify areas impacted by the winding down of cheques, there will inevitably be gaps and grey areas identified, once the decommissioning of cheques is fully implemented. Support for businesses, by way of regular monitoring and post-implementation reviews, will be important for a successful transition from cheque usage in Australia.
8. This submission responds to a selection of questions in the Consultation Paper, with a particular focus on the impact of the abolition of cheques on the Australian legal profession and the clients that the profession routinely serves.
9. The Law Council thanks the Treasury for its engagement to date and looks forward to continuing to engage with the Commonwealth as this transition takes place. The Law Council would welcome the opportunity to be consulted on any relevant legislative proposals in the course of this transition.

Responses to consultation questions

Enabling a smooth transition

Question 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?

10. The Law Council considers that the Consultation Paper appropriately identifies the six key conditions and principles to guide the winding down of the cheques system, namely:⁴
 - a sufficient grace period for consumers and businesses to make necessary adjustments to transition to alternate payment methods;
 - education and support for cheque users by financial institutions, industry associations and consumer groups;
 - reasonable access to bank branches or participating Bank@Post outlets during the transition period to assist with education;
 - appropriate alternatives for all existing uses of cheques;
 - governments eliminating key legislative barriers; and
 - governments ending their own cheque issuance.

⁴ Treasury, Winding down Australia's cheques system (Consultation Paper, December 2023) 5-6.

Questions 2 and 3:

- **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.**
- **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.**

11. The proposed sequencing, and timing, of the transition in the Consultation Paper is as follows:⁵

- **2025:** Cease issuance of bank cheques.
- **2026:** Cease issuance of commercial and government cheques.
- **2027:** Cease issuance of personal cheques.
- **End-2028:** Cease acceptance of personal, commercial and government cheques.
- **End-2030:** Cease acceptance of bank cheques. Close the cheques system.

Sequencing

12. The Law Council does not object to the proposed sequencing of the winding down of Australia's cheques system. However, it is imperative that, in the lead-up to the abolition of cheques, a concerted effort is made to ensure that all individuals—including people who are vulnerable and people who are less digitally inclined or excluded—will be able to transact safely in a digital environment.
13. Sufficient safeguards must be in place to mitigate the privacy and security risks that are more likely to arise when digital payment methods are used. Relevant measures could include enhancing cyber security standards, in addition to improving the digital literacy and cyber security awareness of individuals across the Australian community.
14. All banks should implement improved cyber security measures to enhance the protection of members of the community, particularly the vulnerable cohorts identified in the Consultation Paper (i.e., individuals living with disability, older Australians, First Nations Peoples, and unemployed individuals).⁶ This should occur prior to banks ceasing issuing cheques.
15. In addition, the Law Council considers that, before banks cease issuing cheques, all banks must, at a minimum, have implemented the name-checking technology known as 'confirmation of payee', as announced in November 2023 by the Australian Banking Association as part of its Scam-Safe Accord launch.⁷ This initiative—which enables the matching of the name of a bank account with the BSB and account number—will increase protections for consumers against scammers who provide fraudulent bank account details to receive funds, such through payment

⁵ Ibid 6.

⁶ Ibid 35.

⁷ Australian Banking Association, Scam-Safe Accord launch (Press conference, 24 November 2023) <<https://www.ausbanking.org.au/press-conference-scam-safe-accord-launch/>>.

redirection scams.⁸ The Law Council was pleased to note in 2023 that some banks had already commenced the implementation of name-checking technology.⁹

16. The Queensland Law Society (**QLS**) suggests that consideration be given to implementing a liability-sharing model for all banks, reflecting elements of the United Kingdom's *Financial Services and Markets Act 2003* (UK), under which a reimbursement requirement for Authorised Push Payment (**APP**) fraud will be introduced by late February 2024.¹⁰ Under this model, both the sending and receiving bank are responsible for repaying half the loss to the scam victim.¹¹ While the Law Council does not have a settled policy position on a liability-sharing model for banks, it considers there is merit to the proposal, as banks will have greater incentive to reduce the occurrence of scams if they are directly responsible for reimbursing victims.
17. Following the abolition of cheques, it would be prudent to monitor vulnerable consumers' exposure to compromise of privacy and/or security as a consequence of using digital payment methods. This process would support an assessment of whether enhanced controls, or consumer protection measures, are necessary.

Timing

18. While the Law Council considers that the cessation of cheques is inevitable, the Consultation Paper does not identify all scenarios in which legal practitioners and their clients use cheques, particularly bank cheques. Further detail is provided later in this submission, in response to Questions 19 and 20, relating to the commercial use of cheques.
19. The Consultation Paper acknowledges that the use of bank cheques has not declined as rapidly as the use of personal cheques.¹² This reflects the ongoing regular use of bank cheques in significant business transactions. The Law Council is aware of concerns by members of the Australian legal profession that, in light of the wide-ranging use of bank cheques, the proposed 2025 date for discontinuing bank cheques is premature.
20. Consideration should, therefore, be given to continuing the issuance of bank cheques until at least the end of 2027, noting that some banks have indicated that they will discontinue their cheque offerings earlier than any date mandated by government (as early as the first quarter of 2024).¹³ Difficulties for businesses are already arising due to banks moving ahead of the government's proposed timeline (presumably as a cost-saving measure), even though the digital alternatives are not

⁸ Ibid.

⁹ See, e.g., Westpac, More scam protection for customers with the launch of 'Westpac Verify' (Media Release, 5 March 2023) <https://www.westpac.com.au/about-westpac/media/media-releases/2023/5-March/>; Commonwealth Bank, *NameCheck* (Web Page, 2024) <<https://www.commbank.com.au/support/security/namecheck.html>>.

¹⁰ See Payment Systems Regulator, Fighting authorised push payment fraud: a new reimbursement requirement (Policy Statement, June 2023) <<https://www.psr.org.uk/media/rxtlt2k4/ps23-3-app-fraud-reimbursement-policy-statement-june-2023.pdf>>.

¹¹ Michael Atkin and Loretta Florance, While Australian banks refuse most scam victims refunds, the UK is making them mandatory, ABC News (Online, 11 July 2023) <<https://www.abc.net.au/news/2023-07-11/uk-laws-force-to-banks-reimburse-scam-victims-unless-negligent/102563000>>.

¹² Treasury, Winding down Australia's cheques system (Consultation Paper, December 2023) 7.

¹³ See, e.g., Bendigo Bank, *Cheques are on the way out* (Web Page, 2023) <<https://www.bendigobank.com.au/ways-to-bank/cheques/>>; Suncorp Bank, *Beyond cheques* (Web Page, 2023) <<https://www.suncorp.com.au/banking/help-support/cheques-payments-options.html>>; Warwick Credit Union, *Exiting Cheques* (Web Page, 2023) <<https://www.wcu.com.au/exitingcheques>>; Macquarie Bank, *Make and receive all payments digitally* (Web Page, 2023) <<https://www.macquarie.com.au/help/general/cheque-and-cash-changes.html>>.

yet viable or well-understood. For instance, some banks are already refusing to issue new cheque books to legal practices.

21. The Law Council suggests that financial institutions moving ahead of the government's deadline to cease issuing cheques should consider the impact of these changes on their clients, in order to ensure that businesses can continue to operate effectively, and with certainty, during the transition period. The Law Council also notes that some financial institutions have changed their account terms and conditions to seek to prevent their customers from lodging cheques with the bank. Such action may be contrary to the *Cheques Act 1986* (Cth). A purposive interpretation of the obligations imposed on financial institutions under the Cheques Act indicates it is likely that it imposes an implied obligation on financial institutions to offer customers the opportunity to lodge cheques for payment, or to accept them for deposit.¹⁴

Question 4: What are the roles of government and industry in ensuring a smooth transition?

22. Prior to discontinuing the acceptance of cheques, especially by government bodies who require payment by cheque in specific circumstances, it is critical to ensure that government bodies are technologically equipped and operationally prepared to facilitate electronic payments. It is also important that any digital alternatives easily identify the payee and matter reference immediately, to avoid delay.
23. A comprehensive assessment should be conducted to evaluate the capacity, infrastructure and workforce capabilities of government 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 dialogues with banks to understand their decommissioning timelines.
24. The Law Council additionally recommends that a comprehensive communication strategy should be devised to inform stakeholders—including businesses and the public—about the transition. Clear and concise guidance should be disseminated on the benefits of electronic payments, the relevant timelines, and the support mechanisms that will be available during the transition period.

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

25. A smooth transition is dependent on appropriate alternatives being available, and on consumers having sufficient confidence in the security, availability and accessibility—including ease of use—of digital alternatives. Further, if networks go down, or if mobile devices that facilitate multi-factor authentication (**MFA**) are lost or otherwise inoperative, the ability to visit a bank branch, as an alternative, to achieve a bank transfer may be critical for time-sensitive transactions.
26. The Law Council recognises that there may be a general lack of confidence in digital alternatives, particularly in certain groups of the community who have higher rates of digital exclusion under the Australian Digital Inclusion Index, such as older Australians, First Nations Peoples, and those who live in RRR areas.¹⁵ There is

¹⁴ *Cheques Act 1986* (Cth), e.g., ss 63, 66, 67.

¹⁵ Australian Digital Inclusion Index 2023 (Report, 2023) <https://www.digitalinclusionindex.org.au/wp-content/uploads/2023/07/ADII-2023-Summary_FINAL-Remediated.pdf>.

also a lack of familiarity with digital alternatives within the business community, especially in RRR areas, where the digital gap increases with remoteness. The ongoing digital exclusion of those cohorts, without practical and achievable solutions to address this, will pose a real issue in terms of the transitional arrangements.

27. A significant barrier to ensuring a smooth transition from cheques is the limited reliability of digital alternatives. The government must consider the availability of safeguards to address any technical and digital failures, especially where timing is a critical factor. In this respect, the role of the New Payments Platform (**NPP**)—open access infrastructure for fast payments in Australia (and similar products)¹⁶—will be vital in providing an alternative method for replacing bank cheques and personal cheques.
28. The Law Council notes that these platforms are in the relatively early stages of implementation. Accordingly, it is critical that any such platforms are accessible and easy to use by members of the public, particularly those who have been historically left behind by the digital divide. Moreover, the cost to use these platforms must not be prohibitive. Ideally, these platforms should be available free of charge if customers have no choice but to use them.
29. Relatedly, personal bank transfers are often restricted in high-value transactions and there may be a daily limit for transfers.¹⁷ Clear, consistent guidance will be required to be developed by banks on how to safely put into effect high-value bank transfers, particularly given the declining availability of in-person financial services.
30. As identified in the Consultation Paper,¹⁸ Property Exchange Australia (**PEXA**) and Sympli are digital platforms that enable lawyers, conveyancers and financial institutions to complete property transactions securely online.¹⁹ However, there are various transaction types that are not enabled on PEXA or Sympli (see responses to Questions 19 and 20 below), including:
 - mortgagee sales;
 - business sales; and
 - transfers by direction (which are becoming far more prevalent, due to an increase in off-the-plan projects).
31. The Law Council understands that Sympli—a relatively new platform—is not available in all Australian jurisdictions or for all transaction types and,²⁰ therefore, has had limited take-up to date. Moreover, whilst the more established PEXA has been reasonably successful, its platform is impacted due to payment outages from time to time. Although PEXA case settlements are not delayed by payment outages (as funds transfers occur after settlement), if NPP is to be relied upon as part of the settlement transaction, payment outages will interrupt commerce.

¹⁶ Reserve Bank of Australia, *The New Payments Platform* (Web Page, 2024) <<https://www.rba.gov.au/payments-and-infrastructure/new-payments-platform/>>.

¹⁷ See, e.g., National Australia Bank, *Daily limits for online payments and transfers* (Web Page, 2024) <<https://www.nab.com.au/help-support/daily-limits-online-payments/>>.

¹⁸ Treasury, *Winding down Australia's cheques system* (Consultation Paper, December 2023) 18, 21.

¹⁹ See Property Exchange Australia, *About PEXA* (Web Page, 2024) <<https://www.pexa.com.au/company/>>.

²⁰ Sympli, *Services & Jurisdictions* (Web Page, 2024) <<https://www.sympli.com.au/services-jurisdictions/>>.

Personal use of cheques

Question 12: Are there any other drivers for the current use of personal cheques in Australia?

32. The Consultation Paper identifies three key drivers for the current use of personal cheques:²¹
- the personal preference (or habit) of individuals who continue to rely on cheques for the bulk of their day-to-day transactions, those who do not own debit or credit cards, or do not use the internet on a regular basis;
 - the level of digital inclusion throughout Australia, including the affordability of devices and internet, access to a stable internet connection, and the ability to use the devices that are required to engage with online systems; and
 - lack of trust in digital alternatives by individuals who may be able to use technology, but be unwilling to use it, due to a perceived lack of security or privacy in digital solutions.
33. The Law Council agrees that the above factors are the primary drivers of the current use of personal cheques in Australia. The Law Council also notes that, as identified in the Consultation Paper, 80 per cent of personal cheques are written by individuals over the age of 65.²² Further insight into the use of cheques by older members of the community is outlined below.

Power of attorney

34. The Consultation Paper identifies that cheques enable a degree of financial independence.²³ Some older customers may have the confidence to use a cheque book, but may not have the same level of trust, or confidence, in relation to electronic payments and banking.
35. The winding down of cheques may mean that some older customers move sooner to granting a power of attorney to assist with their daily financial affairs. This will likely give rise to several challenges:
- The process of enabling an attorney to have access to a principal's bank account can be challenging. For example, the bank will typically need to 'see' the customer face-to-face, which can be difficult if they are physically unable to travel to the bank, or if the local bank branch is a significant distance away, as is increasingly the case in RRR areas.
 - While rigorous identification processes are necessary to grant a power of attorney, it can take more than four weeks to obtain bank approval for an attorney to access a principal's bank account, which is often not practicable. Consideration may need to be given to implementing alternative processes, such as the use of audio-visual identification, in appropriate circumstances.
 - Notwithstanding the above, there are a significant number of reported instances of attorneys 'misusing' their principal's bank accounts,²⁴ including

²¹ Treasury, Winding down Australia's cheques system (Consultation Paper, December 2023) 15-16.

²² Ibid 15.

²³ Ibid.

²⁴ See, e.g., *Mary Alice Hughes by her Tutor NSW Trustee & Guardian v Hughes* [2011] NSWSC 702; *Estate of the late Janice Gruer*; *Application of Gail Elizabeth Rands* [2018] NSWSC 401; *Dowsett v King* [2019]

one case where the principal's daughter/attorney withdrew a total of \$914,144.95 from the principal's bank accounts within a two-and-a-half-year period,²⁵ and another case where the attorney admitted spending money from the principal's bank account, totalling more than \$40,000.²⁶ These instances illustrate the very real risk of a principal's bank accounts being misused by their attorney. It will be important for the government to consider ways to mitigate this risk as more people grant a power of attorney in the coming years.

Elder financial abuse

36. The Law Council recognises that the phasing out of cheques may facilitate elder financial abuse, as some older Australians do not have the requisite digital skills to manage their bank accounts online. Over the past two decades, there have been many court cases relating to the 'wrongful' use of a bank account,²⁷ and the sheer number of instances points to the extent of the risk with the relatively invisible operation of bank accounts online, which will increase as cheques are discontinued and older Australians require the assistance of others to navigate their financial affairs.
37. Significant risks arise when adult children operate their parents' internet banking services without their supervision, or knowledge. For instance, the Law Society of New South Wales advised the Law Council of a concerning situation where an elderly client was unaware of the fact that she had lent a large amount of money to a family member, because she no longer received paper bank statements. Her adult child had caused her bank statements to become available online only, and she was unaware how to access them. The unauthorised transactions were only detected due to subsequent legal intervention.
38. The risk of elder financial abuse is further exacerbated by bank branch closures, as local bank employees have historically provided personalised support to customers and have played a more proactive role in detecting unauthorised transactions by perpetrators. Consideration must be given to how this risk can be mitigated as the transition away from cheque use progresses.

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

39. Whilst acknowledging that the Commonwealth committed in 2023 to maintain access to cash in Australia,²⁸ the Law Council considers that access to alternative forms of payment for those who do not have a reliable internet connection, or do not utilise services such as internet banking, will be a significant hurdle to winding down the cheques system. This hurdle will likely be more pronounced in RRR areas,

NSWSC 1459; *Grant v Grant*; *Grant v Grant (No. 2)* [2020] NSWSC 1288; *Howell v Kelly* [2021] NSWSC 1422; *Katsoulas v Kritikakis*; *Katsoulas v Apostolatos* [2024] NSWSC 67.

²⁵ *Bronkhorst v Lloyd* [2015] NSWSC 1618.

²⁶ *Downie v Langham* [2017] NSWSC 113.

²⁷ See, e.g., *Watson v Watson* [2002] NSWSC 919; *Angliss v Urquhart* [2002] NSWCA 256; *Tevenar v Ussfeller* [2005] NSWSC 582; *Badman v Drake* [2008] NSWSC 1366; *Johnson v Smith* [2009] NSWCA 306; *Fulton v Fulton* [2014] NSWSC 619; *SKC* [2014] NSWCATGD 39; *Matouk v Matouk (No 2)* [2015] NSWSC 748; *Thorn as executor of the estate of McAuley v Boyd* [2014] NSWSC 1159; *Bronkhorst v Lloyd* [2015] NSWSC 1618; *Borthistle v Kanaef* [2016] QSC 182; *Tschirn v Australian Executor Trustee Ltd* [2016] SASC 149; *Lindsay –v- Arnison* [2017] NSWSC 41.

²⁸ Treasury, A Strategic Plan for Australia's Payment System (June 2023) <<https://treasury.gov.au/sites/default/files/2023-06/p2023-404960.pdf>> 2, 22, 33.

where the availability of bank branches—and ease of access to cash—is in decline, and as the geographical distance increases between branches.

40. Other related hurdles include:

- the affordability of internet and mobile services and devices; and
- daily transfer limits for internet banking, which may otherwise require the customer to make payments over several days, or physically attend a bank branch to increase the daily limit.

41. The Bank@Post initiative, as outlined in the Consultation Paper,²⁹ may somewhat assist to address these hurdles—particularly for customers who are unable or unwilling to use internet banking—by providing basic banking services (including cash deposits and withdrawals) through participating Post Offices. However, further consideration must be given to the level of resourcing and the infrastructure that will be required to ensure that the Bank@Post initiative can effectively, and efficiently, meet the needs of the community. Public education about Bank@Post will also be essential to ensuring that this service achieves its intended role in assisting in the transition away from cheques.

42. As a broader point, the Law Council observes that a near-total reliance has developed upon smart mobile phones (and their applications) to negotiate modern life, particularly finance. For instance, without a modern mobile phone and access to the internet, it is very difficult to use MFA for most financial transactions (i.e., through an authenticator application, banking application, or SMS). Given Australia's ageing population, coupled with a rise in reduced mental capacity for this cohort, the Law Council considers that a concerted policy effort will be required to facilitate accessible and effective alternatives to the required use of a mobile phone to provide access to financial transactions.

Commercial use of cheques

Questions 19 and 20:

- **Are there other reasons why cheques are being used in an institutional or commercial setting? If so, please provide more detail.**
- **How significant are the barriers to reducing commercial uses of cheques? What timeframes, support or legislative change is required for businesses transitioning away from cheque use?**

43. One of the key roles of legal practitioners is facilitating the flow of money in transactions. As such, there are various legal settings where cheques are used by lawyers to complete transactions or effect payments. Bank cheques are regularly used in high-value transactions as a secure and certain method 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.

²⁹ Treasury, Winding down Australia's cheques system (Consultation Paper, December 2023) 12.

44. The phasing out of cheques will, therefore, require adaptation to new procedures and processes by legal practitioners and their clients, and some instances will be more challenging than others to establish an alternative process with a similar risk profile.
45. The Consultation Paper identifies the use of cheques in such circumstance as ‘an entrenched practice to fulfill obligations’.³⁰ In some legal settings, the use of cheques has become an established practice due to convenience. Other potentially challenging legal settings are the transactional settings that are not covered by electronic conveyancing (**e-conveyancing**). These transactions essentially involve the handing over of a cheque (usually a bank cheque) in exchange for title documents.
46. The Law Council understands that the key reason that cheques are used in these settings is that they preserve the ‘delivery versus payment principle’, which means that there is no point in time in the transaction where a party holds both the purchase funds and the title documents. This was a key design feature in the development of e-conveyancing, and is an important concept to consider when examining alternatives to using cheques for commercial transactions outside of e-conveyancing.
47. The circumstances and barriers identified below highlight the need for education, guidance and collaboration in relation to the impacted areas. In the Law Council’s view, the barriers are not insurmountable, but do require further targeted consultation and consideration. As raised earlier in this submission, and in light of the further consultation required, it is possible that the proposed 2025 date for discontinuing bank cheques is premature.

Real property transfers

48. The Consultation Paper suggests that e-conveyancing platforms are an alternative to using cheques for settling real estate transactions.³¹ However, the Law Council understands that there are various transaction types that are not enabled on PEXA or Sympli, where legal practitioners are currently conducting physical settlements, via an exchange of cheques.
49. Further, although the Electronic Conveyancing National Law governs the provisioning and operation of electronic conveyancing in each state and territory,³² e-conveyancing for standard transactions has been mandated to varying degrees in some, but not all, Australian jurisdictions. By way of illustration, the state of play in various jurisdictions is outlined below.

Australian Capital Territory

50. E-conveyancing is not currently mandated in the Australian Capital Territory (**ACT**), and this is unlikely to occur until there is at least one other Electronic Lodgment Network Operator functioning in the ACT, in addition to PEXA. As a result, it is up to

³⁰ Ibid 20, 24.

³¹ Ibid 18.

³² See *Electronic Conveyancing (Adoption of National Law) Act 2012* (NSW); *Electronic Conveyancing (Adoption of National Law) Act 2013* (Vic); *Electronic Conveyancing National Law (Queensland) Act 2013* (Qld); *Electronic Conveyancing Act 2014* (WA); *Electronic Conveyancing National Law (South Australia) Act 2013* (SA); *Electronic Conveyancing (Adoption of National Law) Act 2013* (Tas); *Electronic Conveyancing (National Uniform Legislation Act) 2013* (NT); *Electronic Conveyancing National Law (ACT) Act 2020* (ACT).

the contracting parties to agree whether or not to settle a property transaction electronically.

51. The Law Society of the ACT has advised the Law Council that the vast majority of property transactions in the ACT are now being settled electronically via PEXA. Nonetheless, there remain contracting parties who elect to settle a property transaction using traditional, in-person methods which involve the use of cheques.
52. In addition, there remains a wide variety of property transactions that cannot be transacted electronically in the ACT, including:³³
 - more than 20 types of transactions where there is a Crown Lease restriction on title;³⁴
 - if there is a form of stopper notice (Caveat, Writ, Court Order, Statutory Charge, or Charge) on the title; and
 - where the organisation type is 'Registered Company in External Administration'.
53. Given the above factors, the Law Council understands that the ACT has a higher proportion of property settlements still being conducted in-person, relative to other Electronic Lodgment Network-enabled jurisdictions. On this basis, it follows that the ACT also has a higher proportion of property settlements requiring the use of cheques.

Northern Territory

54. While the *Land Legislation Amendment Act 2023* (NT) recently came into force to amend the *Land Title Act 2000* (NT), the *Law of Property Act 2000* (NT), and other legislation necessary for the purposes of e-conveyancing, the Northern Territory does not have a timetable for the mandatory adoption of e-conveyancing.
55. The Law Council understands that the Northern Territory Government has not allocated funding for the necessary enabling infrastructure in its 2023–24 Budget,³⁵ so there may be a significant delay in mandating e-conveyancing in the Northern Territory, notwithstanding that there is a lower volume of property transactions in that jurisdiction. Bank cheques will, therefore, be required to be used in the interim period.

Queensland

56. In Queensland, since 20 February 2023, the transfer of real property has generally been required to be completed using an e-conveyancing platform under the *Land Title Regulation 2022* (Qld).³⁶
57. However, there remain several exemptions to the mandate.³⁷ The QLS has advised that, although work is underway to increase the scope of transactions within the mandate, it is highly likely that some transactions will permanently remain exempt,

³³ ACT Government, *E-conveyancing for lawyers and banks* (Web Page, 2024) <<https://www.accesscanberra.act.gov.au/building-and-property/e-conveyancing-for-lawyers-and-banks>>.

³⁴ The Australian Capital Territory has a leasehold system of land tenure, so all property settlements involve the sale and purchase of a Crown Lease.

³⁵ See Northern Territory Government, *2023-24 Budget Papers* (Web Page, 2023) <<https://budget.nt.gov.au/budget-papers>>.

³⁶ Titles Queensland, *eConveyancing Mandate* (Web Page, 2023) <<https://www.titlesqld.com.au/econveyancing/mandate/>>.

³⁷ *Ibid.*

as it is not feasible to address all the many permutations of real property transfers in the e-conveyancing platform.

Tasmania

58. Tasmania has not yet mandated the use of e-conveyancing for property transfers. While the Law Council understands that Tasmania is progressing towards mandatory adoption—possibly by 2025—this timeframe is uncertain, meaning that both paper and electronic settlements are expected to continue for some time.

Business sales where there is no transfer of land component

59. Business sales, where there is no transfer of land component, cannot be transacted using e-conveyancing. Conversely, the Law Council notes that where a transfer of land (usually a transfer of lease) is part of a sale of a business, payment for the other assets (e.g., stock, plant and machinery) can be made using e-conveyancing. It will be important that this continues to be the case as cheques are phased out.

The settlement process

60. In business sales where there is no land component—for instance, the sale of a business that involves the sale of plant and equipment and motor vehicles—a bank cheque is usually handed over to the vendor by the purchaser, in exchange for ‘the keys’ and title papers being handed over.
61. Once cheques are no longer in use, a new settlement process will need to be adopted which is acceptable to both parties, and allows one party to electronically transfer funds to another party prior to business assets being released. It is noted that a vendor will not want to release the business assets prior to receipt of cleared funds. Where such a transaction is put into effect through lawyers, difficulties may be addressed by way of an agreed process, where the funds are transferred into trust (upon various undertakings by the parties), and then once acted upon, the funds are transferred electronically.
62. Each stage of such a process—as opposed to the simultaneous physical exchange of a bank cheque for physical assets (including titles and transfers)—is a point of additional risk. Such risks include a breach of an undertaking, or the risk of bank account fraud or error. There are also additional compliance risks due to the increased use of the trust account.

Release and taking of security

63. Another challenge to manage for commercial transactions outside of e-conveyancing is the process for release of security by the vendor’s outgoing bank, and the taking of security by a purchaser’s incoming bank.
64. While lawyers may be able to come to an agreement for the settlement of the transaction through the use of undertakings and holding items in escrow, the release and taking of security in a transaction introduces an additional layer of complexity.
65. The Law Council understands that there may be a reluctance by an incoming bank to provide funds to an outgoing bank without securities being released. However, the outgoing bank will not release securities without receipt of funds from the incoming bank. This situation can result in a stalemate if parties will not accept undertakings from the other party in relation to these items. The phasing out of cheques is likely to exacerbate this issue.

66. The Law Council suggests that further consideration and industry consultation is warranted as to the appropriate approach to be taken regarding commercial transactions outside of e-conveyancing. These discussions must include financial institutions.

Sale of company title apartments

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

Sale of rural property

70. As mentioned above, if a transaction involves the sale of land together with other assets, it can be transacted using e-conveyancing. The sale of rural land with a water access licence, stock/cattle, and machinery, is an example of this type of transaction.
71. However, Electronic Lodgment Network Operators do not have functionality across a large number of rural transactions. For example, any leasehold matter, matter with a water allocation, or other matter that requires the Minister's consent, cannot be completed using e-conveyancing. The same issues will arise as the sale of business without a land component, including in relation to the release and taking of security.

Court applications

72. The Law Council understands from the QLS that cheques are required when out-of-town solicitors in Queensland lodge court applications. For example, a probate application is required to be filed in person or by post. The QLS advises that most legal practitioners in Queensland draw trust cheques from funds paid by the client in anticipation of the application fee, or a business cheque from their own business account.
73. The QLS reports that an application fee will very rarely be paid by credit card, and equally rarely would a legal practitioner provide credit card details (which are secured details, usually from the Principal of the practice). Practitioners cannot yet file these applications (and pay the required fee) online—something that they can do using the Commonwealth Courts Portal. Until a secured portal is provided in every jurisdiction, cheques will be a necessity in these circumstances.

Litigation

74. One prevalent area of ongoing cheque use is for the provision of conduct money in litigation matters. Conduct money is routinely tendered by cheque when serving subpoenas on third parties, pursuant to the civil procedure rules of each state and territory.³⁸ A legal practitioner will typically have had no previous contact with the third party when serving a subpoena, and will not be aware of any digital banking details for the addressee, rendering the use of cheques an attractive option.³⁹
75. With the phasing out of cheques, minor changes may be required to the procedural rules in various Australian civil jurisdictions to facilitate electronic payment systems as an alternative to cheque usage for tendering conduct money, and to ensure subpoena compliance.
76. Where the issuing party has served a subpoena to attend, and has indicated an intention to pay conduct money by way of an electronic payment system, the addressee may opt to provide the necessary bank account (or other) details requested by the issuing party to make the funds available to the addressee, or arrange some other convenient method of payment.
77. Where details are not provided to enable payment to be made a reasonable time before attendance, the addressee should not be released from the obligation to comply with the subpoena. However, the addressee should remain entitled to compensation by way of orders for costs, and expenses of compliance to attend court.

Other impacts on law practices

78. The cessation of the use of cheques may lead to an 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.
79. The legal profession will also be required to review and update any template forms and documents, including contracts, that refer to the use of cheques.
80. The Law Council recognises that there are digital solutions available for many payments and strongly supports incorporating new payment technologies that are safe, resilient, have appropriate consumer protections, promote competition, and address risks posed by money laundering and terrorism financing. However, the Law Council reiterates that there is a lack of familiarity with, and confidence in, appropriate alternatives, particularly with respect to the security and risk profile of those alternatives. This will likely be a business-wide issue across Australia, not only for legal practices.

³⁸ For instance, in New South Wales, this practice has arisen from the need to meet the requirements of Rule 33.6(1) of the *Uniform Civil Procedure Rules 2005* (NSW): 'An addressee need not comply with the requirements of a subpoena to attend to have evidence unless conduct money has been handed or tendered to the addressee a reasonable time before the date on which attendance is required'.

³⁹ This is a further example of an 'entrenched practice to fulfill obligations', as referred to in the Consultation Paper.

Distribution of deceased estates

81. The Law Council understands that payments to beneficiaries of deceased estates are frequently made by direct deposit through electronic funds transfer (**EFT**), so the impact of discontinuing cheques is likely to be relatively minor. There may be some instances where beneficiaries are reluctant to provide bank account details for payment, but this is likely to be transitional.
82. The Law Council considers that the discontinuation of the use of cheques to distribute deceased estates will reduce the administrative burden on law practices. Members of the Law Council's National Elder Law and Succession Law Committee advise that it is not uncommon for beneficiaries who insist on receiving their inheritance via cheque to not present their cheque for months (even years). This delay requires law practices to keep the relevant file open, follow up with the beneficiary, and, at times, re-issue stale cheques. As the rest of the estate will have been fully administered, there are no remaining funds to draw upon to compensate for any additional administrative work that is necessary.

Alternative payment methods

83. The Consultation Paper identifies alternative payment methods for the commercial use of cheques, including PayID.⁴⁰ Yet, there are regulatory and practical impediments to the wholesale facilitation of PayID (and similar systems, such as BPAY) by law practices. For example, at present, PayID cannot typically be used for high-value transactions, and most banks will not allow a solicitor's trust account to be associated with PayID.
84. The Law Council understands that there are currently efforts in some Australian jurisdictions to permit the use of PayID and BPAY for the payment of trust monies.⁴¹ Nonetheless, it considers that a national approach to enabling increased flexibility in payment mechanisms for law practices is preferable over the current piecemeal approach. The Law Council is currently considering its policy position on this matter and, once it has a settled view, would be pleased to engage further with the Treasury.

Operation of cheque accounts

85. The Law Council understands that there are legislative restrictions that effectively require solicitors in some jurisdictions to operate cheque accounts. For example, in Queensland, the *Legal Profession Act 2007* (Qld) requires the withdrawal of trust money by cheque, unless the law practice has obtained approval from the QLS to use EFT.⁴²
86. Amendments would be required to the *Legal Profession Act 2007* (Qld), and any equivalent provisions in other State and Territory legislation, to remove the mandating of cheques as a payment method. Consultation will be required with the regulating bodies of the legal profession in each State and Territory to ensure that any such amendments are fit for purpose, and that any changes in requirements are effectively communicated to law practices.

⁴⁰ Treasury, Winding down Australia's cheques system (Consultation Paper, December 2023) 21.

⁴¹ E.g., the Law Society of South Australia has implemented an exemption pursuant to regulation 56 of the *Legal Practitioners Regulations 2014* (SA), while the Law Society of the ACT has waived the BSB and account number recording requirements under regulation 81 of the *Legal Profession Regulation 2007* (ACT).

⁴² *Legal Profession Act 2007* (Qld) s 250(1). Section 252(1) contains an equivalent restriction relating to withdrawals from controlled money accounts.