



Bulletin No 4

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Bank cheques

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1. Introduction

The Office has become aware of problems that may arise out of the issue of what are commonly known as "bank cheques". The purpose of this bulletin is to inform the banks as to how the Office views the legalities surrounding such cheques and how it would typically approach a complaint relating to a bank cheque, based on the suggested guidelines set out below.

2. The Legal Position

A "bank cheque" is typically used for the payment for large and important purchases on the understanding that, being a cheque of the bank, it is more or less the equivalent of cash and certainly more reliable and safer than an ordinary cheque.

The Bills of exchange Act No. 34 of 1964 ("the Act") defines a bill as:

"An unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time, a sum certain in money to a specified person or his order or to bearer (s2 (1))."

A cheque, in turn, is defined as a bill drawn on a bank and payable on demand (s1).

A document in the form of a cheque which is drawn by one person (e.g. a bank) and not directed to another person, is not a bill. Therefore a "bank cheque" does not meet the requirements of the Act's definition of either a bill or a cheque. Section 3(2) of the Act does, however, provide that the holder of such an instrument may treat it, at his option, as either a bill or a note.

Notwithstanding this, the Act does, through the latest amendments (through section 27 of Act 56 of 2000), provide that the provisions of the Act applicable to a cheque, apply to a bill drawn by a bank on itself and payable on demand (see: section 91(2)).

The end result is that the holder of a bank cheque may treat it, at his option, as a bill and also rely on the provisions of the Act that are applicable to cheques specifically (e.g.: Section 81 of the Act which is applicable to lost or stolen cheques).

The question whether the drawer of a bank cheque is entitled to countermand payment has not yet come before the South African courts and it is for this reason that comparative law be used in this regard.

The Australian Bankers' Association announced in 1985 that payment of bank cheques could only be countermanded in four instances:

1. Where the "cheque" is a forgery;
2. Where the cheque contains material alterations;
3. Where the cheque has been lost or stolen;
4. Where there is a court order preventing the bank from honouring the cheque.

A fifth reason for countermanding a bank cheque is cited in Australia, namely where the bank has not received consideration for the cheque.

This fifth reason has limited application. Such a cheque may not be dishonoured unless the holder has not given value or unless the holder was aware, at the time of giving value that funds against which the cheque was drawn would not clear.

This means that if a bank wants to issue a bank cheque before funds have been cleared, then it must do so at its own risk, and not that of the holder of the cheque.

The Australian Banking Ombudsman confirmed the continued existence of the five instances of dishonour.

In the United States of America the *Uniform Commercial Code* has extensive provisions regulating the countermanding of bank cheques. It has been argued that policy in America should not allow the countermanding of bank cheques because "the public regards bank cheques as cash and therefore payment by bank cheques should be irrevocable".

3. Suggested Policy

It is suggested that the banks adopt the following policy regarding bank cheques:

1. That the requestor of a bank cheque be informed that a bank cheque will only be stopped in special circumstances.
2. That the banks themselves adopt a policy of only countermanding bank cheques in the circumstances listed in paragraph 2 above.
3. That banks advise their clients generally that it is best not to treat bank cheques as equivalent to cash, but to contact the bank issuing the cheque for confirmation that it will honour it.
4. Where one or more of the instances in paragraph 2 exist, that banks obtain an appropriately worded indemnity from the requestor of a bank cheque against a claim from the payee before any countermand is made so as to protect the interests of the bank. In the event that funds were reversed for the purpose of covering the bank cheque, such funds should not be released until the bank is fully satisfied that no claims will be submitted by the payee. These facts should be communicated to the requestor of the bank cheques prior to the cheques being drawn.

**Adv NJ Melville
Ombudsman**