

**USURY, BILLS OF LADING, AND WRITTEN MEMORANDA
(REPEAL) BILL 1990**

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The object of this Bill is to repeal the Usury, Bills of Lading, and Written Memoranda Act 1902 and to re-enact certain of its provisions that are still of practical utility in other Acts.

Repeal of sections 2, 3, 4, 8 and Schedule

The proposed Act will repeal, and not re-enact, sections 2, 3, 4 and 8 of and the Schedule to the Usury, Bills of Lading, and Written Memoranda Act 1902.

Section 2 gives effect to the Schedule which lists the Acts and sections of Acts which were repealed on commencement of the Usury, Bills of Lading, and Written Memoranda Act 1902. The operation of section 28 of the Interpretation Act 1987, which prevents the revival of previously repealed Acts or statutory rules as a consequence of the repeal of the later repealing Act or section, means that the repeal of section 2 and the Schedule of the subject Act will not revive the older legislation. Section 2 and the Schedule are therefore spent.

Section 3 provides that no Imperial Act relating to usury is to have effect in New South Wales. Following enactment of the Imperial Acts Application Act 1969, which specified the Imperial Acts continuing to apply in this State, the section is no longer required.

Section 4 limits the amount of interest that may be recovered by legal action for a loan or under any other contract to 8% where no rate of interest is otherwise provided. This provision has been largely superseded by the Credit Act 1984, particularly sections 36 and 42. Section 36 of that Act requires a loan contract to include a statement of the annual percentage rate and section 42 of that Act renders a debtor not liable to the credit charge where section 36 is not complied with. Thus, if no interest rate is specified, the debtor is not liable for any credit charge.

Section 8 provides that a guarantee is not invalid only because the consideration for the guarantee does not appear in writing or by necessary inference from a written document. The section was originally considered necessary because it was decided that section 4 of the Statute of Frauds, which required an agreement to be in writing, extended to both the promise and the consideration for it. As the Statute of Frauds has been repealed, section 8 may also be repealed.

Transfer of sections 5, 6 and 7 to Sale of Goods Act 1923

Sections 5, 6 and 7 deal with certain consequences of consignment or indorsement of bill of lading. Where a bill of lading is delivered to the consignee named in it, or is transferred by indorsement to an indorsee, with the intention and effect of passing the property in the goods specified in it, the rights and liabilities under the contract contained in the bill of lading are, by the provisions, transferred to the consignee or indorsee as if the contract had been made with that person. The person is therefore entitled, on presenting the bill of lading, to claim delivery of the goods and the shipowner cannot escape liability for their non-delivery unless the shipowner succeeds in proving either that the goods were never in fact shipped, or that the non-delivery was occasioned by some excepted peril. The consignee or indorsee must in turn take delivery of the goods and pay the freight reserved by the bill of lading, the shipowner being entitled to withhold delivery until that freight has been paid or tendered, or until any other lien existing at common law or created by the bill of lading has been discharged.

The provisions do not affect certain existing rights such as any right of stoppage in transitu or deprive the shipowner of the right to claim the freight from the original shipper or owner of the goods.

It is further provided that a bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped, is conclusive evidence of shipment as against the master or other person signing it, even if the goods or some part of them may not have been shipped, unless the holder of the bill of lading had, at the time when he or she became holder, actual notice that the goods had not in fact been put on board.

Proposed section 4 re-enacts sections 5, 6 and 7 in line with legislation in force in the United Kingdom and other Australian jurisdictions as sections 50A - 50C of the Sale of Goods Act 1923.

Transfer of section 8A to Law Reform (Miscellaneous Provisions) Act 1965

Section 8A provides that a person who is surety for the debt or duty of another, and who pays the debt or performs the duty, is to be entitled to have assigned to him or her, or to a trustee on his or her behalf, all the securities that the principal creditor had against the debtor.

Section 8A was relied on successfully in *D & J Fowler (Australia) Ltd and anor v. Bank of New South Wales and ors* [1982] 2 NSWLR 879.

Proposed section 5 re-enacts the provision in substantially the same form as is in force in South Australia and Victoria as section 3 of the Law Reform (Miscellaneous Provisions) Act 1965.

Usury, Bills of Lading, and Written Memoranda (Repeal) 1990

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides that the proposed Act is to commence on a day to be appointed by proclamation.

Clause 3 repeals the Usury, Bills of Lading, and Written Memoranda Act 1902.

Clause 4 amends the Sale of Goods Act 1923 as described above.

Clause 5 amends the Law Reform (Miscellaneous Provisions) Act 1965 as described above.
