

SEA-CARRIAGE DOCUMENTS BILL 1996

EXPLANATORY NOTES

GENERAL OUTLINE

Objective of the Legislation

The objectives of this Bill are to update the law in relation to entitlement to sue under bills of lading and to extend this law to sea waybills, ships' delivery orders and sea-carriage documents in electronic form. In addition, the Bill repeals those sections of the *Mercantile Act 1867* providing for limited liability partnerships which are now redundant.

Reasons for the Bill

The existing sections of the *Mercantile Act* relating to bills of lading no longer meet the expectations of modern industry. They fail to apply to certain types of transactions and have no application to sea waybills or ships' delivery orders which have gained in popular usage as sea-carriage documents in recent years. They also take no account of advances in electronic data interchange in the shipping industry. Because of the failure of the *Mercantile Act* and corresponding legislation in other States to address these problems representatives of industry approached the Commonwealth Government with a view to enacting new legislation based upon the *Carriage of Goods by Sea Act 1992 (UK)*. The legislation is to become uniform in all States.

The *Mercantile Act* also contains sections dealing with the unrelated issue of limited liability partnerships. However the *Partnership (Limited Liability) Act 1988* provides that any new limited partnerships must be formed, and any existing limited partnerships renewed, under the later Act. While the provisions of the *Mercantile Act* continued to have transitional effect for some time, they are now redundant.

Method by which Objectives will be Achieved

Sections 5 to 7 of the Mercantile Act, which contain the current law relating to entitlement to sue under bills of lading, are being repealed. These sections are being replaced by the Bill which extends the right to sue to certain situations not covered by the Mercantile Act. The Bill also repeals redundant provisions of the Mercantile Act dealing with limited liability partnerships and some transitional provisions in the *Partnership (Limited Liability) Act 1988*.

Alternatives to the Bill

The alternative is to leave the provisions of the Mercantile Act in place. However, this would frustrate the operation of the uniform legislative scheme and place Queensland at a disadvantage in the area of commercial practice.

Estimated Cost for Government Implementation

It is estimated that there will be no costs for government.

Consistency with fundamental legislative principles

The Bill is consistent with fundamental legislative principles.

Consultation

The Bill is based on the *Carriage of Goods by Sea Act 1924 (UK)* (“the UK Act”) which was the result of extensive consultation in the United Kingdom. Consultation was assisted by the preparation and circulation by the Law Reform Commission and Scottish Law Reform Commission of a report titled “*Rights of Suit in Respect of Carriage of Goods by Sea*” (London: HMSO, 1991). This consultation is relevant to Queensland as the Act will have consequences for international shipping arriving into and leaving from Queensland ports.

Consultation has taken place around Australia through circulation of two discussion papers prepared by the Commonwealth Attorney-General’s Department and Commonwealth Department of Transport, as well as a draft bill. A wide range of industry groups including lawyers, bankers,

insurers, commodity exporters and shippers have been consulted and indicated their support for the Bill.

NOTES ON PROVISIONS

Clause 1. This sets out the short title of the Act.

Clause 2. States that the Act will not have any retrospective effect.

Clause 3. Sets out relevant definitions.

The definition of “bill of lading” is based on the definition in section 1(2) of the UK Act. It includes a “received for shipment” bill of lading as well as a “shipped” bill of lading.

“Contract of Carriage” is defined in relation to each sea-carriage document. This definition is based on that in section 5(1) of the UK Act.

“Data message” means information which exists, is produced or communicated in electronic form. This definition is based on that in Article 2 of the draft *Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication* as developed by the United Nation’s Commission on International Trade Law (UNCITRAL).

“Goods” is defined in relation to a sea-carriage document.

The definition of “identification” is based on section 5(3) of the UK Act. The definition provides for situations where the document allows the identity of the person named to be varied after its issue. It makes clear that, in the case of a sea waybill, the person entitled to sue includes the person who (though not initially the named consignee) subsequently becomes the person entitled to delivery, as when the shipper varies its instructions so that the carrier is required to deliver to someone other than the original consignee. Similarly, in the case of a ship’s delivery order, it covers the undertaking made to “X or order”.

The definition of “lawful holder” is based on section 5(2) of the UK Act. The “lawful holder” of a bill of lading is either the consignee named in the bill or any endorsee (including the holder of a “bearer” bill) who is in possession of the bill in good faith, including those cases where the person becomes a lawful holder after the bill of lading has ceased to be a transferable document of title (but see subclause 6(4)).

The definition of “sea-carriage document” ensures that the Act applies to bills of lading, sea waybills and ships’ delivery orders.

The definition of “sea waybill” is based on that in section 1(3) of the UK Act. A sea waybill is a receipt issued by the carrier of goods which contains or evidences a contract for the carriage of goods by sea and under which the carrier undertakes to the shipper to deliver to the person who is for the time being identified as being entitled to delivery. There is nothing in this definition which operates to exclude “received for shipment” sea waybills from the Act.

The definition of “ship’s delivery order” is based on that in section 1(4) of the UK Act. A ship’s delivery order is a document which contains an undertaking by the carrier to deliver the goods to the order of a named person. Clause (a) covers the case where the goods to which the delivery order relates form a part of other goods.

Clause 4. Applies the provisions of the Act to sea-carriage documents in the form of data messages and to communications of sea-carriage documents in the form of data messages. Subclauses (3) and (4) make it clear that the parties to the contracts are to agree on the procedures for effecting these electronic transactions.

Clause 5. This clause is based on section 5(4) of the UK Act. It makes it clear that rights of suit in relation to any document can exist in respect of goods which are not ascertained or have ceased to exist, as when goods form part of a larger bulk or where goods are destroyed in transit.

Clause 6. Subclauses (1) and (2). These subclauses are based on subsection 2(1) of the UK Act. They allow (a) the lawful holder of a bill of lading; (b) the consignee identified in a sea waybill; (c) the person entitled to delivery in accordance with an undertaking given in a ship’s delivery order, to assert contractual rights of suit against the carrier of the goods. As for the words in brackets in subclause 6(1)(b), the shipper will have rights of suit by being a party to the contract of carriage. See also subclause 6(5).

Subclause (3). This subclause is based on subsection 2(3) of the UK Act. It makes it clear (a) that the person entitled to sue under a ship’s delivery order does so on the terms of the undertaking contained in the order; and (b) that any such rights are confined to the goods covered by the order.

Subclause (4). This subclause is based on section 2(2) of the UK Act. It allows the lawful holder of a bill of lading which is no longer a transferable document of title to sue the carrier providing that it became the holder of the bill under arrangements made before the bill ceased to be a transferable document of title. The words “possession of the bill no longer gives a right ... to possession of the goods” include the case where delivery of the goods has been made and also the case where the goods are destroyed.

Subclause 4(b) makes it clear that where a person becomes the holder of a bill of lading as a result of the rejection by another of goods or documents delivered under arrangements made before the bill of lading ceased to be a transferable document of title, that person will be able to assert contractual rights against the carrier.

Subclause (5). This subclause is based on section 2(4) of the UK Act. It provides that, where the person who has rights of suit has not suffered any or all of the loss in question, he or she can exercise the rights of suit for the benefit of the person who has suffered the loss.

Subclause (6). This subclause applies the clause to contracts of carriage which have been varied by the parties.

Clause 7. This clause is based on subsection 2(5) of the UK Act. It provides that:

Subclause 1

- (a) The shipper under a bill of lading ceases to have any contractual rights once someone else becomes the lawful holder.
- (b) The intermediate holder of a bill of lading ceases to have contractual rights once someone else becomes the lawful holder.

Subclause 2

- (a) Those intermediately entitled to delivery under the terms of a sea waybill cease to be entitled to rights of suit once someone else becomes entitled to delivery. Usually, the person entitled to sue will be the consignee named in the sea waybill. However, where the consignee’s name is changed before delivery, it will cease to be entitled to sue under the Act and, instead, the new consignee will have rights of suit.

Those intermediately entitled to delivery under a ship's delivery order cease to be entitled to rights of suit when someone else subsequently becomes entitled to delivery.

- (b) The rights of a sea waybill consignee do not affect any rights which the shipper may have under the waybill contract.
- (c) In the case of a ship's delivery order, the rights of the person entitled under the delivery order are in addition to any rights possessed by any person under the contract of carriage in relation to which the order is issued.

Clause 8. This clause is based on subsection 3(1) of the UK Act. It provides that when any person entitled to sue takes or demands delivery or otherwise makes a claim against the carrier, the person becomes subject to any contractual liabilities as if the person had been a party to the contract of carriage. Likewise, where a person takes or demands delivery before the person had any contractual rights (as where he or she takes delivery pursuant to a letter of indemnity), the person becomes liable under the statute when the rights are subsequently conferred on him or her.

Clause 9. This clause is based on section 3(3) of the UK Act. It provides that nothing in clause 8 affects any of the shipper's (or carrier's) liabilities as an original party to the contract of carriage.

Clause 10. Subclauses (1) and (3) are based on section 4 of the UK Act. These subclauses dispose of the rule in *Grant v Norway* (1851) 10 C.B. 665. They provide that a bill of lading, representing goods to have been shipped or received for shipment and in the hands of the lawful holder, is conclusive evidence against the carrier of such shipment or receipt.

Subclause (2) has no equivalent in the UK Act. It provides that a bill of lading to which the clause applies is prima facie evidence against the carrier in favour of the shipper that the goods have been shipped, or in the case of a received for shipment bill of lading, that they have been received for shipment.

Clause 11. Amends the Acts in the Schedule.

Schedule

Repeals sections 5 to 7 of the Mercantile Act. Sections 5 to 7 constitute the current Queensland legislation relating to bills of lading, which were based on the *Bills of Lading Act 1855* (UK). They are being replaced in full by this Act.

Repeals sections 53 to 68 of the Mercantile Act. These sections relate to limited liability partnerships. They have been made redundant by the *Partnership (Limited Liability) Act 1988*. Sections 1 and 2 of the later Act commenced on the date of assent, 11 November 1988. The remainder of the Act commenced on 15 May 1989. As that Act provided that partnerships were unable to be entered into or renewed under the Mercantile Act and any existing partnerships formed under the Mercantile Act were subject to a duration limited to seven (7) years, the date that any partnerships formed under the Mercantile Act ceased to exist was 15 May 1996. Since that date sections 53 to 68 of the Mercantile Act have ceased to have any effect and all limited liability partnerships are formed and renewed under the *Partnership (Limited Liability) Act 1988*.

Repeals sections 5 of the *Partnership (Limited Liability) Act 1988* which contains now redundant transitional provisions relating to the Mercantile Act.