

**USURY, BILLS OF LADING, AND WRITTEN MEMORANDA
(REPEAL) ACT 1990 No. 7**

NEW SOUTH WALES



TABLE OF PROVISIONS

1. Short title
 2. Commencement
 3. Repeal of Usury, Bills of Lading, and Written Memoranda Act 1902 No. 43
 4. Amendment of Sale of Goods Act 1923 No. 1
 5. Amendment of Law Reform (Miscellaneous Provisions) Act 1965 No. 32
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**USURY, BILLS OF LADING, AND WRITTEN MEMORANDA
(REPEAL) ACT 1990 No. 7**

NEW SOUTH WALES



Act No. 7, 1990

An Act to repeal the Usury, Bills of Lading, and Written Memoranda Act 1902 and to re-enact certain of its provisions in the Sale of Goods Act 1923 and the Law Reform (Miscellaneous Provisions) Act 1965.
[Assented to 22 May 1990]

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Usury, Bills of Lading, and Written Memoranda (Repeal) Act 1990.

Commencement

2. This Act commences on a day to be appointed by proclamation.

Repeal of Usury, Bills of Lading, and Written Memoranda Act 1902 No. 43

3. The Usury, Bills of Lading, and Written Memoranda Act 1902 is repealed.

Amendment of Sale of Goods Act 1923 No. 1

4. The Sale of Goods Act 1923 is amended by inserting after Part 5 the following Part:

**PART 5A - CONSIGNMENT OR INDORSEMENT OF
BILLS OF LADING**

Rights of consignee or indorsee under bills of lading (see Act No. 43 1902 s.5)

50A. Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading, to whom the property in the goods described in the bill of lading passes on or by reason of the consignment or indorsement, shall have transferred to and vested in him or her all rights of action and be subject to the same liabilities in respect of the goods as if the contract contained in the bill of lading had been made with the consignee or indorsee.

Saving as to right of stoppage *in transitu* or claims for freight (see Act No. 43 1902 s.6)

50B. Nothing in this Part prejudices or affects:

- (a) any right of stoppage *in transitu*; or
- (b) any right to claim freight against the original shipper or owner; or

(c) any liability of the consignee or indorsee arising:

(i) as a consignee or indorsee; or

(ii) because of receiving the goods,

by reason or in consequence of the consignment or indorsement of the bill of lading.

Bill of lading conclusive evidence of shipment (see Act No. 43 1902 s.7)

50C. (1) Every bill of lading held by a consignee or indorsee for valuable consideration which represents that goods have been shipped on board a vessel is conclusive evidence of the shipment of the goods as against the master or other person signing the bill of lading even if the goods or some part of the goods have not been so shipped.

(2) The holder of a bill of lading is not entitled to rely on subsection (1) if the holder had actual notice, at the time the holder received the bill of lading, that the goods had not been in fact loaded on board the vessel.

Amendment of Law Reform (Miscellaneous Provisions) Act 1965 No. 32

5. The Law Reform (Miscellaneous Provisions) Act 1965 is amended by omitting section 3 and by inserting after Part 1 the following Part:

PART 2 - GUARANTEES

Surety discharging liability to be entitled to securities (see Act No. 43 1902 s.8A)

3. (1) A person who, being surety for the debt or duty of another, or being liable with another for a debt or duty, pays that debt, or performs that duty, is entitled:

(a) to have assigned to that person, or to a trustee for that person, every judgment, specialty or other security held by the creditor in respect of that debt or duty, whether or not that judgment, specialty or other security is taken at law to have been satisfied by the payment of the debt or the performance of the duty; and

(b) to stand in the place of the creditor and to use all the remedies, and, if necessary, and on a proper indemnity, to use the name of the creditor in any proceedings to obtain from the principal debtor or any co-surety, co-contractor or co-debtor (as the case requires) indemnity for the advances made and loss sustained by the person who paid the debt or performed the duty.

(2) The payment of the debt or the performance of the duty by a surety is not a defence to any such proceedings referred to in subsection (1).

(3) A co-surety, co-contractor or co-debtor is not entitled under this section to recover from another co-surety, co-contractor or co-debtor more than the proportion to which, as between those parties themselves, that person is justly liable.

[*Minister's second reading speech made in -
Legislative Assembly on 1 May 1990
Legislative Council on 2 May 1990*]





FIRST PRINT

**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.

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

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 bills 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.

FIRST PRINT

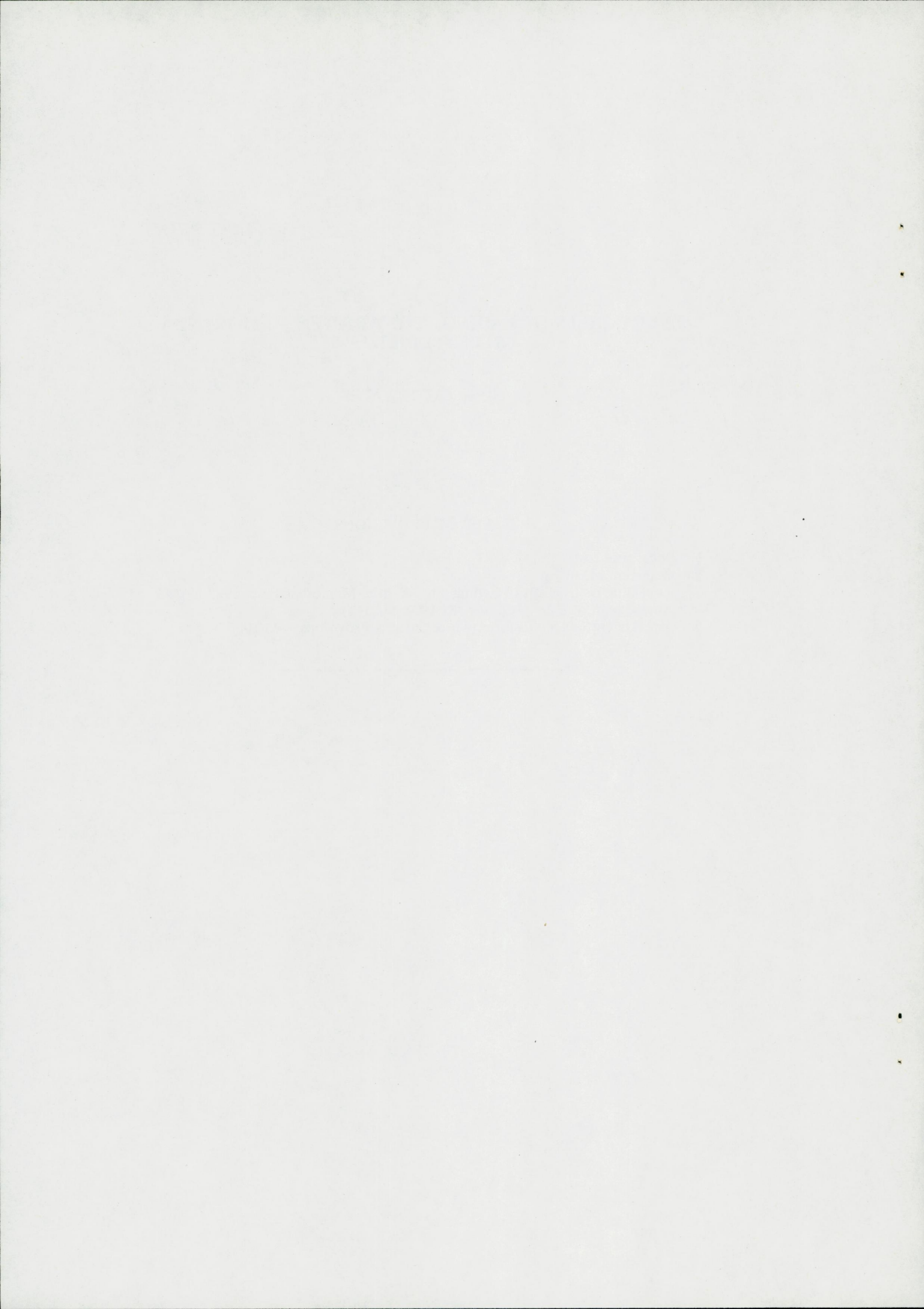
**USURY, BILLS OF LADING, AND WRITTEN MEMORANDA
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NEW SOUTH WALES



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

NEW SOUTH WALES



No. , 1990

A BILL FOR

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Saving as to right of stoppage *in transitu* or claims for freight (see Act No. 43 1902 s.6)

50B. Nothing in this Part prejudices or affects:

- (a) any right of stoppage *in transitu*; or
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- (a) to have assigned to that person, or to a trustee for that person, every judgment, specialty or other security held by the creditor in respect of that debt or duty, whether or not that judgment, specialty or other security is taken at law to have been satisfied by the payment of the debt or the performance of the duty; and

(b) to stand in the place of the creditor and to use all the remedies, and, if necessary, and on a proper indemnity, to use the name of the creditor in any proceedings to obtain from the principal debtor or any co-surety, co-contractor or co-debtor (as the case requires) indemnity for the advances made and loss sustained by the person who paid the debt or performed the duty.

(2) The payment of the debt or the performance of the duty by a surety is not a defence to any such proceedings referred to in subsection (1).

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