ELECTRONIC VERSION

REFORMING QUEENSLAND'S BILLS OF LADING LEGISLATION: THE SEA-CARRIAGE DOCUMENTS BILL 1996

LEGISLATION BULLETIN NO 7/96

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The Bulletin reflects the legislation as introduced. The *Queensland Legislation Annotations*, prepared by the Office of the Queensland Parliamentary Counsel, or the *Bills Update*, produced by the Table Office of the Queensland Parliament, should be consulted to determine whether the Bill has been enacted and if so, whether the legislation as enacted reflects amendments in Committee. Readers are also directed to the relevant *Alert Digest* of the Scrutiny of Legislation Committee of the Queensland Parliament.

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1. PURPOSE

The Sea-Carriage Documents Bill 1996 (Qld) reforms and modernises the law relating to the carriage of cargo by sea, by repealing and replacing outdated provisions of the *Mercantile Act 1867* (Qld) (ss 5-7). The Bill also repeals redundant provisions of the Mercantile Act dealing with limited liability partnerships (ss 53-68).

The main purposes of the Sea-Carriage Documents Bill 1996 are:

- to remedy a number of problems in the area of title to sue on contracts for the carriage of goods by sea;
- to extend the operation of the legislative reforms to cover sea waybills, and ships' delivery orders, as well as bills of lading, and
- to apply the new legislation to sea-carriage documents in electronic as well as traditional paper format.

2. BACKGROUND

2.1 LEGISLATIVE REFORMS IN THE UNITED KINGDOM

In March 1991, the English and Scottish Law Commissions (the Law Commission), in their joint report, *Rights of Suit in Respect of Carriage of Goods by Sea*, made a number of recommendations for the reform of the statute law governing the rights of action of those concerned with contracts for the carriage of goods by sea. The initial impetus for the report was an approach, in 1985, by representatives of a leading international commodity trade association (the Grain and Feed Trade Association) to the Law Commission requesting it to consider investigating reform of the law relating to the rights of purchasers of goods which form part of a larger bulk. As a result of comments received during the consultation process, the Law Commission subsequently extended the scope of its inquiry to include several other problems relating to title to sue.[1]

2.1.1 Approach

Rather than making radical changes, the reforms proposed by the Law Commission were based upon an "*evolutionary*" approach, whereby those elements of the 1855 UK Bills of Lading Act which had worked well were retained as a foundation upon which to build.[2] In considering options for reform, the Law Commission chose to improve upon the existing law rather than to adopt wholly untried approaches.[3]

2.1.2 Recommendations

In summary, the Law Commission ultimately recommended that the lawful holder of a bill of lading should be able to sue irrespective of whether property in the goods to which the bill of lading related had passed.[4]

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1 The Law Commission and the Scottish Law Commission, *Rights of Suit in Respect of Carriage of Goods by Sea*, March 1991 (Law Commission No 196; Scottish Law Commission No 130), pp 1-2.

2 Law Commission, p 31.

3 Law Commission, p 12.

4 Law Commission, p v.

In addition, the Law Commission recommended that any legislative reform should extend beyond bills of lading to include sea waybills and ships' delivery orders. Specifically, the Law Commission Report recommended that:

- the consignee named in a sea waybill should be able to assert rights of action against the carrier of the goods, and
- the holder of a ship's delivery order to whom the carrier has undertaken to deliver goods should be able to assert rights of action against the carrier. [5]

Finally, the Law Commission recommended that the proposed legislative reforms should make provision for documents forming part of an electronic record.[6]

The summary of the principal recommendations made by the Law Commission is included as Appendix A to this *Legislation Bulletin*.

A draft Bill giving effect to the Law Commission's recommendations formed Appendix A to the Report.

In 1992, the *Bills of Lading Act 1855* (UK) was repealed and replaced by the *Carriage of Goods by Sea Act 1992* (UK) (the UK Act), the provisions of which were based upon the recommendations made by the English and Scottish Law Commissions in their report (and upon the Commission's draft Bill). According to Bradgate and White, the UK Act :

> *... owes its place on the statute book to Lord Goff, who took up the Commissions' proposals and introduced the Commissions' draft Bill as a private peer's measure in the House of Lords*.[7]

2.2 PROPOSALS FOR REFORM TO AUSTRALIAN BILLS OF LADING LEGISLATION

In 1992, the Maritime Law Association of Australia and New Zealand approached the Commonwealth Attorney-General and the Minister for Transport and Communications regarding problems relating to title to sue in Australian bills of lading legislation. After consultation with interested industry and professional bodies seeking their views, a Discussion Paper was prepared by the Commonwealth Attorney-General's Department in conjunction with the Department of Transport. After a draft of this Discussion Paper had been circulated to all relevant State and

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5 Law Commission, p 31.

6 Law Commission, p 39.

7 R Bradgate and F White, 'The Carriage of Goods by Sea Act 1992', *Modern Law Review*, v 56, March 1993, p 188.

Territory Ministers and to industry and professional organisations, a revised paper was prepared which incorporated comments made, or responded to the views expressed in the submissions received. All subsequent references in this *Legislation Bulletin* to the Discussion Paper refer to the *Revised Discussion Paper*.

In considering options for reform of the Australian bills of lading legislation, the Cth Attorney-General's Department and the Transport Department, in their Discussion Paper, decided that:

> *Australia should consider following the UK approach of building on the current legal system rather than attempting to introduce any untried and uncertain legal regimes in the areas of bills of lading legislation and associated legal issues*.[8]

Further:

> *The evolutionary approach has a great deal of attraction in the Australian context. It favours certainty in the law and the least disruption in a well established area of commercial law.*
>
> *For Australia, as was the case for the UK, the main focus for reform in Australia relates to title to sue ... the UK Law Commission ranged wider and made additional recommendations which were adopted in the Carriage of Goods by Sea Act 1992 (UK). An Australian approach which is as consistent as possible with the UK law, including the wider reform measures, would mean greater legal and commercial certainty*.[9]

In a paper presented to the Maritime Law Association of Australia and New Zealand in June 1993, and subsequently published in the Association's journal, Melbourne barrister Michael Thompson argued:

> *... it is hard to see any good reason for not adopting the thrust of the 1992 Act* [Carriage of Goods By Sea Act 1992 (UK)] *in Australia. The question then arises as to whether it should be adopted without variation. As a lawyer, I would urge that it be so adopted. Given the limited opportunity within Australia for the building up of a body of case law in this area it is necessary to look overseas, principally to England, to determine the law in this field. A body of case law, texts and academic commentary on provisions identical to those in Australia would be of great assistance in achieving certainty in the law here. This can only be in the interests of the whole industry*.[10]

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8 *Revised Discussion Paper: Proposals for Reform of Australian Bills of Lading Legislation*, prepared by the International Trade Law Section of the Attorney-General's Department of Australia in conjunction with the Department of Transport, June 1994, p 3.

9 *Revised Discussion Paper*, p 40.

10 M Thompson, 'Title to sue on overseas contracts of sea carriage - the need for reform in Australia', *MLAANZ Journal*, v 10, 1994, p 34.

Because of the need to take into consideration federal implications in any reform of Australian bills of lading legislation, and in view of the possibility that the UK legislation might be able to be improved upon, the Discussion Paper did, however, canvass a number of other possible reforms, in addition to those recommended by the Law Commission. These included issues such as the status of bills of lading legislation for the purpose of conflict of laws, and whether a remedy in tort law should continue to be available to a consignee against a carrier of goods by sea.[11] However, after considering these and other matters, the authors of the Discussion Paper ultimately recommended the inclusion in any Australian legislative reforms of only one additional provision. The Discussion Paper concluded:

> *The UK approach as used in the Carriage of Goods by Sea Act 1992 (UK) should generally be followed in Australia and improved upon with an additional provision providing that where a carrier issues a document, being a bill of lading, to evidence the receipt of goods carried, that document is prima facie evidence of the taking over, by the carrier, of the goods as therein described.*[12]

The summary of the recommendations made in the Discussion Paper prepared by the Cth Attorney General's Department in conjunction with the Department of Transport forms Appendix B to this *Legislation Bulletin*.

2.2.1 A Uniform Approach

The Explanatory Notes to Queensland's Sea-Carriage Documents Bill state that the legislative provisions are to become uniform in all the Australian states.[13] This would be in line with the recommendations contained in the Discussion Paper prepared by the Cth Attorney-General's Department in conjunction with the Department of Transport. At p 15 of the Discussion Paper, it was recommended that: "*States and Territories should consider amending their bills of lading legislation with a uniform approach*".

2.3 THE QUEENSLAND BILL

As the Explanatory Notes to the Bill make clear, Queensland's Sea-Carriage Documents Bill 1996 is modelled upon the Carriage of Goods by Sea Act 1992

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11 *Revised Discussion Paper*, pp 40-46.

12 *Revised Discussion Paper*, p 47.

13 Explanatory Notes, Sea-Carriage Documents Bill 1996 (Qld), p 1.

(UK).[14] The Queensland Bill adopts the provisions of the UK legislation, with two differences:

- The extension of the Act's operation to electronic transactions is effected through primary legislation (**Clause 4**) rather than by means of regulation (the approach used in s 1(5) of the UK Act).
- The Queensland Bill contains an additional provision (**Clause 10(2)**) not found in the UK Act, but which was recommended for inclusion in any reform of Australian bills of lading legislation (see Section 2.2 of this *Legislation Bulletin*). **Clause 10(2)** provides that a bill of lading, signed by the master of a ship or a person with authority to sign bills of lading, representing goods to have been shipped or received for shipment is, in favour of the shipper, evidence against the carrier of the shipment of the goods or their receipt for shipment.

This *Legislation Bulletin* outlines the provisions of the proposed Queensland legislation and compares them, where appropriate, with the UK Act and the recommendations of the English and Scottish Law Commissions.

The Queensland proposals are also discussed in the light of the proposals for reform of Australian bills of lading legislation canvassed in the Discussion Paper prepared by the International Trade Law Section of the Attorney-General's Department of Australia in conjunction with the Commonwealth Department of Transport (see Section 2.2 above).

Reference is also made to the New Zealand *Mercantile Law Amendment Act 1994*, which has incorporated most though not all of the provisions contained in the UK Carriage of Goods By Sea Act.[15]

In light of the international character of maritime transport, reference is also made, where appropriate, to the maritime law in force in a number of other jurisdictions, including the United States, France, Germany, Holland, Sweden and Greece.

The rationale for the proposed Queensland changes is explained by reference to the limitations of the existing legislation, as evidenced by case law, and current commercial practice.

Where relevant, commentary on the UK equivalents to the proposed Queensland provisions is provided.

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[14] Sea-Carriage Documents Bill 1996 (Qld), Explanatory Notes, p 2.

[15] The *Mercantile Law Amendment Act 1994* (NZ) incorporates into the *Mercantile Law Act 1908* all of the substantive provisions of the UK Act except for s 4, which deals with representations made in bills of lading.

3. MAIN PROVISIONS OF THE BILL

3.1 SCOPE OF THE BILL

Queensland's Sea-Carriage Documents Bill 1996 applies to the following type of shipping documents:

- bills of lading
- sea waybills
- ships' delivery orders.

However, **Clause 10** of the Bill applies only to bills of lading.

3.2 DEFINITIONS

3.2.1 Sea-Carriage Documents

Queensland statute law governing disputes relating to carriage of cargo by sea is presently contained in ss 5 to 7 of the Mercantile Act 1867. However, these provisions deal only with bills of lading.

In accordance with the recommendations of the English and Scottish Law Commissions, the UK Act applies to sea waybills and ships' delivery orders, in addition to the traditional form of commercial shipping document, the bill of lading: s 1.

In considering the possible scope of reform of Australian bills of lading legislation, Part II of the Discussion Paper prepared by the Commonwealth Attorney-General's Department and the Department of Transport considered two alternatives:

- simply extending the reforms to specific types of shipping instruments (the UK approach)
- extending the reforms to non-negotiable instruments in general.

However, the Discussion Paper recommended that the second approach not be adopted because:

> *... the types of documents to which the exemption would apply would be uncertain. Even to limit the category of non-negotiable documents by means of terms such as "contractual shipping documents" or "non-negotiable shipping documents" leaves too much scope for legal doubt particularly when it is recognised that such a broad description could bring in a whole range of aberrant and unusual instruments with an accompanying indeterminate class of beneficiaries. To achieve certainty, any extension of the reforms to documents other than bills of*

> *lading should be limited to documents which are recognised commercially and are capable of definition.*[16]

The Discussion Paper recommended that any reform of Australian legislation governing bills of lading should also encompass sea waybills and ships' delivery orders.[17] However, the authors of the Discussion Paper specifically recommended that any such reforms should **not** be extended to mate's receipts (these are documents issued by a shipowner (carrier) as a temporary receipt for goods received from the shipper; the temporary receipt may later be exchanged for a bill of lading). By contrast with bills of lading, sea waybills, and ships' delivery orders, which convey upon the party named in the particular document some rights against the shipowner, a mate's receipt gives the person named in the receipt only a prima facie entitlement to the bill of lading.[18] Accordingly, the authors of the Discussion Paper argued that:

> *Given the preliminary nature of a mate's receipt and the fact it does not contain any undertaking concerning delivery of the goods, it seems inappropriate to extend the proposed reforms to mate's receipts*.[19]

Queensland's Sea-Carriage Documents Bill 1996 significantly extends the coverage of the Mercantile Act 1867, by including not only bills of lading, but also sea waybills and ships' delivery orders within the scope of the proposed new legislation. Each of these types of documents is defined as a "**sea carriage document**" for the purpose of the proposed legislation: **Clause 3**.

Bills of Lading

Traditionally, the carriage of goods by sea has been governed by a bill of lading (or bill of loading), which has been described as " *the classic contract of carriage of goods*".[20] A bill of lading is defined as " *the written evidence of a contract for the carriage and delivery of goods by sea for certain freight*"[21] (as opposed to a

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16 *Revised Discussion Paper*, pp 16-17.

17 *Revised Discussion Paper*, p 16.

18 *Revised Discussion Paper*, pp 19-20.

19 *Revised Discussion Paper*, p 20.

20 W Tetley, 'Waybills: the modern contract of carriage of goods by sea: Part I', *Journal of Maritime Law and Commerce*, 14(4), 1983, p 465.

21 S*troud's Judicial Dictionary of Words and Phrases*, 4th edn, Sweet & Maxwell , London, 1971, p 290.

charterparty which is a contract for the hire of a ship[22]). A bill of lading is said to have three basic characteristics:

- it is an acknowledgment by the shipowner of receipt of the goods referred to in the bill of lading
- it is evidence of the contract of carriage between the shipper and the carrier (shipowner)
- it is a negotiable document of title, by the indorsement of which the property in the goods for which the bill of lading is a receipt may be transferred, or the goods pledged or mortgaged as security for an advance.[23]

The Queensland Sea-Carriage Documents Bill 1996 (**Clause 3**) says that a bill of lading means a bill of lading (including a received for shipment bill of lading) capable of transfer either by indorsement, or as a bearer bill, by delivery without indorsement. The elements of the definition are the same as those contained in the UK Act (s 1(2)). Like the UK Act,[24] the Queensland Bill does not contain an exhaustive definition of a bill of lading (ie by reference to its functions or characteristics, as discussed above). According to Cooper, the United Kingdom legislation did not try to incorporate the functions of a bill of lading into the statutory definition because " .... *the bill of lading will in due course cease to be a document of title when it ceases to grant constructive possession of the goods*".[25]

Received for Shipment Bills of Lading

The UK Act (s 1(2)(b)) and the Queensland Bill (**Clause 3**) specifically include a "received for shipment" bill of lading within the statutory definition of a bill of lading.

The traditional form of bill of lading is what is known as a "shipped on board" bill.[26] This form of bill of lading begins with an acknowledgment that the goods have been shipped, and specifies that the goods have been shipped on board a particular ship. By comparison, a "received for shipment" bill of lading, as was explained in the case

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22 Tetley, p 465.

23 *Scrutton on Charterparties and Bills of Lading*, 19th edn, 1984, p 2, quoted in *Carrington Slipways v Patrick Operations* (1991) 24 NSWLR 745 at p 751.

24 James Cooper, Annotations to the *Carriage of Goods by Sea Act 1992* (UK), in *Current Law Statutes Annotated 1992*, v 3, p 50-2.

25 Cooper, p 50-2.

26 *Carrington Slipways*, per Handley JA at p 752.

of *The Ship "Marlborough Hill" v Cowan and Sons* [1921] 1 AC 444 at pp 450-51, refers to a bill of lading:

> *... whereby the agents for the master put their signature to the contract, admit the receipt for shipment and contract to carry and deliver, primarily by the named ship ... , but with power to substitute any other vessel ... But the contract does contain the further obligation that, subject to the excepted conditions and perils, either the named ship or the substituted ship shall duly and safely carry and deliver.*

In *The"Marlborough Hill"*, the Privy Council held that a "received for shipment" bill was a bill of lading within the meaning of the Bills of Lading Act 1855 (UK), the predecessor to the current UK Carriage of Goods By Sea Act. Their Lordships chose not to take the "narrow" view that commercial shipping documents framed in the form "received for shipment" were not bills of lading, stating that:

> *There can be no difference in principle between the owner, master or agent acknowledging that he has received the goods on his wharf, or allotted portion of quay, and his acknowledging that the goods have been actually put over the ship's rail.*[27]

In their Lordships' opinion, the traditional "shipped on board" bill of lading was:

> *... in the more appropriate language for whole cargoes delivered and taken on board in bulk; whereas "received for shipment" is the proper phrase for the practical business-like way of treating parcels of cargo to be placed on a general ship which will be lying alongside the wharf taking in cargo for several days, and whose proper stowage will require that certain bulkier or heavier parcels shall be placed on board first, while others, though they have arrived earlier, wait for the convenient place and time of stowage.*[28]

In the United Kingdom, the Law Commission recommended that "received for shipment" bills of lading should be treated the same as shipped bills of lading.[29] This recommendation was given effect to in s 1(2)(b) of the UK Act.

The inclusion of "received for shipment" bills within the legislative definition of bills of lading contained in **Clause 3** of Queensland's Sea-Carriage Documents Bill 1996 places it beyond doubt that a "received for shipment" bill of lading is a valid bill of lading for the purpose of the proposed Queensland legislation. In New Zealand, the Mercantile Law Act 1908 has, since 1922, contained an amendment stating that a received for shipment bill of lading has the same effect and the same consequences

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27 *The Ship "Marlborough Hill" v Cowan and Sons* [1921] 1 AC 444 at p 451.

28 *The Ship "Marlborough Hill"*, p 451.

29 Law Commission, p 19.

as if it was a bill of lading acknowledging that the goods to which the bill relates had been actually shipped on board.[30]

Sea Waybills

Sea waybills have been described as "*modern substitutes*" for bills of lading.[31] A sea waybill is a list of goods to be carried; unlike the bill of lading, it is not a negotiable document of title.[32] According to Tetley, the advantages associated with the use of sea waybills are as follows:

Modern ships travel so fast that they often arrive before the negotiable signed bill of lading can be sent by air, while mail services are perhaps slower and less reliable than they were ten years ago. The waybill, not being a document of title, and therefore not having to be an original, can be reproduced and thus has the advantage of speedy electronic transmission; the waybill's lack of negotiability also makes it a safe document which can be handled easily and without fear of theft or loss.[33]

According to the Law Commission at p 33 of its report on *Rights of Suit in Respect of Carriage of Goods by Sea*:

> *The United Nations Conference for Trade and Development has commended waybills to the market as one of the main instruments against documentary fraud, and there is a widespread desire in many liner trades to do away with bills of lading altogether.*

In the Australian context, the Final Report of the House of Representatives Standing Committee on Transport, Communications and Infrastructure on *Efficiency of the Interface between Seaports and Land Transport*, found that as

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30 *Mercantile Law Act 1908* (NZ), s 15, as amended by s 3 of the *Mercantile Law Amendment Act 1922* (NZ).

31 Tetley, p 465.

32 Tetley, pp 466-67.

33 Tetley, p 466.

much as 90% of cargo carried on the Trans-Tasman route is carried under a waybill.[34] The Committee noted that:

> *The Australia/New Zealand trade is conducive to the use of waybills due to the large proportion of "inhouse" trade, closer commercial and credit relationships between non associated firms and a short transit time*.[35]

Ships' Delivery Orders

Ships' delivery orders refer to documents which are usually issued by or on behalf of a shipowner containing an undertaking by the carrier to deliver the goods to which the document relates to the holder of the delivery order or to the order of a named person.[36]

As explained by the Law Commission:

> *The commercial need for ship's delivery orders stems from the fact that a seller may wish to sell parts of a bulk cargo to a number of different buyers while the goods are at sea. Where a single bill of lading covers the whole consignment, the seller cannot give the bill to each of the buyers, so he stipulates for the right to tender a ship's delivery order in respect of each of the smaller parcels.*[37]

3.2.2 Contract of Carriage

Clause 3 of the Queensland Bill provides that a "**contract of carriage**", in connection with a sea-carriage document, means:

- for a bill of lading or a sea waybill - the contract of carriage contained in, or evidenced by, the document, or
- for a ship's delivery order, the contract of carriage in association with which the order is given.

The equivalent provision in the UK legislation is contained in s 5(1).

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[34] Australia. House of Representatives Standing Committee on Transport, Communications and Infrastructure, *Efficiency of the Interface between Seaports and Land Transport "Warehouse to Wharf": Final Report*, AGPS, Canberra, November 1995, p 17.

[35] Australia. House of Representatives Standing Committee on Transport, Communications and Infrastructure, p 17.

[36] Law Commission, p 37 & 47.

[37] Law Commission, p 37.

According to Cooper, the definition of a contract of carriage for a bill of lading "*... meets the frequently made point that the bill of lading will not, at least initially, contain the contract of carriage, which is usually made before the bill of lading comes into existence*".[38] For example, *Scrutton on Charterparties and Bills of Lading* (Article 30) citing Lord Bramwell in *Sewell v Burdick* (1884) 10 App Cas 74 at p 105, says:

> *The bill of lading is not the contract, for that has been made before the bill of lading was signed and delivered, but it is excellent evidence of the terms of the contract, and in the hands of an indorsee is the only evidence*.[39]

3.3 ELECTRONIC AND COMPUTERISED SEA-CARRIAGE DOCUMENTS

Electronic data interchange (EDI) or electronic data processing (EDP) refers to "*... the transmission of electronic messages in the form of binary digits, or bits, from one computer system to another, using an agreed standard to structure message data*".[40] According to Myburgh, transactions conducted by electronic means have become "*... an increasingly irresistible option*"[41] in the shipping industry, due to limitations of traditional paper-based shipping documents such as slowness and expense. As Myburgh explains, because paper-based shipping transactions:

> *... necessarily involve the physical transfer and processing of original paper documents, they cannot ever be faster or more efficient than available postal or courier services. Containerisation and other changes in ship design, navigation and operation have greatly enhanced the efficiency and speed with which goods can be transported. Some containerised liner services now produce cargo at the discharging port before the relevant documentation can be processed ...*[42]

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38 Cooper, p 50-9.

39 *Scrutton on Charterparties and Bills of Lading*, p 55.

40 Paul Myburgh, 'Bits, bytes and bills of lading: EDI and New Zealand maritime law', *New Zealand Law Journal*, September 1993, p 324.

41 Myburgh, p 324.

42 Myburgh, p 324.

In addition:

> *... paper is costly to process, and it has a mysterious tendency to multiply. Excising, or even just trimming the paper trail in shipping transactions should ... result in significant cost savings*.[43]

According to Boss, the use of EDI in the United States shipping industry has lowered the cost of processing claims from $20 to $1 each.[44] Appendix C to this *Bulletin* comprises an article describing innovations in the use of EDI in the Australian shipping industry, whereby ships can be cleared electronically by customs.

According to figures cited by Williams, converting to electronic bills of lading saved the US Department of Defence $17 million per annum, and eliminated a paper stack which previously, each year, had reached "*four times higher than the Empire State Building*".[45]

Other problems with paper-based transactions (in addition to those of delay and cost), as identified by the Law Commission, include theft and fraud.[46]

Queensland's Sea-Carriage Documents Bill makes provision for shipping transactions effected by electronic means by providing in **Clause 4** that the proposed legislation applies, with necessary changes, to documents in the form of data messages, and to communications of sea-carriage documents by data messages. "**Data message**" is defined in **Clause 3** of the Bill to mean " *information generated, stored or communicated by electronic, optical or analogous means, including electronic data interchange, electronic mail, telegram, telex and telecopy*". **Clauses 4(3) and 4(4)** allow the parties to a contract of carriage to agree between themselves on the procedures by which they will contract by electronic means. In introducing the Bill to the House, Hon D E Beanland MLA said that the application

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43 Myburgh, p 324.

44 A H Boss, 'The legal status of electronic data interchange in the United States', a paper prepared as part of the Electronic Trade Document Project, funded by the Volkswagen Foundation, July 1992, p 2, quoted in *Revised Discussion Paper*, p 23, fn 63.

45 S M Williams, 'Something old, something new: the bill of lading in the days of EDI', *Transnational Law and Contemporary Problems*, Fall 1991, p 556, fn 3, quoted in *Revised Discussion Paper*, p 23, fn 63.

46 Law Commission, p 39.

of the proposed legislation to sea-carriage documents in electronic form "*... is an improvement on the equivalent United Kingdom legislation*".[47]

In the UK, the English and Scottish Law Commissions, in their report, *Rights of Suit in Respect of Carriage of Goods by Sea*, stated that:

> *Although much work has been done in the direction of paperless transfers, there are equally formidable technical and legal problems still to be overcome before paperless transactions become the norm in international sales. Nevertheless, if paperless transactions were not to be covered in a reformed Bills of Lading Act, and if in the next few years they were to become common, we would again be in the position of the Act failing to meet the needs of its users*.[48]

The Law Commission recommended that:

> *... implementing legislation should allow the Secretary of State to make provision by regulations for information given by means other than in writing to be of equivalent force and effect as if it had been given in a written document*.[49]

Under the United Kingdom legislation, the above recommendation is given effect to in s 1(5) which empowers the Secretary of State to extend, by regulation, the operation of the Act to transactions effected via a telecommunication system or other information technology (ie paperless transactions). The power to make regulations of this kind is stated to be exercisable by statutory instrument, subject to annulment by resolution of either House of the British Parliament: s 1(5). According to Cooper, the reason why regulations have been used to extend the operation of the Act to transactions involving electronic data transmission is that:

> *Regulations can be updated more easily than primary legislation, and will not be forever limited to the state of the art at the time of the enactment of the parent Act*.[50]

In their Discussion Paper, the Cth Attorney-General's Department and the Transport Department, in considering reform of Australian bills of lading legislation, expressed the view that:

> *Because it is difficult to predict the exact form of EBL* [electronic bills of lading] *developments, it would be undesirable that the law be changed in a manner that prevents flexibility in respect of new developments, but to do nothing would be an*

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47 Sea-Carriage Documents Bill 1996 (Qld), Second Reading Speech, Hon D E Beanland MLA, Q*ueensland Parliamentary Debates*, 24 July 1996, p 1812.

48 Law Commission, p 39.

49 Law Commission, p 39.

50 Cooper, p 50-3.

> *obstacle to their emergence as a better way of doing business. In light of this and in the interests of developing Australia's characterisation as an innovative and flexible trading nation, the approach taken in the* Carriage of Goods by Sea Act 1992 *(UK), of allowing regulations to be made whereby information given by means other than in writing is given equivalent force and effect to information in a paper document, should be adopted as one element of the Australian response. If, however, the Working Group of UNCITRAL finalises its proposed Model Statutory Provisions on EDI prior to the adoption of the recommendations in this Discussion Paper, it may be appropriate for all or some of the Model Statutory Provisions to be given legislative form. This would be an alternative to including a regulation-making power in the reforms.*[51]

As explained in the Explanatory Notes to the Queensland Bill, the proposed legislation's definition of "**data message**" is based upon Article 2 of UNCITRAL's draft *Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication*. (A copy of this document is available in the Parliamentary Library.)

In New Zealand, the drafting of new s 13(5) of the Mercantile Law Act, as inserted in 1994, has followed the UK approach of applying the legislation to cases where a network or other information technology is used to effect transactions, by means of regulations. However, in its original form, the Bill for the Act made no provision whatsoever for shipping transactions effected by electronic means. A section based upon s 1(5) of the UK Act was only included in the legislation following a submission made to the Transport Committee (a Select Committee of the New Zealand Parliament) by New Zealand Rail.[52]

3.4 ACT'S APPLICATION IF GOODS HAVE CEASED TO EXIST, OR CANNOT BE IDENTIFIED

Clause 5 of the Queensland Bill is based upon s 5(4) of the UK Act. **Clause 5(a)** of the Bill ensures that the proposed legislation applies to situations where goods have ceased to exist after the issue of a bill of lading or a sea waybill or ship's delivery order. An example of such a situation is where goods are carried on a ship which sinks.[53]

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51 *Revised Discussion Paper*, p 22.

52 Mercantile Law Amendment Bill 1994 (NZ), Report of Transport Committee, Mr Ian Revell, Member for Birkenhead, *New Zealand Parliamentary Debates*, 13 October 1994, p 4284.

53 Cooper, p 50-9.

Clause 5(b) of the Bill ensures that the Bill applies to situations where goods cannot be ascertained (eg when goods form part of a larger bulk cargo).

According to commentary upon the equivalent provision in the UK legislation, the opening words of **Clause 5** ensure that **Clause 10** (which deals with representations in bills of lading) will operate even where goods have ceased to exist before the issue of a bill of lading.[54]

3.5 TRANSFER OF CONTRACTUAL RIGHTS

3.5.1 The Existing Legislation

Qld's Mercantile Act of 1867 (s 5(3)), which is based upon s 1 of the old UK Bills of Lading Act 1855, was intended to rectify a problem arising from the concept of privity of contract. (Privity of contract refers to the relationship which exists between the parties to a contract. According to the doctrine of privity of contract: "*... only those who are actual parties to a contract may sue or be sued on it*").[55] As the Law Commission explained in its report on *Rights of Suit in Respect of Carriage of Goods by Sea*:

> *The problem was that a buyer of goods, including one to whom a document of title had been transferred and thus who had constructive possession of the goods or even ownership, was unable to sue or be sued on a contract of carriage which had been made between the shipper and the carrier and to which he was not privy.*[56]

The intent of Qld's Mercantile Act can be seen from the preamble to s 5 which provides that :

> *Whereas by the custom of merchants a bill of lading of goods being transferable by endorsement the property in the goods may thereby pass to the endorsee but nevertheless all rights in respect of the contract contained in the bill of lading*

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54 J Beatson and J J Cooper, 'Rights of suit in respect of carriage of goods by sea', *Lloyd's Maritime and Commercial Law Quarterly*, May 1991, p 207; Cooper, p 50-9. Jack Beatson was one of the English Law Commissioners responsible for the preparation of the 1991 report on *Rights of Suit in Respect of Carriage of Goods by Sea.* The co-author of the article in *Lloyd's Maritime and Commercial Law Quarterly*, James Cooper, was a member of the Law Commission's Common Law Team. He is also responsible for the annotations to the UK Act published in *Current Law Statutes Annotated.*

55 Stephen Marantelli and Celia Tikotin, T*he Australian Legal Dictionary*, 2nd edn, Edward Arnold, Rydalmere, NSW, 1985, p 246.

56 Law Commission, p 5.

continue in the original shipper or owner ***and it is expedient that such rights should pass with the property***.(emphasis added)

Section 5(3) of the Mercantile Act 1867 itself provides that:

> *... every consignee of goods named in a bill of lading and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement shall have transferred to and vested in the consignee or endorsee all rights of suit and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself or herself.*

However, s 5(3) provides that the shipper's contractual rights and liabilities will be transferred to the consignee or indorsee only if the property passes upon or by reason of the consignment or indorsement. As the Law Commission and other commentators have pointed out, a number of situations have arisen where a buyer does not acquire rights as envisaged by the UK Bills of Lading Act and its Australian derivatives, because of the wording of the above provision and the way in which it has been interpreted by the courts over time. Examples of the sorts of difficulties which have been encountered are discussed below.

Where property does not pass at all

The UK decision of "*The Aramis*" [1989] 1 Lloyd's Law Reports 213 involved two issues - firstly, the non-delivery of certain goods and secondly, the incomplete delivery of another parcel of goods. Both parcels formed part of a larger bulk cargo. The first issue is discussed below; the second issue is discussed in the sub-section dealing with bulk cargoes.

In relation to the first issue, damages were sought for the non-delivery of a parcel of Argentine linseed expellers under a bill of lading. As there had been no delivery of goods, there was no passing of property. At p 218 of the judgment, Bingham L J said:

> *When property in the goods passes upon or by reason of an endorsement, contractual rights of suit and contractual liabilities are transferred to the endorsee. When property does not so pass there is no such transfer.*

Bulk Cargoes

Typically with bulk cargoes, property passes after consignment or indorsement.[57] Sales of goods legislation traditionally prevent property from passing before the

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[57] Law Commission, p 5; *Revised Discussion Paper*, p 7.

goods have been "ascertained." In Queensland, the relevant provision is s 19 of the *Sale of Goods Act 1896*, which provides that:

> *When there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.*

Normally goods will not be ascertained (and property will not pass) until the goods are discharged from the ship at the end of the voyage, when the contracted for quantity is separated out from the bulk and delivered.[58]

In "*The Aramis*", the issue of unascertained goods arose in the context of the UK equivalent to our own sales of goods legislation. The case involved the incomplete delivery of a second parcel of goods which formed part of the bulk cargo of Argentine linseed expellers referred to above. In relation to this issue, Bingham L J said:

> *The circumstances in which property may be said to pass upon or by reason of endorsement are far from settled, but here it is (necessarily) accepted that property did not so pass in the goods the subject of this bill because they formed part of a single undivided bulk cargo. That being so, it would, in my view, emasculate the Act* [the Bills of Lading Act 1855 UK] *to hold that contractual rights and liabilities were transferred, however just and reasonable that result might be*.[59]

In Australia, the Discussion Paper prepared by the Cth Attorney-General's Department in conjunction with the Department of Transport noted that:

> *For Australia, a nation where bulk commodity exports are of such significance in export trade, the relationship between the sale of goods provisions and the bills of lading legislation might be said to be particularly relevant*.[60]

Where property passes before or independently of consignment or indorsement

A case illustrating this problem is *The "Delfini"* [1990] 1 Lloyd's Law Reports 252. Here the indorsements of the bills of lading took place eleven days after delivery of the goods had been made and were not instrumental in transferring title. According to the view taken by the Court of Appeal in "*The Delfini*", an indorsee would be entitled to sue on a bill of lading, even though the indorsement was not the

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58 "*The Aramis*" [1989] 1 Lloyd's Law Reports 213, per O'Connor L J at pp 230-31.

59 "*The Aramis*" at p 218.

60 *Revised Discussion Paper*, p 8.

immediate occasion of the passing of property, if the act of indorsement played a definite causal connection with the passing of the property.[61]

Commenting upon this decision, the Law Commission said

> [It] *seriously weakens the bill of lading as a commercially useful document. Consultation revealed that it is commonplace in the oil trade, particularly where there are long chains of buyers and comparatively short ocean voyages, for title in entire cargoes to be transferred well ahead of transfer of the bill of lading, the ship reaching its destination long before the documents. Where the buyer makes payment against a letter of indemnity furnished by the seller, and where the carrier delivers the goods in return for a letter of indemnity furnished by the person requesting delivery, the bill of lading becomes of minimal significance: it may be received, if at all, long after discharge. Nevertheless, the law still attaches crucial significance to the time of indorsement and the time that property passes. If bills of lading cease, by the end of the voyage, to be effective as documents capable of transferring contractual rights, and yet they consistently arrive after the goods, then the bill of lading is even further weakened as a document useful for dealing with goods in transit. In particular, all indorsements after the end of the voyage will not operate to transfer contractual rights to indorsees. The intention is that the shipping documents, including the bill of lading, will be passed down the chain until they reach the final buyer and thereby bring him into a contractual relationship with the carrier. ... Since the passing of the original bill of lading down the line remains important even after discharge, it is understandable that traders and bankers assume that contractual rights accompany the bill. This makes commercial sense when the shipper has been paid in full and thus has no interest in suing the carrier. Unfortunately, the law on this point no longer gives effect to reasonable commercial expectations.*[62]

Where an indorsee does not obtain full property in the goods

In *Sewell v Burdick* (1884) 10 App Cas 74, after goods shipped under bills of lading had arrived and been warehoused, the shipper indorsed the bills in favour of a bank as security for a loan. The House of Lords held that the indorsement of the bill of lading, by way of security for a loan, did not "pass" "the property" in the goods, but only pledged them. As explained in the Discussion Paper prepared by the Cth Attorney-General's Department in conjunction with the Department of Transport:

> *In the circumstances of that case, it meant that the shipowner was prevented by the court from obtaining payment for the freight from the bank. A corollary of this outcome may be that a bank in seeking to realise its security would encounter*

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[61] Purchas L J at p 261; Mustill L J at p 274 and Woolf L J at p 275.

[62] Law Commission, pp 7-8.

> *difficulties in suing the carrier under the current Australian bills of lading legislation and may need to resort to other principles.*[63]

3.5.2 Proposals and Rationale for Reform

To reform the deficiencies in the law in this area (as illustrated by the examples above), the Law Commission recommended that the lawful holder of a bill of lading should be able to assert rights of suit against the carrier, in contract, for loss or damage to the goods covered by the bill of lading, whether or not property in the goods passes upon or by reason of the consignment or indorsement. The effect of this proposal would be to break the link between the transfer of contractual rights and the passing of property, so that any lawful holder of a bill of lading would be able to sue the carrier.[64]

The Law Commission's reasons for choosing this option as the basis for legislative reform were as follows:

- The Law Commission considered that this approach would solve all the major problems experienced by holders of bills of lading under the (now repealed) UK Bills of Lading Act 1855. In particular, it would solve the problems which arose in *The Delfini* and in relation to unascertained parts of bulk cargoes.
- It would build and improve upon the existing law rather than involving an untried legal technique.
- It would bring English law into line with the law in jurisdictions such as France, Germany, Holland, Sweden and Greece (ie major European trading partners of the United Kingdom).[65]

In considering proposals for reform of Australian bills of lading legislation, the Discussion Paper (p 14) advanced substantially the same reasons as those listed above. In addition, the Discussion Paper pointed out that adopting the above proposal would also bring Australia into line with the law in the United States, and with the law in the United Kingdom following the enactment of the Carriage of Goods by Sea Act 1992.

Enactment of the Sea-Carriage Documents Bill 1996 would now also bring Queensland into line with New Zealand, which enacted legislation based on the UK

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63 *Revised Discussion Paper*, p 9.

64 Law Commission, pp 11-12.

65 Law Commission, p 12.

Act (with the exception of s 4 of that Act) in 1994.[66] Across the Tasman, concerns about the need to maintain uniformity with Australian law were specifically raised during the debate on those amendments to NZ's Mercantile Act whereby the UK provisions were incorporated. Mr John Blincoe, Member for Nelson, said:

> *Given the international nature of transport, and particularly maritime transport, it does seem to be important that jurisdictions such as New Zealand, the United Kingdom, and Australia should have similar rules. What steps have been taken to ensure there is some uniformity between our law as it will now be in this area and say, the law of Australia? Given the enormous amount of commerce that goes across the Tasman Sea I would have thought it was highly desirable to have compatibility with our Tasman neighbour, at least.*[67]

Finally, the Discussion Paper prepared by the Cth Attorney-General's Department and the Department of Transport rejected notions that reform of bills of lading legislation might be unnecessary in the Australian context, for the reasons given below:

> *It was suggested at the Commonwealth Law Conference in Auckland in 1990 that the problems which made such reforms necessary were largely those of a jurisdiction which was a substantial commodity importer (as opposed to exporter). It may be that particular problems arising out of title to sue do not, therefore, occur with sufficient frequency in Australia to justify reform. A strong contrary argument is that reform affords the opportunity for legislation conferring rights of action in respect of non-negotiable waybills and other non-negotiable instruments ... A further argument in support of reform is the need for Australian legislation to be consistent with other major trading nations in this respect. Subsection 11(1) of the* Carriage of Goods by Sea Act 1991 *(Cwlth) provides that the law in force at the place of shipment should apply where goods are shipped out of Australia pursuant to a bill of lading or similar document of title. If the Australian law determining title to sue is different from that of other nations, cargo receivers may choose the jurisdiction in which to sue according to which jurisdiction has the most favourable law. This is not desirable for the orderly resolution of disputes in the shipping industry. Many of those consulted in the course of the preparation of the draft and final versions of this Discussion Paper support a resolution of the problem in the manner achieved in the UK ...*[68]

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66 *Mercantile Law Act 1908* (NZ), as amended by the *Mercantile Law Amendment Act 1994*.

67 Mercantile Law Amendment Bill (NZ), Report of Transport Committee, Mr John Blincoe, Member for Nelson, *New Zealand Parliamentary Debates*, 13 October 1994, p 4288.

68 *Revised Discussion Paper*, pp 12-13.

3.5.3 The Proposed Legislation

Bills of Lading

The above recommendation of the Law Commission (that contractual rights should be able to be transferred from the shipper to the lawful holder of a bill of lading, irrespective of whether property in the goods covered by the bill passes upon or by reason of the consignment or indorsement) was given effect to in s 2(1) of the UK legislation. The Queensland counterpart of this section can be found in **Clauses 6(1)(a)** and **6(2)** of the Sea-Carriage Documents Bill. **Clause 6(1)(a)** provides that, in relation to a bill of lading, all rights under the contract of carriage are transferred to each successive lawful holder of the bill (as defined in **Clause 3**). **Clause 6(2)** provides that rights in a contract of carriage transferred to a person under **Clause 6(1)** vest in that person as if the person had been a party to the original contract.

Clause 6(4)

Clause 6(4) of the Queensland Bill is based upon s 2(2) of the UK Act. **Clause 6(4)** provides that even when a person becomes a lawful holder of a bill of lading after it has ceased to be an effective document of title (eg after delivery of the goods has been made), that person will still have rights of action against the carrier of the goods if that person:

- holds the bill pursuant to contractual or other arrangements (eg gifts, pledges[69]) made before the bill of lading ceased to be a transferable document of title, or
- becomes the holder because of a re-indorsement of the bill following the rejection by another person of goods or documents delivered under contractual or other arrangements made before the bill ceased to be a transferable document of title.

As explained previously, **Clause 6(1)(a)** transfers rights of suit to the lawful holder of a bill of lading. The reason why a provision of the kind contained in **Clause 6(4)** is needed is explained by Cooper, (discussing the equivalent UK provision (2(2))), to be:

> *... to prevent the indorsement of exhausted bills of lading to those who have no interest in the goods to which the bill once related but who simply wish to "buy" a cause of action against the carrier.*[70]

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69 Cooper, p 50-5.

70 Cooper, p 50-5.

Sea Waybills

The old Bills of Lading Act (UK) and its Australian derivatives, including the Mercantile Act 1867 (Qld), do not apply to sea waybills or ships' delivery orders.

The proposed Queensland Bill, however, operates to extends the transfer of contractual rights to the consignee named in a sea waybill or such other person to whom the carrier is instructed to deliver the goods (**Clause 6(1)(b)**), and to the person entitled to delivery in accordance with an undertaking given in a ship's delivery order (**Clause 6(1)(c)**). These provisions are based upon ss 2(1)(b) and (c) of the UK Act, which give effect to the recommendations contained in Part V of the Law Commission's report on *Rights of Suit in Respect of Carriage of Goods by Sea*.

The rationale for the extension of the primary reform proposed by the Law Commission (ie to give contractual rights of suit to the lawful holder of a bill of lading, irrespective of the passing of property) to sea waybills was stated to be as follows:

> *It is commercially inconvenient that the consignee named in a waybill is unable to sue the carrier. A sea waybill is a paradigm case of a contract for the benefit of a third party. Only the common law's insistence on the doctrine of privity prevents the consignee from suing the carrier. It was this doctrine which the 1855 Act sought to circumvent for bills of lading. However, waybills had not then been invented and they do not fall within the ambit of the 1855 Act. In a modern reform of the Bills of Lading Act, it would expose English law to further criticism if the opportunity to include sea waybills were not taken. ...*
>
> *Although such a reform would be a further inroad into the doctrine of privity of contract, it is a necessary inroad given the increasing commercial importance of sea waybills. It is a limited inroad and does not give rise to the possibility of an indeterminate class of persons being able to sue the carrier. Modern conventions on air, rail and road transport all give the consignee named in a waybill the right to sue the carrier. It would be anomalous if new legislation on rights of suit did not give the consignee named in a sea waybill a similar right.*[71]

Under **Clause 6(1)(b)**, and its UK equivalent s 2(1)(b), contractual rights of suit are transferred to the person (other than an original party to the contract) who is entitled to delivery,[72] rather than simply to the consignee named in the waybill. As

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[71] Law Commission, p 33.

[72] In the words of the clause, rights are transferred to "*... the person (other than an original party to the contract) to whom delivery of the goods is to be made by the carrier in accordance with the contract*".

Beatson and Cooper explain, discussing the equivalent UK provision, the reason for this form of drafting is as follows:

> *Since a sea waybill is not a transferable document of title, the shipper will (unless he has made contractual provision otherwise) retain rights of disposal over the goods until the time of delivery. If rights were given to the named consignee as from the time of consignment, this would prevent the shipper from exercising his rights of disposal in favour of a new consignee*.[73]

Therefore, for a sea waybill, s 2(1)(b) of the UK Act, and **Clause 6(1)(b)** of the Queensland Bill, give rights to the person entitled to delivery (ie the consignee named in the waybill or such other person to whom the carrier is directed to deliver), thereby allowing the shipper to change his instructions concerning delivery.[74]

Ships' Delivery Orders

In supporting the extension of the reforms to ships' delivery orders, the Law Commission stated:

> *If it is correct to give a right of action to the person who has acquired a right of delivery against the carrier, this should apply indifferently to the bill of lading holder and to the person to whom delivery is due under a ship's delivery order*.[75]

Clause 6(3)(a) of the Qld Bill ensures that the holder of a ship's delivery order acquires contractual rights on the terms of the undertaking contained in the order.

Clause 6(3)(b) is intended to ensure that, where rights in a contract of carriage in relation to which a ship's delivery order is given are transferred, the rights of a buyer of part of a bulk cargo are limited to his or her sub-purchase. (As explained in Section 3.4 of this *Legislation Bulletin*, **Clause 5(b)** makes it clear that such a buyer has rights of suit despite the fact that the goods to which he she is entitled form part of a larger bulk.)

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73 Beatson and Cooper, p 203.

74 Beatson and Cooper, p 203; Cooper, p 50-5.

75 Law Commission, p 38.

3.6 TRANSFER OF CONTRACTUAL LIABILITIES

Clause 8 of the Queensland Bill provides that where a person acquires contractual rights under **Clause 6** of the Bill, the person will also assume contractual liabilities as if he or she had been a party to the original contract, where:

- the person takes or demands delivery of the goods to which the contract of carriage relates (**Clause 8(1)(a)**&**(b)**, or
- makes a contractual claim against the carrier (**Clause 8(1)(c)**.

Clause 8 of the Queensland Bill is based upon s 3 of the UK Act, which in turn is based upon the recommendations of the Law Commission contained at pp 25-27 of

its report. There the Law Commission, discussing the issue of the transfer of liabilities to the holders of bills of lading, expressed the view that:

> *Contractual liabilities are not to be automatically imposed on every holder of a bill of lading. However, where the holder of the bill of lading enforces any rights conferred on him under the contract of carriage he should do so on condition that he assumes any liabilities imposed on him under that contract.*[76]

As to when the holder of a bill of lading should be taken to be enforcing rights, so as to make him or her subject to contractual liabilities, the Law Commission said:

> *It is not desirable that liabilities could be enforced against the person who merely holds the bill of lading, otherwise banks and others merely with a security interest would be liable without more. The question is whether the holder should be subject to liabilities if he either takes delivery or merely claims delivery, for instance by presenting the bill of lading to the ship. ...*
>
> *We see, in general, no unfairness in making the person who either claims delivery or who takes delivery of the goods, from being subject to the terms of the contract of carriage, since in both cases the person is enforcing or at least attempting to enforce rights under the contract of carriage. ... Although it may seem odd to impose liabilities on the person who claims delivery but who actually receives nothing, this will not invariably be so. Let us say that a buyer agrees to take delivery, but will only do so from a particular dock so that the ship has to delay unloading until there is enough water. Demurrage is meanwhile incurred. If the goods are subsequently destroyed, it does not necessarily seem unreasonable that the buyer should pay the demurrage even though he never receives the goods.*
>
> *Thus, we believe that where a person takes or demands delivery of any of the goods to which the document relates, or otherwise makes a claim against the carrier in respect of any of the goods, fairness decrees that he assumes the obligations imposed on him under the contract.*[77]

By contrast with the UK Act, and the Queensland Bill, in the **United States**, the *Federal Bills of Lading Act 1916* transfers contractual rights but not liabilities.[78]

3.6.1 Ships' Delivery Orders

Section 3(2) of the UK Act provides that the liabilities of the person entitled to delivery under a ship's delivery order are confined to the parcel of goods covered by the order. The section is to be read with s 2(3) of the UK Act which confines the

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[76] Law Commission, p 25.

[77] Law Commission, p 26.

[78] Beatson and Cooper, p 206.

rights of a person entitled to delivery under a ship's delivery order to the parcel of goods covered by the order.

Clause 6(3)(b) of the Qld Bill is based upon s 2(3) of the UK Act. However, **Clause 8** of the Qld Bill does not appear to contain a sub-clause along the same lines as s 3(2) of the UK Act.

3.7 LIABILITY OF ORIGINAL CONTRACTING PARTIES

According to the Law Commission, at common law, the original shipper remained liable on the bill of lading contract.[79] Section 2 of the old 1855 UK Act, upon which Section 6 of Qld's Mercantile Act 1867 is based, expressly preserved the shipper's liability for freight. In the words of the Qld section:

> *Nothing herein contained shall prejudice or affect ...any right to claim freight against the original shipper or owner...*

Nor did the old 1855 UK Act, upon which Qld's Mercantile Act is based, expressly relieve the shipper of any liabilities to which he remained subject at common law.[80]

At p 27 of its report, the Law Commission recommended that the liabilities of the holder of a bill of lading should be without prejudice to any liabilities of the original shipper. The merits of this approach were illustrated by reference to the following example:

> *... if an exporter shipped a cargo of highly poisonous gas which escaped and caused extensive property damage and loss of life, a shipowner would be disturbed to find that the shipper had been absolved of his liabilities simply by indorsing the bill of lading to another; the more so, since if the new holder did not seek to enforce the contract, the shipowner would be denied redress against anyone.*

The Law Commission gave effect to its recommendation in Clause 3(3) of its draft Bill (now s 3(3) of the UK Act).

Clause 9 of the Queensland Bill is based upon s 3(3) of the UK Act. The clause provides that **Clause 8** does not affect the liability of an original party to the contract of carriage.

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79 Law Commission, p 26.

80 Law Commission, p 27.

3.8 ACTIONS FOR THE BENEFIT OF ANOTHER

Clause 6(5) of the Queensland Bill provides that where a person with any interest or right in relation to goods suffers loss or damage as a result of a breach of a contract of carriage, but **Clause 6(1)** operates to transfer the rights of suit to another person, the person to whom the rights in the contract are transferred is entitled to exercise those rights for the benefit of the person who sustained the loss or damage. The Explanatory Notes to the Bill state that this clause is based on s 2(4) of the UK legislation.[81]

Commenting on s 2(4) of the UK Act, Bradgate and White have argued that the provision has the following limitations:

- The provision is permissive, rather than mandatory. By virtue of the provision, the person to whom rights of action have been transferred **may** exercise the rights of suit for the benefit of the person who has suffered loss or damage, but is not required to do so (ie the wording of the UK provision says that the person in whom rights have been vested "*shall be entitled*" to exercise the rights of suit for the benefit of the person who suffered loss or damage; the Queensland Bill says the person to whom the rights in the contract of carriage have been transferred "*is entitled*" to so exercise them).
- The provision does not expressly impose a duty upon the person who recovers damages to account for them to the person who suffered the loss or damage. Bradgate and White express the view that the requirement that the rights of suit be exercised "*for the benefit*" of the person who sustains loss or damage would probably be construed as imposing a duty to account[82] but point out that there is no clear statement in the Law Commission's report to show that it was intended that the person in whom rights are vested should account for damages recovered.[83]

3.9 EVIDENTIARY PROVISIONS

In *Grant v Norway*, a case decided in 1851, the English Court of Common Pleas held that the master of a ship did not have authority to sign a bill of lading for goods which had not been shipped; the shipowner was therefore not liable for the act of the ship's master in signing a bill of lading stating that a certain quantity of goods had been shipped (ie the master of the ship was not considered to be the agent of the

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81 Explanatory Notes, Sea-Carriage Documents Bill 1996 (Qld), p 5.

82 Bradgate and White, p 201.

83 Bradgate and White, p 201, fn 93.

shipowner). As a consequence, the indorsee of the bill was not able to sue the shipowner to recover moneys which had been advanced on the faith of the bill of lading, where the bill incorrectly stated that the goods had been shipped.[84]

As the Law Commission pointed out in its report on *Rights of Suit in Respect of Carriage of Goods by Sea*:

> *The rule is obviously an inconvenient one for those who in the normal course of business pay or lend money on the faith of statements made in bills of lading.*[85]

In an effort to overcome this problem, s 3 of the old 1855 UK Act provided that a bill of lading should be " *conclusive evidence of such shipment as against the master or other person signing the same*", notwithstanding the fact that the goods may not have been shipped, unless the holder of the bill of lading was aware at the time he received the bill that the goods had not been put on board. The same provision was enacted as s 7 of Queensland's existing Mercantile Act 1867.

However, the above provision does not make the bill of lading conclusive against the carrier or shipowner, but only against the master or other signatory. As Bradgate and White point out, there is usually no cause of action against the master or other signatory "*... since such people are rarely contractually liable*".[86] Furthermore: "*Even if the master was personally liable, he does not have the same deep pocket as a carrier or shipowner*".[87]

This issue of false representations in a bill of lading was considered by the Law Commission in Part IV of its report, on the ground that s 3 of the 1855 UK Act "*... clearly* [did] *not perform the task for which it was designed*"[88](as explained above). This problem had in fact been identified as long ago as 1890, in an article published in the *Law Quarterly Review* by T G Carver[89], who proposed that the section should be amended to make statements in a bill of lading conclusive

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84 *Grant v Norway* (1851) 10 CB 665.

85 Law Commission, p 28.

86 Bradgate and White, p 190.

87 Bradgate and White, p 190.

88 Law Commission, p 28.

89 T G Carver, 'On some defects in the Bills of Lading Act, 1855', *Law Quarterly Review*, No XXIII, July 1890, p 303.

evidence against the shipowner (carrier).[90] Echoing Carver's sentiments, the Law Commission recommended:

> *... the abolition of the rule in Grant v Norway. Under section 3 of the 1855 Act, a bill of lading in the hands of a consignee or indorsee for valuable consideration is conclusive evidence of such shipment against the signatory of the bill, although in practice this is of minimal effect ... We recommend that a bill of lading, representing goods to have been shipped or received for shipment and in the hands of the lawful holder in good faith, should be conclusive evidence of such shipment or receipt as against the carrier*.[91]

Section 4 of the UK Act (and **Clauses 10(1)** and **(3)** of the Queensland Bill) give effect to the above recommendation by providing that a bill of lading, signed by the ship's master or a person with authority to sign bills of lading, representing goods to have been shipped or received for shipment, is, in favour of the **lawful holder of the bill of lading**, conclusive evidence against the **carrier** of the shipment, or receipt for shipment, of the goods.

The wording of **Clause 10(1)(b)(ii)** is designed to ensure that where the bill of lading is not signed by the master of the ship, the person who has signed must have had the carrier's authority (express, implied or apparent) to sign, for the signature to bind the carrier.

Clause 10(2), read in conjunction with **Clause 10(1)**, provides that a bill of lading, signed by the ship's master or a person with the carrier's authority to sign, representing goods to have been shipped or received for shipment, is, in favour of the **shipper**, evidence against the **carrier** that the goods have been shipped or received for shipment.

3.10 LEGISLATION NOT TO BE RETROSPECTIVE

The United Kingdom legislation does not apply to documents issued prior to the legislation's coming into force: s 6(3).

Nor will the proposed Queensland legislation be retrospective. By **Clause 2** of the Queensland Bill, the proposed legislation is to apply only to sea-carriage documents which come into existence after **Clause 2** commences. As was envisaged in relation to the United Kingdom legislation,[92] it would appear that there would thus be a

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90 Carver, pp 304 and 306.

91 Law Commission, p 29.

92 Cooper, p 50-10.

transitional period during which the old Mercantile Act would continue to apply to bills of lading issued before the commencement of the proposed new legislation. In this regard, s 20(2)(b) of the *Acts Interpretation Act 1954* (Qld) provides that the repeal or amendment of an Act does not affect anything begun under that Act.

4. APPLICATION OF HAGUE RULES

In his Second Reading Speech, Hon D E Beanland MLA stated that the Queensland Bill " *... does not affect the operation of The Hague Rules on liability in respect of cargoes carried under a bill of lading*".[93]

The Hague Rules refer to a set of rules relating to bills of lading, subjecting the rights and liabilities between shippers and carriers to rules of general application. The Rules, first agreed to in 1921, were revised and embodied in the articles of an International Convention signed at Brussels in 1924 (the Brussels Convention).[94]

In Australia, what are known as the amended Hague Rules have the force of law by virtue of s 8 of the Commonwealth *Carriage of Goods by Sea Act 1991*. The amended Hague Rules refer to the Brussels Convention, as amended by rules agreed upon in a protocol signed at Brussels in February 1968 (the Visby Protocol) and by Article II of the rules agreed upon in a protocol signed in December 1979 (the SDR Protocol).

Section 10 of the Commonwealth Act provides that the amended Hague Rules only apply to contracts for the carriage of goods by sea from one port in Australia to another port in Australia (though not to intra-state voyages).

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93 Sea-Carriage Documents Bill 1996 (Qld), Second Reading Speech, Hon D E Beanland MLA, Q*ueensland Parliamentary Debates*, 24 July 1996, p 1812.

94 E R Hardy Ivamy, *Mozley & Whiteley's Law Dictionary*, 11th edn, Butterworths, London, 1993, p 123.

5. IMPACT OF REFORMS

In moving that the Carriage of Goods by Sea Bill 1992 (UK) be read a second time in the House of Lords, Lord Goff, who was responsible for introducing the Bill, said:

> *It is some considerable time since the enactment of the Bills of Lading Act 1855. ... There is now considerable evidence that commercial practice has moved on and that our law in this area needs to be amended and updated. Indeed, the common thread running through the discussions and correspondence which took place following publication of the Law Commissions' reports was that the proposed updating was badly needed and long overdue. ... With the enactment of the* [Carriage of Goods by Sea] Bill ... *Parliament will move our law in this area from the middle of the 19th century to well into the 21st.*[95]

Similar sentiments have been echoed by Hon D E Beanland MLA in his Second Reading Speech to Queensland's Sea-Carriage Documents Bill 1996, and in a subsequent Media Release (attached as Appendix D to this Bulletin). In his Second Reading Speech to the Bill, the Attorney-General and Minister for Justice stated:

> *The passage of this Bill will ensure that Queensland's laws relating to carriage of goods by sea meet the demands of commercial practice here and abroad. Queensland has the opportunity to be the first State in Australia to introduce a Bill which redresses the inadequacies of the existing nineteenth century legislation in this area. It is important for Queensland's international trading relations that our legislation evolve in line with modern developments in the export industry. As the first State in Australia to introduce the Sea-Carriage Documents Bill, Queensland is adopting a leadership role, and would urge other States to follow suit without delay. The adoption of this Bill will facilitate reform in an area of vital significance to the State and national economy.*[96]

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95 Carriage of Goods by Sea Bill 1992 (UK), House of Lords, Second Reading Stage, Lord Goff, *Hansard*, 4 February 1992, pp 233-34.

96 Sea-Carriage Documents Bill 1996 (Qld), Second Reading Speech, Hon D E Beanland MLA, Q*ueensland Parliamentary Debates*, 24 July 1996, p 1812.

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- *Mercantile Law Amendment Act 1994* (NZ)
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- *Waren Import Gesellschaft Krohn & Co v Internationale Graanhandel Thegra N V* [1975] 1 Lloyd's Law Reports 146
- *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277

APPENDIX A

Source: The Law Commission and the Scottish Law Commission, *Rights of Suit in Respect of Carriage of Goods by Sea*, March 1991 (Law Commission No 196; Scottish Law Commission No 130).

PART VII

SUMMARY OF RECOMMENDATIONS

7.1 In this part of the report we summarise our principal recommendations for reform.

1) The lawful holder of a bill of lading should be entitled to assert contractual rights against the carrier, irrespective of the passing of property and regardless of whether he has suffered loss himself, if necessary being able to recover substantial damages for the benefit of the person who has suffered the loss.

[Paragraphs 2.22 and 2.27; clauses 2(1) and 2(4)]

2) The shipper and any intermediate holder of a bill of lading should not be entitled to rights of suit after someone else has become the lawful holder of the bill of lading.

[Paragraphs 2.34-2.41; clause 2(5)]

3) A bill of lading should be capable of indorsement so as to pass contractual rights even after delivery of the goods has been made, providing that the indorsement is effected in pursuance of arrangements made before the delivery of the goods.

[Paragraphs 2.42-2.44; clause 2(2)]

4) Where the holder of a bill of lading, or any other person entitled to sue under our recommendations, takes or demands delivery of the goods, or otherwise make a claim under the contract of carriage against the carrier, he should become subject to any contractual liabilities as if he had been a party to the contract of carriage, without prejudice to the liabilities under the contract of carriage of the original shipper.

[Paragraphs 3.19 and 5.22; clause 3]

5) The rule in *Grant v. Norway* should be abolished. A bill of lading, representing goods to have been shipped or received for shipment and in the hands of the lawful holder, should be conclusive evidence against the carrier of such shipment or receipt.

[Paragraphs 4.7; clause 4]

6) The consignee named in a sea waybill, or such other person to whom the carrier is duly instructed to deliver under the terms of the sea waybill, should be able to sue on the contract of carriage, without prejudice to the rights of the original shipper.

[Paragraphs 5.13 and 5.23; clause 2(1) and 2(5)]

7) The person entitled to delivery in accordance with an undertaking contained in a ship's delivery order should be able to assert contractual rights against the carrier on the terms of the undertaking.

[Paragraph 5.30; clause 2(1)]

8) The Secretary of State should be empowered to make provision by regulations for information given by means other than in writing to be of equivalent force and effect as if it had been given in writing.

[Paragraph 6.3; clauses 1(5)-1(6)]

(Signed) PETER GIBSON, *Chairman, Law Commission*
TREVOR M. ALDRIDGE
JACK BEATSON
RICHARD BUXTON
BRENDA HOGGETT
MICHAEL COLLON, *Secretary*
C.K. DAVIDSON, *Chairman, Scottish Law Commission*
E.M.CLIVE*
PHILIP N. LOVE
I.D. MACPHAIL
W.A. NIMMO SMITH
KENNETH F BARCLAY, Secretary

15 February 1991

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*Subject to the disagreement expressed below

APPENDIX B

Source: *Revised Discussion Paper: Proposals for Reform of Australian Bills of Lading Legislation*, Prepared by the International Trade Law Section of the Attorney-General's Department of Australia in conjunction with the Department of Transport, 1994.

SUMMARY OF RECOMMENDATIONS

It is envisaged that the recommendations in Part I - IV should be implemented as a total package. The recommendations from each Part are not so interdependent, however, that the set of recommendations from any Part or Parts are not capable of standing alone. For example, the amendments suggested in Part I could be made without the recommendations from the other Parts being followed.

The recommendations, as extracted from each Part, are as follows.

Title to Sue [from Part I]

. States and Territories should consider amending their bills of lading legislation with a uniform approach.

. The Australian bills of lading legislation should be amended to allow the transfer of contractual rights from the shipper to the lawful holder of a bill of lading but for such transfer to occur irrespective of whether property in the goods passes upon or by reason of the consignment or indorsement.

Sea waybills and other non-negotiable instruments [from Part II]

. States and Territories should consider reform of the law pertaining to sea waybills and ship's delivery orders.

. Relevant bills of lading legislation should be amended to allow the transfer of contractual rights from the shipper to the consignee named in a sea waybill or such person to whom the carrier is duly instructed to deliver under the terms of the sea waybill.

Amendments should allow the person entitled to delivery in accordance with an undertaking contained in a ship's delivery

order such contractual rights against the carrier as are contained in the terms of the undertaking.

The legislation should not at this stage be amended to extend to non-negotiable instruments other than sea waybills and ship's delivery orders.

Electronic bills of lading [Part III]

Legal policy areas should be vigilant and take a cooperative approach, in identifying legal constraints that unnecessarily inhibit the operation of market forces towards the more efficient use of EDI technology in the area of shipping trade documentation.

. Any reform of bills of lading legislation should include a provision similar to the Carriage of Goods by Sea Act 1992 (UK) allowing for the making of regulations to make provision for the application of the legislation to cases where EDI systems are used.

. The functional equivalence approach as advanced by the EDI Working Group of UNCITRAL should be further examined with a view to its applicability to electronic shipping documents.

The UK approach [from Part IV]

. Australia should consider following the UK approach of building on the current legal system rather than attempting to introduce any untried and uncertain legal regimes in the area of bills of lading legislation and associated legal issues.

. The UK Approach as used in the Carriage of Goods by Sea Act 1992 (UK) should generally be followed in Australia and improved upon with an additional provision providing that where a carrier issues a document, being a bill of lading, to evidence the receipt of goods carried, that document is prima facie evidence of the taking over, by the carrier, of the goods as therein described.

APPENDIX C

Source: *Australian Financial Review*, 2 April 1993, p 14.

'Govt waterfront reform gets a welcome boost'

By Beverley Head

A key plank in the Government's plans to reform the waterfront has fallen into place this week when the first ship to be cleared electronically by customs and quarantine docked in Brisbane.

Paperless trading systems - or electronic data interchange - have been championed as the tools needed to make trade more efficient.

With a system called SeaCargo, which has been under development since September 1991, electronic messaging will replace the current paper chase of manifests and clearances required for trade.

The Australian Endurance which docked in Brisbane on Wednesday could usually have had to submit separate paper manifests to customs, quarantine and the port authorities 48 hours before docking.

It would then have received separate paper clearance certificates.

Under SeaCargo, the principal agent for the ship, Australian National Line, sent one electronic manifest to the Australian Customs Service. (It still has to be lodged 48 hours ahead, but can be done remotely from a computer terminal, and only one message needs to be sent - to the ACS.)

Acting as clearing house, the ACS directed copies of the electronic manifests to quarantine and port officials for vetting.

A single clearance message will then be generated with the authority of all three, so that the ship can dock.

Essentially the EDI system does away with paper and streamlines the clearing process.

It also allows the ACS to integrate its computer systems.

SeaCargo has been developed at a cost of about $4 million, and has been running since early March.

Teething problems resulted in electronic manifests sent by both Australian National Line and P & O being rejected, but those problems now seem to have been ironed out.

The project leader for the ACS, Mr Grant Allison-Young, said the ultimate goal would be to have all ships use the paperless trading system rather than paper-based systems to achieve maximum efficiency gains.

However, they would have to either develop their own computer systems allowing access to SeaCargo, or buy third party software for about $2,500 to run on a personal computer which would provide access to the trading network.

Mr Allison-Young said the Se-Cargo system was now being tested with freight-forwarding companies, and with foreign shipping companies which were trading with Australia.

APPENDIX D

MINISTERIAL MEDIA STATEMENT

Attorney-General and Minister for Justice

24 July1996

QUEENSLAND'S SHIPPING INDUSTRY GOES FULL STEAM AHEAD

Attorney-general and Minister for Justice, Denver Beanland, today introduced a Sea Carriage Documents Bill into Parliament, to bring Queensland into line with international shipping standards.

Mr Beanland said the Bill would ensure Queensland legislation regarding title to sue on se-carriage documents met the needs and expectations of modern commercial practice.

The Bill extends the right to sue the carrier of goods to endorsees where property in the goods passes independently of the endorsement of the Bill of Lading.

These new provisions overcome the problem of 'ascertaining' (physically identifying and separating) goods where they may be part of a bulk cargo.

"Under this new Bill, if a bulk cargo is split up between several buyers, but the cargo is lost or damaged during transportation, all of those buyers are now able to sue for that loss," Mr Beanland said.

In the past, only the shipper and the carrier were able to sue on the contract.

"People who are given a mortgage over the goods can also sue for loss or damage," Mr Beanland said.

"That means parties, such as banks, now have the right to legally recover the losses incurred in sea carriage."

The Bill also legally recognises the transmission and storage of electronic documents via computer or fax. In the past, ships could be delayed for hours awaiting written Bills of Lading.

"Technology has changed the face of the shipping industry. The age of the sail and steam has given way to computers and steel ships," he said.

"This Bill is updates and modernises the Mercantile Act (1867), which is more than 130 years old."

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