

# MERCANTILE LAW.

## No. 4 of 1962.

An Ordinance relating to Mercantile Agents, Guarantors and Sureties, Usury, Written Memoranda and Warehousemen's Liens.

### PART I.—PRELIMINARY.

1. This Ordinance may be cited as the *Mercantile Law Ordinance* 1962.\* Short title.
2. This Ordinance is divided into Parts, as follows:— Parts.
- Part I.—Preliminary (Sections 1-3).
- Part II.—Mercantile Agents (Sections 4-11).
- Part III.—Guarantors and Sureties (Sections 12-13).
- Part IV.—Usury (Section 14).
- Part V.—Written Memoranda (Sections 15-16).
- Part VI.—Warehousemen's Liens (Sections 17-32).
3. The laws specified in the Schedule to this Ordinance shall cease to be in force in the Territory. Certain laws to cease to be in force.

### PART II.—MERCANTILE AGENTS.

4. In this Part, unless the contrary intention appears— Definitions.
- “advance” includes a payment of money and the delivery of a bill of exchange or other negotiable security;
- “document of title” has the same meaning as in the *Sale of Goods Ordinance* 1954;
- “mercantile agent” has the same meaning as in the *Sale of Goods Ordinance* 1954;
- “pledge” includes a contract pledging or giving a lien or security on goods, whether in consideration of an original advance, a further or continuing advance or a pecuniary liability.
- 5.—(1.) Where— Consignor and consignee.
- (a) the owner of goods—
- (i) has given possession of the goods to a person for the purpose of consignment or sale and the person has consigned the goods in his own name; or

\* Made on 6th April, 1962; notified in the *Commonwealth Gazette* and commenced on 12th April, 1962.

(ii) has consigned the goods in the name of a person; and

(b) the consignee of the goods has not had notice that that person is not the owner of the goods,

the consignee has, in respect of advances made to or for the use of that person, the same lien on the goods as if that person were the owner of the goods.

(2.) A consignee who has a lien on goods by virtue of the last preceding sub-section may transfer the lien to any person.

(3.) Nothing in this section limits or affects the validity of a sale, pledge or disposition by a mercantile agent.

**Powers of mercantile agent.**

**6.** Where a mercantile agent is entrusted as such with the possession of goods or the documents of title to goods—

(a) a sale, pledge or other disposition of the goods made by him in the ordinary course of business of a mercantile agent to a person acting in good faith and not having at the time of the disposition notice that the mercantile agent had not authority to make the disposition is, subject to the provisions of this Part, as valid as if the mercantile agent were expressly authorized by the owner of the goods to make the disposition; and

(b) a sale, pledge or other disposition of the goods to a person which would have been valid if the entrusting had continued is valid, notwithstanding the determination of the entrusting, unless the person had at the time of the disposition notice of the determination of the entrusting.

**Presumptions.**

**7.** For the purposes of this Part—

(a) a mercantile agent in possession of goods or of the documents of title to goods shall be deemed to have been entrusted with the goods or documents as a mercantile agent until the contrary is shown;

(b) a mercantile agent entrusted as a mercantile agent with, and possessed of, the documents of title to goods, whether derived immediately from the owner of the goods or obtained by reason of the agent having been entrusted with the possession of the goods or of any other document of title to the goods, shall be deemed to be entrusted with the possession of the goods;

(c) a mercantile agent shall be deemed to be possessed of goods or documents of title to goods whether the goods or documents, as the case may be, are in the actual custody or control of the mercantile

agent or are held by another person subject to the control of, or for or on behalf of, the mercantile agent;

- (d) a contract, whether made directly with a mercantile agent or with a clerk, or other person, on behalf of a mercantile agent, shall be deemed to be a contract with the mercantile agent;
- (e) a pledge of the documents of title to goods shall be deemed to be a pledge of the goods; and
- (f) where—

- (i) an advance is made in good faith to a mercantile agent entrusted as a mercantile agent with the possession of goods or documents of title to goods on the faith of an agreement in writing to consign, deposit, transfer or deliver the goods or documents; and
- (ii) the goods or documents are received by the person making the advance without notice that the mercantile agent was not authorized to make the pledge,

the advance shall be deemed to be an advance on the security of the goods or documents within the meaning of this Part although the goods or documents are not received by the person making the advance until after the advance is made.

8. Where a mercantile agent pledges goods in consideration of the delivery or transfer of—

**Pledge by way of exchange.**

- (a) other goods;
- (b) documents of title to other goods; or
- (c) negotiable securities,

upon which the person so delivering or transferring the goods, documents or securities had at the time a valid and available lien and security for or in respect of a previous advance by virtue of an agreement made with the mercantile agent, the pledge shall, if the pledgee acts in good faith and without notice that the mercantile agent had not authority to make the pledge, be deemed to be in consideration of an advance within the meaning of this Part as if there had been a present advance of money, but the pledgee does not acquire any right or interest in excess of the value of the goods, documents or negotiable securities when so delivered or transferred.

Pledge for  
antecedent debt.

9. Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee does not acquire any further right to the goods than could have been enforced by the pledgor at the time of the pledge.

Saving for  
rights of true  
owner.

10. Nothing in this Part—

- (a) authorizes a mercantile agent to exceed or depart from his authority as between himself and his principal or exempts him from any liability, civil or criminal, for so doing;
- (b) prevents the owner of goods from recovering the goods from a mercantile agent or his trustee in bankruptcy at any time before the sale or pledge of the goods;
- (c) prevents the owner of goods sold by a mercantile agent from recovering from the buyer the price agreed to be paid for the goods, or any part of that price, subject to any right of set-off on the part of the buyer against the agent; or
- (d) prevents the owner of goods pledged by a mercantile agent—
  - (i) from having the right to redeem the goods at any time before the sale of the goods on satisfying the claim for which the goods were pledged and paying to the mercantile agent, if by him required, any money in respect of which the mercantile agent would by law be entitled to retain the goods or the documents of title to the goods, or any of them, by way of lien as against the owner; or
  - (ii) from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of the lien.

Saving for  
common law  
powers of  
mercantile  
agents.

11. The provisions of this Part are in amplification and not in derogation of the powers exercisable by a mercantile agent independently of this Part.

### PART III.—GUARANTORS AND SURETIES.

Consideration  
for guarantee.

12. A special promise by a person to answer for the debt, default or miscarriage of another person which is in writing and signed by that first-mentioned person or some other person

thereunto by him lawfully authorized shall not be deemed invalid to support an action, suit or other proceeding to charge that first-mentioned person therewith by reason only that the consideration for the promise does not appear in writing or by necessary inference from a written document.

**13.**—(1.) Subject to this section, a person who, being surety for the debt or duty of another or being liable with another for a debt or duty, pays the debt or performs the duty, is entitled—

Surety entitled to stand in place of creditor whose debt, &c., he has discharged.

(a) to have assigned to him or to a trustee for him every judgment, specialty or other security held by the creditor in respect of the debt or duty, whether the judgment, specialty or other security is, or is not, deemed 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 need be and upon proper indemnity, to use the name, of the creditor in any action or other proceeding at law or in equity in order to obtain from the principal debtor or any co-surety, co-contractor or co-debtor, as the case may be, indemnification for the advances made or loss sustained by the first-mentioned person.

(2.) The payment of a debt, or the performance of a duty, in the circumstances referred to in the last preceding sub-section does not prevent the bringing of any action or other proceeding by virtue of that sub-section.

(3.) A co-surety, co-contractor or co-debtor is not entitled, by virtue of sub-section (1.) of this section, to recover from another co-surety, co-contractor or co-debtor more than the just proportion for which, as between the parties themselves, the other co-surety, co-contractor or co-debtor is justly liable.

#### PART IV.—USURY.

**14.** Where the rate of interest for a loan of money or upon any other contract has not been agreed upon by the parties, the rate of interest for that loan or upon that contract that may be recovered in an action or suit shall not exceed Eight pounds per centum per annum.

Maximum rate of interest.

#### PART V.—WRITTEN MEMORANDA.

**15.** An action shall not be brought whereby to charge a person—

Debts and contracts of infants.

(a) upon a promise made after full age to pay a debt contracted during infancy; or

(b) upon a ratification after full age of a promise or simple contract made during infancy, unless the promise or ratification is made in writing signed by the party to be charged.

Representations  
of character,  
&c.

16. An action shall not be brought whereby to charge a person upon or by reason of a representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of another person to the intent or purpose that the other person may obtain credit, money or goods upon the faith of the representation or assurance, unless the representation or assurance is made in writing signed by the party to be charged.

#### PART VI.—WAREHOUSEMEN'S LIENS.

Definitions.

17. In this Part, unless the contrary intention appears—

“the Court” means the Court of Petty Sessions established under the *Court of Petty Sessions Ordinance 1930-1961*;

“lien” means a lien under this Part;

“warehouseman” means a person lawfully engaged in the business of storing goods as bailee for hire or reward.

Warehouseman  
to have lien on  
goods.

18. Subject to this Part, a warehouseman has a lien on goods deposited with him for storage.

Charges covered  
by lien.

19.—(1.) Such a lien shall be for the amount of—

- (a) all lawful charges of the warehouseman for storage and preservation of the goods;
- (b) all lawful claims of the warehouseman for insurance, transportation, labour, weighing, packing, coopering and other expenses in relation to the goods; and
- (c) where default is made in satisfying the lien charged on the goods by virtue of the preceding provisions of this sub-section—all reasonable charges of the warehouseman for notice and advertisement of an intended sale of the goods and, if the goods are sold, for the sale of the goods.

(2.) Where the charges referred to in paragraph (c) of the last preceding sub-section are incurred with respect to more than one item of goods, those charges shall, with respect to any one item, be deemed to be an amount that bears the same proportion to the total charges as the amount of the lien charged on the item by virtue of the other provisions of that sub-section bears to the amount of the lien charged on all the items by virtue of those other provisions.

20.—(1.) Subject to this Part, if a warehouseman fails, within the period of three months after the date of the deposit of goods, to give notice, in accordance with the succeeding provisions of this section, of the lien on the goods, the lien on the goods is void as against the persons to whom he failed to give notice.

Notice by  
warehouseman.

(2.) Notice of a lien on goods shall be given to—

- (a) any person who has before the expiration of the period of two months after the date of the deposit of the goods served upon the warehouseman a notice of his claim to be the owner of the goods or an interest in the goods;
- (b) the grantee, or, where a transfer by the grantee has, not later than two months after the date of the deposit of the goods, been registered in accordance with the *Instruments Ordinance* 1933, or that Ordinance as amended at any time, the transferee, of a bill of sale relating to the goods which—
  - (i) was granted by the person depositing the goods or by any other person of whose interest in the goods the warehouseman has knowledge;
  - (ii) was, prior to the date of the deposit of the goods, registered in accordance with the *Instruments Ordinance* 1933 or that Ordinance as amended at any time; and
  - (iii) has not become null and void or had a discharge registered in respect of it; and
- (c) any other person (not being the person who deposited the goods) of whose interest in the goods the warehouseman at any time before the expiration of the period of two months after the date of the deposit of the goods has knowledge.

(3.) Notice of a lien on goods—

- (a) shall be in writing; and
- (b) shall contain—
  - (i) a brief description of the goods;
  - (ii) a statement showing the situation of the warehouse where the goods are stored, the date of their deposit with the warehouseman and the name of the person by whom they were deposited; and
  - (iii) a statement that a lien under this Part is claimed by the warehouseman in respect of the goods.

Notice by  
person  
depositing  
goods.

**21.** A person shall, on depositing goods with a warehouseman for storage, give notice in writing to the warehouseman of the name and, if known, the address of every person who the first-mentioned person knows has an interest in the goods.

Penalty: Ten pounds.

Power to sell  
goods.

**22.**—(1.) Subject to this Part, a warehouseman may, in addition to any other remedy provided by law for the enforcement of liens or for the recovery of warehousemen's charges, sell, by public auction, any goods upon which he has a lien for charges which have become due.

(2.) Notice of intention to sell goods under this section shall be given by the warehouseman to—

- (a) the person liable as debtor for the charges for which the lien on the goods exists;
- (b) any person who has served upon the warehouseman a notice of his claim to be the owner of the goods or an interest in the goods;
- (c) the grantee or transferee of a bill of sale relating to the goods, being a person to whom notice of the lien has been given under section twenty of this Ordinance, unless the bill of sale has become null and void or a discharge has been registered in respect of it; and
- (d) any other person of whose interest in the goods the warehouseman has knowledge.

(3.) Notice of intention to sell goods under this section—

- (a) shall be in writing; and
- (b) shall contain—
  - (i) a brief description of the goods;
  - (ii) a statement showing the situation of the warehouse where the goods are stored, the date of their deposit with the warehouseman and the name of the person by whom they were deposited;
  - (iii) an itemized statement of the warehouseman's charges showing the sum due at the date of the notice;
  - (iv) a demand that the amount of the charges as stated in the notice and such further charges as may accrue shall be paid on or before a day specified in the notice, being a day not less than one month after the delivery of the notice, if it is personally delivered, or after



the time when the notice should reach its destination according to the due course of post, if it is sent by post; and

- (v) a statement that unless the charges are paid within the time mentioned the goods will be sold by a method, and at a time and place, specified in the notice.

(4.) For the purposes of a sale of goods under this section, the warehouseman shall be deemed to be the absolute owner of the goods.

(5.) This section applies only to cases in which some part of the charges in arrear are in respect of a period more than twelve months prior to the date upon which notice of intention to sell is given.

**23.**—(1.) A sale under the last preceding section shall not be held unless an advertisement of the sale describing the goods to be sold and stating the time and place of the sale has been published twice in a daily newspaper published in the Territory, the first publication appearing not less than fourteen days before the day of the sale and the second publication appearing not less than seven days after the first.

Sale of goods  
to be  
advertised.

(2.) For the purpose of advertising a sale of goods under the last preceding sub-section, a warehouseman may, without liability for damage, take all reasonable steps (including the opening of sealed or closed boxes or packages) to ascertain the nature and description of the goods.

(3.) The last preceding sub-section does not authorize the opening of a sealed or closed box or package unless—

- (a) two persons other than the warehouseman or a representative of the warehouseman are present at the opening; and
- (b) those two persons subsequently make, sign and verify by statutory declaration an inventory of the contents of the box or package.

**24.** The Court may, at any time after the service of a notice of intention to sell goods under section twenty-two of this Ordinance, on the application of a person having an interest in the goods or part of the goods, make an order staying further proceedings under that section for such period and on such terms as it deems just.

Stay of  
proceedings  
to sell.

**25.**—(1.) If, at any time before goods are sold under section twenty-two of this Ordinance, a person claiming an interest in, or a right of possession of, the goods or a part of the goods pays

Payment of  
charges before  
sale.

to the warehouseman the amount necessary to satisfy the warehouseman's lien on the goods or the part of the goods to which the person's claim relates, as the case may be, no further proceedings for the sale of the goods or the part of the goods to which the person's claim relates, as the case may be, shall be taken.

(2.) If, after a payment is made to satisfy a lien on goods, being a payment made in pursuance of the last preceding sub-section, the goods are left deposited with the warehouseman for storage, the warehouseman shall, for the purposes of this Part, be deemed to retain the goods according to the terms of the original contract of deposit.

(3.) A person who, in pursuance of sub-section (1.) of this section, makes a payment to satisfy a lien on goods for charges for which the person is not primarily liable may recover the amount of the payment, together with interest on that amount at the rate of Four pounds per centum per annum calculated from the date of payment, as a debt due to him from the person primarily liable to pay the charges.

No action by  
reason of sale.

**26.** No action lies against any person by reason of a sale of goods in accordance with this Part.

Disposition of  
proceeds of  
sale.

**27.—(1.)** A warehouseman shall pay into the Court so much, if any, of the proceeds of a sale of goods made in pursuance of section twenty-two of this Ordinance as is not required to satisfy his lien on the goods.

Penalty: Fifty pounds or imprisonment for six months.

(2.) When making a payment into the Court under the last preceding sub-section, a warehouseman shall deliver to the Clerk of the Court or a Deputy Clerk of the Court—

(a) a statement of account showing how the amount paid in has been computed; and

(b) a copy of each notice of his intention to sell the goods given by the warehouseman in pursuance of section twenty-two of this Ordinance.

Penalty: Ten pounds.

(3.) Moneys paid into the Court under sub-section (1.) of this section may, upon the order of the Court, be applied as the Court thinks fit.

(4.) Where the Court has not, within twelve months after the payment of moneys into the Court under sub-section (1.) of this section, made an order with respect to the moneys, the moneys shall be paid into the Consolidated Revenue Fund.

**28.—(1.)** A notice by a warehouseman under this Part may be given to a person— Service of notices.

- (a) personally;
- (b) by registered post addressed to the person at the last address of the person known to the warehouseman; or
- (c) where the warehouseman does not know an address of the person—by advertisement published twice in a daily newspaper published in the Territory, with an interval of at least seven days between the advertisements.

(2.) A notice given by advertisement in accordance with paragraph (c) of the last preceding sub-section shall, for the purposes of this Part, be deemed to have been given on the date of the second publication of the advertisement.

**29. Where—**

- (a) a notice of lien or a notice of intention to sell purports to have been given under this Part but the provisions of this Part with respect to the giving of the notice have not been strictly complied with; and
- (b) a court before which a question respecting the notice is tried or inquired into considers that—
  - (i) those provisions have been substantially complied with; or
  - (ii) it would be inequitable that the lien or sale should be deemed to be void by reason of the non-compliance,

Notice provisions—substantial compliance.

an objection to the sufficiency the notice shall not be allowed to prevail so as to release or discharge the goods from the lien or vitiate the sale.

**30.—(1.)** This Part applies to cases in which the goods were deposited for storage before, as well as to cases in which the goods are deposited after, the commencement of this Ordinance, but no notice under section twenty-two of this Ordinance shall be given before the expiration of three months after the commencement of this Ordinance. Application of Part.

(2.) In applying section twenty of this Ordinance to a case in which goods were deposited for storage before the commencement of this Ordinance, the goods shall be deemed to have been deposited for storage on the date of commencement of this Ordinance.

Rights not to be affected.

**31.** Nothing in this Part abrogates, limits or in any manner affects—

- (a) a lien, power of sale or other right (whether arising under contract or by operation of law) that a warehouseman may have apart from this Part with respect to any goods stored by him; or
- (b) the enforcement of such a lien or the exercise of such a power or right.

Sales otherwise prohibited are not authorized by this Part.

**32.—**(1.) This Part does not authorize the sale by public auction by a warehouseman of any goods if the sale by public auction of those goods is prohibited by a law in force in the Territory.

(2.) This Part does not authorize the sale by public auction by a warehouseman of any goods if the sale by the warehouseman of those goods is prohibited by any other law in force in the Territory.

---

## THE SCHEDULE.

### Section 3.

- (a) The Imperial Act 4 George IV., chapter 83, entitled an Act for the better protection of the property of merchants and others, who may hereafter enter into contracts or agreements in relation to goods, wares or merchandizes intrusted to factors or agents, as declared to be in force in the State of New South Wales;
- (b) The Imperial Act 6 George IV., chapter 94, entitled an Act to alter and amend an Act for the better protection of the property of merchants and others, who may hereafter enter into contracts or agreements in relation to goods, wares or merchandize intrusted to factors or agents, as declared to be in force in the State of New South Wales;
- (c) The Factors Act, 1899 of the State of New South Wales;
- (d) The Usury, Bills of Lading, and Written Memoranda Act, 1902 of the State of New South Wales, other than section eleven of that Act.