Warehousemen's Liens Act Review
Policy and Legislation Branch
Consumer Affairs Victoria
GPO Box 123
Melbourne VIC 3001

02/03/2016

RE: REVIEW OF THE WAREHOUSEMEN"S LIENS ACT 1958 (VIC)

Dear Dr Elizabeth Lanyon,

I am writing in response to your letter seeking feedback on the Storage Industry Consultation Paper in relation to the Warehousemen's lien Act 1958 (VIC) ('the Act).

We would like to thank you for giving Fort Knox Self Storage the opportunity to provide you with feedback on our position.

Fort Knox Self Storage has been in operation for 20 years providing self storage solutions to thousands of Melbournians. With approximately 8000 storage units currently scattered across 8 centres and another facility due to open this year, we are one of the largest self storage operators in the Melbourne market.

Personally, I have been a member of the Self Storage Association of Australasia (SSAA) for over 17 years and I am the current Chairman of the Board of the SSAA. Fort Knox Self Storage operates within the guidelines and advice of the Manual of Advice and Procedures provided by the SSAA. For the majority of our clients we use the SSAA Standard Self Storage Agreement. This agreement is used for traditional self storage. The contract is a licenced use of space whereby the storer places their own items into that space, secures the space, and maintains the only key(s) or means of access to that space, thus denoting a licenced use of space which is vastly different and is definitely not a bailment situation.

In the traditional use of self storage we do not hold any key(s) to the storers space, no right of entry, and therefore have no possession or control of the goods in the space. We believe that the traditional use of self storage is clearly an act of licence and not bailment and therefore is not covered by the Act.

However, in roughly 1% of transactions with the public we use the SSAA's Managed Storage Agreement. This is very different from traditional self storage. In a Managed

Storage Agreement we, the facility owner, hold key(s) to the Storer's Space. Under this business practice we would be entering into a bailment relationship as defined by the Act and the *Disposal of Uncollected Goods Act 1961 Vic* ('Uncollected Goods Act').

We have a fairly good awareness of the Act which stems from the fact that all of our facilities are members of the SSAA. We actively attend regular legal training workshops to ensure we are up to date in latest regulations pertaining to our Industry. Much of the knowledge we have has been sourced through the SSAA's CEO and Legal Counsel Simone Hill.

The concern for us is that the distinction between traditional self storage and managed self storage in the current legislation isn't very clear. We would strongly support the notion that the Act should clearly define that traditional self storage does not fall under the Act. Only when one of our self storage facilities holds key(s) and therefore enters into a Managed Storage Agreement, where there is a relationship of bailment, should the Act be binding.

Given the nature of our business and our practices we would like to suggest the following proposed changes:

1. **When Warehousemen's Liens Act does not apply to Self-Storage Licence vs. Bailment.**

In its traditional form, self storage is the act of storage by an individual, couple, group, business or corporate entity (the 'Storer') in a unit, locker, garage, or other such place ('space') where the Storer places their own items into that space, secures the space, and maintains the only key(s) or means of access to that space. The space itself is located within a storage complex which may contain any number of other spaces (the 'Facility'), the perimeter of the facility being maintained by the facility owner.

As such the business of self storage is governed as a licenced use of a space by the facility to the storer, as distinct from a bailment which is the relationship defined in the Act and the Uncollected Goods Act.

The reason the relationship between the facility and the storer is not one of bailment is because in a bailment relationship, a person takes possession of goods (the Bailee) belonging to another (the bailor), where as in traditional self storage we, the facility owner do not have any key(s) or access to the space and therefore do not have possession of the goods. It is our understanding that a bailment can only arise where the Bailee takes possession of goods.

Our proposed change is that the Act be amended to clearly address the distinction between traditional self storage as a licence use of space as opposed to other forms of

self storage whereby a bailment relationship is entered. Traditional self storage should not form part of the Act and only when the facility owner has key(s) and access should it be governed by the Act.

2. **When the Warehousemen's Liens Act does apply to Self-Storage Non-traditional Self Storage where there is a bailment relationship – Necessity of notice by warehousemen**

As previously discussed when we use the Managed Storage Agreement we hold key(s) and have access to the storer's space thus we are engaging in a bailment relationship which is bound by the Act.

Under both Agreements Fort Knox Self Storage does not permit storers' to store goods that do not belong to them personally. This ensures that no third parties can have any interest in the goods stored in their space thus in the event the storer defaults on payment only their goods are sold. This eliminates the need for the storer to serve us, the facility owner, any notices advising us of any third party details.

The storer is the only person who has an interest in the goods stored. The Managed Agreement clearly states that we have the right to sell a storer goods upon default which is agreed upon at the time of signup therefore we believe the notice requirements under the Act are redundant. Our signup process ensures all storer's whom enter into either of these agreements with us have had the terms and conditions, including the right to sell and the corresponding notice periods brought to their attention. Furthermore, each individual storer is required to sign the storage agreement stating they have read and understood the term and conditions. Additionally, our electronic sign up process clearly states all timeframes pertaining to defaults and the corresponding actions that will be taken. Again, each individual storer receives a copy of these and is required to read, sign, agree and accept them before proceeding.

Our proposed change is that the Act is amended to distinguish the difference between storage where a third parties goods are permitted to be stored and where only goods by the primary storer are stored. Where storer's are not permitted to store third party goods they should be required to sign a written agreement agreeing this exclusion to store third party goods Where such an agreement is signed neither party should be required to undertake the notice requirements.

3. **Power to Sell**

Currently under the Act's power to sell goods provisions there are three main requirements that provide difficulties for us as a self storage business:

- Non-payment for more than twelve months

- The sale of goods by public auction only; and
- The prescribed default notices

Non-payment for more than twelve months

The requirement that we hold on to the goods of non-paying storer's for twelve months creates an enormous burden on both potential storers wishing to store goods at our facility and our facilities themselves. Most of our facilities are at high occupancy and we have limited units available. As such when we hold onto non-paying storer's goods we are forced to refuse service to other members of the public wishing to access this service. When our facilities our using the Managed Self Storage Agreement and acting under a bailment relationship, this creates a great deal of frustration as new consumers are unable to access our service for lengthy period of time. This means we see potential new customers go elsewhere as we are unable to assist them.

Additionally, if this 12-month requirement to hold onto non-paying storer's goods were to continue we would incur a substantial financial loss when dealing with non-paying storers under the Managed Self Storage Agreement. This is because, when a storer defaults on their payments usually the only financially viable means of rectifying this breach of agreement and mitigating the loss is for us to sell the storer's goods to pay for the outstanding debt. In most cases, when goods are sold, we do not even redeem the outstanding costs leaving us to run at a loss. Additionally, pursuing these cases through tribunals and courts is too costly and time consuming and usually results in us incurring further outstanding debts. By accruing the debt for twelve months it becomes so large that it prevents us the ability to mitigate our loss entirely by way of sale of the goods in the space forcing us to run at a loss.

Our proposed change would include amending the Act so that our facilities wait three months prior to selling a non-paying Storers goods, not twelve. This will allow our storers a reasonable time to communicate any problems they may have regarding payment and give us a chance to rectify those issues with them. Additionally, it would allow potential storers greater access to the Self-Storage industry and allow us a more realistic amount of debt to attempt to mitigate through our right to sell.

The sale of goods by public auction

The most financially viable option for us as a self storage provider to mitigate our losses from a non-paying storer is by selling the storer's goods in the space. Currently, the legislation strictly prohibits this sale to be done by any other means, besides public auction. This requirement as it stands currently provides us with three short falls:

- The goods stored by the storer which cannot be sold at public auction are simply disposed of, leaving the storer still liable for the outstanding debt;

- There are very few public auction houses who will take goods from self storage facilities, which puts the burden on us to hire additional personnel to go through the storers goods.
- The costs associated with using a public auction such as, personnel resources, transport and commission all inhibit us from mitigating our loss.

History shows us that the majority of goods sold due to non-payment are not of high commercial value and so the sale of these goods will rarely if ever cover a storer's three-month non-payment debt. In many cases we incur more debt through this process, such as removal and disposal of goods that cannot be sold.

There are fewer second-hand dealers and commercial auction houses around due to an increase in online sales sites such as Ebay, Gumtree, Grays…etc. These sites have become more competitive and make it difficult to ensure the best possible price for the goods to clear the debt.

Our proposed change would be to amend the Act so that public auction is not the only method of sale available to sell goods. Rather than the Act prescribing the method of sale the Act should prescribe a general duty for self storage facilities to 'take steps to obtain the best reasonably obtainable price'. This ensures that Facility Owners are given the opportunity to choose a suitable platform for sale based on the type of goods sold without imposing unrealistic standards for the price of the goods sold. Whilst also ensuring that the storer is protected from having their goods disposed of without having their debt relinquished.

<u>Prescribed default notices</u>

Under the Act when a storer defaults on their payments there are several notices that are required to be sent. One notice is to be sent to the storer themselves alerting them to the non-payment, another to any third parties who the facility or warehousemen has become aware of that may have an interest in the goods and finally a notice is sent to the public generally through advertisements in a daily newspaper in Melbourne. With the ongoing decrease in print media due to an increase in the digital market and modern generations of society it is no longer effective for us and other facilities to use public notices to make announcements. In fact, we believe that many consumers no longer read public notices and thus this requirement does not achieve its intended purpose or awareness to the public regarding a sale of goods. As a result, this requirement causes additional costs to our facilities in circumstances where traditionally we already incur financial losses, without achieving a greater awareness to members of the public about the auction.

Moreover, as discussed previously these notices are unnecessary when used in conjunction with the terms of the SSAA's Managed Storage Agreement (bailment).

Under the Managed Storage Agreement storer's are not permitted to store any goods that do not belong to them personally. Therefore, no third party goods can be stored in a space nor sold in the event of sell up resulting from non-payment. As the legislation fails to distinguish between storage that allows for third party storage and those that do not we are unnecessarily burdened with these onerous notice requirements which provide no further benefit for the community or storers.

Our proposed change would therefore be that the default provisions in the Act be amended to distinguish between storage that allows for third party goods to be stored and those that do not. This would mean that where no third party goods are stored, only notice to the storer is required and not the other two notices currently in the Act that are sent to third parties and in newspaper advertisements. This will ensure that these onerous requirements, which do not further the legislatures agenda, are not unnecessarily imposed.

We hope that our response has provided you with a greater insight into our very unique industry. We appreciate being given the opportunity to discuss our concerns and would be more than happy to assist further to ensure the legislation is clear and precise to avoid future uncertainty for the wider self storage industry.

Kindest Regards

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