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4<sup>th</sup> March, 2016

To:  
Warehouseman's Liens Act Review  
Policy and Legislation Branch  
Consumer Affairs Victoria  
GPO Box 123  
Melbourne, Victoria 3001

From:  
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### **Review Of The Warehouseman's Liens Act 1958 (Vic) February 2016**

Dear Dr Elizabeth Lanyon,

Thank you for including Kennards Self Storage in your request for feedback regarding the Warehouseman's Liens Act 1958 (Vic).

Kennards Self Storage is a family owned and operated self storage business commencing operations back in 1973. We service over 50,000 customers in eighty three locations across Australia and New Zealand North Island.

My understanding is that the Warehousing Act refers to the lawful business of storing goods on behalf of an owner under a bailment arrangement for hire or reward.

This is different in nature to self storage, being the licence use of space to a customer, the customer secures the space and controls access to the space. There is no care, control or custody taken by the facility owner over how the space is used by the customer. There is no bailment created. The relationship between customer and facility owner is governed by a contract.

Our customers are predominantly residential/domestic choosing self storage as an extension of their homes. Unlike warehousing which is mainly business to business for logistics, supply chain requirements. Self Storage customers can generally access their storage 24 hours/ 7 days a week. Spaces vary from one cubic metre lockers to a full size garage and larger. Length of stay by customers is dependent on a person's particular situation and can vary from one month to years. Our current average length of stay by a customer is just over nine months.

Warehousing and self storage operate differently and service very different needs in the market place, and are therefore treated differently.

We are in agreement and support the position of the Self Storage Association of Australasia (SSAA);

That there should be a clear distinction between Warehousing and Self Storage.

When a self storage operator is in possession of keys and has access to a storers space then this becomes a bailment relationship and should be treated under the Warehousemen Lien's Act. Kennards Self Storage currently holds keys for approximately 0.3% of our customers. These customers are predominantly very large businesses such as Pharmaceuticals, or other businesses requiring storage across multiple locations to assist with their logistical needs. Kennards has agreed to carry the additional burden based on the risk profile of the customer being very low in relation to the customers ability to pay and dependence on moving their products.

The time to sell a non-paying customer's goods should be reduced from twelve months to three months. In our experience allowing the time to extend further than three months becomes very difficult for the customer to cover a growing debt. Managing non-paying customers early leads to a better outcome for the customer and the facility owner. Often an agreement can be reached to the satisfaction of both parties, customer retains their goods and the facility owner gets the space back to rent.

In many instances in our experience when a customer is unable to pay for their storage they disappear and avoid all attempts by the facility owner to make contact and come to a resolution. This is because there is no urgency based on a twelve month sale process for the owner of the goods to speak with facility owner. It is the owner who has the burden of urgency because they are losing money the longer the non-payment extends, and less chance the owner will recover their costs.

The act should be amended so that public auction is not the only method of sale. What's important is achieving the best reasonable price for the goods. Today when technology is so advanced online auctions as opposed to public auction can be a more effective method of sale. Online will potentially reach a greater more targeted audience and achieve a better price for the goods. In other circumstances specialised valuers and buyers could be used to get the best outcome for the customer and cover the outstanding cost of storage.

The act should provide for the provision of Third Party goods stored by an individual on behalf of another, to reach an outcome that isn't onerous and costly to the storage owner. The general notice provisions in the Act we would like to see amended to distinguish between storage where third party goods are permitted to be stored by the primary Storer. Where Storers are not permitted to store third party goods it should be a requirement that there is a signed written agreement of this prohibition between the Storer and the Storage Facility. Where such an agreement is made neither party should be required to undertake these notice requirements given their redundant nature.

The default notice provisions in the Act should 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 the notice requirements that apply to the Storer should be required and all other notices including to third parties and in newspaper advertisements should not be required.

The dealing of unauthorised or dumped goods in storage. We would like to see the Act amended to provide parameters for sending notices when dealing with Storers who have broken into the

storage Facility and stored Goods, trespassed or otherwise engaged in unauthorised use of the Space which has resulted in the Facility having no contact details for a Storer. For example, the Act should allow for notice to be placed on the front door of the Space, advertised in a local newspaper, online or both. The time required complying with the current laws through no malpractice of their own creates enormous stress and cost to business owners who deal with these situations, taking them away from servicing paying customers and building new business.

Please consider this submission along with the submission by the Self Storage Association of Australasia (SSAA) as our full and complete response to the request by the Victorian Government for feedback regarding the Warehouseman Liens Act 1958.

Regards,

A handwritten signature in black ink, appearing to read 'D Marshall', written in a cursive style.

**Darren Marshall**  
General Manager  
Kennards Self Storage



Advice, Awareness, Connect, Collaborate

## **Self Storage Association of Australasia**

**Submission to the  
DEPARTMENT OF JUSTICE and REGULATION**

**Draft for Comments regarding Review of the  
Warehousemen's Liens Act 1958 VIC**

**February 2016**

**Prepared by Simone Hill and Kate Ruhl**

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## 1. WHO ARE WE?

The Self Storage Association of Australasia ('SSAA') is the professional industry association for owners of self storage facilities and industry suppliers in Australasia. Founded in 1990 by a small group of facility operators the SSAA now represents more than 1300 centres across Australia, New Zealand and Asia.

Membership to the SSAA is widely recognised as an important asset aiding the growth, credibility and profitability of self storage businesses. The SSAA is continually expanding and developing the range of services and benefits provided to members to meet their needs. Both established and newer operators have found that they benefit from an active Association that promotes, educates, advises and represents them.

The SSAA aims to be the top-of-mind reference point for any stakeholder with an interest in Self Storage. To represent the interests of facility owners/operators and industry related stakeholders, sharing data, knowledge and resources that will improve business performance and promote the benefits of Self Storage to the wider community through the provision of information, education, advocacy, governance, networking and member benefits.

A large part of the services the SSAA provides to members' deals with the legal and business sides of Self-Storage. As part of the legal service, the SSAA provides members with 'Storage Agreements', a 'Manual of Advice and Procedures' entailing how these Storage Agreements are to be used, legal training throughout Australia and New Zealand which is specifically tailored to running a Self-Storage facility, an 'Employment Guide' to employing staff in the Self Storage industry and more.

For more information about us please see our website at [www.selfstorage.org.au](http://www.selfstorage.org.au)

## 2. Definitions Clause

**Bailment:** Where a person takes possession of goods (the bailee) belonging to another (the bailor).

**Bailment Agreement:** The Self Storage Association of Australasia's contract pertaining to Self Storage in which a bailment relationship exists.

**Facility:** The storage complex which contains Space or Spaces.

**Facility Owner:** The legal owner of a Facility.

**License:** The grant of such authority to another to enter upon land for an agreed purpose as to justify that which otherwise would be trespass and its only legal effect is that the licensor until the license is revoked is precluded from bringing an action for trespass.

**Possession:** Where a person has control and access over a goods without having to use force. For example, by having keys to a Space where goods are stored.

**Space:** The storage unit, locker, garage, cage or other such place where a storer's goods are stored for the purposes of Self Storage.

**Storage Agreements:** The Self Storage Association of Australasia's contracts which pertain to Self Storage.

**Storer:** An individual, couple, group, business or corporate entity who stores their goods at a Facility.

**The Act:** The *Warehousemen's Liens Act 1958 Vic*

**Traditional Self Storage:** The act of storage by a Storer 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 not a bailment.

### 3. SUMMARY

The SSAA believes that the following changes to the *Warehousemen's Liens Act 1958 Vic* are advisable:

1. The Act should be amended to address the distinction between traditional Self Storage which is a license agreement and all other storage scenarios including warehousing which are an example of a bailment. The legislation should make it clear that traditional Self Storage is not caught by the Act. Only Self Storage where the Facility has keys and access to the Space, and thus is in a bailment relationship, should fall under the scope of the Act.
2. The general notice provisions in the Act should be amended to distinguish between storage where third party goods are permitted to be stored by the primary Storer. Where Storers are not permitted to store third party goods it should be a requirement that there is signed written agreement of this prohibition between the Storer and the Storage Facility. Where such an agreement is made neither party should be required to undertake these notice requirements given their redundant nature.
3. The Act should be amended to provide parameters for sending notices when dealing with Storers who have broken into the storage Facility and stored Goods, trespassed or otherwise engaged in unauthorised use of the Space which has resulted in the Facility having no contact details for a Storer. For example, the Act should allow for notice to be placed on the front door of the Space, advertised in a local newspaper or both.
4. Where the Act applies the Act should be amended so that Facilities wait three months prior to selling a non-paying Storers goods, not twelve.
5. Where the Act applies the Act should be amended 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 Facilities to 'take steps to obtain the best reasonably obtainable price'.
6. The default notice provisions in the Act should 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 the notice requirements that apply to the Storer should be required and all other notices including to third parties and in newspaper advertisements should not be required.

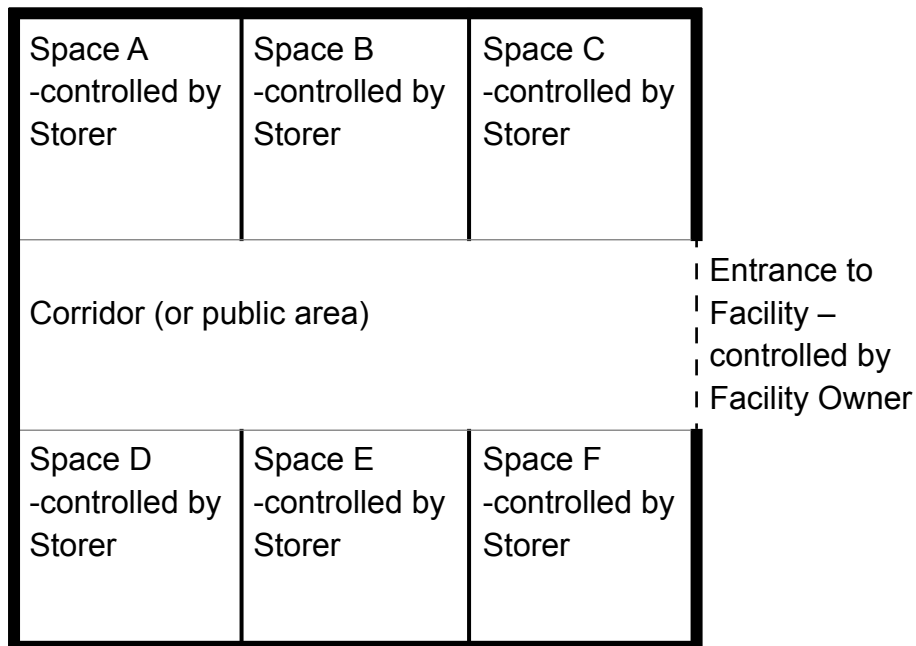


## 4. DISCUSSION

### 4.1. When Warehousemen's Liens Act does not apply to Self-Storage

#### I. Licence vs. Bailment.

The Self Storage industry is incredibly unique by nature. 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, cage 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. See below.



However, there are many versions of Self Storage. Some Facilities are accessible to Storer's 24 hours per day, others are only accessible during 'business hours'; some Facilities are entirely undercover, contained in purpose built or converted buildings or warehouses, others consist of outdoor garage style structures; some Facilities are multi story; some offer different styles of Space – there is no one 'type' of Facility.

The key for the SSAA to defining Self Storage is not in the style or type of physical structure, but in the manner by which the relationship between Facility Owner and Storer is governed. As such the Self Storage industry is predominantly governed as a licensed use of a Space by the Facility to the Storer, as distinct from a bailment which is the relationship defined in the *Warehousemen's Liens Act 1958 Vic* ('the Act') and the *Disposal of Uncollected Goods Act 1961 Vic* ('Uncollected Goods Act').

The reason the legal nature of 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 the Facility has no keys and access to the Space and thus no possession of the goods. A bailment can only arise where the bailee takes possession of goods. There can be no bailment unless the bailee has possession.<sup>1</sup>

It is generally held that not having a key to a place in which a person has stored goods precludes the finding of a bailment in that context. For example, in *Peers v Sampson*, a landlord who did not have a key to the tenant's room:

*...had no control over the goods; [as] he could not enter the room where ... [the goods]...lay.*<sup>2</sup>

This resulted in the conclusion that there was no bailment between the parties.

A similar conclusion is reached in the High Court of Zimbabwe case of *Electra Rubber Products (PVT) Ltd v Socrat (PVT) Ltd*.<sup>3</sup> In that case, a security firm was engaged to guard the defendant's factory. The guard had no key, nor any means of entering the building without the use of force. It was held that while the

*...right of entry might have afforded good evidence of possession and control...*<sup>4</sup>

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<sup>1</sup> J W Carter, P Lane, GJ Tolhurst & E M Peden, *Helmore Commercial Law and Personal Property in New South Wales*, 10<sup>th</sup> ed, Sydney : Law Book Company, 1992, at 77.

<sup>2</sup> *Peers v Sampson* (1824) 4 Dow & Ry 636, at 640.

<sup>3</sup> [1981(4)] ZAD 451, judgement number AD 147/ 81.

<sup>4</sup> [1981(4)] ZAD 451, judgement number AD 147/ 81, at 3.

No such ability or right of entry was granted although the right to force access was included in the contract. As a result, control and/or possession of the factory were not considered transferred to the security company. These cases emphasise the necessary element of possession, crucial to a legal interpretation of a situation as bailment.

These examples are comparable to traditional Self Storage, where the Facility Owner does not have keys to a Storer's Space, and subsequently has no right or ability to enter, hence no possession in any legal sense.

This is why traditional Self-Storage where the Facility Owner has no keys and access and thus no means of controlling the Space is more akin to a licensed use of Space.

A Licence however, is generally defined by way of distinguishing it from bailment. Although given by way of contrasting licence from bailment, and hence to some extent interdependent upon an understanding of bailment, a helpful and precise definition of licence is offered in the Ontario Court of Appeal case *Heffron v Imperial Parking Co*<sup>5</sup> which states that:

*'A licence...is simply the grant of such authority to another to enter upon land for an agreed purpose as to justify that which otherwise would be trespass and its only legal effect is that the licensor until the license is revoked is precluded from bringing an action for trespass.'*<sup>6</sup>

Hence it is possible for a person's goods to be placed or located on the property of another and have a licence rather than a bailment arise as:

*'...the mere leaving or depositing of chattels upon land occupied by another, even with his knowledge or at his invitation, does not necessarily make the occupier a bailee.'*<sup>7</sup>

Many legal cases considering the question of distinguishing licence from bailment result from car parking disputes. In those cases, where control over the car is transferred to the car park operator, it is generally accepted that possession is also transferred – and consequently a bailment arises. Usually, control over the vehicle is transferred by way of the giving of the vehicle's keys to the car park operator.

See: *BG Transport Services Ltd v Marston Motor Company* [1970] 1 Lloyd's Rep 371 for discussion of relevant cases and law in this area.

However, it is also possible to have control transferred to a car park operator without the transfer of keys. Generally, if the car owner cannot remove the car from the car park without the assistance of the car park operator either due to the lay out of the

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<sup>5</sup> (1974) 46 DLR (3d) 642.

<sup>6</sup> *Heffron v Imperial Parking Co* (1974) 46 DLR (3d) 642, at 647.

<sup>7</sup> N E Palmer, *Bailment*, 2<sup>nd</sup> ed, Sydney : Law Book Company, 1991, at 382.

car park or the requirements of the ticket, it is usually accepted that control of that vehicle has been transferred to the car park operator.

See: *Ashby v Tolhurst* [1937] 2 KB 242 (see appendix); *Waltons Stores Ltd v Sydney City Council* (1968) 88 WN (Pt 2)(NSW) 153 (see appendix), and *Council of the City of Sydney v West* (1965) 114 CLR 481 and earlier decision in same matter *West v Sydney City Council* (1964) 82 WN (Pt 1) NSW 139.

As discussed above, in Self Storage, possession of items in the Space remains with the Storer, and is not transferred to the Facility Owner because the Storer retains the only means of accessing and controlling the Space. If the Facility Owner had control of the Space, they would have possession of items in that Space, and would be considered a bailee. Judicial evidence to date supports a view of traditional Self Storage as being one of licence and not bailment. For example, in the Supreme Court of New South Wales civil claims appeal of *Doherty v Kondo*,<sup>8</sup> by way of giving the background to a claim in conversion and breach of contract relating to a party outside the storage arrangement being granted access to the Storer's shed, Windeyer J states:

*'...the claim of the plaintiff was that they had entered into a licence agreement with [the Facility operators] for the occupation of what was described as a self storage unit.'*

The conclusion of this discussion is therefore that the Self Storage industry in its traditional form as described above denotes the legal relationship of license and not bailment and therefore traditional Self Storage is not covered by the Act.

The issue for the SSAA and its members however, as can be seen from the Department of Justice and Regulation's own review paper, is that this distinction is often not clear under the current legislation. The current legislation assumes that traditional Self Storage denotes a bailment relationship and therefore people dealing with traditional Self Storage are often confused by the name of the legislation and its terms. Further, at present the legislation assumes to cover all Self Storage which is erroneous as there are many different forms of Self Storage such as license and bailment.

#### **Proposed Change:**

The SSAA advises in order to avoid further confusion that the Act be amended to address the distinction between traditional Self Storage which is a license agreement and all other storage scenarios including warehousing which are an example of a bailment. The Act should make it clear that traditional Self Storage is not caught by the Act. Only Self Storage where the Facility has keys and access to the Space, and thus is in a bailment relationship, should fall under the scope of the Act.

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<sup>8</sup> [2000] NSWSC 800 (10 Aug 2000).



## **4.2. When the Warehousemen's Liens Act does apply to Self-Storage**

### **I. Non-traditional Self Storage where there is a bailment relationship**

As previously discussed as part of the SSAA's services we provide members with 'Storage Agreements'. One of these Agreements provided to member's deals with non-traditional Self-Storage where the Facility as well as the Storer has keys and thus access to the Storage Unit. When Facilities use this agreement there is no longer a license agreement between the parties but a bailment relationship. In these circumstances the SSAA's advice to members when using this Bailment Agreement is predicated on the Act.

Additionally, when Facilities do not have a written Storage Agreement between them and/or the Storer or they are using an Agreement drafted by someone other than the SSAA which depicts a bailment relationship then we again rely on the Act and the Uncollected Goods Act, depending on the facts of the situation.

### **II. Necessity of notice by warehousemen**

#### *Bailment Storage Agreement*

As discussed previously, the SSAA provides our members with 'Storage Agreements'. One of these Storage Agreements depicts a bailment relationship as the Facility as well as the Storer has keys and thus access to the Storers Space (the 'Bailment Agreement'). When using this Bailment Agreement, the SSAA's advice to its members is predicated on the Act. When using the Act, we do find difficulties arise as a result of the prescribed notices clauses under the Act.

Under the SSAA's Bailment Agreement, Storer's are not permitted to store goods in their Space that do not belong to them personally. This ensures that no third party goods are stored in their Space and thus sold if the Storer defaults on payment.

As such, the requirement that the Storer serve a notice to the Facility or warehouseman to advise of any third party interests in the goods stored is contradictory to terms of their Bailment Agreement. This requirement is thus redundant as the notice cannot come back with any third party details unless the Storer has already breached the Bailment Agreement, in which case the Facility would be terminating the Bailment Agreement. Therefore, we would argue, that such a notice is not always necessary and should only be required where a Facility does allow third party goods to be stored.

The second notice served by the Facility or warehousemen to the Storer and any third other third parties also possess the same barriers as the first notice for the Self Storage Industry. Again, as the Bailment Agreement prohibits the storage of third party goods, this notice is redundant. The only person who needs to be aware of the

risk that the goods stored may be sold upon default is the Storer. This is because they are the only person who has an interest in the goods stored. As this right to sell is outlined in the Bailment Agreement and brought to the Storers attention during this sign up process, this notice is again redundant as the information has already been transferred to the Storer when the Bailment Agreement is signed.

**Proposed Change:**

The SSAA therefore suggests that the general notice provisions in the Act are amended to distinguish between storage where third party goods are permitted to be stored by the primary Storer. Where Storers are not permitted to store third party goods it should be a requirement that there is signed written agreement of this prohibition between the Storer and the Storage Facility. Where such an agreement is made neither party should be required to undertake these notice requirements given their redundant nature. This will ensure that the intent behind these provisions is carried out only where necessary.

*No Contract*

As discussed previously, the Self Storage industry will also often rely of the Act where a Storer has moved into a Space without signing a Storage Agreement. This can happen for various reasons in Self Storage, the most common of which being because a Storer has broken into the storage Facility and stored Goods, trespassed or otherwise engaged in unauthorised use of the Space which has resulted in the Facility having no contact details for a Storer. When this occurs, because there are no contractual terms setting out a license agreement the SSAA advises its members to rely on the Act. In saying this however, the notice requirements can be particularly difficult for Facilities to comply with in these circumstances.

The main reason for this is that where there is no contract, because a Storer has broken into the storage Facility and stored Goods, trespassed or otherwise engaged in unauthorised use of the Space, there is also no information about the Storer. This means no contact information, no ability of the Facility to ensure the goods stored belong to the Storer and no means of ascertaining where the Storer resides so as to send notices.

### **Proposed Change:**

The SSAA therefore suggest that the notice provisions of the Act be amended to provide parameters for sending notices when dealing with Storer's who have broken into the storage Facility and stored Goods, trespassed or otherwise engaged in unauthorised use of the Space which has resulted in the Facility having no contact details for a Storer. For example, the Act should allow for notice to be placed on the front door of the Space, advertised in a local newspaper or both. These adjustments should be drafted to ensure that the Facilities are able to deal with Storer's in a timely and cost efficient way to ensure Facilities are able to make available to other consumers looking for storage any Spaces that aren't being paid for.

### **III. Power to Sell**

Currently under the Act's power to sell goods provisions there are three main requirements that provide difficulties for the Self Storage industry:

1. Non-payment for more than twelve months
2. The sale of goods by public auction only; and
3. The prescribed default notices

#### *Non-payment for more than twelve months*

The requirement that Facilities hold on to the goods of non-paying Storer's for twelve months creates an enormous burden on both potential Storer's wishing to store goods at a Facility and the Facility itself. The SSAA finds that many of our members are running Facilities that are at near to or at full capacity. This means that at any given time, the demand for Space at a Facility is on par with supply or outweighs supply. By denying a Facility the ability to remove a non-paying Storer from a Space for more than twelve months' other consumers are being prohibited from accessing this service for unnecessarily prolonged periods of time. This creates a barrier in the market for consumers to be able to access this service.

Additionally, this requirement also forces Facilities to incur a substantial financial burden when dealing with non-paying Storer's. When a Storer defaults on their payments often times the only financially viable means of rectifying this breach of agreement and mitigating the loss is for the Facility to sell the Storer's goods to pay for the outstanding debt. This is because pursuing this matter through tribunal and courts is too costly and time consuming and often results in the Facility incurring further outstanding debts. By requiring the debt to accrue for twelve months the debt



becomes so large that it inhibits the Facility any ability to mitigate their loss entirely by way of sale of the goods in the Space.

Therefore, at present this twelve-month time period requirement does not reflect the reality of the Self Storage industry and balance all the parties involved being the Storer, potential Storer's and the Facility. From the SSAA's experience only a very small percentage of Storer's who default for more than three months will ever rectify this non-payment and avoid sell up. We often find Storer's who default between three to twelve months will either sever all communication with the Facility or provide intermittent communication promising to pay but never do.

**Proposed Change:**

Therefore, the SSAA suggests amending the Act so that Facilities wait three months prior to selling a non-paying Storer's goods, not twelve. This will allow Storer's a reasonable time to communicate any problems they may have with the Facility, it will allow potential Storer's greater access to the Self-Storage industry and will allow Facilities a more realistic amount of debt to attempt to mitigate through their right to sell.

*The sale of goods by public auction*

As discussed above, the most financially viable mechanism a Facility has for mitigating its losses from a non-paying Storer is by selling the Storer's goods in the Space. At present, the legislation strictly prohibits this sale to be done by any other means bar public auction. This requirement as it stands currently provides two short falls:

1. 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; and
2. The Facility is inhibited from mitigating their loss as far as practicable.

The Self Storage industry allows for storage of almost all personal property. Some Storer's will choose to store expensive items such as cars, boats, trailers and electronic goods in their Space. But more commonly we find that the majority of Storer's will store less expensive items such as old stained couches, towels, used children's toys and even kitchen ware. In fact, the SSAA finds that the majority of goods sold due to non-payment are not of high commercial value and thus will almost never relinquish even a Storer's three-month non-payment debt.

What is also clear from the SSAA's experience is that public auction is not always the most appropriate method for sale of a Storer's goods. With the rapidly changing state of technology more and more sales based avenues are becoming available. Websites such as EBay, Gumtree and other online public auction sites allow an unparalleled ability for goods to be sold around the world reaching markets that public auction cannot. Additionally, many traditional avenues such as second hand dealers and garage sales can also provide a successful means for the sale of lower value goods, which public auction cannot. By limiting the method by which sale occurs, the potential for the goods to be sold is being limited. It is difficult for low-value goods such as old strained couches, kitchen ware and towels to be sold at public auction and it is expensive to do so. However, by selling these goods for example on EBay, Gumtree or by garage sale there is an increased chance of the goods being sold and for a more competitive price seeing's as more of the market is being reach.

The impact of this falls both on Storers and Facilities. When Storers goods are sold, they should be given the greatest possible ability to have their debt to the Facility decreased. This means the goods should be sold at the most appropriate avenue possible to ensure the best price for those goods is secured. This will ensure that the Storer's debt is as low as possible after the sale of their goods.

Additionally, the Facility's right to mitigate their loss is severely impeded. If a Facility cannot sell a Storer's goods at public auction they should be granted the ability to attempt to sell the goods by any other means possible. This will allow the Facility to decrease the Storers debt as far as practicable given the state of the market.

It is in the Facilities best interest to sell the goods for the greatest price possible by whatever means so as to mitigate their loss. Just as it is in the Storers best interest to have the sale of their goods relinquish as much of their debt as possible. By prohibiting the Storer from relinquishing the maximum amount of debt from their non-payment through the sale of their goods and impeding the Facilities ability to mitigate their loss as far as practicable, no party is better off by have this requirement.

**Proposed Change:**

The SSAA therefore suggests amending 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 Facilities to 'take steps to obtain the best reasonably obtainable price'. This ensures that Facility Owners are given the opportunity to choose the 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.

*Prescribed default notices*

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.

As discussed previously, these notices are unnecessary when used in conjunction with the terms of the SSAA's Bailment Agreement which is used by our members in the Self Storage industry. Under the Bailment Agreement Storers 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 such the legislation fails to distinguish between storage that allows for third party storage and those that do not. This creates onerous requirements on Facilities and provides no further benefit for the community or Storers.

**Proposed Change:**

The SSAA suggests 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 legislative agenda are not unnecessarily imposed.

## 5. Questions to consider

### Background to the Warehousemen's Liens Act

#### **IV. What is your level of awareness with the Warehousemen's Liens Act 1958?**

The SSAA has a strong awareness of the Warehousemen's Liens Act which is displayed by our Head Legal Counsel Simone Hill's LLB thesis 'The Australian Self Storage Industry: Defining and regulating the legal relationship between Facility Owner and Storer', published in August 2005.

### Necessity of notice by warehouseman under the Act

#### **V. Do you ever have third parties asserting an interest over goods deposited with you for storage? If yes, how do they advise you of their interest in the goods?**

SSAA members do occasionally inform us that they have third parties approach them to claim an interest in goods stored. Where this occurs we approach the Storer directly and advise them that if this is true they are in breach of their Storage Agreement. We advise that any goods should be removed immediately and returned to the relevant parties. We also advise that in the event that they as a Storer defaults on their payments and third party goods are sold they will likely be liable for conversion.

At the same time, we ask the third party claiming a right to the goods to provide the Facility with a statutory declaration listing all the goods they claim to have an interest in which are being Stored. Therefore, if the Storer does default we will know what goods are prohibited from being sold when mitigating loss. Those goods listed will not be sold. We often negotiate with the third party a fee for returning these goods, or where an agreement cannot be reached we hand the goods back to the Storer and advise the third party of this.

#### **VI. Are there benefits in retaining the requirement on people with an interest in stored goods to give notice to warehousemen of their interest?**

The SSAA does not feel there is a necessity for the requirement that Storer's provide notice to a Facility of any third party interests. From our discussions above we outline that under the SSAA's Storage Agreements Storer's agree that no third party goods may be stored. Therefore, this requirement is redundant under the SSAA's Storage Agreements.

## **Power to sell goods**

### **VII. Do you provide notice to the owner of goods or other people with a known interest in the goods informing them of your intention to enforce your lien by selling the goods?**

The SSAA provides its members with several notices to be sent out to Storer's who are in default. This is done so regardless of whether there is a bailment relationship or a licence agreement. Each notice sets out an intention to sell, a statement that unless payment is made the goods will be sold, how much is owing and the address of the facility. However, only for our Bailment Agreements do we send any details about the goods stored as under our other agreements we have no keys and access to the Space thus we do not know what is being stored and therefore cannot describe them.

### **VIII. Is public auction the most appropriate method for the sale of goods deposited for storage?**

As discussed above, the SSAA believes that public auction is not always the most appropriate method of sale and that it should be amended to all Storer's goods to be sold at their highest possible price to decrease the Storer's debt and to allow Facilities to mitigate their loss as far as reasonably practicable.

### **IX. Are the notice and advertising requirements under the Act appropriate?**

The SSAA believes that the advertisement requirements under the Act are unnecessary where no third party goods are permitted to be stored. However, we can see where they might be useful when there is no written agreement between a Storer and a Facility and thus no contact details for the Storer or owner of the goods stored.

### **X. Is the requirement that there must be at least 12 months' worth of unpaid charges before a lien can be enforced too long or too short?**

As per the discussion above, given our experience we believe that twelve months is too onerous a time period to hold onto non-paying Storer's goods. It allows the Storer's debt to grow too large for them to deal with, it denies other consumers the ability to use the Space and also severely hinders the Facilities ability to mitigate their loss as the debts are usually much larger than the worth of the goods stored. The SSAA would strongly advise that three months be the requisite period of time to wait.

**XI. Is it common for a power of sale to be challenged at court? Do you have any knowledge or experience with any such challenges?**

From our experience it is not common for a power of sale to be challenged at court. However, we do sometimes have members being pursued in the Victorian Civil and Administrative tribunal ('VCAT') regarding the right to sell under the SSAA Storage Agreements, not usually the power to sell under our Bailment Agreements and the powers of the Act.

**Proceeds of sale**

**XII. Is a surplus common?**

We very rarely deal with surplus money. The reason being is it is very unusual for a Storer's goods to be worth more than their debt. This is even more rare when dealing with the Act's twelve-month requirement.

**Interaction between warehousemen's liens and the Personal Property Securities Act**

**XIII. Have you experienced issues with exercising the warehousemen's lien power of sale where there have been competing security interests over the stored goods?**

No, we generally do not have any issues. Our policy has been to contact the party with higher priority and negotiate with them to come and claim the goods.

**XIV. Do you use the Personal Property Securities Register to check whether goods deposited with you have any registered security interests?**

We generally do not register with the PPSR for traditional Self-Storage or under our Bailment Agreements which rely on the Act. Our members will only usually register with the PPSR when they are renting out Storage Units that reside offsite at a Storer's premise.