

**Warehousemen's Liens Act 1958
Review**

Storage Industry Position Paper

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1 Review of the Warehousemen's Liens Act 1958

1.1 Introduction to the Review

The *Warehousemen's Liens Act 1958* (the Act) enables a person to recover the cost of storage where the person who deposits the goods does not pay for the storage or cannot be located.

Under the Act, a warehouseman has a lien so that they can recover their charges, and a power to sell the goods if the charges are not paid. The Act also deals with a situation where various people deposit goods which are then intermingled. For example, where several people deposit grain in a silo, the owner can recover an amount equivalent to what they deposited from the total bulk.

In February 2016, Consumer Affairs Victoria published a discussion paper for public feedback in order to assess the use and effectiveness of the Act. The discussion paper also aimed to explore the impact of both uncollected goods legislation and personal property securities legislation on the scheme established by the Act, to determine whether legislative changes are required.

The review's objectives are broadly to:

- explore the modern storage industry's use of the existing legislative scheme established under the Act
- examine industry enforcement practices and any existing legislative barriers to recouping costs for uncollected goods left in storage
- recommend potential amendments that may be required to improve the operation of the legislation.

This paper commences the final stage of the review and outlines the proposed changes to the legislative scheme relating to warehousemen's liens, in response to the issues identified in the discussion paper.

1.2 Comment on the position paper

We encourage interested individuals and organisations to make a submission on all or any parts of this position paper.

Forward submissions to:

Post:

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

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Submissions must be received by **Wednesday 1 March 2017**.

Each submission will be considered on a case-by-case basis.

Submissions will be published on the Consumer Affairs Victoria website unless you expressly notify us that you do not wish for your submission to be published. However, it should be noted that all submissions may be subject to Freedom of Information applications. Should this occur, the release of any material contained in a submission would be assessed on its merits.

1.3 Executive summary

The paper proposes the following changes to the warehousemen's liens scheme:

1. repeal of the *Warehousemen's Liens Act 1958*
2. incorporation of a storage lien scheme in the *Australian Consumer Law and Fair Trading Act 2012*, which declares that a storer has a lien over goods stored with that storer (subject to new contractual notice requirements)
3. update of terminology in the new scheme, including references to 'storage lien' and 'storer'
4. aligning the power of sale and notice requirements for goods subject to a storage lien with the uncollected goods scheme provisions of the *Australian Consumer Law and Fair Trading Act 2012*:
 - (a) notice requirements and periods will vary depending on the value of the goods, classified as low, medium and high value
 - (b) where medium or high value goods are proposed to be sold by public auction, the storer will be required to advertise the sale in the seven days prior to sale
 - (c) removal of the requirement that the storer, in order to rely on the lien, must provide notice to the owner and provider of goods within two months of the deposit of goods with them
 - (d) requiring storers to keep records of the inventories of containers/boxes that are opened for the purposes of compliance with the new scheme.
5. declaration under section 73(2) of the *Personal Property Securities Act 2009* of the Commonwealth that a storage lien will be given priority over other interests, including interests registered on the Personal Property Securities Register.

2 Overview of the Act

The Act enables a person who engages in the business of storing goods (the **warehouseman**) to recover the cost of storage where the person who deposited the goods (the **provider**), such as the owner of the goods or their agent, does not pay them or cannot be located. The primary purposes of the Act are to allow for the creation of a warehousemen's lien, outline a warehouseman's power to sell goods to recover storage costs and establish ownership arrangements in intermingled goods stored with a warehouseman.

A warehouseman is defined under the Act as a person who is lawfully engaged in the business of storing goods as a bailee for hire or reward. The modern storage business falls under this definition. A bailment is a legal relationship between two parties where the provider gives the property to another person for repair or treatment in some way, but the provider retains ownership in those goods.

Under the Act, a warehouseman obtains an interest called a lien over goods deposited with them which allows the warehouseman to sell the deposited goods to recover storage charges and claims for insurance, transportation, labour and other expenses in relation to the goods.

A lien is a property interest which arises in favour of a person in possession of goods (such as the warehouseman) belonging to another person (the provider or owner of goods). The lien allows the warehouseman to retain possession of those goods until certain debts owed by the provider or owner to the warehouseman have been paid.

There is no recognised lien in favour of warehousemen at general law. However, a lien may be created by statute, as is the case with the Act.

The lien can be enforced in situations where the provider does not return to collect the goods or does not pay the storage fees and other expenses to the warehouseman. Under the Act, there are a number of steps that must be followed before the goods can be sold:

- notice of the warehouseman's lien and power of sale must be given by the warehouseman to the provider, and any other person with an interest in the goods, within two months of the deposit of goods for storage
- a period of 12 months must elapse from the time that the charges became overdue
- advertisements proposing the sale of the goods must be published each week for two weeks before the sale.

3 Proposed changes

3.1 Repeal of the *Warehousemen's Liens Act 1958*

It is proposed that the Act be repealed upon completion of the necessary legislative changes set out in this paper.

3.2 Incorporation of warehousemen's lien into the *Australian Consumer Law and Fair Trading Act*

Part 4.2 of the *Australian Consumer Law and Fair Trading Act 2012* (the **ACLFT Act**), which comprises the **uncollected goods scheme**, provides for the disposal of uncollected goods that have been provided to a person under a bailment.

This paper proposes that the ACLFT Act will provide for the warehousemen's lien (hereafter referred to as a '**storage lien**') as a distinct statutory right with supporting provisions. The ACLFT Act provisions will largely retain the effect of the Act, but will incorporate power of sale and advertising requirements that align with the approach taken in the uncollected goods scheme. The ACLFT Act will preserve the intermingled goods provisions from the Act.

3.2.1 Update of terminology

Proposed position

The definition of *warehouseman* will be changed to *storer*.

Accordingly, the *warehousemen's lien* will be changed to *storage lien*.

The warehousemen's lien is proposed to be renamed as the 'storage lien'. Similar to the current Act, a 'storer' will have a lien over goods deposited with that storer under a bailment for storage.

A 'storer' will be defined as 'the person who takes possession of goods under a bailment for the purposes of engaging in the business of storing goods for hire or reward'. This definition distinguishes between a storer and a receiver under the uncollected goods scheme by reference to the storer's engagement in a storage business for a fee. There is otherwise no material change to the definition from the previous definition of 'warehouseman' under the Act.

The relevant lien will accordingly be referred to as a 'storage lien'.

The changes to terminology reflect the Victorian Government's current approach to gender neutral words in drafting legislation.

3.2.2 The uncollected goods scheme under the *Australian Consumer Law and Fair Trading Act 2012*

Proposed position

Transfer the storage lien scheme from the Act to the ACLFT Act.

Due to the similar nature of the Act and the uncollected goods scheme under the ACLFT Act, it is proposed that the provisions necessary to the creation and effectiveness of the storage lien be transferred into the ACLFT Act.

The uncollected goods scheme allows persons such as dry cleaners and mechanics to dispose of goods received by them to recover outstanding fees and charges. The scheme applies as between a 'provider' of goods to a 'receiver' (such as a repairer) where the goods provided are uncollected for the purposes of the scheme.

A receiver of goods may dispose of those goods if they are uncollected. Goods are considered uncollected if:

- the provider does not collect the goods when ready for delivery in accordance with the contract and there are no arrangements for delivery
- the receiver of the goods is unable to contact or locate the provider when the goods are ready for delivery, or
- the provider has not paid the relevant fees or charges payable to the receiver after the goods are ready for delivery.

The manner in which goods may be disposed of depends on the value of the goods. The uncollected goods scheme provides for a number of pre-disposal requirements, which differ depending on whether the goods are of low, medium or high value¹. For example, low value goods require written notice be given to the provider of those goods; high value goods require that written notice be given to the provider, any registered secured party, the owner of the goods and any other person having or claiming an interest in the goods of which the receiver is aware.

Relocation of the storage lien to the ACLFT Act allows the storage lien scheme to be updated so that it assumes the approach taken by the power of sale and advertising provisions of the uncollected goods scheme.

3.2.3 Declaration of storage lien and coverage of relevant charges

Proposed position

The storage lien is proposed to be created in favour of the storer upon receiving goods under a bailment for storage, subject to the requirement that the contract of storage clearly outlines that the storer claims a lien over the goods under the ACLFT Act. The contract of storage must also set out that, if storage charges remain unpaid, the lien entitles the storer to sell the goods in accordance with the storage lien provisions of the ACLFT Act, and that notice will be given to the provider and any third party of which the storer is aware, who claims an interest in the goods prior to any proposed sale of the goods.

The new storage lien scheme in the ACLFT Act will create a storage lien in these circumstances.

The storage lien will continue to cover charges relating to the amount payable for storage, claims for insurance and other matters, and reasonable charges relating to compliance with the notice and advertising provisions of the ACLFT Act.

Requirements for contract of storage

Consistent with the Act, a storer who receives goods under a bailment for the purpose of storage will have a lien over those goods under the ACLFT Act. The lien will arise upon deposit of the goods by the provider, subject to the requirement that the contract of storage clearly sets out the existence of the storage lien.

The ACLFT Act will create new disclosure requirements relating to the contract of storage. It is proposed that the contract of storage must set out the following information:

¹ In the case of goods that are not motor vehicles, low value goods are of a value less than \$200; medium value goods are of a value less than \$5,000; high value goods are those of a value more than or equal to \$5,000: s3 of the ACLFT Act.

- that the storer claims a storage lien under the ACLFT Act over the goods
- that the storage lien allows the storer to sell the goods to recover unpaid charges relating to the storage of goods
- that a notice that the storer intends to sell the goods subject to the storage lien will be given to the provider and any third party of which the storer is aware, who claims an interest in the goods.

The provision of notice in the contract of storage serves the purpose of the notice requirements currently in place under the Act. A storer must provide a notice to any person who has an interest in the goods, irrespective of the value, registered on the Personal Property Securities Register.

Charges covered by the storage lien

Section 5 of the Act outlines the charges covered by the storage lien. The ACLFT Act will provide, as the Act currently does, that the storage lien covers:

- the amount payable by the provider to the storer for goods under bailment, the payment of which entitles the provider to take delivery of the goods
- all lawful claims for insurance, transportation, labour, weighing, packing and other expenses in relation to the goods
- all reasonable charges for any notice required to be given under the provisions of the ACLFT Act, and for notice and advertisement of sale, and for sale of the goods where default is made in satisfying the storer's lien.

3.2.4 Period of time before uncollected goods may be sold under a storage lien

Proposed position

A storer will be able to exercise a power of sale over goods subject to the storer's lien after a period of time, shorter than that currently required under the Act, in which the storer's charges have been in arrears. The length of time required to give the provider a chance to repay the charges will depend on the total value of the stored goods.

Feedback to the discussion paper highlighted concerns about the length of time that charges for storage needed to be in arrears before storer could exercise the power of sale under the Act. Section 7(8) of the Act provides that the power of sale can only be exercised over goods in which charges have been in arrears for a period of more than 12 months.

The storage lien is proposed to be amended so that a storer is able to initiate the sale process by providing the notice discussed in 3.2.5, after a shorter period than under the Act, of the storage charges being in arrears. The time period before the power of sale is invoked will depend on the value of the goods, such that the charges in respect of high value goods will need to be unpaid for a relatively longer period than low value goods. These are also set out in 3.2.5.

3.2.5 Power of sale and notice/advertising requirements

Proposed position

The ACLFT Act will provide for an updated procedure for the storer to give notice of their intention to sell goods subject to the storage lien. The updated procedure will align with the existing notice requirements for the sale of uncollected goods, which imposes increasing notice requirements based on the value of the goods.

The advertising requirements under the proposed ACLFT Act provisions will require advertising for medium and high value goods where the goods are being sold by public auction. The storer will be required to advertise the sale during the seven days before the auction takes place.

Notice of intention to sell goods

The new storage lien scheme in the ACLFT Act will incorporate the approach taken by the uncollected goods scheme in relation to the power of sale and notice requirements, where stored goods remain uncollected and storage charges have not been paid. Public feedback during consultation focused on the lengthy notice period requirements under section 7 of the Act². It is proposed that the new storage lien scheme will closely follow the uncollected goods scheme, which has a similar application in relation the sale of goods to recoup a receiver's costs, and therefore modernise the current requirements relating to the storage industry.

The power of sale under both the Act and the uncollected goods scheme requires that the requisite notice is given to the provider or owner of the goods (as appropriate) prior to the sale occurring. The relevant notice and advertising requirements are proposed to be based on the value of the goods stored with the storer. For example, a storer may sell:

- low value goods if –
 - the storer has given the provider written notice of the storer's intention to sell the goods, and
 - 28 days have elapsed since the giving of the notice and the provider has not taken delivery of the goods or given direction as to their delivery (or 60 days after the goods became uncollected if the storer cannot locate or communicate with the provider in order to give notice)
- medium value goods if –
 - the storer has given written notice of the storer's intention to sell the goods to the provider, and the owner of the goods (if the provider is not the owner)
 - 28 days have elapsed since the giving of the notice and the provider has not taken delivery of the goods or given direction as to their delivery (or 90 days after the goods became uncollected if the storer cannot locate or communicate with the provider in order to give notice)
 - the goods are sold by way of private sale (subject to notice and best price requirements) or by way of public auction advertised at least seven days in advance or held over a period of seven days.

² Section 7(8) provides that a notice of intention to sell can only be given when the relevant charges owed to the storer have been in arrears for 12 months.

- high value goods if –
 - the storer has given written notice of the storer's intention to sell the goods to the provider, the owner of the goods (if the provider is not the owner), any person who has a publicly registered interest in the goods, and any other person having or claiming an interest in the goods of which the storer is aware,
 - 28 days have elapsed since giving the notice and neither the provider or the owner of the goods have taken delivery of the goods or given directions as to their delivery (or 180 days after the goods became uncollected if the storer cannot locate or communicate with the provider and owner in order to give notice), and
 - the goods are sold by way of private sale (subject to notice and best price requirements) or by way of public auction advertised at least seven days in advance or held over a period of seven days.

The ACLFT Act will provide for the ability, currently provided for under section 7(6)(a) of the Act, to take all reasonable steps, including opening sealed or closed boxes, to ascertain the nature, value and description of the goods to be sold. The storer will be required to make an inventory of the goods in any sealed or closed boxes that are opened for this purpose. It is proposed that storers must keep records of inventory documentation for five years to avoid potential disputes relating to goods stored in sealed or closed boxes.

Information required in a notice of intention to sell goods

Section 7(4) of the Act provides that a notice of intention to sell goods contain certain information. The proposed provision in the ACLFT Act will contain similar requirements, such that the storer's notice of intention must contain:

- a brief description of the goods
- a statement identifying the location of the premises where the goods are stored, the date of their deposit with the storer and the name of the person the goods were deposited by
- an itemised statement of the storer's charges showing the sum due at the time of the notice
- a demand that the amount of the charges as stated in the notice and such further charges as may accrue be paid on or before a day mentioned (not less than a number of days indicated above in accordance with the value of the goods) in the notice
- a statement that unless the charges are paid within the time mentioned the goods will be sold in accordance with the storage lien provisions of the ACLFT Act.

The ACLFT Act will provide that payment of the outstanding charges prior to sale extinguishes the storer's right of sale. This mirrors section 8 of the Act, which provides that a proposed sale of goods must not proceed if any person who claims an interest or right of possession in the goods pays the storer an amount necessary to satisfy the storage lien.

Advertising requirements

Section 7(5) of the Act provides for advertising requirements before goods subject to a lien can be sold. Under section 7(5), advertisements for sale must be published at least once a week for two consecutive weeks in a local newspaper and in one daily Melbourne newspaper, stating the time and place of the sale. The sale is required to be held not less than 14 days after the date of the advertisement's first publication.

The advertising requirements under the Act are outdated and place a significant financial cost on storers. It is proposed that, similar to the uncollected goods scheme, medium and high value goods that are sold by public auction will require advertising at least seven days before the sale and, consistent with the uncollected goods scheme, private sales of goods subject to a storage lien will not require advertising prior to sale.

3.2.6 No changes to intermingled goods provisions

Proposed position

Section 10A of the Act, which relates to goods that become intermingled with goods of the same kind after deposit with the storer, will be retained in the ACLFT Act.

3.3 Registration of storage liens on the Personal Property Securities Register

3.3.1 Background

The Personal Property Securities Act 2009 of the Commonwealth (the **PPSA**) is the national law regulating security interests in personal property. Personal property includes various types of tangible and intangible property and does not include any interests in land. Examples of personal property include motor vehicles, household appliances, jewellery, artwork and business inventory.

The PPSA regulates security interests over personal property. A security interest refers to a right over property that is usually created by agreement or operation of law. An example of a security interest is a charge or mortgage that a finance provider takes over a car as part of its loan to the car's owner to enable the car owner to purchase the car. For the purposes of the PPSA, the finance provider that is able to enforce the security interest is referred to as the 'secured party'. The security interest allows the secured party to take possession of the car to sell it to recover money owing on the loan if the owner defaults on repayments.

The PPSA also regulates the priority between different security interests in the same goods. Priority refers to a secured party's right to be first or ahead of the rights of other creditors (being other persons or companies money is owed to). For example, a security interest with priority would entitle the secured party to access the proceeds of sale of an item before other parties. For this purpose, the PPSA establishes the Register of Personal Property Securities, which allows secured parties to give notice of existing security interests, or security interests that they are in the process of creating.

The Storage Act 1935 of New South Wales provides that a storage lien over property has priority over any other interest in the property and displaces the priority rules set out in the PPSA. As a result, in NSW a person cannot take action to enforce a PPSA security interest if the action is inconsistent with the storage lien legislation.³

The Act is silent on the issue of priority. A storer can satisfy their lien from the proceeds of sale, but the Act does not clearly establish that the storage lien takes priority over other interests.

³ Section 73(2) of the PPSA provides that the priority of a security interest in collateral that arises by being created, arising or being provided for under a law of a State and a security interest in the same collateral is to be determined in accordance with that law if, and only if, that law declares that section 73(2) of the PPSA applies to statutory interests of that kind. Section 3 of the Storage Act 1935 declares that the storage lien is such an interest, and further that it should take priority over other interests in the goods.

3.3.2 Proposed change

It is proposed that the storage lien provisions in the ACLFT Act follow the approach in NSW and expressly declare that section 73(2) of the PPSA applies to the storage lien created under the ACLFT Act. In addition, the ACLFT Act will provide that a storage lien over property has priority over any other interest in the property and may be enforced in accordance with the provisions of the ACLFT Act.

In order to avoid any retrospective effects, the declaration will only apply to liens created on and after the date of the declaratory provision's commencement.

4 Next steps

We expect that the amendments proposed in this paper will be put through in amending legislation in 2017. After the final date for submission of comments for this paper, we will review all submissions and consider any necessary changes that may need to be made to the proposed position.

Submitting your feedback

Your submissions in response to the position presented above would be greatly appreciated.

Forward submissions to:

Post:

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