4 March 2016

By email: cav.consultations@justice.vic.gov.au

Dr Elizabeth Lanyon
Director, Regulation and Policy
Consumer Affairs Victoria
GPO Box 123
Melbourne VIC 3001

Dear Dr Lanyon,

Review of the *Warehousemen's Liens Act 1958* (VIC)

Thank-you for the opportunity to provide comment on the review of the *Warehousemen's Liens Act 1958* (Vic) ("Act").

Consumer Action welcomes the opportunity to respond to the review whilst acknowledging that the Consultation Paper is primarily directed toward industry.

The storage industry is not a major policy priority for Consumer Action, or one that we have devoted significant resources to. That being said, we do encounter storage related consumer detriment through our case work quite regularly, and on that basis we are well placed to respond to the consumer issues raised in the Consultation Paper. We have limited our responses to the final four questions of the Consultation Paper which are directed specifically at consumers.

Specifically, we have seen:

- instances of poor compliance around notice periods,
- instances of poor compliance around forms of notice given,
- unfair contract terms (such as terms absolving operators from liability for any damage caused to stored property), and;
- goods being sold by operators well before the required twelve month default period.

It is difficult for us to comment on the prevalence of these issues—it's unclear whether they are indicative of wide-spread non-compliance, or relatively isolated occurrences in an otherwise well run industry. To determine this, we would encourage CAV to undertake more proactive research about the consumer experiences of storing goods. What we can say is that compliance issues certainly do exist—and we illustrate this with a number of case studies.

Our comments are detailed more fully below.

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About Consumer Action

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

Questions for consumers' consideration

1. What are the common issues, if any, that arise for consumers of storage services?

In our experience, consumers do enter into storage contracts that clearly fail to meet the requirements of the Act. Consumers can experience difficulty in accessing goods, have goods sold without their knowledge, and are not provided with any surplus funds arising from the sale. Some storage contracts also seek to absolve the storage provider from any liability arising from damage to the goods, including through their own negligence, and restrict the right of consumers to pursue litigation or arbitration in the event of a dispute. Consumer Action has encountered the following contractual terms and actions, which clearly breach the Act:

- Goods sold prematurely (i.e. without the consumer being twelve months in default). On a number of occasions, we have encountered contracts which stipulate that the goods may be sold if the consumer is 42 days in default.
- Goods being sold without notice.
- Goods being sold by methods other than public auction.
- A failure to return surplus funds generated from the sale of goods, to the owner of the goods.
- Clauses purporting to absolve the storage provider of any and all damage to the goods, including that caused by the negligence of the storage provider or persons under their control.
- Clauses purporting to require the consumer to indemnify the storage provider for any claim the consumer may make against the storage provider for loss.
- Clauses purporting to restrict the right of the consumer to pursue litigation or arbitration in the event of a dispute.

Case studies illustrating these breaches are outlined below.

Case study 1

Client X entered into a self-storage agreement with a storage provider on 10 July 2011 for storage of personal belongings at a rate of $165 per month.

Client X made regular late payments from September 2011 until May 2013, when his goods were discarded. The client was $617.30 in arrears at the time. The storage

provider claimed to have given notice to the client, but the client was unaware of any such notice.

The contract provided for the following terms:

- The storage provider would not be deemed to have knowledge of the goods.
- The storage provider would not be legally considered to be a bailee or warehouseman.
- If any amount was owing under the agreement and not paid in full after 42 days of the due date, the storage provider may—without notice—enter into the storage space and sell or dispose of any goods in the storage space, on such terms as the storage provider may determine.
- The storage provider was absolved from any liability for damage to the property caused whether by negligence or deliberately by the storage provider, or persons under its control.
- The client's right to litigation was purportedly limited by a condition requiring the client to submit any dispute to mediation prior to commencing arbitration or litigation (other than for interlocutory relief).

In short, the contract wrongfully purported to reduce the storage provider's obligations under the Act and the provider failed to comply with the procedures under the Act regarding the sale of goods. Most significantly, the storage provider disposed of the goods well before they were legally entitled to, and appear to have failed to provide the required notice or undertake any of the other processes required by the Act.
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Case study 2

Client Y went bankrupt on 18 April 2012, and a $500 furniture storage fee was included in the bankruptcy settlement. When Client Y went to reclaim her goods she found the lock had been changed on her storage unit, and she was told she owed $753.

With the aid of a donation, Client Y paid the fee—only to find that the soft furnishings in the storage unit (couch, mattress, clothes) were water damaged and infested with mice.

The contract provided for the following terms:

- In the event of fees remaining unpaid for 42 days, the storage provider had the right to "without further notice, enter the space, relocate the goods and/or take possession and sell or dispose of any goods in the Space on such terms as [the storage provider] may determine". There was no requirement to notify the owner of the goods of the sale, sell by public auction, or return any surplus funds to the owner of the goods.
- The goods were stored at the sole risk and responsibility of Client Y "who shall be responsible for any and all theft, damage to, and deterioration of the goods

and shall bear the risk of any and all damage caused by flood or fire or leakage or overflow of water, heat, spillage, pest or vermin or any other reason whatsoever including acts or omissions of [the storage provider] or persons under its control".

Case study 3

Client Z had a storage contract with a storage provider, where she was paying $130 per month. The client fell three months into arrears, and was then advised by email that if she did not pay her late fees the storage provider would open the locker and sell her goods. She was given ten days to pay.

The client was unable to pay, and the goods were sold. At the time of sale, Client Y owed $436.10. The goods were sold for $663.20, and she was provided with a cheque $200. In her view the goods were worth far more (approximately $3000). She asked for details of the sale, but this was not forthcoming.
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It is worth noting that our clients that experience difficulties with storage contracts and services are often extremely vulnerable. These include people who are in transitional accommodation, because they are leaving domestic violence situations or they are experiencing homelessness. Noting this, we consider that the consumer protections benefiting storage consumers should be strong, and that there should be an active compliance and enforcement regime to ensure traders comply with statutory rules.

1. **Does the Warehousemen's Liens Act provide clarity to consumers of storage services of their rights and obligations under the Act? What needs to be improved?**

In Consumer Action's view the underlying principles of the Act are not unreasonable. The Act strikes a fair balance between the rights of consumers to their own property and the right of storage providers to recoup losses in circumstances in which a consumer has ceased to pay, and has effectively "occupied" a storage space for an extended period of time.

Our primary concern is that although the terms of the Act are fair, its terms are not widely known and consumers can easily enter into contracts which purport to strip them of their rights under the Act. In many instances, consumers will not challenge the terms of contract—which they simply assume reflects prevailing law.

A simple solution to this issue would be to require the use of an Act compliant standard form contract for the industry. This would not be difficult to draft, and would have the benefit of standardizing business practice, ensuring that contracts at least comply with the Act. Such a contract would need to be supported by an active enforcement and compliance regime, but if this were done it would provide far effective consumer protection than currently exists.

As stated above, we're also conscious that many consumers involved in storage related disputes are vulnerable, often experiencing a difficult time of their lives—through the loss of housing, relationship breakdown, and potentially in traumatic circumstances such as escaping domestic violence. In such circumstances, dispute resolution can be challenging. Victorian Civil and Administrative Tribunal (**VCAT**) hearings are intimidating for many consumers, due to their adversarial, court-like nature. This is exacerbated if the applicant is vulnerable or experiencing a particularly stressful time in their lives. As a result, many consumers may choose not to pursue a dispute—not because it doesn't have merit, but because the process for doing so is too difficult.

In our recent submission to the Department of Justice and Regulation's "Access to Justice Review", we argued for the establishment of a Retail Ombudsman to hear consumer disputes, such as that currently operating in the UK. [1] The UK also has a Consumer Ombudsman, and these two schemes appear to have some overlapping jurisdiction. An industry funded ombudsman scheme capable of hearing storage industry disputes would provide a far more accessible and less intimidating forum for consumers to resolve their disputes, and would be a powerful step forward for consumer protection.

2. **Have you had any issues with retrieving goods from a storage service?**

It is our experience that consumers do encounter difficulties retrieving their goods from storage services, and that storage providers will take measures such as changing locks on the storage unit in order to prevent consumers from accessing their goods.

3. **Have you had any issues giving notice to a storage service (or receiving notice from a storage service) under the Act?**

It is our experience that consumers do have goods sold without their knowledge, or any form of notice (let alone the correct form of notice), as required by the Act.

Please contact Zac Gillam, Senior Policy Officer on 03 9670 5088 or at zac@consumeraction.org.au if you have any questions about our comments on the review.

Yours sincerely
CONSUMER ACTION LAW CENTRE

Gerard Brody
Chief Executive Officer

Zac Gillam
Senior Policy Officer

[1] Consumer Action Law Centre, *Access to Justice Submission*, 29 February 2016, p 26 (http://consumeraction.org.au/access-to-justice-review/).