24 February 2017

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

Dr Elizabeth Lanyon
Director, Policy and Corporate Services
Consumer Affairs Victoria
GPO Box 123
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Dear Dr Lanyon,

Review of the Warehousemen's Liens Act 1958 – Position Paper

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to respond to the Storage Industry Position Paper.

In our view, the proposed changes to the *Warehousemen's Liens Act 1958* (**the Act**) are heavily in favour of industry. There appears to be little (if any) protections for the most vulnerable members of our community, who are those most likely to experience difficulties with storage contracts. These include people who are in transitional accommodation because they are escaping domestic violence situations[1] or are experiencing homelessness.

We are concerned that significant changes are being proposed to the Act without any proactive research about the consumer experiences of storing goods having been undertaken. In fact, the review appears to have been almost entirely informed by industry. The only submission to the review addressing consumers' experiences with the storage industry was from Consumer Action.

The storage industry is big business: Australia's $1.1 billion self-storage industry expected to grow 3.3 per cent in 2017.[2] The consumer protections for Victorians using these facilities should be strong, and there should be an active compliance and enforcement regime to ensure traders comply with statutory rules. As set out in our previous submission, we have seen numerous instances of storage contracts that clearly fail to meet the requirements of the Act.

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[1] For example: Amy Mitchell-Whittington, Brisbane Times, *Supercheap Storage gives free removal to violence victims*, 8 March 2016. Available at: http://www.brisbanetimes.com.au/queensland/supercheap-storage-gives-free-removal-to-violence-victims-20160307-gncs0b.html.

[2] Larissa Ham, *Behind Australia's $1 billion storage industry,* 10 November 2016. Available at: https://www.domain.com.au/news/behind-australias-1-billion-storage-industry-20161109-gslh91/. Article quoting Ibis World, *Self-Storage Services in Australia: Market Research Report*, 2016. Available at: https://www.ibisworld.com.au/industry/self-storage-services.html.

We have limited our responses to sections 3.2.3 to 3.2.5 of the Position Paper, which are most relevant to our client base.

1. **Declaration of storage lien and coverage of relevant charges (section 3.2.3)**

The Position Paper proposes that the contract of storage must set out the following information:

- that the storer claims a storage lien under the *Australian Consumer Law and Fair Trading Act 2012* (**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; and
- that a notice the storer will provide a notice of intention to sell the goods.

It appears that the exact charges covered by the storage lien will not be required to be set out in the contract. Instead, Victorians will be expected to decipher this information from the ACLFT Act.

We are concerned that many people using storage facilities will have difficulty understanding the rights and obligations set out in these contracts. It is no secret that many Australians have difficulty reading and understanding legal documents, such as contracts and legislation. In 2011-12, 7.3 million Australians (43.7%) had literacy skills below Level 3.[3] Level 3 is considered the minimum skills level suitable for coping with the demands of everyday life and work in a complex, advanced society.[4] Having regard to these statistics, it is unlikely that most consumers will understand what the term 'lien' means, or what effect a lien has over the rights to their stored property.

People who are unable to pay their storage fees are also likely going to be experiencing some level of financial stress. Behavioural research around the impact of poverty on cognitive capacity should inform the reform process to ensure vulnerable and disadvantaged consumers are adequately protected. Researchers studying the impact of poverty found that:

> *Being poor means coping not just with a shortfall of money, but also with a concurrent shortfall of cognitive resources. The poor, in this view, are less capable not because of inherent traits, but because the very context of poverty imposes load and impedes cognitive capacity… Put simply, evoking financial concerns has a cognitive impact comparable with losing a full night of sleep.*[5]

We reiterate our previous recommendation that Consumer Affairs Victoria (**CAV**) consider requiring the use of a standard form contract. Ideally, this document would be drafted in plain English and have regard to behavioural economic principles so that consumers' most important rights and obligations were set out in a way that is readily understood.

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[3] Australian Bureau of Statistics, *4228.0 - Programme for the International Assessment of Adult Competencies, Australia*, 2011-12. Available at: http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4228.0Main+Features202011-12.

[4] Australian Bureau of Statistics, *1367.2 - State and Regional Indicators, Victoria,* 2008. Available at: http://www.abs.gov.au/ausstats/abs@.nsf/featurearticlesbytitle/8121E0B13EA1139FCA25750700146C83?OpenDocument.

[5] Mani, Anandi; Mullainathan, Sendhil; Shafir, Eldar; and Zhao, Jiyaing, *Poverty Impedes Cognitive Function*, Science, Vol 341, 30 August 2013, pp. 976-980.

2. **Period of time before uncollected goods may be sold under a storage lien (section 3.2.4)**

The Position Paper proposes to reduce the period of time before uncollected goods may be sold. Previously, consumers were required to be at least 12 months in arrears before a notice of intention to sell could be given. However, the Position Paper proposes to reduce this to an unspecified time period. Our preference is that the period of time before a notice of intention to sell be given remain 12 months.

In our view, the period of time before a notice of intention to sell should not increase based on the value of the goods. Many of our lower income clients have relatively 'low value' goods, but these goods have significant sentimental value. We believe that, instead, a fair period of notice for all Victorians storing their goods should be provided.

We note that in our experience consumers do have goods sold earlier than permitted by the Act, without their knowledge, or any form of notice (let alone the correct form of notice). As such, we reiterate that an active enforcement and compliance regime is required for this industry.

3. **Power of sale and notice/advertising requirements (section 3.2.5)**

The Position Paper proposes that storage providers will be able to sell people's goods with as little as 28 days' notice of the intention to sell. The notice period increases only if the storage provider cannot 'locate or communicate with' the consumer in order to give notice.

We understand that notice will be presumed to have been given if left at the consumer's last known address, in accordance with section 28A of the *Acts Interpretation Act 1901* (Cth).[6] The onus will be on the consumer to prove that service was not effective if they wish to rely on the extended notice periods proposed in the Position Paper.

As stated above, Victorians who are involved in a storage related dispute may be storing their goods because they are in transitional accommodation due to homelessness, relationship breakdowns, or needing to escape domestic violence. These people are unlikely to become aware of a notice served at their 'last known address', and even less likely to challenge the storage provider on this technical point of law at the Victorian Civil and Administrative Tribunal (**VCAT**).

We also question whether requiring storage providers to deliver a formal notice to consumers will actually achieve the desired consumer protection outcomes. It is now widely accepted that disclosure alone is an ineffective regulatory tool. For example, the Financial Systems Inquiry outlined the limitations of relying on disclosure as the main form of consumer protection for financial consumers. Over time, disclosure has been supplemented by other forms of protections aimed at making firms more directly accountable.[7] However, based on the

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[6] See *Australian Consumer Law and Fair Trading Act* 2012 (Vic) s11.

[7] The Treasury, *Design and Distribution Obligations and Product Intervention Power – Proposals Paper,* December 2016. Available at: http://www.treasury.gov.au/~/media/Treasury/Consultations%20and%20Reviews/Consultations/2016/Design%20and%20distribution%20obligations/Key%20Documents/PDF/Design-and-distribution-obligations.ashx

proposals in the Position Paper, it appears that instead of making storage providers more directly accountable, the onus is being placed on consumers to read technical legal documents and enforce their rights privately through VCAT.

4. General comments regarding dispute resolution

Currently, Victorians involved in a storage related dispute must take their matter to the VCAT for resolution. VCAT hearings can be very intimidating and cost prohibitive for many consumers. The limitations of VCAT were recognised in the Access to Justice Review, which concluded that:

> *The resolution of small civil claims at VCAT has become too complex, and disadvantaged Victorians and Victorians residing in regional areas continue to experience barriers to accessing justice. The cost parties incur when resolving small civil claims at VCAT is disproportionate to the value of many small claims.*[8]

As mentioned above, many consumers involved in storage related disputes are experiencing a very stressful period in their lives, such as a loss or change of housing, relationship breakdown or are escaping domestic violence. If the applicant is experiencing a particularly stressful event, it is even less likely they will seek redress at VCAT. This is not because their dispute is not meritorious, but simply because the process is too difficult and stressful.

We reiterate our recommendation in our previous submission that an industry-funded ombudsman scheme (or similar service) capable of hearing storage disputes would provide a far more accessible and less intimidating forum for resolving disputes.

5. General comments regarding compliance & enforcement

As noted in our previous submission, we have seen numerous examples of storage providers using contracts that fail to meet the requirements of the Act. The contracts have purportedly permitted the storage provider to sell goods prematurely, sell goods without notice, fail to return surplus funds, absolve themselves of liability arising from damage to goods, and restrict the rights of consumers to pursue litigation, among others.

Regardless of the relevant legislation, the terms are not widely known and consumers can easily sign contracts that try to strip them of their rights. Consumers often do not challenge the terms of a contract because they simply do not understand it or they assume it reflects the prevailing law. In our view, a standard form contract would at least ensure that storage providers' contracts are compliant with the law.

Given the examples of non-compliance we have already provided, it is also apparent that the storage lien regulatory regime must be supported by an active enforcement and compliance regime.

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[8] Victorian Department of Justice and Regulation, *Access to Justice Review – Volume 1 Report and Recommendations,* August 2016, p244. Available at: https://myviews.justice.vic.gov.au/application/files/2414/7554/7522/Access_to_Justice_Review_-_Report_and_recommendations_Volume_1.PDF.

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

Yours sincerely

CONSUMER ACTION LAW CENTRE

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