

NSW Law Reform Commission REPORT 54 (1988) - COMMUNITY LAW REFORM PROGRAM: DISPOSAL OF UNCOLLECTED GOODS

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Community Law Reform Program

The Community Law Reform Program was established on 24 May 1982 by the then Attorney General, the Honourable F J Walker, QC, MP, by letter addressed to the Chairman of the Commission. The letter included the following statement:

This letter may therefore be taken as an authority to the Commission in its discretion to give preliminary consideration to proposals for law reform made to it by members of the legal profession and the community at large. The purpose of preliminary consideration will be to ring to my attention matters that warrant my making a reference to the Commission under s10 of the Law Reform Commission Act. 1967.

The background to the Community Law Reform Program and its progress since 1982 are described in detail in the Commission's Annual Reports.

This is the twelfth Report in the Community Law Reform Program.

Terms of Reference and Participants

New South Wales Law Reform Commission

To the Honourable J R A Dowd LLB, MP,

Attorney General for New South Wales

COMMUNITY LAW REFORM PROGRAM: DISPOSAL OF UNCOLLECTED GOODS

Dear Attorney General,

We make this Report pursuant to the reference to this Commission dated 17 March 1986.

Helen Gamble

(Chairman)

Paul Byrne

(Commissioner)

Keith Mason QC

(Commissioner)

November 1988

Terms of Reference

On 17 March 1986, the then Attorney General of New South Wales, the Honourable T W Sheahan BA, LLB, MP, made the following reference to the Commission:

To Inquire into and report on:

1. The law governing the rights and liabilities of persons in possession of uncollected goods, including but not limited to the application of the Disposal of Uncollected Goods Act, 1966;
2. Any incidental matter.

Participants

Commissioners

For the purpose of this reference the former Chairman, Mr Keith Mason QC, created a Division on 7 May 1986, in accordance with s12A of the Law Reform Commission Act 1967. The Division comprised the following members of the Commission:

Helen Gamble (Commissioner-in-Charge of Reference)

Keith Mason QC

Russell Scott

Following the resignation of Mr Mason as a full-time member of the Commission, the Division was reconstituted on 19 August 1987 to comprise:

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Helen Gamble (Commissioner-in-Charge of Reference)

Paul Byrne

Russell Scott

The Division was again reconstituted on 11 August 1988 to comprise:

Helen Gamble (Commissioner-in-Charge of Reference)

Paul Byrne

Keith Mason QC

Research Director

William J Tearle

Research

James Hirshman

Leanne O'Shannessy

Secretary

John McMillan (to 31 August 1988)

Typing and Word Processing

Ms Lorna Clarke

Miss Judith Grieves

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Ms Jennifer McMahon

Ms Glenda Owens

Miss Doris Sclosa

Librarian

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Ms Zoya Howes

Ms Dianne Wood

Mr Grant Van Wingerden

1. Introduction

I. BACKGROUND AND TERMS OF REFERENCE

1.1 In 1985 the Commission received submissions from the General Legal Committee of the Law Society of NSW (9 July 1985) and the Conference of Chamber Magistrates (5 December 1985), both dealing with deficiencies in the Disposal of Uncollected Goods Act 1966. The major concern expressed by these two bodies was the difficulty experienced by landlords in complying with the terms of the Act when selling goods abandoned on their premises by departing tenants. The 1966 Act does not provide a suitable procedure for them and, at common law, a landlord who of the goods may be guilty of conversion.¹ Concern expressed about the unnecessary complexity of the legislation, and the cost of relying on its provisions, as most goods to be disposed of under the Act will be of little monetary value.

1.2 On 17 March 1986 the then Attorney General, the Hon T W Sheahan BA, LLB, MP, made the following reference to the Commission:

To inquire into and report on:

1. The law governing the rights and liabilities of persons in possession of uncollected goods, including but not limited to the application of the Disposal of Uncollected Goods Act, 1966;
2. Any incidental matter.

1.3 A draft report was completed by the Commission in July 1986, but work was then postponed pending the outcome of a review of landlord and tenant law by the Department of Consumer Affairs.

II. RESIDENTIAL TENANCIES ACT 1987

1.4 The Residential Tenancies Act 1987 was passed by the NSW Parliament in April 1987. It was intended to introduce major reforms in tenancy law, and to cover every aspect of the landlord and tenant relationship. It was the second stage in a package of reforms which commenced with the Residential Tenancies Tribunal Act 1986. In June 1986, the Commission obtained from the Department of Consumer Affairs an outline of the proposed legislation which included a proposal to make special provision for landlords who needed to dispose of goods left by their tenants. Further inquiries revealed that the provisions of the new Act were to be based on s79A of the Residential Tenancies Act 1981(SA), which created a simple and effective mechanism for dealing with such goods.

1.5 When it comes into force, the Residential Tenancies Act 1987 (NSW) will allow the landlord to apply to the Residential Tenancies Tribunal for an order in relation to the disposal of uncollected goods.² Alternative methods of disposal (such as those set out in the South Australian legislation) will be settled by regulation.³ At the time of writing (November 1988) no regulations had been promulgated pursuant to s79.

1.6 Even without the regulations, the Residential Tenancies Act will offer a clear solution for the landlord in custody of abandoned goods. As any further adjustment of the landlord's rights is likely to take place within the structure of the Residential Tenancies Act, the major reason for this reference has been removed.

III. COMMUNITY CONSULTATION

1.7 During the writing of the draft report, the Commission contacted a number of community groups, which could be expected to rely on the Disposal of Uncollected Goods Act. The results of this consultation⁴ showed that most industrial and organisations rely on the provisions of legislation business which has special application to their industry when disposing of goods left on their premises. There appeared to be little knowledge of the existence of the Disposal of Uncollected Goods Act amongst those contacted. Since the tenancy problems are to be dealt with by the residential tenancies legislation, and there is only a limited number of businesses not covered by special legislation, any problems with the operation of the Disposal of Uncollected Goods Act are likely to have minimal impact.

IV. NEED FOR REVIEW OF THE DISPOSAL OF UNCOLLECTED GOODS ACT

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1.8 As the Commission found a number of grounds on which its provisions could be criticised we decided to continue our review of the Act. It may be that the deficiencies identified could deter those for whom it was designed from using the procedures laid down in the Act. The terminology of the Act is confusing, its remedies complex and some of its requirements outdated and impractical. In addition we thought it important to question whether general legislation should be passed to cover all uncollected goods, when it is clear that specific legislation exists to accommodate the disposal of goods in many industries and businesses. The Commission decided to proceed to a report, and to make recommendations for revision of the Act, in order to make the legislation more effective and its procedures more attractive to those who may use them. To address the problem of the general ignorance of the provisions of the Act, the Commission recommends that a brochure explaining the operation of the (revised) Act should be produced and distributed widely. There would then be a better basis for discussion if further review of the Disposal of Uncollected Goods Act is thought necessary in the future.

V. STRUCTURE OF REPORT

1.9 We began our inquiry by examining the legal rights to dispose of uncollected goods. The results of this study appear in Chapter 2 where we look first at rights given at common law and then at the statutory provisions which have been passed to supplement the common law. Chapter 3, describes the most common situations in which the need to dispose of uncollected goods arises. In most cases, special legislation has been passed to regulate disposal of the goods. That legislation is discussed. Chapter 4 is an evaluation of the Disposal of Uncollected Goods Act 1966 and in Chapter 5 we present our recommendations for reform.

VI. ACKNOWLEDGEMENTS

1.10 The Commission wishes to acknowledge the contribution of Ms Leanne O'Shannessy, a Senior Legal Officer with the Commission, to this reference. She was primarily responsible for the research and writing of the Report. The Commission also wishes to acknowledge the assistance of Mr Michael Orpwood, QC, Deputy Parliamentary Counsel, who freely made himself available for consultation during the course of this project.

FOOTNOTES

1. See generally *Sachs v Miklos* [1948] 2 KB 23; *Munro v Willmott* [1949] 1 KB 295.
2. Residential Tenancies Act 1987, s79. For a description of the operation of these provisions see Chapter 3, para 3.3.
3. *Id* s79(1)(b).
4. See Chapter 3 generally.

2. The Existing Law

I. COMMON LAW

2.1 Two areas of the common law are relevant to the disposal of uncollected goods: the law of bailment and the law relating to liens. In both areas the common law has been supplemented by specific legislation, notably the Disposal of Uncollected Goods Act 1966. The common law is discussed first.

A. Bailment

2.2 Bailment is a common transaction in every day life and covers a wide range of commercial and other dealings.¹ Typically, a bailment arises when the owner or possessor of goods (the bailor) transfers possession of such goods to another person (the bailee) in order that the bailee may perform some act in relation to the goods. For example, a bailment will arise when goods are taken for repair or storage.

2.3 While possession,² the mere fact of possession does not automatically give rise to a bailment. Generally, a conscious and willing assumption of possession of the goods³ is required before bailment can exist. The requirements and obligations of bailment are more easily defined by reference to the subcategories of bailments.

1. Bailment for Reward

2.4 A bailment for reward arises where goods are taken into custody for purposes of storage, treatment or repair, in return for valuable consideration. The bailment is for the mutual benefit of the parties and the bailee is under a duty to deal with the goods with the due care and diligence which a careful person would exercise over their own chattels of similar circumstances.⁴ A bailee for reward has no right to sell the goods of the bailor. To do so would constitute an act of conversion, making the bailee liable in an action for damages.⁵

2. Gratuitous Bailment

2.5 A gratuitous bailment is one from which only one party to the agreement benefits.⁶ Generally it involves the keeping of goods without reward, to be returned to the bailor on demand. While the duty of care owed by a gratuitous bailee is of a lower standard than required of a bailee for reward, neither the bailee for reward nor the gratuitous bailee can dispose of or sell the goods in their possession.

3. Involuntary Bailment

2.6 This is often characterised as a form of gratuitous of the goods by, or any benefit accruing to, the bailee. For example, an involuntary bailment occurs where goods are found by someone or taken into possession through a process of inertia selling (but note the Unsolicited Goods and Services Act 1974, discussed below at 3.11); or where a departing tenant leaves goods on the landlord's premises.⁷ The duty arising here is much lower than in either bailment for reward or gratuitous bailment, amounting only to a duty to abstain from wilful or reckless damage.⁸ The prohibition against the sale or disposal of the goods remains.

2.7 The scope of the duty of the involuntary bailee to abstain from wilfully damaging the goods varies widely according to the circumstances of the bailment. There is some authority for the proposition that there can be no legitimate complaint against a bailee who acts in a manner which is considered "reasonable and proper" in all the circumstances,⁹ including the destruction of the goods if they have become a nuisance.¹⁰ Similarly, a bailee who acts with the object of either returning the goods or mitigating responsibility for them (whether by delivering them to the police or a bank, or by returning an unsolicited letter to the post office) incurs no liability to their owner.

2.8 However, the precise duties of an involuntary bailee, and the nature of the safeguards to be taken in disposing of the goods, remain ill-defined and unsatisfactory due to the wide variety of goods and circumstances in which the involuntary bailee can acquire possession.

2.9 Logically the whole concept of involuntary bailment is a contradiction in terms. The term "bailment" implies both possession of another person's goods and agreement to or acceptance of such possession. Involuntary

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bailment does not require a voluntary election by the bailee to hold the goods. It has been argued¹¹ that without this voluntary element there may not be a true relationship of bailor and bailee.

2.10 These problems are of particular importance in the present inquiry for they form the only part of the common law relating to unclaimed goods not superseded by the Disposal of Uncollected Goods Act. Involuntary bailees are thus the only bailees left without an effective remedy.

B. Liens

2.11 A lien is a right, arising by implication of law, of one person to retain possession of the goods of another until a liability is satisfied.¹² Except in the case of an equitable lien, the right depends on actual possession of the goods. A lien can be general, allowing the lienee to hold all chattels until a general account owing is settled, or particular, attaching to specific goods which will be held until charges owing on them are paid. A lien can also be implied by statute: see, for example, Warehousemen's Liens Act 1935 and Pawnbrokers Act 1902.

2.2 A lienee is under a duty to take reasonable care of the goods, but has no claim for the cost of keeping them. The right is passive, to detain the articles until the debt is paid. There is no right to sell the goods, and to do so leaves the lienee liable to an action for wrongful interference with the goods. In special circumstances, a statutory lien is accompanied by a right of sale, subject to compliance with certain conditions: see Warehousemen's Liens Act 1935 s6(1) and Pawnbrokers Act 1902 s19.

C. Liens and Bailment Compared

2.13 Bailment arises on acceptance of possession of goods by a bailee. By contrast a lien generally requires more than the mere custody of goods, for example, some work to improve or repair them, or a debt owed in relation to them. A lien may arise in favour of repairers and common carriers, and is implied by statute in favour of warehousemen and pawnbrokers. Except where there is an agreement granting it, a landlord has no lien over the goods of a tenant, even where that tenant has vacated the premises leaving rent unpaid.

D. Rights of Disposal

2.14 In summary it can be said that the law of bailment or lien will apply when people are in possession of goods that remain uncollected. However, the remedies available to a bailee or lienee are limited. At common law they do not extend to the sale or disposal of the goods.¹³ Any relief offered by the common law is therefore very limited. There are two narrow exceptions:

1. Agency of Necessity

2.15 In some, very limited, circumstances a bailee may be relieved from liability for disposing of goods without authority. The principle of agency of necessity excuses the bailee from liability when there is an actual commercial necessity to dispose of the goods. Traditionally, the defence is confined to:

(a) those who accept bills of exchange to be honoured by the drawer, that is, the bailee who is entitled to be reimbursed by the person for whom the payment is made; and

(b) masters of ships in foreign ports, unable to obtain immediate instructions from the owners of the ship or cargo and in need of money for unforeseen expenses.¹⁴

The defence developed to cover carriers by land, but is still limited to cases of emergency or real business necessity,¹⁵ is for example, where the goods are perishable and it is impracticable to obtain instructions from the owner.¹⁶ The principle also applies where goods are deteriorating or otherwise losing value, but only if the loss is serious enough to constitute an emergency.

2.16 The courts have been reluctant to extend the classes of agents of necessity. This is well illustrated by the decision in *Sachs v Miklos*.¹⁷ In that case gratuitous bailees sold items of furniture which they had stored for three years after several attempts to reach the bailor by letter and telephone had failed. The Court of Kings Bench found the bailees guilty of conversion, and refused to accept that they had acted as agents of necessity,

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stating that the sale was made for the convenient running of their business (a boarding house), and not in response to any real emergency. In the course of his judgment Lord Goddard CJ said: "in peace-time such a course would probably have landed them in no real liability for if the market value of the furniture had been obtained and had remained constant they would have had an adequate sum to hand to the plaintiff".¹⁸

2.17 It is not hard to see why the courts have been reluctant to widen the defence of agency of necessity. The defence developed as part of the specialised law of common carriers, to facilitate the smooth carriage or shipment of goods, and to deal with the unforeseen circumstances which can occur during the performance of such contracts. In cases dealing with necessity there is rarely, if ever, any suggestion that the goods will remain uncollected by the owner. It is the intervention of factors beyond the control of the carrier and owner, such as delays, strikes and unforeseen expenses which gives rise to the agency. The concept is, therefore, of limited value when dealing with uncollected goods. By contrast, the possibility that the goods will never be claimed is the major concern of the bailee in possession of uncollected goods.

2. Abandonment

2.18 It is sometimes suggested that an involuntary bailee can argue that the bailor has abandoned all title and interest in the goods, thus permitting the bailee to dispose of the goods at will. While the common law recognises abandonment, the concept is of very limited application. In order to rely on it the bailee must prove that the true owner has intentionally abandoned the goods.¹⁹ Mere accidental or negligent loss of goods does not amount to abandonment. The concept has very little application to the problem of uncollected goods, since in most cases it would be difficult or impossible to prove the requisite intent in the bailors at the time the goods left their possession. Uncollected goods are, by their very nature, merely uncollected; they are not abandoned as that term is legally defined.

II. STATUTORY PROVISIONS: DISPOSAL OF UNCOLLECTED GOODS ACT

2.19 The Disposal of Uncollected Goods Act 1966 provides a bailee with a statutory right to sell uncollected goods. It was introduced in order to remove the anomalies that existed in the common law, while providing safeguards to protect the owners of goods.²⁰ The Act was based on Victorian and English legislation and was intended to cover wider ground than the remedies provided for specific groups in other Acts.²¹ Victoria, Queensland and Tasmania all have specific legislation dealing with uncollected goods.²² While there is some variation in the classes of bailees covered by the legislation in these States, the legislation generally provides remedies similar to those available under the NSW Act.

2.20 The NSW Act sets out two methods of exercising the right of sale: by way of notice (Part II) and by way of court order (Part III). Section 16 of the Act makes it clear that the rights given by the Act are in addition to other remedies available to the bailee. Thus, where there is a contract of bailment between the parties, they may use the contract to regulate the relationship rather than rely on the Act. As the Report of the Statute Law Revision Committee (Victoria)²³ noted, many difficulties arising under the Victorian legislation could be alleviated by the parties contracting out of the Act and imposing their own conditions. This is a simple and inexpensive solution to many difficulties experienced with the legislation.

A. Disposal of Goods without a Court Order

2.21 Part II of the Act is limited in operation to bailments created in the course of businesses for repair or other treatment.²⁴ The procedures of Part II cannot therefore be applied to goods bailed for carriage or storage. Section 5 creates in the bailee a right to sell goods where they have not been collected by a bailor but are ready for redelivery. The right is limited and is withdrawn if the bailee has notice that the goods are subject to a hire purchase agreement or a mortgage under the Credit Act 1984.²⁵

2.22 Before exercising the right of sale under Part II, the bailee must comply with the notice requirements set out in s6:

1. Notice on premises

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At the time the bailment agreement is entered into, there must be a notice "conspicuously placed" in the bailee's premises indicating that acceptance of the goods was subject to the Disposal of Uncollected Goods Act 1966, and that the Act confers on the bailee a right to sell goods that remain uncollected after 6 months.²⁶

2. First notice to bailor

This must be given when the goods are ready for redelivery and should include:

- (a) a description of the goods;
- (b) a list of the charges due; and
- (c) a warning that failure to pay the charges and collect the goods within 6 months will give the bailee the right to sell them.²⁷

3. Second notice to bailor

Six months after the goods are ready for redelivery, the bailee must give a further notice to the bailor, in the same terms as the first. This second notice must state in addition that if the charges are not paid and the goods not collected within 14 days, the bailee intends to sell them.²⁸

4. Persons to whom notice should be sent

The second notice should be forwarded to the bailor, and every other person, known to have an interest in the goods. It must also be published in a newspaper circulating in Sydney and NSW.²⁹ Where the bailee is holding a motor vehicle on behalf of the bailor, the notice must also be published in the Government Gazette.

5. Mode of Sale

Once these requirements are satisfied the goods must be sold by public auction in separate lots.³⁰ When there is a dispute between the bailee and bailor over the payment of charges, or adequacy of treatment or repair, the right of sale is suspended.³¹ Sections 6(3),(4) and 6) set out special provisions for the resolution of such disputes.

2.23 Where the right of sale is to be exercised the bailee is required to keep records of the sale³² and a copy of the notice of intent to sell for a period of six years. These records must be made available to the bailor for inspection.

B. Disposal of Goods with a Court Order

2.24 Many bailments (including contracts for hire, carriage of goods and warehousing) are not covered by Part II. Part III covers a wider field by including all bailments for reward. It also provides an alternative remedy for bailments already covered by Part II. Part III differs from Part II in four respects. It allows for:

- (a) a bailee to proceed by way of court order;
- (b) a reduction of the period during which the goods must be held;
- (c) the disposal of goods by means other than public auction;
- (d) the inclusion of other forms of bailment beyond the strict bailments for repair or treatment dealt with in Part II.

1. Application of Part III to other Forms of Bailment

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2.25 Sections 10(1)(a) and (b) give the right to apply for a court order to all bailees for reward. This includes all bailments under Part II, as well as those for storage or carriage. Section 10(1)(c) purports to extend this coverage. It provides:

the bailee of goods that have been accepted by him ... pursuant to a bailment not for reward has, by notice in writing given to the bailor, required the bailor to take delivery of the goods at a time specified in or determined in accordance with the contract of bailment or, if the contract of bailment does not specify or make provision for determination of the time when the goods are to be redelivered to the bailor, within such reasonable time as may be specified in the notice, and the bailor fails, at the time so specified or determined or within such reasonable time, to take delivery of the goods or, if the terms of the bailment so provide, to give directions as to their delivery.

The intention of this section is to extend the operation of Part III to gratuitous bailees. Its effect is questionable, however, because of the use of the phrase "contract of bailment".

2.26 In New South Wales, the courts have held that gratuitous bailments cannot be characterised as contracts, nor the law of contract applied to them.³³ As a gratuitous bailment exists without reward, a basic element of a contract, namely consideration, is absent.³⁴ The effect of the use of the words "contract" and "bailment" in s10(1)(c) is therefore to render the section meaningless.

2.27 It has been suggested that, in keeping with the intention of the Act, the reference to "contract" should be read down:

... It must be assumed that the word will in future be construed loosely, to include any agreement which may or may not be binding principles other than contract.³⁵

Because consideration is an essential element of a contract, this does seem likely to happen. While the intention of s10(1)(c) is clear, its language is so convoluted as to place obstacles in the way of its interpretation. The only way to overcome the problem would be to delete any reference to "contract" from the sub-section and to substitute more suitable language such as "the terms of the bailment agreement".

2. Procedure by way of Court Order

2.28 in those cases to which Part III does apply the bailee is able to apply for an order of sale from the Local Court of the district in which the goods were accepted.³⁶ If it chooses to make an order the Court should:³⁷

(a) specify an amount which reasonable estimate of th charges;³⁸ and

(b) prohibit the sale of the goods until the expiration of a period of 6 months, or such lesser period as may be specified, after the date of the order.³⁹

The order may also specify a rate to be paid for charges associated with storage and removal of the goods prior to the sale.⁴⁰

2.29 Section 12 allows the bailee to use some other means than public auction to dispose of goods to which Part III applies. The bailee is then liable to the bailor for any difference between the bailee's charges and the gross proceeds of the sale. Conversely, the bailor is shortfall if the proceeds of the sale do not cover such charges.⁴¹

C. Other Provisions of the Act

2.30 A number of other provisions in the Act should be noted.

1. Tow Truck Operators

Section 11 extends the operation (with specific provisions) of the Act to tow truck operators.

2. Disposal of Goods by Agreement

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As already noted above, s16 provides that all powers conferred by the Act are granted in addition to, and not in derogation from, any powers exercisable independently of the Act. The parties to a bailment may therefore regulate the terms of any right of sale through a bailment agreement.

3. Rights of Purchasers

Section 18 deals with the rights of purchasers of goods sold pursuant to the Act. Good title will be acquired provided the purchaser buys in good faith and without notice of any defect in the title of the bailor, or any failure of the seller to comply with the provisions of the Act.

4. Proceeds of Sale

Section 20 sets out the procedure for the disposal of the proceeds of the sale. Any surplus moneys are to be paid by the seller into Consolidated Revenue.

FOOTNOTES

1. N E Palmer *Bailment* (Law Book Co, 1979) at 1.
2. *Ibid.*
3. Note 1 at 30; see also Graham Johnson "Disposal of Goods" (Unpublished) Paper No 3 *Chamber Magistrates' Conference* (1981).
4. *Coggs v Bernard* (1703) 2 Ld Raym 909; 92 ER 107 per Holt CJ at 916; 111.
5. See generally *Sachs v Miklos* [1948] 2 KB 23; *Munro v Willmott* [1949] 1 KB 295.
6. Note 1 at 89.
7. Note 1 at 379.
8. Note 1 at 383; see also *Elvin & Powell Ltd v Plummer Roddis Ltd* (1933) 50 TLR 158.
9. *Hiort v Bott* (1874) LR 9 Ex 86 at 91 per Cleasby B.
10. Winfield and Jolowicz *Torts* (12th ed Sweet and Maxwell, 1984) at 481.
11. Note 1 at 379. The approach of the English courts at least has been to deny that the involuntary recipient of goods is a bailee; see *Lethbridge v Phillips* (1819) 2 Stark 478. Australian authority is limited in this area, but see Alice Erh-Soon Tay, "The Essence of a Bailment: Contract Agreement or Possession?" (1966) 5 *Sydney LR* 239, especially 248-257.
12. *Halsbury's Laws of England* (4th ed Butterworths, 1979) Vol 28 at para 501.
13. Outside of those statutory exceptions already noted.
14. *Hawtayne v Bourne* (1841) 7 M & W 595, 600, 151 ER 905, 907; Bowstead on *Agency* (14th ed Sweet and Maxwell, 1976) 63-64.
15. Note 1 at 684, *Sims & Co v Midland Railway* [1913] 1 KB 103.
16. Or in some similar category, such as livestock which must be tended, fed and watered. See *Sachs v Miklos* [1948] 2 KB 23, per Lord Goddard, CJ at 35.
17. [1948] 2 KB 23, followed in *Munro v Willmott* [1948] 2 All ER 983; and see also *Jebara v Ottoman* [1927] 2 KB 254 at 270 per Scrutton LJ.

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18. *Id* at 35.
19. See *Halsbury's Laws of England* (4th ed Butterworths, 1973) Vol 2-at para 1510.
20. See the second reading speech, the Honourable J Maddison, then Minister for Justice, on 1 December 1966 in the Legislative Assembly, New South Wales Parliament, *Parliamentary Debates* (NSW Hansard) Vol 65 at 3068.
21. *Id* at 3069.
22. Disposal of Goods Act 1961 (Vic); Disposal of Uncollected Goods Act 1967 (Qld); Disposal of Uncollected Goods Act 1968 (Tas); see also Torts (Interference with Goods) Act 1977 (UK).
23. Statute Law Revision Committee (Victoria) Report on the Disposal of Uncollected Goods Act 1960 (1971), 3.
24. Disposal of Uncollected Goods Act, s4.
25. Ss13(3)(g) and 90 of the Credit Act prevent the creation of a lien on the goods by a hirer or mortgagor.
26. S6(1)(a).
27. Ss6(1)(b), 6(7).
28. S6(1)(c).
29. S6(1)(c)(iii).
30. S6(1)(d).
31. S6(2).
32. S7(2) .
33. *Thomas v High* [1960] SR (NSW) 401, decided six years before the Disposal of Uncollected Goods Act came into force.
34. Some transactions may occur between bailee and bailor which, in other circumstances, could be construed as consideration. The crucial difference is that in gratuitous bailment there is no intention by the parties that their actions have that effect.
35. N E Palmer, note 1 at 405.
36. S12(1)(a).
37. S12(2).
38. S12(3)(a),(e).
39. S12(3)(9).
40. S12(3)(f).
41. S13(1).

3. Applications of the Disposal of Uncollected Goods Act 1966

3.1 The declared purpose of the Disposal of Uncollected Goods Act is to provide a general remedy for bailees in possession of uncollected goods. Yet frequently remedies are provided for bailees in other legislation specifically designed to regulate the commercial area in which the bailment arises. This raises the question of whether a general approach to the problem is necessary. This Chapter outlines the procedures available to recover goods under legislation other than the Disposal of Uncollected Goods Act. After examining these an evaluation of the need for a general scheme of recovery is made in Chapter 4.

I. TENANCY

3.2 Before the Residential Tenancies Act was passed in 1987, the landlord was considered to be an involuntary bailee with no common law right to dispose of goods left by a tenant vacating premises. The bailment was imposed even when the landlord had neither the desire nor capacity to store the goods. Any attempt to sell exposed the landlord to liability for conversion. Even when the landlord had a lien for unpaid rent the sale or other disposal of the goods could still constitute conversion.¹

3.3 This law will be overtaken by the Residential Tenancies Act 1987 when it comes into operation. Section 79(1)(a) of the Act gives a right to apply to the Residential Tenancies Tribunal for an order allowing the landlord to dispose of the goods.² Under s79(2), the Tribunal is given a wide discretion in the sorts of orders it may make. These include

- (a) an order authorising the removal, destruction or disposal of the goods;
- (b) an order authorising the sale of the goods;
- (c) an order directing that notice of any action or proposed action in relation to the goods is to be given to the former tenant or any other person;
- (d) an order as to the manner of sale of the goods;
- (e) an order as to disposal of the proceeds of sale of the goods;
- (f) any ancillary order which the Tribunal in the circumstances, thinks appropriate.

Section 79(3) guarantees good title to purchasers of goods sold subject to an order of the Tribunal. The Residential Act 1987 had not been proclaimed at the time of writing (November 1988). The Commission understands that the Act is likely to come into force in February or March 1989.

II. REPAIRERS

3.4 When goods are left for repair or treatment under a bailment for reward, the only right the repairer has to dispose of them is under the terms of the Disposal of Uncollected Goods Act 1966. These are both complex and expensive to satisfy. The main problem with the Act is that unless a court order is obtained, the only means of disposing of goods is by public auction.³ Items left uncollected with repairers are usually of little value: second-hand and useless to anyone but the owner. Court proceedings are inappropriate in relation to such goods and they cannot be sold at auction easily. The Act is rarely used by repairers.

III. WAREHOUSES AND STORAGE FOR HIRE

3.5 The responsibilities and liabilities of a person who is a bailee for hire, are set out in the Warehousemen's Liens Act 1935. Under s3 of that Act, a warehouseman has a lien on goods deposited with him for all charges and costs incidental to the storage and preservation of the goods, including the cost of notices required by the Warehousemen's Liens Act.⁴

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3.6 Section 6 empowers the warehouseman to sell the goods over which he has a lien at public auction upon satisfaction of certain conditions, which include:

- (i) written notice of intention to sell, to the person liable for the debt, the owner of the goods, and other persons with interests in them, as set out by s6(2). This notice is to be delivered personally or by registered post;⁵
- (ii) requirements for the contents of the notice are set out by s6(4), and include a statement of the charges due and a demand that they be paid, along with advice that if such charges are not paid the goods are liable to be sold;
- (iii) an advertisement of the sale of the goods published in one local and one metropolitan daily newspaper, once a week for 2 weeks, describing the goods and stating the time and place of the sale;⁶
- (iv) sale of the goods will only be allowed where the charges due on them are more than 12 months in arrears.⁷

3.7 The Warehousemen's Liens Act 1935 only applies to goods stored in the course of a business. It does not apply to other bailments undertaken for reward outside business. Further, while the conditions imposed on the bailee's right of sale may be appropriate to the extensive operations of warehouses and other such storage facilities, they are unlikely to be helpful when the goods involved are of little value, and when the bailee's facilities are not designed to deal with long-term storage of goods.

IV. INNKEEPERS

3.8 When a guest departs premises leaving goods behind, the proprietor of a hotel or guesthouse is in the same position at common law as a landlord. However, if a guest leaves without paying a "reasonable sum for accommodation", the innkeeper or licensee has a lien over the property. The extent of this lien is however limited by s8 of the Innkeepers Act 1968, which abolishes an innkeeper's lien over certain property.⁸

V. BOARDING HOUSES

3.9 Like landlords at common law, the owners of boarding houses are considered involuntary bailees with no rights to dispose of the goods and no lien over their boarders' goods even when the rent is unpaid.⁹ The Commission understands that boarding houses are likely to be included within the operation of the Residential Tenancies Act at some time in the future.

VI. "INERTIA" SELLING

3.10 Inertia selling is a practice whereby goods are sent unsolicited to a person and, when not returned, are deemed to have been accepted by the recipient, who is then billed accordingly. The practice is regulated by the Unsolicited Goods and Services Act 1974. Section 4 of this Act relieves the recipient from any liability for damage to, or payment for, goods sent in such a manner. After a specified period (not more than three months) the goods are deemed to be the property of the recipient "freed and discharged from all liens and charges of any description" so long as the recipient has unreasonably refused to allow the sender to retrieve them and so long as the goods were not received in circumstances "in which he has, or might reasonably be expected to have known, that they were not intended for him". Section 4 also sets out some notice provisions, but these are optional as title to the goods automatically vests in the recipient after three months.¹¹

VII. PAWNBROKERS

3.11 When goods are given in pawn, the pawnbroker's right to sell the goods is governed by the Pawnbrokers Act 1902. The period during which any article taken in pawn may be redeemed is three months, or longer as agreed between the parties. After this period the pawned article will be deemed forfeited pursuant to s17(1) of the Act, and may be sold. Section 19 provides for the sale of goods by public auction. These provisions also require a notice of every sale, and a catalogue of all articles, and the time they were taken in pawn, to be inserted in a newspaper circulating in New South Wales, at least 14 days before the proposed date of the sale.

VIII. "LOST" GOODS

3.12 There is a variety of regulations giving rights to dispose of lost or misplaced on public transport. There are extensive provisions relating to "public passenger vehicles" (including buses, taxis and private hire cars) set out in the State Transport (Co-ordination) Regulation 1931 and the Transport (Public Vehicles) Regulations 1930. In addition, the Governor has power to make

regulations in relation to the disposal of uncollected goods on the railways.¹²

FOOTNOTES

1. Discussed 2.6-2.14 above.
2. Section 79(1)(b) also allows for regulations to be made to provide guidelines for the manner of disposal of abandoned goods.
3. Disposal of Uncollected Goods Act 1966, Part II.
4. Warehousemen's Liens Act 1935, s4(a),(b) and (c).
5. S6(3).
6. S6(5).
7. S6(7).
8. Innkeepers Act 1968, ss8 and 6(a).
9. Discussed 3.2 above.
10. Unsolicited Goods and Services Act 1974, s4(5).
11. See also Trade Practices Act 1974 (Cth), Part V which deals with unsolicited goods. Section 65 contains provisions similar to those of s4 of the Unsolicited Goods and Services Act.
12. Pursuant to Government Railways Act 1912, s64. The Act also covers railway cloak rooms. An outline of the common law position of railway authorities appears in *Halsbury's Laws of England* (4th ed Butterworths, 1973) Vol 2 at para 1548 and *Van Toll v South Eastern Railways Co* (1862) 12 CB (NS) 75; 142 ER 1071; *Pratt v-South Eastern Railways Co* [1897]1 QB 718.

4. Evaluation of the Current Law

4.1 The Disposal of Uncollected Goods Act 1966 was designed to provide a general remedy for all bailees in possession of uncollected goods. It has not done this effectively and the gaps it leaves are not filled adequately either by the common law or by the specific legislation designed to regulate those businesses and industries whose members may become bailees. The Commission does not believe that further reform can be left to be achieved by the development of case law. Legislation will be necessary.

I. THE ACT IS INCOMPLETE

4.2 The Disposal of Uncollected Goods Act does not cover all the problems that can arise. It is directed specifically at bailees for reward who take possession of goods for treatment or repair. These bailees are offered two alternative remedies: a right of sale after giving the requisite statutory notice, or a right of sale by court order. All other bailees for reward must obtain a court order before selling. The distinction between bailments for repair and treatment and other bailments for reward was made originally to give those bailees who at common law had a lien over the goods (namely bailees whose possession of the goods was linked to their improvement, repair or a debt owed on them)¹ a simple way of disposing of the goods, as no power to dispose of them attached to either the bailment or the lien at common law. Because of their lien they were to be permitted to dispose of the goods without incurring the costs and delay of court proceedings. The attempt at simplicity and economy failed, however, because the Act imposes a complex and expensive procedure for the giving of notice which is little improvement on the court process.

4.3 Another problem with the current legislation is its failure to provide adequately for gratuitous bailees. Reference has already been made to the poor drafting and ambiguity of s10(1)(c).² The nebulous position of Involuntary bailees, both at common law and under this Act, is also unsatisfactory.³ The difficulties at common law have already been examined,⁴ and s10(1)(c) does not resolve the problem because it requires an acceptance of the goods before the Act can apply.⁵ The largest group of involuntary bailees, those who come into possession of goods as landlords, will be given a remedy under the Residential Tenancies Act 1987, but others remain outside the Act.⁶ They should be provided with a remedy.

II. NEED FOR A "GENERAL" ACT

4.4 The Commission's investigations have shown that in many cases where goods are left unclaimed, remedies are provided by legislation other than the Disposal of Uncollected Goods Act. In Chapter 3 we noted that this separate legislation is often part of a larger scheme relating to a specialised area of law or business practice. The Pawnbrokers Act 1902, which regulates the entire operation of pawnbroking businesses, provides pawnbrokers with a right to sell uncollected goods. The State Transport Regulations deal with property found on public vehicles, and landlords are to be provided with remedies under the Residential Tenancies Act 1987.

4.5 There are also cases which would not be properly dealt with under disposal of uncollected goods legislation. For example, where someone takes possession of goods believing them to be their own,⁷ the matter will usually be resolved by reference to the general law of property. Similarly the law relating to agency of necessity⁸ stems from problems relating to carriage of goods, and their spoilage en route. In neither of these cases is the central question a failure by the owner to collect the goods.

4.6 The Disposal of Uncollected Goods Act does not cover all bailees of uncollected goods. Its failure to do so raises the question of whether a general approach is the most effective method of dealing with the matter. As the circumstances regulated by the legislation are so varied, the matter may be dealt with most successfully by legislation specific to the circumstances under which the goods remain uncollected. If this view were adopted the functions of the Disposal of Uncollected Goods Act would be fourfold:

- (i) to continue to provide remedies for bailees for reward whose bailment is for the improvement or repair of the goods or for the discharge of unpaid debts attaching to them;
- (ii) to continue to provide a procedure for sale for other bailees for reward;

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(iii) to make remedies available to gratuitous bailees, including involuntary bailees, who have none at present; and

(iv) to offer safeguards to those bailees currently thought to have been brought within the terms of legislation covering specific industries and businesses, but who may, through unforeseen gaps in the legislation, be left without remedies.

The aim would be to provide simple and easily accessible s for the sale of uncollected goods, while retaining the right of the parties to contract out of the Act and make their own agreements under s16.

III. THE TERM “BAILMENT” IS UNRELIABLE

4.7 The use of the term bailment in the Act is a major stumbling block to its smooth operation. Most of the problems have already been dealt with in detail and need only be noted here:

(i) Vagueness and uncertainty surround th concept of bailment. The law of bailment i very old, and the rights and duties which th law provides have never been clearl defined. This is especially so in relation to involuntary bailment.

(ii) The difficulties caused by the use S10(1)(c) of the terms “bailment” “contract” together.

(iii) The failure to accommodate those possession of uncollected goods who cannot be characterised as bailees because the Act is based on principles of bailment.

IV. CUMBERSOME PROCEDURES

4.8 When the costs of complying with the notice provisions, or of instituting proceedings in court, are compared with the value of most of the goods involved, the remedies provided appear illusory. Most often the goods are second-hand, in need of repair and hardly justify the long periods of storage, the recordkeeping and procedures for separate sale at public auction required by the Act. The Act fails to take account of the wide variety of goods involved by offering only one type of remedy no matter what the nature or value of the goods.

FOOTNOTES

1. Discussed 2.13 above. Second Reading speech, the Honourable J Maddison, then Minister for Justice, on 1 December 1966 in the Legislative Assembly, NSW Parliament, *Parliamentary Debates* (NSW Hansard) Vol 65 at 3069.

2. See Chapter 2, 2.25-2.27.

3. *Id* 2.6-2.10.

4. *Id* 2.5.

5. *Id* 2.25-2.27.

6. Discussed Chapter 2, 2.6-2.10.

7. This is one of the examples given by the Tasmanian Law Reform Commission in its report *The Disposal of Uncollected Goods* (TLRC No 23, 1978) at 5.

8. Discussed Chapter 2, 2.15.

5. Recommendations for Reform

5.1 Any reform of the Disposal of Uncollected Goods Act must balance the rights of bailees and others unwillingly in possession of goods and the property rights of owners. The following recommendations seek to achieve that balance.

I. REMEDIES AVAILABLE TO ALL BAILEES

5.2 The two remedies in the Disposal of Uncollected Goods Act should be available to all persons in possession of uncollected goods, whether as bailees for reward or not. The stringency of the notice provisions should be varied according to the value of the goods. For example:

(a) if the value of the goods is insignificant, or less than the combined cost to the bailee of their removal, storage and sale, the bailee should be able to sell, or otherwise dispose of, or in certain circumstances, destroy the goods one month after giving the owner notice of the intention to do so;

(b) where the goods are of more than the insignificant value, but worth less than say \$500, the Act should provide alternative remedies of either a right of sale by notice as currently set out in the Act, but requiring only 3 months storage, or the court procedure currently set out by the Act;

(c) where the value of the goods is more than \$500, the same alternatives ought to be offered, but the storage requirement should be retained at 6 months.

II. PRIVATE AGREEMENTS

5.3 Those in business should be encouraged to make more use of private agreements outside the Act to set their own conditions and to create their own rights of sale. Section 16 of the Act permits such private agreements. To complement this the Act should be altered to include a minimum notice provision of three months (less for goods of insignificant value) which could not be varied by private agreement.

III. GOODS OUTSIDE BAILMENT

5.4 An additional category should be inserted into the Act to cover "goods held other than by bailment for reward" to cover those arrangements discussed in this Report that are currently outside the ambit of the Act. As there is no question that the reliance of the Act on the term "bailment" creates problems, it would be better to avoid the use of the term altogether. In practice, however, the creation and application of an alternative definition which will both take account of all the elements covered by bailment, as well as recognise all the problems inherent in the concept, would be difficult. It is clear that in practice most of the difficulties with terminology could be overcome by the use of the provision noted above. This provision would be intended to include those areas that are left in doubt by the common law definition of bailment.

IV. PUBLIC AUCTIONS

5.5 The requirement that the sale of goods be by public auction and in separate lots, should be deleted from the Act. Bailees should be allowed to dispose of goods as they wish, provided full records are kept. An exception to this should be made in relation to goods of more than a specified value; for example, goods worth more than \$500.

V. RECORDS AND SURPLUS PAYMENTS

5.6 There are two provisions in the Act which the Commission recommends should be retained. These are:

(a) requirements that records of all the goods sold be kept for up to six years after their disposal for inspection by the bailor. The recommendations of this Report are designed to make it easier for a bailee to dispose of uncollected goods. Given this, bailees should be accountable for their actions, at least to the standards set by the current Act. While these provisions can be cumbersome, they are necessary for the effective enforcement of the Act. Similarly the requirement for storage of the goods cannot be avoided, and can only be reduced as recommended above.

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(b) proceeds of sale which exceed the value of the goods are paid to Consolidated Revenue. This may discourage resort to the Act. However, the aim of the legislation is not to provide a profit for a bailee, but to provide a legal means of disposing of the goods.

5.7 Other Acts dealing with unclaimed goods contain similar procedures for the payment of surplus proceeds into Consolidated Revenue. The one exception to this is in relation to lost property found on public transport, which may in some circumstances be claimed by the finder. It is important to note, however, that the goods themselves are handed to the finder. If the goods are sold the proceeds are paid into Consolidated Revenue.

VI. CONCLUSIONS

A. Retention of Disposal of Uncollected Goods Act

5.8 After examining both the Disposal of Uncollected Goods Act 1966 and the common law, the Commission considers that the current Act should be retained with some amendments. These are summarised in paragraph 5.12 below.

B. Information Needs

5.9 As a result of this inquiry the Commission has concluded that there is a lack of awareness of the existence and effect of the Disposal of Uncollected Goods Act amongst those who might benefit from its provisions. A person in possession of uncollected goods is unlikely to be aware of the rights or obligations in the Act. Such ignorance is hardly surprising. The holder of uncollected goods would seldom regard them as being of sufficient value to warrant seeking legal advice on their disposal. The most easily available guide to the law for lay readers, *The Law Handbook*, contains no information on the subject.¹

5.10 The Commission considers that this lack of knowledge of the existing law in the community might be as much a problem as any deficiencies in the Disposal of Uncollected Goods Act itself. Accordingly, the Commission has taken a cautious approach and is recommending that the Act be retained, but with some amendments. The information needs identified by the Commission might be met by the preparation of a brief, simple guide to the rights, liabilities and remedies available under the Disposal of Uncollected Goods Act. Such a brochure should be prepared by the Attorney General's Department, and should be distributed widely, particularly to repairers of goods.

5.11 Once information regarding available procedures becomes widespread, any problems with these procedures will become apparent. It might then be appropriate to undertake a further, more detailed review of the Disposal of Uncollected Goods Act.

C. Recommendations

5.12 The Commission therefore makes the following recommendations:

Recommendation 1

The Disposal of Uncollected Goods Act (1966) in the following manner:

- (a) The remedies available under the Act should be extended to include all bailees and possessors of goods (5.2).
- (b) The stringency of notice provisions should be varied according to the value of the goods (5.2).
- (c) Section 16 of the Act should be amended to include a "minimum notice" provision from which parties cannot contract out. This would also vary according to the value of the goods (5.3).
- (d) An additional category should be inserted into the Act directed at "goods held other than by bailment" to cover relationships outside the ambit of the current Act (5.4).

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(e) The requirement of sale by public auction in separate lots [s6(0(d))], should. only apply to goods worth more than \$500. In all other cases, the bailee should be allowed to dispose of goods as he or she wishes, provided full records are kept (5.5).

Recommendation 2

A brochure should be published and distributed to community groups and associations representing persons who face the problem of disposing of uncollected goods in order to publicise the procedures available.

FOOTNOTES

1. Redfern Legal Centre (2nd ed, 1986).