



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 7**

**Disposal of Uncollected Goods**

**WORKING PAPER**

**DECEMBER 1968**



## INTRODUCTION

As part of its first programme the Law Reform Committee has been asked to consider the need for legislation to permit bailees to dispose of abandoned or uncollected goods.

The Committee having completed its first consideration of the matter now issues this working paper. The paper does not represent the final views of the Committee.

Comments and criticisms on the paper are invited. The Committee requests that they be submitted by the 14th day of February, 1969.

Copies of the paper are being forwarded to –

The Chief Justice and the Judges of the Supreme Court of Western Australia,

The Law Society of Western Australia,

The Law School, University of Western Australia,

The Western Australian Automobile Chamber of Commerce Inc.,

The Australian Finance Conference, W.A. Division,

and

Other Law Reform Commissions and Committees, and persons with whom this Committee has corresponded on this project.

The Committee may add to the above list.

The research material on which this paper is based is at the offices of the Committee and may be made available on request.

## **WORKING PAPER**

### **TERMS OF REFERENCE**

1. “To consider the need for and if found necessary to recommend legislation to permit bailees to dispose of abandoned or uncollected goods.”

### **MOVEMENT FOR REFORM**

2. The need for reform has been felt for several years. It is not merely local, and statutory provisions dealing with the problem have been enacted in several jurisdictions.

3. In Western Australia The Automobile Chamber of Commerce has from time to time over the past few years drawn attention to the difficulties facing motor traders when vehicles left for repair are not collected.

4. The Law Society of Western Australia has drawn attention to similar difficulties confronting keepers of boarding houses who have furniture and other goods left on their hands when the lodger leaves.

5. The Press in this State has also called attention to instances of hardship when landlords are left in similar circumstances and when shoe repairers are left with repaired articles uncollected.

### **THE LAW IN WESTERN AUSTRALIA**

6. The law on bailments in Western Australia, apart from the statutory provisions found in the statutes listed in Appendix A, is to be found in the common law. If a bailee is owed money for work done in connection with the bailed article he has a possessory lien on the article until his claim is satisfied, but he may not (except in rare cases as an agent of necessity) dispose of the article by way of sale or otherwise. He is bound to use due care and diligence in keeping and preserving the article entrusted to him. Other bailees are similarly restricted regarding any right of sale or disposal and are also under a similar duty of care.

7. It has been suggested that R.S.C., O.49, r.3 enables the court in some circumstances to order a sale. In the opinion of Counsel this rule applies only in a case where an action is current between parties.

8. It has also been suggested that if a bailment could be construed as an implied or constructive trust, then, under s.89 of the *Trustees Act, 1962-68*, the bailee may obtain a court order for sale on the grounds of expediency. In practice a bailment which could be so construed would be of rare occurrence.

## **LAW IN OTHER JURISDICTIONS**

9. The problem has been dealt with in different ways in different jurisdictions. A summary of the legislation prevailing in the United Kingdom, Victoria, New South Wales, Queensland and Tasmania is contained in Appendix B.

10. The Act of the United Kingdom deals only with the rights of a bailee who accepts goods in the course of a business for repair or other treatment, delivered to him otherwise than in the course of the bailor's business.

11. Victoria has followed the pattern of the United Kingdom legislation.

12. Queensland has also followed the United Kingdom legislation but has enlarged the class of bailees to include those who accept goods not only for repair or treatment but also for inspection, custody or storage.

13. New South Wales has added two other classes: a bailee of goods accepted pursuant to any other bailment for reward, and a bailee of goods accepted pursuant to a bailment not for reward.

14. Tasmania has legislation similar to that of New South Wales.

15. In all of these Acts the bailee is given the remedy of sale where goods are delivered in the course of the bailee's business, without the necessity of a court order. However, in Queensland, New South Wales and Tasmania there are other types of bailment and circum-

stances in which the remedy of sale is only available on a court order (see Queensland s.10, New South Wales ss.10 and 11, Tasmania s.12).

16. It should be noted that all the bailments under all these statutes presuppose an "acceptance" and no relief is given to an "involuntary bailee" e.g., the boarding house keeper or landlord (as in paragraphs 4 and 5 above) in respect of whom the question of "acceptance" does not arise.

17. Tow truck operators are given a special mention in some of the State Acts. In Victoria he is made a statutory bailee. In New South Wales he is given specific rights to apply to the court for sale. In Queensland the tow truck operator who deals with the owner would come within the definition of persons accepting goods for inspection, custody, etc.

#### 18. **Sale without court order**

Sale without a court order is only permitted in the statutes mentioned where the goods have been accepted in the course of the bailee's business and, in order to protect the bailor and other interested persons, various procedural safeguards have been inserted into the statutes as set out below:-

- (i) Requiring the display of posters or notices on the bailee's premises drawing attention to the relevant statutory provisions;
- (ii) Excluding the right of sale where notice has been given that the goods are subject to a hire-purchase agreement which prohibits the creation of a lien;
- (iii) Prescribing the minimum time (12, 9 or 6 months) which must elapse before notice of the bailee's intention to sell the goods may issue;
- (iv) Prescribing the contents of the notice to be issued when a bailor fails to pay or take delivery;
- (v) Requiring such notice to be published in the press;

- (vi) Prescribing the method of sale. In Australian jurisdictions sale must be by auction. In the United Kingdom sale by private contract is permitted if the bailee in his notice of intention to sell informs the bailor of the lowest price he is prepared to accept for the goods;
- (vii) The nature of the record of the sale to be kept by the bailee and the time for which he must keep such record;
- (viii) Prescribing the manner of disposal of surplus money resulting from the sale;
- (ix) Providing for a suspension of the right of sale on a dispute arising as to charges, etc. and for the determination of such dispute by notice or by the court.

#### **19. Sale pursuant to Court order**

Where the sale has been permitted only pursuant to a court order special provisions have been made as follows:-

- (i) Specifying a time which must elapse or circumstances in which notice must first be given before a bailee becomes entitled to apply to the court (see New South Wales s.10, Queensland ss.10 and 11 and Tasmania ss.12 and 13);
- (ii) Specifying the special powers given to or the restrictions imposed by the court, e.g. :- the time limit before a sale can take place after the order, the method of sale, the amount of the bailee's charges, the amount of costs of the sale and the costs of the order;
- (iii) Specifying the procedure after sale - the keeping of records and the filing of them with the Clerk of the Court;
- (iv) Prescribing the manner in which the bailee shall account for the proceeds of sale.

20. All the legislation provides for the acquisition of a good title by the purchaser in a sale effected pursuant to the provisions of the legislation, subject to the proviso that the purchaser

bought in good faith and without notice of a failure by the seller to comply with the legislative provisions or without notice of any defect in the title of the bailor.

## **POSSIBLE REFORM IN WESTERN AUSTRALIA**

21. It appears to be generally accepted that legislative relief should be given, the main questions remaining being the types of bailment in respect of which relief should be granted and the extent of the relief.

22. Consideration should be given to the adoption of legislation along the lines of that in operation in –

- (i) New South Wales and Tasmania, or
- (ii) in Queensland, or
- (iii) in the United Kingdom and Victoria.

23. Consideration should be given to the adoption of legislation to give relief (not given at present in any of the jurisdictions referred to above) to an "involuntary bailee". Such relief should perhaps be limited to rights of sale only after court order.

24. Consideration could be given to including tow truck operators as a type of statutory bailee and if so the circumstances under which they might avail themselves of the provisions of any proposed legislation.

25. It would probably be conceded that any general statutory provisions adopted should not limit in any way the relief available under the various statutes listed in Appendix A.

26. Any proposed legislation should not exclude the right of parties to make such contractual arrangements as they think fit.

27. Each of the present State Acts contains a provision in effect prohibiting a bailee from selling if, before he commenced work, he had notice that the goods were the subject of hire-purchase agreement which prohibited the creation of a lien. The policy behind this is possibly



similar to that which gave rise to the provisions of s.26 of the *Hire-Purchase Act* in Western Australia, which in turn is similar in effect to legislation in each of the other States.

28. We question whether this policy should be carried over into this type of legislation because we consider the statutory remedy of sale is not dependent on the existence of a possessory lien.

29. We notice that in all the legislation mentioned the right of sale is suspended where "a dispute" arises between the bailor and bailee as to charges, etc. However, no provision appears to be made for the clear establishment of such "a dispute" and to avoid subsequent disagreement as to its existence, we suggest that "a dispute" should only be deemed to arise on notice being given by the bailor to the bailee. The consequences of a sale in the light of a finding that a dispute existed at the time of sale appear to be so serious that an evidentiary provision of this sort seems to be highly desirable.

30. Another matter which will require special consideration is the way in which surplus proceeds of sale are to be disposed of. We mention this because of the different procedures adopted in the various Acts, many of which do not appear to us to be entirely satisfactory.

31. Perhaps the best solution would be to provide that within 14 days the bailee shall pay the surplus proceeds to the Treasury, if within that period he has not paid such moneys to the person entitled. In any event he shall render to the Treasury an account of the sale and disposal of the moneys arising on the sale.

## APPENDIX “A”

*City of Perth By-Law No.80, 1962 - Removal and Disposal of Obstructing Animals or Vehicles*, ss.7, 8 and 12;

*City of Perth Parking Facilities 1956-1965*, s.21;

*Customs Act, 1901-1965*, (Commonwealth), ss.72, 276 and 277;

*Firearms and Guns Act, 1931-1966*, s.11A;

*Fremantle Port Authority Act, 1902-1965*, ss.29 and 35;

*Government Railways Act, 1904-1967*, ss.30, 31, 32 and 33;

*Hire-Purchase Act 1959*, s.26;

*Innkeepers Act, 1887*, s.1 (51 Vict. No.16);

*Jetties Act, 1926-1965* (Regulation made under...) Reg. 27;

*Metropolitan (Perth) Passenger Transport Trust, 1957-1966*, (and Regulations made under...) s.75A, and Reg. 66;

*Pawnbrokers' Act, 1860-1948*, ss.5 and 6;

*Police Act, 1892-1967*, ss.74, 75 and 76;

*Shipping and Pilotage Act, 1967*, ss.5 and 6;

*Warehousemen's Liens Act, 1952-1954*, (and Regulations made under...) ss.4, 9 and 10, and Regs. 4 and 5.

## APPENDIX "B"

### A. UNITED KINGDOM

#### **Disposal of Uncollected Goods Act, 1952**

The Act gives a power of sale to bailees in circumstances where previously only a lien existed. It provides that, subject to agreement and to certain conditions imposed by the Act, bailees of goods accepted in the course of business for repair or other treatment may sell the goods if the bailee fails to pay or tender the charges or to take delivery or give directions as to delivery. The conditions imposed by the Act include the following: a notice drawing attention to the Act and the right of sale thereunder must be displayed on the bailee's business premises; the bailee must duly give the bailor prescribed notices (i) that the goods are ready for re-delivery, (ii) that the bailee intends to sell them; twelve months must elapse between the first and second notice, and fourteen days between the second notice and the sale; the right of sale is suspended during dispute as to the charges or as to the manner in which the repair or treatment has been carried out.

The following points are worthy of notice:

- (a) A dispute will suspend the right of sale only if it arises before the bailee has given notice of his intention to sell; in addition to the usual modes of determining a dispute, the Act adds a new procedure by allowing the bailee to serve on the bailor "a notice to treat the dispute as determined"; unless within one month of service the bailor objects, the dispute is treated as determined for the purposes of the Act.
- (b) The application of the Act is restricted to goods accepted by the bailee for repair or other treatment in the course of a business comprising the acceptance by him of goods of that class for repair or other treatment (whether or not the repair or other treatment is effected by him) wholly or mainly from persons who deliver the goods to him otherwise than in the course of a business. All other relationships are excluded.

- (c) The bailee must sell the goods by public auction unless in his notice to the bailor of intention to sell he has stated the lowest price which he is prepared to accept on a sale of the goods.
- (d) A special procedure involving the publication of notices in the press is provided to cover cases where the bailment occurred before the Act and the bailee is unaware of the address of the bailor.
- (e) A full record of the sale must be kept by the bailee for a period of six years, and be made available for inspection by the bailor on request within that time; any surplus of moneys is recoverable by the bailor.

## **B. VICTORIA**

### **Disposal of Uncollected Goods Act, 1961-1964**

The Victorian Act follows closely the United Kingdom Act, with the following changes:-

- (a) The bailee cannot avail himself of the provisions of the Act if he had notice of a hire-purchase agreement prohibiting the bailor from creating a lien on the goods.
- (b) All persons known to the bailee to have or to claim an interest in the goods must be notified of the bailee's intentions as fully as the bailor.
- (c) The twelve months that must elapse before a sale can be made is reduced to nine.
- (d) Notice of intention to sell must be published in the press.
- (e) Goods can only be sold by auction. A bona fide buyer acquires a good title notwithstanding any defect in the bailor's title or any prior failure of the bailee to comply with the provisions of the Act. The rightful owner is not entitled to the return of the goods but only to the proceeds of the sale.

- (f) If the goods to be sold are a motor vehicle, the bailee must, before the sale, obtain from the Commissioner of Police a certificate that the vehicle is not listed as stolen.
- (g) After the sale the bailee must pay any surplus moneys into a special savings bank account. Twelve months later any such moneys not claimed by the bailor must be transferred with interests earned to the Receiver of Revenue.
- (h) **The Amendment Act of 1964**

The parent Act did not provide for a tow truck operator who, at police request, had moved a damaged vehicle. He had no lien over the vehicle, and did not come within the class of bailees protected by the Act. The amendment assimilates him to a bailee of goods accepted under the Act.

## C. **NEW SOUTH WALES**

### **Disposal of Uncollected Goods Act, 1966**

New South Wales gives two distinct solutions to the problem:

1. In its first approach it reproduces with minor modifications the provisions of the United Kingdom and Victoria Acts combined regarding the right to sell goods bailed for repair or other treatment. The modifications are as hereunder: -

- (i) The twelve or nine months that must elapse before goods can be sold is reduced to six;
- (ii) In case of dispute, where a bailor served with a "notice to treat the dispute as determined" objects, the United Kingdom and Victoria Acts leave the ensuing procedure to other modes of settling disputes available in those jurisdictions, - whereas in the New South Wales Act either party may apply to the Magistrates Court, and the Court may make an award; the dispute is treated as having been determined on the date of the order.

2. In its second approach, in a separate Part of the Act, New South Wales introduces a new development. It grants to the bailee a right to apply to the Court for an order to sell the goods and extends the types of bailment where such right is exercisable, namely:-

(i) All bailments of goods accepted for repair or treatment in the course of a business, and in respect of which the earlier part of the Act entitles the bailee to sell the goods without order of Court;

{ii) All other bailments of goods accepted for reward;

{iii) All bailments of goods accepted not for reward.

3. The Act also treats the tow truck operator separately. It does not assimilate him to a bailee, as done by the Victoria Act, but gives him specific right to apply to Court for an order to sell if the goods are in his possession. If possession has passed to a repairer, the Act gives to that repairer, or, where appropriate, to the repairer jointly with the truck operator, the right to apply for the Court order.

4. The Act goes on to make detailed consequential provisions as to procedure and powers of the Court on such an application. It may be underlined that an order shall prohibit the sale of the goods before six months from the date of the order and that the Court can, it seems, order the goods to be sold otherwise than by public auction.

## **D. QUEENSLAND**

### **The Disposal of Uncollected Goods Act, 1967**

1. In its treatment of this problem the Queensland Act has three important features:-

(a) Firstly, reverting to the same principle embodied in the United Kingdom and Victoria Acts, it restricts the application of the Act only to bailees accepting goods *in the course of a business*. It ignores therefore the two other classes of bailees brought in by New South Wales mentioned in C-2 (ii) and (iii) above,

which can conceivably include bailees accepting goods *not* in the course of a business;

- (b) Secondly it excludes from the Act a tow truck operator receiving a vehicle from the police or other third party. But it still gives relief to the operator dealing directly with the actual owner by enlarging the phrase "for repair or other treatment" of earlier Acts to "for inspection, custody, storage, repair and other treatment", and defining those words to include "transport and towing" wherever applicable;
- (c) There can be no sale without a Court order where the bailee's charges exceed \$100.

2. Subject to the above remarks, in that part of its Act dealing with the right to sell where no Court order is required, Queensland follows the New South Wales provisions.

3. Queensland keeps the New South Wales innovation of granting to the bailee - and in this case "bailee" is restricted to a bailee accepting goods in the course of a business - a right to apply to the Court for an order to sell. But whereas in New South Wales a bailee can apply to the Court immediately after a bailor fails to meet his obligations, in Queensland the procedure is twofold:-

- (a) the bailee must have followed the same procedure required if he had wanted to sell without Court order, up to and including the delay of 6 months after service of the notice that goods are ready for re-delivery, before he is entitled to apply to the Court; and
- (b) he can have recourse to a special procedure available to him at any time, by giving a specified notice to the bailor and other interested parties and publishing that notice in the press not less than 28 days before making his application to the Court.

4. Two further provisions of the Queensland Act to be noted are:-

- (a) Any person claiming an interest in the goods may pay the bailee's charges before sale; and the bailee, if satisfied of that person's title to possession, is entitled to deliver the goods to him;
- (b) The Act provides that a covenant shall be implied in every bill of sale in respect of any goods in favour of the grantee to the effect that any payment made by him in relation to those goods under (a) above shall be added on to the principal moneys secured by such bill of sale.

## **E. TASMANIA**

### **Disposal of Uncollected Goods Act, 1968**

The Tasmania Act's main contribution relates to two matters:-

- (a) It does away with the need for the bailee to put up notices on his business premises
- (b) It adopts the classes of bailees already discussed in the New South Wales Act and mentioned at C (2) (ii) and (iii) above.