

Discussion Paper

Review of the *Unclaimed Goods Act 1987*

16 January 2024



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Purpose

The South Australian Attorney-General's Department is undertaking consultation on potential reforms to the *Unclaimed Goods Act 1987* (the Act) and the *Unclaimed Goods Regulations 2013* (the Regulations).

A copy of the Act and the Regulations can be downloaded from the South Australian legislation website, <https://www.legislation.sa.gov.au/>.

Submissions

Feedback is sought on the specific topics discussed in this paper. Comments are also welcome on any other issues that you wish to raise.

Submission can be sent to LLPSubmissions@sa.gov.au, addressed to the Director of Legislative Services, Attorney-General's Department.

Submissions will be received until 16 February 2024.

When making a submission, please indicate:

1. whether the submission should be kept confidential; and
2. if so, the reasons why it should be kept confidential.

Please be aware that, unless a request for confidentiality is made, information contained in any submission may be referred to publicly or published. Any material identified as 'confidential' is still subject to the *Freedom of Information Act 1991* and, while efforts will be made to keep the material confidential, in some circumstances it may be disclosed under the *Freedom of Information Act 1991*. Where disclosure of information may identify you attempts will be made to consult with you under the *Freedom of Information Act 1991* before the documents are disclosed.

Introduction

When a person (the bailee) comes into possession of goods belonging to another, it is expected that they retain and take reasonable care of the goods pending its collection by the owner or person who bailed the goods (the bailor, referred to in this discussion paper as ‘the owner’ for ease of reference). The Act provides a process by which a bailee may sell or dispose of goods that are abandoned or have not been collected by the owner. A bailee who disposes of unclaimed goods without the consent of the owner, and who does not follow the process set out in the Act (or another Act that applies to the particular situation), risks the owner taking legal action against them.

A bailee may come into possession of goods belonging to another in a number of ways. If they are a business, the owner may have left the goods in their possession for a specific purpose such as for inspection, storage, cleaning, repair or other treatment. An individual may have agreed to temporarily look after goods for a friend or family member. Alternatively, goods may have been abandoned on premises such as in a private car park, or left behind by a former housemate or employee. A person in possession of goods belonging to another may be considered a bailee under the Act even if they did not agree to the bailment.

The Act provides a process for a bailee to sell or otherwise dispose of goods without risk of legal action from the owner.

In certain circumstances there may be other lawful ways for a bailee to dispose of goods that are not collected by the owner. Section 10 of the Act makes clear that the Act does not affect a bailee’s right to dispose of goods in accordance with any other Act.

For example:

- The *Residential Tenancies Act 1995* provides an alternate process for landlords to dispose of property that has been abandoned by a tenant after the landlord regains possession of the premises.
- The *Worker’s Liens Act 1893* provides a process for a worker who performs work on personal property at the request of the owner to sell the property in order to recover the debt for work done.
- The *Passenger Transport Regulations 2009* enable a passenger transport operator to dispose of property abandoned on public transport.

The Government has identified the need to review the Act to ensure that it remains fit for purpose.

The Act commenced in 1987. In 2013, the scales of value, which provide thresholds for categorising lower, mid-range and higher value goods, were increased via the Regulations. The legislation has otherwise remained substantially unchanged since coming into operation.

Since the commencement of the Act, there have been significant advancements in electronic communications and changes in the way that businesses and consumers

interact. A number of other Australian jurisdictions have reviewed their unclaimed goods legislation in recent years, and in doing so have updated their legislation to reflect modern forms of communication and business practices.

The Government has also received feedback that the waiting periods prescribed in the Act create an unreasonable burden for businesses and other bailees to retain goods for lengthy periods of time. Feedback has also indicated that the notice requirements and prescribed methods of disposal or sale of goods are overly cumbersome, imposing undue cost and inconvenience on bailees.

If the regulatory burden imposed by the Act is too onerous, bailees may be more likely to sell or dispose of goods other than in accordance with the Act despite the risk of legal action from the owner. On the other hand, owners may have legitimate reasons for failing to collect goods or being uncontactable. It is therefore necessary for the legislation to maintain appropriate levels of protection for owners of goods. The legislation should strike a reasonable balance between the interests of bailees, owners and other persons who may have an interest in goods.

This discussion paper provides an overview of the current legislative requirements for selling or disposing of unclaimed goods under the Act, and sets out potential areas for reform. The Attorney-General's Department is seeking feedback from a range of stakeholders, including Government agencies, interest groups, businesses and members of the public on the specific reform topics identified in the discussion paper. Stakeholders are also invited to provide any other information or feedback they consider relevant.

Summary of position under the Act

What are 'unclaimed goods'

Section 5 of the Act defines when goods are considered 'unclaimed goods' for the purposes of the Act.

Under s 5(a) of the Act, if goods were received pursuant to an agreement which specified when they were to be collected, the goods become unclaimed goods if the owner fails to collect them at the agreed time or within the agreed period.

Under s 5(b) of the Act, if goods were received pursuant to an agreement which specified that the bailee was to deliver them to the owner, the goods become unclaimed goods if the bailee, after making reasonable attempts to do so, has not been able to deliver them in accordance with the agreement.

Under s 5(c) of the Act, if there is no agreement governing the collection or delivery of goods, the bailee must request the owner to collect the goods by post or, if the identity or whereabouts of the owner is unknown, by notice published in a newspaper circulating generally throughout the State. The goods become unclaimed goods if the owner refuses to collect them or has failed to collect them within 42 days of the date of the request.

Waiting period

Section 6 of the Act requires the bailee to wait for 3 months (in addition to the 42 day notice period in s 5(c), if applicable) before taking steps to sell or dispose of the unclaimed goods.

Disposal of goods

Section 6 of the Act sets out the process for sale or disposal of unclaimed goods. The process varies depending on the value of the goods.

Goods valued at \$500 or less (scale 1 goods) may be sold by any method or, if the value of the goods would be insufficient to defray the costs of sale, may otherwise be disposed of.

Goods valued between \$500 and \$2000 (scale 2 goods) may be sold by public auction. Before selling unclaimed goods by public auction, the bailee must notify the owner and the Commissioner of Police of the time and place of the proposed sale, in the prescribed form, at least one month before the auction. If the identity or whereabouts of the owner is unknown, the notice to the owner may be given by advertisement in a newspaper circulating generally throughout the State. Alternatively, the bailee may apply to the Court for authorisation to sell or dispose of the goods.

Goods valued at more than \$2000 (scale 3 goods) may only be sold or disposed of with authorisation of the Court. Notice of the application to the Court must be given to the

Commissioner of Police, the owner and any other person who, in the opinion of the Court, may have an interest in the goods.

Proceeds of sale

The bailee is entitled to retain certain costs from the proceeds of sale. This includes the reasonable costs of the sale and of proceedings under the Act, the reasonable costs of storing and maintaining the goods prior to sale and the amount of any lien over the goods. The balance must be paid to the State Treasurer.

Discussion

Collection period before goods become ‘unclaimed goods’

The collection period of 42 days in s 5(c) of the Act before goods are considered ‘unclaimed goods’ may place an unnecessary burden on the bailee. No other jurisdiction has such a lengthy collection period before goods are deemed as unclaimed.

In the majority of other Australian States and Territories, unclaimed goods legislation does not specify a collection period where there is no agreement between the bailee and the owner regarding collection or delivery of goods. Goods become unclaimed when certain criteria are met – for example, if the bailee can reasonably expect to be relieved of any duty to safeguard the goods on giving notice to the owner but cannot locate or communicate with them, or if the owner is notified that the goods are ready for delivery but fails to pay charges owed within a reasonable time.

In the Australian Capital Territory, where there is no agreement regarding collection, goods become unclaimed where the owner has failed to comply with a request to collect goods within 7 days.

South Australia could consider adopting criteria similar to the majority of States and Territories or could retain the current language but consider reducing the collection period in s 5(c).

Notice of intent to dispose of goods

If there is no agreement regarding the collection or delivery of goods, the bailee must (in accordance with s 5(2) of the Act) provide the owner with a notice of request for collection of goods in the prescribed form. The prescribed form in Schedule 1 of the Regulations makes clear to the recipient that goods that remain uncollected may, after 3 months, be sold or disposed of in accordance with the Act.

However, there is no such notice requirement where goods become unclaimed under s 5(a) or (b) – i.e. where the owner does not collect goods within the agreed timeframe or the bailee was unable to deliver the goods as agreed. In these circumstances, the Act permits scale 1 goods to be disposed of without any requirement to give prior notification to the owner. For higher value goods there is a requirement to provide a notice of intention to sell at public auction or notice of a court application, but these only apply after the completion of the 3-month waiting period.

A requirement could be introduced in the Act for a bailee to give the owner a notice of intent to dispose of goods prior to the commencement of the waiting period. Such a notice would make clear that goods that remain uncollected may, after 3 months, be sold or disposed of in accordance with the Act. An earlier notice requirement may prompt owners to collect items earlier, saving the time and expense of retention for the waiting period.

Method of service for private notices

The Act requires private notices to be delivered by post addressed to the last known address of the owner.

South Australia could consider modernising this requirement to include other methods of written communication such as email or text message.

Public notice requirement

If the identity or whereabouts of an owner is unknown, the Act requires the bailee to provide notification to the owner by publishing a notice 'in a newspaper circulating generally throughout the State'. This applies to the initial request to collect goods under s 5 of the Act, as well as the requirement to notify the owner of the time and place of public auction under s 6 of the Act.

A simple way to modernise this requirement would be to require publication of the notice in the public notice section of an in-print or online newspaper operating within South Australia.

Alternatively, it may be considered that the requirement to publish a notice publicly does not serve any functional purpose and is an unnecessary expense, particularly for lower value goods. The average consumer or a person who has bailed goods in a non-commercial context is highly unlikely to regularly monitor newspapers or online public notice boards for such notices. Publication in a newspaper or other public forum may assist to notify other persons who may have an interest in the goods (such as finance companies) of a bailee's intention to sell the goods. However, an alternate requirement for bailees to search the Personal Property Securities Register (PPSR) and give notice to persons with a security interest over the goods may be quicker and more cost-effective mechanism to protect the interests of such persons.

Personal Property Securities Register

South Australia could consider introducing a requirement for bailees to search the PPSR before selling or disposing of unclaimed goods. This requirement could be introduced for all goods, for goods above a certain value, and/or for special categories of goods such as motor vehicles.

A PPSR search may reveal important information, such as whether a vehicle is stolen, damaged or written off. It may also enable bailees to identify any persons with a registered interest in goods, and to notify them of their intention to dispose of the goods in accordance with the Act. Pursuant to s 9 of the Act, a person who purchases goods that are sold in accordance with the Act acquires good title to the goods, free of any mortgage, lien or charge unknown to the purchaser at the time of sale. A requirement to conduct a PPSR search may therefore protect the interests of persons with a registered interest in goods. It may also reduce or remove the need for bailees to publish a public notice in a local newspaper.

The cost to search the PPSR is currently \$2, making it a comparatively inexpensive way of protecting the interests of persons with registered security interests over goods.

Scales of value

The process for sale or disposal of unclaimed goods in accordance with the Act differs depending on the value of the goods. In accordance with s 13 of the Act, the Regulations provide for the following scales of value:

- Scale 1 – \$500 or less
- Scale 2 – Between \$500 and \$2000
- Scale 3 - \$2000 or more

Scales of value differ in unclaimed goods legislation across Australian States and Territories. A number of jurisdictions set a lower scale 1 value (or equivalent) than in South Australia such as 'less than \$200'. Conversely, the scale 3 value (or equivalent) in most other jurisdictions is higher than in South Australia, with New South Wales setting the highest scale 3 value of 'at least \$20,000'.

South Australia could consider adjusting the scales of value in the Regulations. This may include increasing scales of value to account for inflation and/or reducing the scale 1 value limit to facilitate the adoption of a simpler process (including reduced waiting periods and flexible methods of disposal) for lower value items.

Waiting period

The Act imposes a blanket 3-month waiting period before a bailee may sell or dispose of unclaimed goods.

The purpose of the waiting period is to protect the interests of owners who may not be contactable or are unable to immediately collect their belongings. However, storage of goods for 3 months may be costly and inconvenient, especially for bulky items such as vehicles, furniture or whitegoods.

A number of other Australian jurisdictions specify different waiting periods based on the value of goods. South Australia could consider adjusting the required waiting period, including potentially adopting a shorter waiting period for scale 1 and/or 2 goods. Consideration could be given to retaining the 3-month waiting period in circumstances where the identity or whereabouts of the owner is unknown, particularly if the public notice requirement is removed.

Methods of sale or disposal

Historically, sale by public auction has been required to dispose of unclaimed goods on the basis that it is more likely to achieve market price than private sale. Sale by public auction may avoid practical difficulties that might be experienced by a bailee in predetermining the value of the goods. However, the prevalence of private online marketplaces has widened the group of people that goods can be marketed to by

private sale. Public auctions can be costly, time consuming and impractical, especially for bailees in regional or remote areas. A requirement to sell goods by public auction may also result in goods that remain unsold being unable to be disposed of.

The requirement to notify the Commissioner of Police before selling scale 2 or 3 goods appears to safeguard against the sale of stolen goods. However, this requirement may be of limited value for goods that are not clearly identifiable by registration numbers or unique markings. Further, a PPSR search may now identify whether a motor vehicle is stolen.

South Australia could consider simplifying the process for sale or disposal of unclaimed goods, including by:

- allowing more flexibility in the method of sale for scale 1 and 2 goods, including allowing sale by private treaty for fair market price;
- allowing scale 1 goods to be sold or disposed of by any means, or be appropriated by the bailee; and/or
- reviewing the necessity to notify the Commissioner of Police prior to the sale of scale 2 goods.

Separate provisions for disposal of special categories of goods

Unclaimed goods legislation in several other States and Territories contains separate provisions for the disposal of special categories of goods, including perishable items, personal documents and motor vehicles.

The Act could be amended to include a simpler process for disposal of perishable items. For example, the Act could permit the sale or disposal of perishable items after a reasonable time has lapsed following notice being given.

A separate process could also be adopted for personal documents, including birth certificates, passports, financial statements, licences or photographs. This could include a reduced waiting period and requirements to dispose of documents in a manner that protects the security of the owner's personal information. For example, bailees could be required to return a document to the authority that issued it or destroy it by way of a secure destruction method.

South Australia could also consider adopting special provisions for motor vehicles, other goods of high value, or goods that cannot reasonably be expected to be retained in the circumstances (for example, where a pet needs to be rehomed or where a person has moved from premises where goods are being stored and cannot take the goods with them or find alternative storage). This could include additional obligations on the bailee or an ability to expedite the process (for example, an ability for the bailee to apply to the court for permission to dispose of property before the expiry of the waiting period).

Record keeping

The Act does not contain a requirement for a bailee to keep records for any period of time following disposal of goods. A number of other Australian States and Territories require records to be kept for a period of time (commonly 6 years), particularly in respect of higher value items.

A requirement could be included in the Act for the bailee to keep a record of information for a certain period after its sale or disposal. Such a record might include a description of the goods, details of the person to whom they were sold, the sale price and the amount retained by the bailee in accordance with s 8 of the Act. A retention period of 6 years would align with the limitation periods that apply to actions in tort or simple contract.

Prior agreement

In most other Australian States and Territories, unclaimed goods legislation makes clear that the provisions apply to the disposal of unclaimed goods where there is no agreement between the parties about their disposal. Adoption of such a clause in South Australia may provide clarity that the Act does not prevent parties from coming to their own agreement about how goods may be disposed of in the event that they are not collected or are unable to be delivered as agreed. This may be particularly beneficial for businesses which regularly receive goods in bailment and are concerned about the cost and inconvenience of retaining unclaimed goods for lengthy periods of time.