



Focus on

Uncollected Goods

Part of the NSW Office of Fair Trading's proposed residential tenancies law reform

December 2007

In its report on New South Wales residential tenancies law, the NSW Office of Fair Trading (OFT) proposes a new regime for dealing with goods left behind at rented premises after the tenant has vacated or been evicted.

The proposed new regime would change the law in a number of respects. The most significant change is the reduction in the period of time for which a landlord is required to store uncollected goods to not more than seven days.

The TU strongly opposes this change. It would allow landlords to dispose of or destroy uncollected goods far too readily, and more tenants would suffer the extraordinary hardship that follows from the disposal or destruction of one's worldly goods.

There are other changes proposed: some are good and some are bad. The proposed new regime would differentiate between uncollected goods in different ways to the current regime. The TU supports some of these ways of differentiating but not others. The proposed new regime would also change the way landlords notify tenants about uncollected goods, and allow landlords to give away uncollected goods rather than sell them. The TU opposes these changes. The proposed new regime would make special provision for uncollected goods that are 'personal documents', and allow a tenant to apply to the Tribunal for compensation where the landlord has unlawfully disposed of the uncollected goods. The TU supports changes along these lines.

We also note that the proposals do not refer to the current provisions that allow landlords and tenants to apply to the Tribunal for orders in relation to uncollected goods. The TU submits that these provisions should be retained, particularly those that allow a tenant to apply to the Tribunal for an order that the goods be delivered up to them.

The OFT analysis

The OFT analysis is mostly occupied with 'the system' for dealing with uncollected goods – particularly the period of time for which landlords are required to store uncollected goods and the process for disposing of those goods – and gives insufficient attention to the circumstances in which the system operates. It is important to understand these circumstances, because they give rise to a number of problems that are not considered in the analysis.

Uncollected goods in context

In the experience of the TU and of the Tenants Advice and Advocacy Services (TAASs), uncollected goods matters are almost always matters in which the tenancy has ended badly. In most cases, the tenant has either been evicted or they have moved out urgently. In many cases, the tenant is just not dealing effectively with their housing or, for that matter, with life generally. This is especially so where the tenant is being evicted: generally speaking, at that point a person's life is going to pieces.

In some of these cases there may be specific reasons why the tenant cannot arrange for the removal of their goods before the end of the tenancy: for example, where the tenant is in hospital or gaol. In other cases, the tenant is just not effectual enough to organise both their own housing and the removal of their goods at the same time. In some cases, the tenant is relying on the help of relatives or charities to remove their goods, who cannot always help exactly when needed.

Furthermore, in many cases the relationship between landlord and tenant has become poor or even acrimonious.

In many of these cases the tenant owes money to the landlord, who might be anxious to recover at least some of the amount owed. In some of these cases, the landlord or agent unlawfully keeps the goods, refusing to deliver them up to the tenant unless the debt is paid, effectively holding the goods to ransom.

In other cases, the landlord might be anxious never to see or speak with the tenant again.

This context means that uncollected goods matters are often highly conflictual, with the tenant often unable, and the landlord sometimes unwilling, to co-operate in the resolution of the matter.

Law reform in a context of high conflict needs to consider more than just the formal operation of the law. It also needs to consider its tactical operation. In particular, we need to ask how landlords might try to bend the rules, or use them to their advantage. We need to anticipate the sorts of things the proposed regime might encourage landlords to do, even when these things are strictly in breach of the regime.

For the landlord who wants to use their possession of the tenants' uncollected goods to extract the payment of monies from the tenant, the practical effect of the proposals would be to ramp up the pressure. For the landlord who wants never to speak to the tenant again, the practical effect of the proposals would be that they avoid the tenant's phonecalls for seven days then take all the goods to the tip.

In terms of its formal operation, the proposed new regime would allow for the lawful disposal of a tenant's goods after such little time as to effectively punish a tenant for being disadvantaged and ineffectual. In terms of its tactical operation, the proposed new regime would give rein to abusive, unlawful conduct.

The proposals

19) the existing obligation on landlords to place public notices in newspapers regarding abandoned or uncollected goods be discontinued along with the general process of removal, storage and sale.

This proposal is of two parts. The first relates to the current regime's requirements about public notices in newspapers where a landlord proposes to sell uncollected goods. The second part relates to the current regime for removing, storing and selling uncollected goods generally, about which OFT goes on to make more detailed proposals (proposals 20-24). The TU will discuss those proposals in turn further below.

The TU opposes the first part of the proposal. It would allow a tenant's property rights, and the property rights of persons who had left their goods in the possession of the tenant, to be extinguished without due process.

The TU accepts that in many instances, newspaper advertisements do not reach the tenant or other persons with an interest in the goods of the landlord's intention to sell the goods. In some instances, however, the notices are successful. The TU understands that this especially the case in regional areas, where local and regional newspapers are still read for this sort of information.

The public notice process is especially important for persons who are third parties with an interest in the uncollected goods. Without public notices, many of these persons would have no information that their goods were at risk of disposal – many of them would not know that the tenancy has ended.

The TU submits that landlords should be required, before they dispose of goods, to take all reasonable steps to contact the tenant and any other party whom the landlord ought reasonably to suspect has an interest in the goods. This suspicion ought reasonably to arise where, for example, goods bear a label indicating that they are the property of another person. As well as this generally stated obligation, landlords should also be required to place a public notice in a newspaper.

20) landlords be given the right to dispose of rubbish left behind by a tenant immediately. Any items which appear to have been accidentally left behind the landlord/agent be required to make an attempt, where possible, to contact the former tenant and make arrangements to collect the items from the premises or elsewhere within a period of no more than 7 days, or as otherwise agreed.

This proposal does two things. First, it proposes new categories of uncollected goods. Secondly, it proposes new provisions for dealing with each category of uncollected goods. We will discuss each of these things in turn.

Differentiating between uncollected goods

The TU submits that the way in which the current regime differentiates between uncollected goods should be reformed. The current regime differentiates between ‘abandoned goods’ (s 79) and ‘goods left behind, but not abandoned’ (s 79A), but the process for dealing with them is, in practice, the same (Part 4 of the *Residential Tenancies Regulation 2006*). It also differentiates on the basis of whether the uncollected goods are perishable, and whether the uncollected goods are of a value equal to or greater than the cost of storage. It does not differentiate on the basis of whether the goods were left uncollected after an eviction (as proposal 21 would), and it does not differentiate on the basis of whether the goods are ‘personal documents’ (as proposal 23 would). The figure below illustrates the different categories of uncollected goods under the current regime, and the period for which a landlord is required to keep the goods.

Figure 1: categories of uncollected goods, per current law

Uncollected goods					
‘Abandoned goods’			‘Goods left behind, but not abandoned’		
Perishable	Value < cost of storage	Value ≥ cost of storage	Perishable	Value < cost of storage	Value ≥ cost of storage
<i>Dispose of immediately</i>	<i>Store for 2 working days</i>	<i>Store for 2 working days + 30 days</i>	<i>Dispose of immediately</i>	<i>Store for 2 working days</i>	<i>Store for 2 working days + 30 days</i>

The proposed new regime would differentiate between uncollected goods on a different basis. The figure below illustrates the different categories of uncollected goods proposed by proposals 20, 21 and 23, and the periods for which a landlord is required to keep the goods.

Figure 2: categories of uncollected goods, per OFT proposals

Uncollected goods				
Goods left behind after eviction		Goods left behind after tenant vacates		
Personal documents	Other goods	Personal documents	'Rubbish'	'Appear to have been left behind accidentally'
<i>Store for 30 days</i>	<i>Store for 7 days</i>	<i>Store for 30 days</i>	<i>Dispose of immediately</i>	<i>Store for 7 days</i>

The TU submits that the differentiation in proposal 20, which relates to 'rubbish' and goods that 'appear to have been left behind accidentally', is badly conceived. It confuses two quite different ways of differentiating between goods. The 'rubbish/not rubbish' dichotomy is not the same as the 'apparently accidentally left behind/not apparently accidentally left behind' dichotomy. Consider, for example, a horse left behind at premises: it is unlikely to be considered rubbish, but it is unlikely to be left behind accidentally, in the sense that the horse has been forgotten or mislaid.¹

Neither of these two ways of differentiating between goods is really satisfactory. It is not clear whether the test as to whether a thing is 'rubbish' is subjective or objective. A subjective test would ask whether, in the view of the particular landlord in this case, the goods were rubbish. This is not an appropriate test. An objective test would be more appropriate, but it is still not clear what the test is precisely: for example, the test might ask if a reasonable person would consider the goods to be rubbish; alternatively, it might ask if the goods are without economic value.

The 'appears to have been left behind accidentally' test is even less satisfactory. Again it is not clear whether the test is subjective or objective. Even if it is objective, the test requires an assessment of the intentions or state of mind of the tenant, and this may be difficult to do. To take again the example of a horse: although it is not likely to be left behind because it is forgotten, is it left behind accidentally if its removal was prohibited under equine influenza restrictions? Is it left behind accidentally if the tenant cannot move it because they did not book a horse float in time?

The TU submits that the aim of the law should be to keep available for collection, for a reasonable time, goods that may be valuable to the tenant. We submit that it is appropriate to differentiate, on an objective basis, goods of value from goods without value. The law should make clear that goods of value are goods with an

¹ For a example (albeit a non-tenancy example) of a former occupier giving vacant possession of premises to a new occupier and leaving behind – not accidentally – a number of horses, see *Fitzgerald v Kellion Estates Pty Ltd* [1977] 2 BPR NSWSC 97095.

economic value, and goods without economic value that a reasonable person would consider to be of sentimental value.

The TU’s preferred categories of uncollected goods are illustrated in the following figure. It has features of both the proposed new regime and the current regime. In particular, it retains the category ‘perishable goods.’ This reflects the fact that the longer period of storage proposed by the TU may not be appropriate to perishable goods.

Figure 3: categories of uncollected goods, per TU proposals

Uncollected goods						
Goods left behind after eviction			Goods left behind after tenant vacates			
Personal documents	Perishable goods	Other goods	Personal documents	Perishable	Goods without value	Goods of value
<i>Store for 90 days</i>	<i>Dispose of immediately</i>	<i>Store for 21 days</i>	<i>Store for 90 days</i>	<i>Dispose of immediately</i>	<i>Store for 7 days</i>	<i>Store for 21 days</i>

Dealing with uncollected goods

The TU submits that the proposed new regime requires too little of landlords in relation to their dealings with uncollected goods. The proposal would allow landlords and agents to dispose of ‘rubbish’ immediately, and without any obligation to first attempt to contact the tenant. The proposal would allow landlords and agents to dispose of goods that ‘appear to have been left behind accidentally’ after seven days, and would require only that the landlord or agent ‘make an attempt, where possible, to contact the former tenant.’

The TU submits that landlords and agents should be required to attempt to contact the tenant in relation to any uncollected goods. This obligation should not be subject to the qualification ‘where possible’. In terms of the categories proposed by the TU, goods without value should be kept for seven days, and goods of value for 21 days. We note that the current timeframe (for goods whose value is equal to or greater than the cost of storage) is 32-34 days (two working days before storage plus 30 days storage).

21) in the event that a tenant is evicted by a sheriff they be given a period of no more than 7 days from that date, unless otherwise agreed, to collect their possessions from the property.

As indicated above, the TU supports treating differently goods left behind after eviction. We consider, however, that the proposed timeframe – seven days for all goods of this category – is too short. As we indicated above, persons who have been

evicted are generally not coping. Many persons who are evicted rely on family, friends or charities to remove and store their goods, and they may not be able to act within seven days of the eviction.

As noted above, the current timeframe for goods is 32-34 days. If it is to be reduced, the TU submits that the timeframe for goods of this category, other than perishable goods and personal documents, should be 21 days. Perishable goods may be disposed of immediately. We also submit that the landlord or agent should be required to attempt to contact the tenant about the uncollected goods.

22) in any situation if the former tenant cannot be contacted or does not collect goods within the permitted timeframe the landlord / agent should be able to give the uncollected goods to a charitable organisation or otherwise dispose of them in a lawful manner.

The TU strongly opposes the proposal. It would allow goods to be given away regardless of their value. It would also invite landlords to use charities and op-shops as dumping grounds for uncollected goods.

The TU submits that the law should allow landlords in possession of uncollected goods after the relevant time period has elapsed to dispose of goods without value by giving them to a charitable organisation, if the organisation agrees to take them, or destroying them. Where the goods are goods of value, the law should require that the goods be sold, and the proceeds of the sale be accounted to the tenant, less the cost of storage, removal and sale.

Also, the TU notes that there is an ambiguity in the present wording of the proposal. It is unclear whether the qualification 'within the permitted timeframe' applies where 'the former tenant cannot be contacted.' The TU submits that the law should make clear that a landlord may dispose of uncollected goods only after the time period relevant to that category of goods has elapsed.

23) notwithstanding the above proposals, whenever a tenancy is ended and defined 'personal documents' are found (ie photos or official documents such as a passport or birth certificate) the landlord / agent be required to store them in a safe place until claimed by the former tenant or 30 days has elapsed.

The TU supports reforming the law so that personal documents are treated differently from other uncollected goods, but submits that they should be stored longer than 30 days. These documents tend to be relatively small and capable of being stored at little or no cost. We submit that three months is appropriate.

The TU also submits that the law should provide that after this period has elapsed, the personal documents may be disposed of by returning them to the agency that issued them or, if no such agency exists, destroying them. Personal documents should not be given away or sold.

24) the Tribunal be given the jurisdiction to hear the estimated small number of claims for compensation where abandoned/ uncollected goods are unlawfully dealt with.

The TU supports the proposal. It would correct a deficiency in the current law, which provides that a landlord is liable to compensate the tenant for unlawfully dealing with the tenant's goods, but because the liability is in tort, the tenant must sue through the courts. The proposal would allow liability of this sort to be determined in the more accessible forum of the Tribunal. In some cases there might be other liabilities arising out of the tenancy that might be determined jointly.

The TU submits that compensation orders should be made available in addition to the current orders for uncollected goods to be delivered up to the tenant. We also submit that landlords who do not comply with the law in relation to uncollected goods should be guilty of an offence, and liable to substantial penalties.