

Consumer Law Reform Additional Paper – October 2010

Layby Sales

- 1 This paper provides further analysis of the option to provide for layby sales regulation in the Fair Trading Act 1986 (FTA). In June 2010, the Ministry of Consumer Affairs released the discussion paper *Consumer Law Reform*. The discussion paper suggested regulation of layby sales using a principles-based approach. It noted the Australian Consumer Law (ACL) could provide an appropriate model approach.

Current Regulation of Layby Sales

- 2 A layby sale takes place when a consumer pays instalments towards the cost of a good but does not take possession of the good until the full cost has been paid. For consumers, layby sales are a means of managing payments for goods that may not be affordable in a single transaction.
- 3 At present, layby sales are regulated under the Layby Sales Act 1971 which is formally deemed to be part of the Sale of Goods Act 1908. The Layby Sales Act provides specific binding rules for layby sales that modify certain Sale of Goods Act provisions¹. The Layby Sales Act therefore provides greater protection for consumers purchasing goods through layby than would apply under normal contract law, and other specific consumer laws.

Ongoing Regulation of Layby Sales

- 4 The objective of layby sales regulation is to manage the inherent risks of a layby sale to the parties. These risks include: to the seller - that the consumer may not complete the transaction and in the meantime the good has depreciated; and to the consumer - that the goods are unavailable when the final payment is made, retention of the instalment money by the seller if the consumer cancels the agreement before the final payment is made, and the seller becoming insolvent.
- 5 The National Consumer Survey 2009 showed that layby sales are still a popular form of transaction. The Consumer Law Reform discussion paper concluded that based on available information layby sales regulation continues to fulfil a useful function. About 15% of submitters on the discussion paper commented on layby sales with all supporting the need for continued regulation.
- 6 The Consumer Survey indicated that there were few problems with laybys, and where problems did arise they were satisfactorily resolved with the retailer. However, submitters to the Consumer Law Reform discussion document

¹ The Sale of Goods Act can be contracted out of, but the Layby Sales Act cannot be.

indicated that problems with layby sales still exist. For example, the Commerce Commission stated that, despite having no enforcement role for laybys, it gets a number of enquiries and complaints - between January 2009 and January 2010 the Commission received approximately 20 enquiries/complaints. The Citizens Advice Bureaux received 17 enquiries and complaints within a 3 month period (1 July 2010 to 30 September 2010). The majority of the complaints involved seller refusal to refund the instalments when a consumer cancels the contract.

- 7 The discussion paper sought comments on incorporating layby sales regulation into the Fair Trading Act and taking a principles-based rather than prescriptive approach to layby sales regulation.
- 8 Most of the submitters commenting on layby sales supported having layby sales regulation in the Fair Trading Act, in particular so that breaches could be handled by the Commerce Commission and the Disputes Tribunal². There was also support for having a principles-based approach to layby sales regulation. Several submitters, however, noted that if layby sales regulation is incorporated into the Fair Trading Act, there should be no reduction in the protections provided currently in the Layby Sales Act. A small number of submitters felt that both consumers and traders required some specific provisions so that the obligations were unequivocal.
- 9 The discussion paper suggested that there could be benefits in looking at the Australian Consumer Law's approach to layby regulation. The Australian provisions are as follows:

96 Lay-by agreements must be in writing etc.

- (1) A supplier of consumer goods who is a party to a lay-by agreement must ensure that:
 - (a) the agreement is in writing; and
 - (b) a copy of the agreement is given to the consumer to whom the goods are, or are to be, supplied.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.
- (2) A supplier of consumer goods who is a party to a lay-by agreement must ensure that the agreement is transparent.
- (3) A **lay-by agreement** is an agreement between a supplier of consumer goods and a consumer for the supply, in trade or commerce, of the consumer goods on terms (whether express or implied) which provide that:
 - (a) the goods will not be delivered to the consumer until the total price of the goods has been paid; and
 - (b) the price of the goods is to be paid by:
 - (i) 3 or more instalments; or
 - (ii) if the agreement specifies that it is a lay-by agreement—2 or more instalments.
- (4) For the purposes of subsection (3)(b), any deposit paid by the consumer for the consumer goods is taken to be an instalment.

² The Commerce Commission suggested layby sales regulation may be more appropriate in the Credit Contracts and Consumer Finance Act 2003.

97 Termination of lay-by agreements by consumers

- (1) A consumer who is party to a lay-by agreement may terminate the agreement at any time before the consumer goods to which the agreement relates are delivered to the consumer under the agreement.
- (2) A supplier of consumer goods who is a party to a lay-by agreement must ensure that the agreement does not require the consumer to pay a charge (a *termination charge*) for the termination of the agreement unless:
 - (a) the agreement is terminated by the consumer; and
 - (b) the supplier has not breached the agreement.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

- (3) A supplier of consumer goods who is a party to a lay-by agreement must ensure that, if the agreement provides that a termination charge is payable, the amount of the charge is not more than the supplier's reasonable costs in relation to the agreement.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

98 Termination of lay-by agreements by suppliers

A supplier of consumer goods who is a party to a lay-by agreement must not terminate the agreement unless:

- (a) the consumer who is a party to the agreement breached a term of the agreement; or
- (b) the supplier is no longer engaged in trade or commerce; or
- (c) the consumer goods to which the agreement relates are no longer available.

Note: A pecuniary penalty may be imposed for a contravention of this section.

99 Effect of termination

- (1) If a lay-by agreement is terminated by a party to the agreement, the supplier must refund to the consumer all the amounts paid by the consumer under the agreement other than any termination charge that is payable under the agreement.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.
- (2) The supplier is entitled to recover any unpaid termination charge from the consumer as a debt if the amounts paid by the consumer under the lay-by agreement are not enough to cover the charge.
- (3) If a lay-by agreement is terminated by a party to the agreement, the supplier is not entitled to damages, or to enforce any other remedy, in relation to that termination except as provided for by this section.

- 10 These provisions provide a principles-based approach to layby regulation. There is also a degree of prescription, for example that there must be a layby sale agreement. The paper now discusses the key aspects of layby sales regulation with reference to the Australian approach and the regulatory requirements of the Layby Sales Act under the following headings:

- What is a layby? - deposit vs instalment
- Value of laybys
- Title/Passing of risk (section 6)

- Statements (section 7)
 - Buyer cancellation – selling costs (section 8)
 - Seller cancellation
 - Requirement for written contracts
 - Insolvency
 - Enforcement
- 11 Including layby sales regulation in the Fair Trading Act is not intended to reduce the rights or obligations of consumers and traders (unless those rights and obligations are found to be outdated or ineffective). The Ministry of Consumer Affairs' analysis suggests existing rights or obligations can be retained through principles-based provisions in the Fair Trading Act.

What is a layby? – deposit vs instalments

- 12 As noted, a layby sale is where a purchase price for a good is paid by a number of part-payments and the goods are held by the seller until the purchase price is completely paid. The length of time to complete payment is agreed between the seller and the consumer (such as 3 months), as is the amount of each part-payment. The consumer can pay the outstanding price early with no penalties, and no interest is charged on such transactions. If a consumer cancels the agreement, then they must be refunded all their payments less any selling costs that the seller may incur through the cancellation.
- 13 Payments towards a layby sale are termed “instalments”. The first payment of an instalment is not considered a deposit, but as the first part-payment.
- 14 Historically, the term “deposit” means a non-refundable payment which is security for the completion of the contract – and this money can be forfeited as damages to the seller if the buyer cancels the contract. It is a sign of good faith and a protection for the seller (historically called an “earnest”), and it is not a refundable part-payment of the purchase price.
- 15 The Australian Consumer Law clearly states that three or more part-payments must be considered a layby sale, but recognises that two payments may be either a deposit/final payment arrangement or a layby sale, depending on the intention of the parties. Therefore, they allow a two payment arrangement to be a layby if it is stated in the layby agreement.
- 16 Many of the submitters to the discussion paper that commented on layby sales supported the Australian approach, as they recognised the intention of the parties was important, and that it would be incorrect to capture agreed deposit/final payment contracts as laybys as they are different contractual arrangements.
- 17 Several submitters were concerned that there may be an intention for a layby sale between parties, but there may be no layby sale agreement, meaning the first part-payment will be considered a deposit and therefore non-refundable on cancellation of the contract. This concern should be mitigated by the

recommendation to have a written agreement for all layby sales, as discussed below.

Value

- 18 There is no limit on offering laybys for any value of goods, but the rights and obligations are limited within the value cap, currently set at \$7,500. This cap was increased from \$1,000 to \$7,500 in 2000. The \$7,500 cap was the value limit of the Disputes Tribunal at this time, which was increased from \$3,000 to \$7,500 in 1998 (and in 2009 was increased to \$15,000). Only two submitters commented on the value cap. One felt that the \$7,500 cap was appropriate as few goods over that price were sold by layby. The other submitter, who sells whiteware packages but does not offer layby, commented that \$7,500 may be insufficient if consumers were buying whiteware packages.
- 19 There are three options for the value cap - \$7,500 (status quo), \$15,000 (aligned with the Disputes Tribunal) or unlimited (but only applicable to consumer goods). The argument for an unlimited value is that the rights and obligations on a layby sale should apply because of the method of purchase regardless of the value of the purchase. It is unlikely, however, that there would be layby sales of very high value goods (i.e. over \$15,000) due to the features of layby sales, such as short payback periods. There is some argument that as part of amendments to the layby sales provisions the opportunity should be taken to futureproof the layby sales value cap and continue to align it with the Disputes Tribunal limit. It is therefore recommended that the value cap be amended to \$15,000.

Title/Passing of risk

- 20 The discussion paper proposed that section 6 of the Layby Sales Act may not be required, as sellers are likely to want to retain title in the goods until they are fully paid for, and sellers would not be able to contract out of the layby provisions. This provision is also not included in the equivalent Australian legislation, as it relies on sale of goods legislation within each State and Territory.
- 21 Few submitters commented on this section, but those that did considered that section 6 should be retained. One submitter reasoned that as the layby provisions would be uncoupled from the Sale of Goods Act it would be necessary to be clarified in the Fair Trading Act as it does not mention title or risk.
- 22 Section 22 of the Sale of Goods Act generally provides that the risk in goods being sold passes to the buyer with property in the goods. Section 22 says that *unless otherwise agreed*, goods remain at the seller's risk until the property is transferred to the buyer (whether delivery is made or not). The risk for the buyer under section 22 is that, if title passes before the buyer has the goods, the buyer will be liable for any damage that may occur while the goods are still in possession of the seller. The advantage for a buyer in property passing while the seller still has possession of the goods is that, in the case of insolvency, the buyer would be able to take possession of the goods (if they are available) immediately.

- 23 Section 6 of the Layby Sales Act modifies these rules, and says that participants in a layby sale are *not* free to make their own arrangements as to the passing of risk. Risk only passes when the payments are made AND delivery has been made. This is consistent with the likely position under section 22, but the difference is that section 6 cannot be contracted out of.
- 24 The Australian layby provisions do not include an equivalent of section 6, and rely on the underlying sale of goods legislation in States and Territories with regard to the passing of risk. This provides for risk passing *prima facie* with property, identical to section 22 of the New Zealand Sale of Goods Act.
- 25 As noted above, the general approach in section 22 of the Sale of Goods Act is in line with the intention of section 6 of the Layby Sales Act, but section 6 provides additional clarity and certainty by not allowing any alternative position to be held by sellers and buyers. If the intention of section 6 was removed and there was damage to the goods in the possession of the seller, there is a chance the buyer may be liable. There may also be doubt as to whether the guarantees under Consumer Guarantees Act apply during the layby period if property (and risk) has already passed to the buyer. The retention of provisions similar to section 6 would avoid these potentially complicating issues.

Statements

- 26 The discussion paper proposed removing the requirement for the seller, under section 7, to provide statements on request to layby buyers specifying the purchase price, amount owing and estimated costs if the agreement is cancelled. Few submitters commented on the proposal in the discussion paper to remove section 7. A community law centre supported the provision's removal in favour of an upfront written agreement.
- 27 While there is no doubt the information required in the statement is useful, regulation of this information does not appear to be necessary, and there is evidence that statements are not provided as per the legislation. It is recommended there is no longer a requirement for such statements but instead that included in the termination provisions (see discussion below) that consumers have the right to ask for the costs of cancelling a layby sales agreement and that this information cannot be unreasonably withheld.

Buyer cancellation – selling costs

- 28 The discussion paper asked if the definition of “selling costs” (costs that sellers can retain from the instalments when a consumer cancels the agreement) in the Layby Sales Act was adequate. Submitters showed a clear difference of opinion between consumer groups and business groups, with consumer groups concerned that the selling costs referred to in section 9(1) of the Layby Sales Act are ambiguous.
- 29 The phrase which is probably ambiguous is the “...amount sufficient to recoup the seller for his selling costs in respect of the layby sale”. This could refer to the costs incurred by the seller for the layby element of the sale, i.e. costs in recording and taking payments. Alternatively, it could include all costs involved in

selling the item, such as the salesperson's salary, overheads, and advertising costs.

- 30 It appears that the original policy intention³ was for the seller to be able to recover selling costs if the item has depreciated or lost value in any way during the term of the layby.
- 31 In *Wood v Universal Fur Co Ltd* [1985] 1 NZLR 640 the High Court held that the term "selling costs" followed by the words "in respect of the layby sale" is simply to identify the sale to which the subsection applies, not to restrict the recovery of costs to those involving the layby elements of that sale. In effect, the High Court endorsed the wider definition of selling costs and this is the interpretation favoured by business.
- 32 Australia manages this issue by allowing the seller to charge a "termination charge" if a consumer cancels the agreement. This charge must not be more than the reasonable costs incurred by the supplier in relation to the layby agreement, such as storage and administration costs, and the loss of value of the goods between the time when the layby was entered into and when it was terminated. The Australian Consumer Law Explanatory Note remarks that a determination of the reasonableness of a termination charge is a subjective assessment and may, for example, include a consideration of whether the termination charge is made up of actual costs incurred by the supplier in managing the layby agreement and associated goods.
- 33 Several submitters have indicated that the Australian termination charge is a good compromise between the original policy intention and the realities of loss of value. Therefore, it is proposed to adopt the Australian "termination charge" and its policy intention for reasonable costs.

Seller cancellation

- 34 At present, the Layby Sales Act does not expressly provide for sellers to cancel the contract, leaving it up to general contract law. The discussion paper proposed that the circumstances under which a seller can cancel could be listed, as with the Australian Consumer Law. No submitters commented on this proposal in the discussion document. In the interests of clarity for both sellers and consumers, it is recommended that such a list of conditions, such as insolvency, breach of agreement by the consumer, or unavailability of the goods specified in the agreement, where a seller can cancel a layby sale be included in the legislation. All instalments paid by the consumer should be reimbursed.

Requirement for written contracts

- 35 A requirement for a written agreement could be an additional safeguard for consumers using layby transactions. Currently, there is no requirement for a written agreement to be drawn up at the start of a layby transaction, although sellers must provide a statement of payments when requested by the buyer.

³ NZ Parliamentary Debates, Vol 377, 1971: 4982; Department of Justice "Layby Sales Act 1971" (Legislation Series No. 5, 1981), as described in Lynch, JJ. *Layby sales: the case for further reform*. VUW Law Review (1988) 18 (2), 181.

- 36 Australian legislation specifies a written agreement must be entered into at the time of the layby, and provided to the consumer. The agreement must provide that the goods will not be delivered to the consumer until the total price of the goods have been paid, and the price of the goods is to be paid by 3 or more instalments, or if the agreement specifies it is a layby sale agreement by 2 or more instalments.
- 37 General information could be provided through a Ministry of Consumer Affairs brochure at point of sale, but an advantage of a written agreement is the transparency and clarity of the layby terms for that particular transaction. This could include information such as value, time of payment, and any termination charges. It could also confirm the status of the contract as a layby, safeguarding it from the default rules of the Sale of Goods Act.
- 38 The introduction of a written agreement would be a new requirement on sellers and therefore some compliance costs would be incurred. However, it appears these would be small – probably less than \$85 per year per seller⁴. Initial costs may be incurred in drawing up the forms for the layby agreement, but the majority of costs would lie in the time for the seller to work through the agreement with the consumer. However, many sellers already have documentation for their layby sales and there should not be any significant additional time for the new written agreement as opposed to the existing documentation. A written agreement may also reduce staff time resolving any disputes regarding layby sales.

Insolvency – Christmas clubs/hamper companies

- 39 The Layby Sales Act 1971 was based on the report of the Contracts and Commercial Law Reform Committee of New Zealand. The Committee noted that, while in general the layby system had been working well, there had been many cases of hardship. The Committee noted that where a company failed and the goods subject to the layby contract were not found in the liquidation, layby customers often sustained heavy losses. The Committee were of the opinion that the legislature should intervene. The Committee stated:

In our opinion the proper course is to recognise layby customers as a special class of creditors in the insolvency of the layby vendor. . . . We think that those who finance the vendor's business for gain and those who extend credit to the vendor to encourage the vendor to buy their goods should yield priority to the vendor's layby customers. They assist the vendor in order that he may sell and it seems to us proper that they should be bound within reason by the vendor's contracts in the ordinary course of the business they have made possible. . . . [T]he purchaser should be treated as if the property had passed and, if there are no goods available for him, should be advanced in priority over the general and secured creditors. If such a preference is established, financiers and merchants will, in their own interest, exercise a degree of supervision over layby vendors. The unstable layby vendor will find it more difficult to raise finance or obtain credit.

⁴ Business Cost Calculator, based on 500 businesses providing layby sales

- 40 If there are specific goods that can be found, no difficulty arises because the purchaser will be able to acquire the goods on payment of the balance of the purchase price (section 10 of the Layby Sales Act). In essence, section 10 preserves the pre-insolvency position by allowing the consumer to complete the deal in the case of seller insolvency. It is proposed that section 10 be retained in the new legislation. However, if such goods do not exist, i.e. have not been specifically put aside, it is likely that there is little prospect of a remedy as it is likely the money paid towards the layby will have been mixed with the other money of the seller (or paid into an overdrawn bank account) and will, therefore, not be traceable.
- 41 Section 11(1) of the Layby Sales Act 1971 provides:
- If, on the liquidation or bankruptcy of any seller . . . there are no goods or not enough goods to enable the layby sale to be completed, or if any buyer is or becomes entitled under section 9 of this Act to recover any sum of money, then the buyer shall be a creditor in the liquidation, bankruptcy, or receivership to the extent of the payments that he has made to the seller on account of the purchase price of the goods or to the extent of the sum that he is entitled to recover, as the case may require, with priority . . . over all other unsecured creditors and over creditors secured by a floating charge.*
- 42 In 1999, a further review, The Law Commission Report *Priority Debts in the Distribution of Insolvent Estates: An Advisory Report to the Ministry of Commerce*, touched on layby sales and whether layby purchasers should be priority creditors. They considered that there are compelling reasons why the priority afforded by the Layby Sales Act should be continued:
- Prudent budgeting should be encouraged rather than discouraged by the law.
 - While consumer behaviour has changed significantly since the report of the Contracts and Commercial Law Reform Committee was prepared in 1969, anecdotal evidence suggests that layby is still a popular form of purchasing goods by those who do not wish to extend themselves financially. In other words, while there has been a growth in the use of credit cards, prudent purchasers continue to use the layby system and should not be disadvantaged. Those who elect to use the layby system will largely have modest means. Accordingly, they can least afford to lose the money.
 - The amounts at issue in relation to preferential claims based on layby sales will generally be modest and are unlikely to impact unduly on dividends received by other creditors.
 - Appropriation of goods by the vendor is beyond the control of the customer.
- 43 We have talked to the Insolvency and Trustee Service and they have very few examples of problems with layby sales. They have said as the provision (section 10(1)) that allows consumers to pay the outstanding amount and gain their layby has been very successful. They also suggest that the priority creditor status be

preserved, as if the preferential ranking is repealed then the emphasis currently placed by both receivers and liquidators ensuring that the interest of layby debtors are properly looked after, may be reduced.

- 44 Therefore, it is recommended that provisions similar to both sections 10 and 11 should be retained in the new legislation.

Hamper Companies

- 45 This leads to the question of Christmas Hamper companies. Christmas hamper sales are essentially layby sales as the goods are selected from a catalogue, i.e. the consumer has chosen a specific hamper, and they are paid for by instalment. The goods are only delivered when all the instalments are paid. Christmas Clubs, on the other hand, are not layby sales arrangements. In a Christmas Club, money is effectively saved and held for the consumer to spend on anything in the shop – i.e. the goods to be sold are not specified⁵.
- 46 Chrisco, a hamper company, does not mention the Layby Sales Act in any of its terms and conditions or on its website. It has a cancellation policy that has an interesting interpretation of “selling costs” – if an order is cancelled prior to 90 days before delivery, then a 20% cancellation fee is charged (taken out of money refunded); if an order is cancelled within 90 days before delivery, then a 50% cancellation fee is charged. On its website, Chrisco offers a range of options if a consumer cannot keep up the payments, so cancellation is most likely to occur when a consumer decides they do not want the goods, rather than due to payment issues. Under these conditions, it is likely that a consumer wishing to cancel their order would be significantly penalised by losing up to 50% of their payments.
- 47 In 2009, some hamper companies went into liquidation. If the goods had actually existed when the companies went into liquidation, the consumers could have exercised their rights under section 10 of the Layby Sales Act to complete their transactions, and obtained their goods. However, it appears that the goods would not have been brought in and assembled into hampers before the companies went into liquidation, so the rights under the Layby Sales Act to complete the transactions would not have helped the consumers.
- 48 While this seems as if protections are lacking in this circumstance, there is little a consumer can do when a company goes into liquidation. All creditors are at a disadvantage. Several submitters have suggested trust accounts as a way of protecting consumers.
- 49 However, it appears that, apart from Chrisco, the remaining hamper companies operate more as Christmas Clubs. For example, Hampsta is an EFT-POS card linked to a savings account with Hampsta. Hampsta charges fees for this service (\$20 for joining, and \$35 annual maintenance fee). There are no transaction fees but interest does not accrue on the money a consumer saves. The money is kept

⁵ The fact the goods are specified or known is important in the sale of goods. There are different remedies for goods that are specified, ascertained or unascertained.

with the Public Trust, and therefore in the event of insolvency, the money should be available for refunding.

- 50 Interestingly, the Law Commission in their 1999 review⁶ considered arguments similar to those raised by people who see trust accounts as a means of securing money of customers of hamper companies. Their view was: *“Onerous fidelity bonds, the segregation of goods from the vendor’s assets, or the banking of payments by layby purchasers in separate trust accounts have been suggested. These requirements offer no real security against the dishonest trader, who will simply ignore them. It may protect though in the case of insolvency but consumers would not have any practical advantage either. [We] could go as far as to say, the semblance of security may be exploited by the cheat to deceive his victims more effectively”*.
- 51 Therefore, it is recommended that the use of trust accounts will remain voluntary but can be used as a marketing tool. Any claim of security can be enforced by the Commerce Commission.

Enforcement

- 52 At present, the Layby Sales Act has only one offence, regarding the provision of statements of the consumer’s present position (section 7(4)). There was strong support from those submitting on layby sales for the Commerce Commission to enforce layby sales laws, with one commentator considering the self-enforcing nature of the current Act to work against the users of layby. If the layby sales provisions are incorporated into the Fair Trading Act, more offences could apply to layby sales. The Commerce Commission submitted that they received a number of complaints/enquiries on laybys, but they are unable to take action. Currently, they are limited to action under section 13(i) of the Fair Trading Act, which prohibits misleading representations about consumer rights. This does not cover the main types of layby sales complaints received by consumers. The Commission sees synergies in incorporating layby provisions into the Fair Trading Act, but also with the Credit Contracts and Consumer Finance Act (CCCFA), particularly with regard to selling costs. Both these Acts are enforced by the Commission.
- 53 On this point, most of the complaints⁷ were about a failure of the seller to refund any of the instalments or unilateral changes to the agreement, i.e. ignorance of the law rather than selling cost issues. Being under the Fair Trading Act, this would allow enforcement of the majority of the complaints. A layby sale does not meet the definition of a credit contract and therefore would not be captured under the CCCFA.
- 54 Australia has associated criminal penalties for non-disclosure and retaining unlawful termination charges, which are strict liability offences. Defences are provided, such as an honest and reasonable mistake of fact; where the breach was caused by the act or default of another person or an accident or cause

⁶ The Law Commission Report Priority Debts in the Distribution of Insolvent Estates: An Advisory Report to the Ministry of Commerce

⁷ Collated from the Commerce Commission, Citizens Advice Bureaux and Consumer NZ within the last year.

beyond the person's control: where the person took reasonable precautions and exercised due diligence to avoid the contravention; and where an advertiser publishes an advertisement in the ordinary course of business and does not know and had no reason to suspect the advertisement amounted to a contravention.

- 55 Similar additional enforcement provisions could be introduced that are specific to layby sales, although many of the existing enforcement tools are applicable.
- 56 It is recommended that the Commerce Commission have an enforcement role for layby sales, as there is evidence of detriment to consumers from breaches of the Layby Sales Act. Incorporation into the Fair Trading Act will ensure that all aspects of problems with layby sales can be addressed by the Commission if they see a need.

Recommendations

- 57 We consider that the analysis supports the following recommendations, that:
- layby sales provisions are incorporated into the Fair Trading Act;
 - the provisions are principles-based;
 - a definition of layby sale along the lines of the Australian Consumer Law is adopted, i.e. three or more payments is a layby sale while two instalments will only be a layby if this is specified in the layby sales agreement;
 - provisions similar to section 6 of the Layby Sales Act regarding the passing of risk are retained for clarity;
 - the detailed requirement for the provision of statements when requested is replaced by a principles-based statement within the termination provisions;
 - provisions along the lines of the Australian Consumer Law "termination fee" are adopted;
 - a clear written layby sales agreement is required, along the lines of the Australian Consumer Law;
 - the conditions upon which a seller may cancel the agreement are specified (along the lines of the Australian Consumer Law) and that if a seller cancels, then all instalments must be reimbursed;
 - provisions similar to section 10 of the Layby Sales Act regarding the ability of a consumer to complete the layby sale in the event of a seller liquidation when the goods are available are retained;
 - provisions similar to section 11 of the Layby Sales Act preferential creditor status when the goods are not available are retained; and
 - the Commerce Commission may enforce layby sales.

- 58 We would welcome any additional feedback on this paper. Please contact us on 04 462 4273 or at consumerlawreform@mca.govt.nz or Ministry of Consumer Affairs, PO Box 1473, Wellington.