Layby sales: the case for further reform

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In this paper the author discusses the Layby Sales Act 1971, the reasons for its introduction and its effectiveness as a piece of consumer protection legislation. She suggests reforms of the Act to improve that protection.

I. INTRODUCTION

Buying goods by layby is popular in New Zealand, particularly among people who may not have access to credit and would otherwise have to pay cash for goods or go without. It is also popular in New Zealand, particularly among people who may not have access to a means of securing and paying for goods not required immediately - for example Christmas presents. Most retailers operate some sort of layby system both for the benefit of their customers and to enable them to make sales they otherwise would not make. The chief characteristics of the most common type of layby sale are the payment of a deposit by the purchaser on goods which are held by the retailer for the purchaser until the full purchase price has been paid. The balance of the purchase price may be paid by instalments or in a lump sum and must usually be within a stated period. If instalments have been paid regularly or amount to a substantial part of the purchase price a stated period will usually be extended until the purchaser is able to complete payments.

In 1969 the Contracts and Commercial Law Reform Committee reviewed the law and practice regarding layby sales.[1] The Committee's chief concern was the position of layby customers when retail businesses became insolvent. This concern was due to the failure, in the previous decade, of a number of firms that dealt in layby sales whereupon layby customers with accounts outstanding found themselves in the position of unsecured creditors.[2] They often had no title to the goods their payments were

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1 Contracts and Commercial Law Reform Committee *Layby Sales* (Wellington, 1969). This report followed a suggestion of the Tariff and Development Board, in its 1968 report on *Instalment Credit Trading in New Zealand* (Government Printer, Wellington, 1968), at 63, that layby systems in New Zealand should be examined and reported on.

2 There were may affected adversely by the insolvency of retail businesses. In 1960 the failure of Dominion Supplies resulted in losses of up to $36,000 by layby customers; in 1962 the mail order firm Surplus Engineering suffered losses of $34,000 some of which pertained to layby sales; in 1965 the door to door sales

intended to secure as this could be deemed to have passed only when the full purchase price was paid.[3] In many cases there had been no specific goods appropriated to the accounts in question, nor were there goods of the nature of those the accounts pertained to among the assests of the business, so they had no possibility of gaining title even if they completed all payments due. As unsecured creditors these customers received little or nothing for their money and as the Committee indicated in its report[4] the type of person entering layby contracts could usually ill afford to lose even small amounts of money.

The other major area of concern identified by the Committee was the practice some retailers had of retaining all or large portions of the amounts paid under layby contracts when customers cancelled them. As such payments could amount to a substantial portion of the purchase price this concern was understandable. These practices often had one of two purported legal bases: a clause may have been included in the contract stating something like: "all monies will be forfeited upon cancellation"; or the amount(s) paid were classified as deposits - that is, security for the completion of the contract to be forfeited if it was not completed. Otherwise retention of a customer's money may simply have been accompanied by a flat refusal to hand it back. In these sorts of situations customers had no practical form of redress other than to undertake expensive civil litigation to try and recover some, or more as the case may have been, of the money they had paid. Given the expense this would have entailed and the relatively small amounts that may have been recovered it is not suprising that this was apparently never done.

The Layby Sales Act 1971 was passed on the recommendation of the Committee. It was designed primarily to resolve the problems caused by insolvent retail businesses and refunds to customers cancelling layby contracts. This paper will look at the effectiveness of the provisions enacted to those ends and suggest reforms of these, and other provisions within the Act, that will enhance consumer protection in this area of sales law.

II. THE LAYBY SALES ACT

The layby transactions encompassed by the Act are those described in section 3:

> (1) a contract of sale of goods at retail under terms, express or implied, which provide that -

company Northern Linen's liquidation would have resulted in a return of approximately 10 to 15 cents in the dollar to 3000 dissatisfied layby customers had a competing firm not come to the rescue and ensured those customers received more. Less extensive losses to layby customers of $4,500 in 1969 resulted from the failure of Mademoiselle Linen Co.

3 For a discussion as to when title passes in layby transactions see D.J. McKay "Layby Agreements in New Zealand" (1970) 6 V.U.W.L.R. 11.

4 Supra n.1, 5.

(a) The goods are not to be delivered to the buyer until the purchase price or a specified part or proportion thereof is paid, whether or not any charge is expressed to be payable for storage or delivery of the goods; and

(b) The whole or any part of the purchase price -
(i) Is to be paid by instalments (whether the number of instalments or the amount of all or any of them is fixed by the contract or left at the option of the buyer) payable over a fixed or ascertainable period; or
(ii) Is to be paid at the expiration of a fixed or ascertainable period with the option, express or implied, for the buyer to make payments in respect of the purchase price during that period;but a contract of sale of goods to be delivered by instalments, where the whole of the purchase price of each instalment is payable at the time that instalment is delivered, is not a layby sale.[5]

(2) Where, by virtue of two or more agreements, none of which by itself constitutes a layby sale, there is a transaction which is in substance or effect a layby sale, theagreements shall be treated for the purposes of this Act as a layby sale made at the timewhen the last of those agreements was made.

Section 4 restricts the ambit of section 3 thus:

This Act does not apply to any layby sale in which -
(a) The purchase price exceeds $1,000; or
(b) The goods sold or agreed to be sold are mainly or wholly vehicles that are motor vehicles for the purposes of the Motor Vehicle Dealers Act 1975 and the seller is a dealer licensed under that Act.

Retailers' insolvencies are dealt with by sections 10 and 11 of the Act. Section 10(1) provides that upon the winding up, bankruptcy or appointment of a receiver or manager of the retailer's business, if there exists among its assets the goods the layby contract pertains to, or goods of a similar nature, the customer will be entitled to pay the balance owing and complete the contract. This is so whether or not the goods have been specifically appropriated to the contract in question. This remedy is not available if the customer has breached the layby agreement by not making any payments during the three months immediately preceding the filing of the successful bankruptcy petition, commencement of winding up or appointment of a receiver or manager.[6] Nor is it available to officers or employees of the retailer or the spouses of those people.[7] The latter is supposed to prevent "serious abuses with a less scrupulous trader in the way of defrauding creditors."[8] Section 10 also lays down priorities if there are not enough goods to satisfy all layby customers.[9]

5 This exclusion was included to remove any doubt about the Act's application to what is popularly referred to as "layby sales" of knitting wool - see Justice Department *Layby Sales Bill Comments of The Department of Justice* (Wellington, October 1971).
6 Section 10(3)(a).
7 Section 10(3)(b).
8 Justice Department Comments on the Bill - Supra n.5, 5.
9 Section 10(2).

If the option in section 10 is not or cannot be exercised, then section 11 deems the customer to be preferential creditor, over unsecured creditors and those secured by floating charges, with respect to any money owing him or her on the layby.[10] For the purposes of sections 101 and 308 of the Companies Act 1955 they have first priority except as regards section 308(1) where they rank second[11] but for the purposes of section 104 of the Insolvency Act 1967 they stand after the fifth and before the sixth priority.[12]

Though these provisions certainly place layby customers in a better position than they occupied prior to the passing of the Act they offer small comfort where the retailer has not got the goods the contract pertains to - or goods of a similar nature. Submissions made to the Commerce Committee when the Bill was being considered suggested this problem could be solved if it were mandatory to appropriate specific goods to the contract when it was formed.[13] This would ensure all customers had the option offered in section 10 but these submissions were rejected as[14]

> to force a retailer to set aside goods as soon as he receives a deposit on them could be crippling to his business because it necessarily limits his turnover in requiring him to withdraw from stock goods for which he has not been paid.

Also rejected, as being too demanding and detailed for New Zealand retailers, was a suggestion the Act follow the requirements of the only other similar piece of legislation - the New South Wales Layby Sales Act 1943.[15] That Act requires that where specific goods are not set aside all money paid under the contract is to be deposited in a trust account[16] except where the layby is of a certain type of goods with respect to which the retailer must have a fidelity bond lodged.[17]

In spite of the fears of commentators that the inadequacies of sections 10 and 11 would mean layby customers would continue to suffer losses when retail businesses became insolvent [18] there is no evidence this has happened.

The problems caused by cancellations and refunds are dealt with by sections 8 and 9. Section 8 gives the customer the right to cancel his or her layby at any time before the

10 Section 11(1).
11 Section 11(2)(a) & (b).
12 Section 11(2)(c).
13 Consumer Council *Submissions of the Consumer Council to the Commerce Committee on The Layby Sales Bill 1971* (Wellington, July 1971) 2.
14 Supra n.8.
15 Supra n.1, 8.
16 Section 3(2)(c).
17 Section 3(5).
18 D.J. McKay, supra n.3, 27; B. Coote "The Report on Layby Contracts" (1970) 5 Recent Law 177, 178; see also Consumer Council submission, supra n.13,5.

purchase price has been paid[19] - except where the purchase price is less than $5.00.[20] Section 9 sets out a formula for calculating refunds upon cancellation. In the case of cancellation by a buyer subsection (1) (a) provides:

> If the total amount of money paid plus the value of any other consideration provided by the buyer in respect of the layby sale, together with the retail value of the goods at the time when the layby sale is cancelled, exceeds the purchase price and an amount sufficient to recoup the seller for his selling costs in respect of the layby sale, the buyer shall be entitled, subject to subsection (2) of this section, to recover the excess from the seller as a debt due and payable by him to the buyer.

An example of how the formula works is as follows:

deposit	$10.00	purchase price	$80.00
trade in	10.00	selling costs	10.00
payments	20.00		$90.00
	40.00		
	70.00		
present retail value	$110.00		

$20.00 will be due to the customer

The difference between the purchase price and the retail value allowed for by section 9 (1) (a) is limited by subsection (4):

> Where a layby sale of specific goods is cancelled within one month after the date of the sale or where any layby sale (not being a sale of specific goods) is cancelled at any time, the retail value of the goods at the time of cancellation shall, for the purposes of this Act, unless the contrary is provided,[21] be deemed to be the retail value of the goods at the time when the layby sale was made; and any loss of value of such goods whether due to deterioration of the goods or otherwise shall be disregarded.

Where the retail value of the goods has increased during the period of the contract subsection (2) provides:

> Where a layby sale is cancelled by the buyer, other than by reason of a breach by the seller which entitles the buyer to cancel the sale, the buyer shall not in any case be entitled to a refund exceeding the total amount of money paid plus the value of any other consideration provided by him.

19 Section 8(1).
20 Section 8(5).
21 "Provided" appears to have been erroneously substituted for "proved" in this section. See text infra, accompanying n.39.

If the amount the customer has paid does not cover the extent of the seller's losses the seller may recover the excess from him under subsection (1) (b):

> If the purchase price and an amount sufficient to recoup the seller for his selling costs in respect of the layby sale exceeds the total amount of money paid plus the value of any other consideration provided by the buyer in respect of the layby sale, together with the retail value of the goods at the time when the sale is cancelled, the seller shall be entitled, subject to subsection (3) of this section, to recover the excess from the buyer as a debt due and payable by him to the seller, but shall not be entitled to recover any additional sum, whether as penalty or compensation or otherwise in consequence of the cancellation of the layby sale.

Subsection (3) limits the amount recoverable under subsection (1) (b) thus:

> Where the buyer under a layby sale has paid an initial deposit but has made no other payments at the time when the sale is cancelled the amount that the seller shall be entitled to recover under paragraph (b) of subsection (1) of this section shall not exceed the amount of the deposit.

As have sections 10 and 11, sections 8 and 9 have improved the legal position of layby customers. However some retailers are still deducting excessive amounts from refunds, presumably under the head of "selling costs".[22] As these deductions are sometimes as high as 40% of the purchase price - excluding any charges for depreciation as allowed by section 9 - these retailers appear to be charging customers for relative proportions of many of their retailing costs.

The Act itself provides no limits as to how much can be claimed as "selling costs". This omission is deliberate. When the Bill was first presented to the House clause 9 allowed the deduction of "an amount (not exceeding fifteen percent of the purchase price) sufficient to recoup the seller for his selling costs in respect of the layby sale". However the reference to fifteen percent was deleted and nothing put in its place as it was felt it would be better left to retailers to estimate the amount of their costs.[23] Insufficient account was taken of the point that they will find this difficult to do if they do not know what the costs are to include.

The Justice Department, as administrator of this Act, had always advocated that "selling costs" recoverable should be restricted to those retailers had to bear due to cancellation - those they did not recover on reselling the goods.[24] These would

22 This was ascertained from discussion with Complaints Officers at the Consumers' Institute and from the Institute's files on Layby Sales dating back to 1971. The extent of the problem with refunds is illustrated by the number of enquiries the Institute receives about layby sales annually - in 1986 the Wellington office alone received 36 written enquiries and 527 telephone enquiries. Not all of these were specifically about refunds of selling costs but, according to staff, the majority were and involved relatively high proportions of the purchase price of the goods concerned.

23 N.Z. Parliamentary Debates, Vol 377, 1971: 4982.

24 This is evident from their files on Layby Sales dating from 1971 onwards.

generally have been only costs related to the layby elements of the sales, i.e. the costs of setting up the accounts, servicing them when payments were made and sending reminders out when they were not. In 1981 this was set out in a pamphlet on layby sales designed as a handout for the public.[25] Under the heading "If I cancel do I get my money back?", "selling costs" are said to cover "e.g. sending out reminders and issuing receipts." The Department adds "these costs are usually small."

The Consumers' Institute also espoused this interpretation of the term[26] and attempted to convey this view to retailers and the general public through their monthly magazine "Consumer".[27] However in spite of these measures some retailers continued to deduct excessive amounts from refunds and the ambiguity in the Act as to what "selling costs" included meant they could not be legitimately restrained from doing so. In 1981 this culminated in the Consumers' Institute sponsoring the plaintiff in a test case to determine what deductions are permissible as "selling costs".

Wood v. *Universal Fur Co. Ltd.* [28]

The facts of *Wood* v. *Universal Fur* were as follows: On 31 January Mrs Wood purchased a fur coat on layby from Universal Fur Co. Ltd. for $345.50. She paid a deposit of $60.50 and made further payments of $30.00 on 8 April and $45.00 on 4 July. On 18 July she orally cancelled the contract. Out of the $135.50 she had paid Universal Fur refunded her $105.00 keeping $17.25 for depreciation and $13.25 for "selling costs". The "selling costs" were calculated as follows:

Original sale	$5.00
1st instalment	2.00
2nd instalment	2.00
Mrs Wood's visit to discuss exchange of goods	2.00
Mrs Wood's visit to cancel sale	2.00
Furnishing statement of account	.25
	$13.25

The plaintiff claimed "selling costs" were to be interpreted narrowly so as to cover only costs peculiar to the layby elements of the sale. She claimed $5.00 would cover them in this case. The defendant contended a wider interpretation was correct and that "selling costs" included the general overhead costs of running a business.

As the coat had subsequently been resold at its original price Seeman D.J. held that depreciation could not be deducted but he allowed the defendant to retain the $13.25 claimed as "selling costs" as he interpreted the term as meaning the costs of the sale in

25 Department of Justice "Layby Sales Act 1971"(Legislation Series No. 5, 1981).
26 This is evident from their files on Layby Sales.
27 See "Consumer" 123 (1975) at 314; 131 (1976) at 219; 157 (1978) at 332; 167 (1979) at 297.
28 [1985] 1 N.Z.L.R. 641.

each particular case rather than the costs pertinent only to the layby elements of the sale. His Honour went on the say he saw no reason why a percentage to include overheads could not be calculated provided adequate accounting evidence was available, and had the defendant claimed between ten and twenty percent as costs of the sale, backed up by expert evidence, he would have found that acceptable. However, as the defendant had only claimed $13.25 he found he could allow it no more than that.[29]

Still sponsored by the Consumers' Institute Mrs Wood appealed to the High Court against Seeman D.J.'s finding that the defendant was entitled to claim the sum of $13.25 as its "selling costs" in respect of the layby sale and that "selling costs" included the sellers' overheads "rather than [just] the costs properly attributable to recording payments of instalments and other ancillary matters exclusive to a layby sale."[30]

With respect to the definition of "selling costs" Davison C.J. stated:[31]

> I do not think that the phrase as used in s.9(1)(a) of the Act limits the selling costs to those involving only the layby elements of the the sale. They will have to be assessed by taking into account such items as: salespersons' salaries, advertising expenses, sales office expenses, depreciation on delivery equipment (if any), costs of storage and insurance of goods pending payment and delivery.

His Honour found Seeman D.J.'s approach in allowing a straight percentage deduction too simplistic as[32]

> ...such a calculation would at best provide an average selling cost for each sale based on the sale price but would have no regard to the cases where there were many periodic payments made by the buyer and recorded in the accounts of the seller, nor of the period of time the goods remained in storage. However that method of assessment would be a reasonable basis on which the seller could arrive at his estimate of selling costs.

Davison C.J. then gave two more methods for estimating such costs: [33]

> Another basis would be.... to take the individual items making up the selling costs and to fix a unit figure for each one at so much per week for such items as storage, insurance etc. and so much per attendance for collecting instalments, entering up accounts.
>
> Yet another method might be to charge a fixed sum varying according to the price of the goods. For example $1 up to $20; $2 up to $50; $4 up to $100 .... He may use such a method as he chooses but if his estimate is challenged he must be able

29 See a summary of his findings in *Wood*, supra n.28, 642.
30 *Wood*, supra n.28, 642.
31 Ibid.
32 Ibid. 645.
33 Idem.

to show that it is a reasonable one which takes into account only the items properly allocated to the particular sale.

His Honour then confirmed Seeman D.J.'s decision that the defendant was entitled to deduct $13.25 as "selling costs", having regard to the attendances involved and the period of time over which the sale continued, and noting that such amount was approximately $3^3/_4$% of the sale price.[34]

Thus "selling costs" may be calculated to include the appropriate proportion of costs referred to by Davison C.J. and/or costs that are similar in nature. The definition therefore is flexible enough to allow relatively large deductions under this head - the only meaningful restriction being that they must be "reasonable" and "properly allocated to particular sales".

III. REFORMS OF THE ACT

As noted earlier layby customers occupy a much better position under this Act than they did prior to its passing. However their position could be further improved were the Act to be reformed in the ways outlined below.

The Act is urgently in need of reform with respect to its financial provisions. There has been no amendment of these in the sixteen years it has been in force and bearing in mind the cumulative effects of inflation during that period such reform is obviously overdue.[35] This is especially so with respect to it only applying to sales of less than $1000.[36] In 1971 such an amount would have covered the cost of most major home

34 Idem. It may seem surprising that the Consumers' Institute sponsored such a small claim when it had a choice from many involving larger amounts that may have more effectively made the point that recovery of "selling costs" should be limited in the manner contended. However, the choice of this particular incident was precipitated by a defamation action being brought against them by the proprietor of Universal Fur Co., Mr Goodman. See *Consumer Council* v. *Arthur Goodman* (Unreported C.A. 53/84, 1985). That case resulted from the publication in "Consumer" - of an article about Mrs Wood's experiences with Universal Fur, to which Mr Goodman took exception. The issue there revolved around whether he had been "within the law" in withholding such a "large" amount of Mrs Wood's refund. It was found he was and his action was successful.

35 According to the Justice Department's files this has been the subject of discussion within the Department. The latest proposals (made sometime in late 1984) for updating are: s.4 from $1000 to $4000 as the maximum sale the Act is to cover; s.7(1) 25c payable for a statement of account to increase to $1; s.7(4) penalty provision for non compliance with requests for statements under s.7(1) to increase from $200 to $750, (note - according to the Justice Department this penalty provision has never been used); s.7(5) minimum purchase section is to cover is increased from $10 to $40; s.8 right to cancel will apply to sales over $20, cf. $5 as at present and likewise s.9 will also apply to sales over $20. These figures are based on movement in the C.P.I. since the original figures were fixed.

36 See s.4.

appliances and items of furniture but of course the inflation rate over the ensuing years means that now such items would not be covered by the Act so it is obviously not fulfilling completely the role it was intended to.

An area of concern, not confined to this Act, is the need to educate consumers about existing consumer protection legislation. Successive governments have been aware of this need and over the last few years there have been several efforts made to this end.[37] However an easy and effective way of "educating" layby customers about their rights under this Act would be to follow the example set in the New South Wales Act. That Act requires that when a layby contract is entered into the retailer must give the customer a docket setting out the details of the purchase, the terms and conditions of the layby sale and "a notice in writing in the prescribed form containing a summary of all the rights and privileges conferred by the Act on purchasers."[38] At present it is not legally necessary to have layby contracts in writing but a requirement to do so cannot impose much hardship on retailers; most are in writing anyway and there must be some record of layby sales kept in order to fulfil the requirements of section 7 - entitling the buyer to a statement of his account on request and payment of twenty five cents - and such a record could easily be made on a sales docket with a duplicate for the customer.

There is apparently a misprint in section 9 that needs to be corrected. Subsection (4), dealing with the loss in value of goods on layby, states:" .... the retail value of the goods at the time of cancellation shall ... unless the contrary is provided be deemed to be...". "Provided" does not fit in with the scheme of the Act - as noted above layby contracts do not have to be written and if oral it would not be possible to have the "contrary provided". In the Bill the phrase read "unless the contrary is *proved*" [39] and no mention of changing it was made by the Committee or in the House when the Bill was discussed. "Proved" should be substituted for "provided" - as well as being applicable to oral contracts it makes more sense to have to prove losses in value once they have occurred than to provide for them when it is not necessarily known whether or not they will occur or the extent to which they will if they do.

"Selling costs" needs to be statutorily defined. Though contrary to the narrow interpretation of the term espoused by the Justice Department and Consumers' Institute for the twelve years preceeding the *Wood* case, Davison C.J.'s wide interpretation is not without merit because of the lack of statutory guidance as to what they are to include. However, for the reasons given below it is submitted that the narrow interpretation is to be preferred.

37 E.g. in 1975 a Consumer Rights Campaign was sponsored by the Government and organised jointly by a number of Government departments, the Consumers' Institute, New Zealand Retailers' Federation and New Zealand Manufacturers' Federation. The Department of Education has integrated consumer education in the core curriculum in primary and secondary schools and this is currently being further developed. The Consumers' Institute, which is partly government funded, has two full time education officers, and programmes such as "Fair Go" are also educational in this respect.

38 Section 5(1).

39 Emphasis is added.

Prior to the Act layby sales were covered by sale of goods law - that is the Sale of Goods Act 1908 supplemented by the Common Law. Under this law when layby customers defaulted under their contracts retailers were allowed to retain monies paid as deposits - so long as they did not constitute amounts large enough to be regarded as penalties which would make their retention invalid. Otherwise customers were bound to make good losses retailers suffered due to their default,[40] and their liabilities could include recompense for: the cost of recording the layby transactions and other costs the sales may have generated such as where special storage had been used, extra insurance paid for, or the goods adapted for resale; the difference between the layby contract price and the current market price for the goods; or if retailers' supplies of those goods exceeded demand loss of profits due to the losses of those sales[41] though if demand exceeded supplies claims for lost profits could not be justified as these profits would have been regained once the goods were resold.[42]

The relative positions retailers and customers would occupy under sale of goods law are illustrated by the following examples:

1) At the beginning of winter C put an exclusive dress on layby. The purchase price was $100. One month later, after making no further payments, C cancelled the contract. R was able to resell the dress for $100. The only losses R actually suffered and could recover from C were the costs of recording the layby sales transactions[43] - say about $2.

2) The situation is the same as in 1) but here the layby was commenced half way through winter. At the time of cancellation R was stocking summer clothes and had to reduce the dress by half to sell it. As well as the costs of recording the layby transactions R could have recovered the difference between the current market price and the contract price of the dress. About $52 was recoverable.

3) The situation is also the same as in 1) but the subject matter was a radio. R had 10 of these in stock but had sold 4. Here R could have recovered the lost profit as instead of selling 5 radios R had only sold 4 - the resale of radio 5 to

40 Sale of Goods Act, s.51.

41 *Thompson (W.L.) Ltd.* v. *Robinson (Gunmakers) Ltd.* [1955] Ch.177.

42 *Charter* v. *Sullivan* [1957] 2 Q.B. 117.

43 It is not clear whether it is the cost of the layby sale transaction or the cost of the resale transaction that is recoverable here. For this example and those in the text following, it makes no difference as the cost of each transaction is deemed to be the same - $2. $2 is arrived at by using the calculation given in the text, infra following n.44. Though the figures used there are somewhat arbitrary this does not matter as they are used only to illustrate the point being made and anyway the $2 cost of recording the transaction, subsumed under "3) sales office expenses" in that calculation, is probably a realistic figure as regards such costs today. Though it makes no difference here whether it is the layby sale or resale costs that are recoverable it would do if there had been other payments made and/or reminders sent out about the layby making those costs higher than those of the resale. In such cases customers would naturally prefer that recompense be for resale costs and retailers for the layby costs. As the Layby Sales Act pegs recompense to the costs of the layby transaction that is what was opted for in the examples.

another customer could not have recouped this profit as but for the cancellation that customer would have bought radio 6. R may not claim for the costs of recording the layby transactions as these would have been incurred anyway in order to make that profit. Assuming the profit margin on the radios was 50% of the purchase price R would have recovered about $50.

The remedies under sale of goods law were designed to put retailers in the position they would have been in had the contracts been completed. However this does not appear to be the intent of the Layby Sales Act as it makes no allowance for retailers to recover for any element of lost profits. Instead its intent seems to be to put retailers in the position they would have been had the contracts not been entered into in the first place. This may be ascertained form the scheme of section 9 which is as follows:

Retailers are allowed:

depreciation on goods - subsection (1) (a)
appreciation where cancellation is not due to fault on their part-subsection(2)
selling costs - subsection (1) (a)
to claim extra where the amounts already paid do not cover depreciation and selling costs - subsection (1) (b)

Customers are allowed:

the balance left after payment of depreciation and selling costs - subsection (1) (a)

appreciation where cancellations are not due to fault on their part - subsection (1) (a) read with subsection (2)

and do not have to pay:

any penalties or compensation to retailers - subsection (1) (b)
any extra where only deposits have been paid - subsection (3).

If the intent of the Act is as stated above then retailers should be compensated for costs they would not have otherwise incurred but not for any they will recover on reselling the goods.

When calculating what costs retailers have incurred it must be borne in mind that retail goods have all foreseeable business costs built into their purchase price. All of those Davison C.J. listed as recoverable under the Act would usually fall into this category. These were: salepersons' salaries; advertising expenses; sales office expenses; depreciation on delivery equipment; storage and insurance of goods pending payment and delivery.[44]

44 Supra n.30, 644.

An example of how these costs would usually be included in retail prices is as follows:

R has 1500 items to sell at the same price. The annual costs of the items Davison C.J. listed are:

1) salaries	$20,000
2) advertising	3,000
3) sales office expenses (which must include the costs of recording the transactions)	3,000
4) depreciation in delivery equipment	2,000
5) storage/insurance pending payment and delivery	2,000
	$30,000

In order to recover these costs R will add $20 to each item to be sold. (This will be along with all other foreseeable costs - fixed and variable.)

When layby contracts are cancelled retailers still have the goods to sell. When they are resold costs already built into the purchase price will be recovered. Therefore the only costs they will have incurred due to the cancellation are any extra generated by those sales - usually only those of recording the layby transactions. These would normally be covered by any allowance for such costs that are built into the purchase price but due to the cancellation, which necessitates reselling the goods, these costs will be doubled (more or less). The following example illustrates this:

4) When C put the dress on layby in 1) above the cost to R of recording the transaction was $2 (based on the calculation in the example immediately prior to this.) When the dress was resold the recording of that transaction cost R another $2. As the sale of the dress recovered only $2 of these costs R will have incurred costs of $2 which will have to be recompensed by C.

If "selling costs" are interpreted so as to exclude all costs recoverable when the goods are resold, in 1) above R will be in the same position under the Layby Sales Act as under sale of goods law. R's position in 2) will also be unchanged as the difference between the contract price and the market price is covered by section 9 (1) (a). However in 3) recompense is severely restricted by R being precluded from recovering for lost profits - only $2 instead of $50 will be recoverable.

On the other hand if "selling costs" were always to include those things Davison C.J. suggested R would be $18 better off in 1) and 2), and in 3) the loss of profit would be mitigated by $18.

It is obvious that neither the wide nor the narrow interpretation of "selling costs" will in all circumstances achieve the apparent intent of section 9 to return retailers to their pre-contact positions when customers cancel layby contracts. In spite of this it is difficult to discern any other intent from section 9 or the Act as a whole. If it were to retain the remedies available under sale of goods law, designed to put the "innocent"

parties into the position they would have been had the contract been performed, this could have been easily achieved - i.e. by adding to the formulation in section 9 something along the lines of "or where the supply of goods the contract pertains to exceeds demand the profit that sale would have realised"; or by including in section 2 a definition of "selling costs" that included lost profits in such circumstances. The seemingly deliberate choice not to do so negates any argument that it may have been what the Act was intended to achieve.

The possibility that the extra retailers may receive under the wide interpretation is in lieu of those lost profits is also negated as overcompensating retailers selling goods for which demand exceeds supplies while those selling goods for which the reverse is true remain under-compensated is nonsensical.

Accepting then that compensation for lost profit as such is precluded by this Act the only question is whether the narrow or wide interpretation of "selling costs" provides the most efficacious results for all parties to the contracts - while achieving the intent of the Act. It is submitted that the narrow interpretation will do this. Though there are no figures available giving a breakdown of the types of goods put on layby there is evidence[45] that in the majority of cases these are ladies' fashion goods. Demand usually exceeds supplies of this type of goods so most often when laybys are cancelled retailers will be fully recompensed for any losses incurred under the narrow interpretation whereas if the wider one were used they would be overcompensated. Though, as shown above, retailers selling goods for which supplies exceed demand will be worse off under the narrow interpretation, it is submitted that this is preferable to having the majority of cancelling layby customers paying, in effect, a penalty they were not subject to prior to the Act that is supposed to enhance consumer protection in this area.

The narrow definition of "selling costs" limits its ordinary meaning. If it is accepted that it should be limited in this manner such limits must be made clear in the Act. As "selling costs" appears in section 7[46] as well as section 9 this is best done by incorporating the "new" meaning in section 2, i.e. "selling costs means those that will not be recovered when the goods are resold"; or more specifically, "selling costs in respect of the layby elements of the sale and other costs incurred with respect to that sale". This would necessitate a designation of "other costs" i.e. "other costs include

45 Of ten "small" retailers interviewed by the writer in March 1987 five selling ladies' fashion clothes reported that layby sales accoutned for up to 40% of their total sales; five others - two of whom were jewellers, two general gift stores and one a sporting goods store - stated that layby sales smade up approximately 2-4% of their total sales. Representativies from Wellington's three major department stores also stated that ladies' fashion clothes made up the vast majority of their layby sales - though they had no actual figures showing a breakdown of the types of goods put on layby.

46 See s.7(1)(d) which reads - "(1) The seller shall, within 7 days after he has received a request in writing from the buyer and the buyer has tendered to the seller the sum of 25 cents for expenses, give to the buyer a statement in writing signed by the seller or his agent showing - (d) The amount which the seller estimates is sufficient to recoup him for selling costs in respect of the layby sale."

those incurred in - readapting the goods for resale; especially obtaining those goods in order to fulfil that contract; storage at places other than on the retailer's premises; any extra insurance necessary to cover those goods during the layby period; any extra advertising necessary in order to resell the goods." Otherwise the definition could be simply as Seeman D.J. suggested - "costs over and above those of an ordinary sale."[47]

There is one more point, with respect to refunds and cancellations, that is worthy of attention and that is the fact there is nothing in the Act to cover customers' rights with respect to payment of "selling costs" when the cancellation of laybys are due to fault only on the part of retailers. Customers' remedies here are found in the Sale of Goods Act but the fact such a situation is alluded to in section 9(2) without referring readers to the Sale of Goods Act is unsatisfactory. This is a piece of consumer protection legislation and it can scarcely fulfil its role adequately if those it is designed to protect must traverse unfamiliar statute books in search of something they may not know exists to supplement what looks like a comprehensive Act.

It is submitted that the fact customers are entitled to refunds of all they have paid, as well as any amount the goods have appreciated by[48] should be spelt out in the Act in a separate subsection thus: (using the language of section 9) "Where a layby sale is cancelled by the seller, other than by reason of a breach by the buyer which entitles the seller to cancel the sale, the buyer shall be entitled to recover the full amount he had paid, plus any amount by which the goods have appreciated since the layby commenced, from the seller as a debt due and payable by him to the buyer."

IV. CONCLUSION

The Layby Sales Act is a valuable piece of consumer protection legislation but its effectiveness could be improved by the amendments suggested above. The most important of these is the legislative definition of "selling costs", in the narrow sense, which is necessary to overcome the binding judicial interpretation of the term in *Wood* v. *Universal Fur Co. Ltd.*

Almost equally important is the task of communicating the rights and obligations the Act confers on retailers and customers to both these groups - there is little point in having the protection available if those it has relevance to are aware of it.

As far as amendment of the financial provisions is concerned it is perhaps only a matter of time before the legislature gets around to it. The sooner it does the better it will be for customers laybying more expensive items who stand to lose more, in dollar terms, upon cancellation than customers buying less expensive goods. In this respect they are perhaps more in need of protection than the latter and as the policy was originally to give them that protection the Act should be amended to that end without delay.

47 Supra n.29.
48 Allowed for by s.9(1)(a).