

FIRST PRINT

FAIR TRADING (LAY-BY) AMENDMENT BILL 1993

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The object of this Bill is to replace the existing Lay-by Sales Act 1943 with simpler and less prescriptive provisions for the protection of consumers under lay-by sales.

The principal features of the new provisions are as follows:

- The consumer is required to be given a written statement of the terms of the lay-by.
- The consumer is given the right to cancel a lay-by at any time before the goods are delivered. The consumer is then entitled to a full refund subject to payment by the consumer of an agreed cancellation charge.
- The only remedy available to a supplier when the consumer misses a payment is to cancel the lay-by and keep the agreed cancellation charge. All other amounts must be refunded to the consumer. The supplier cannot cancel until the consumer has been informed of the supplier's intention to cancel and been given an opportunity to make the missed payment.
- The cancellation charge payable is not to exceed a reasonable amount based on the supplier's reasonable selling costs and any loss of value of the goods.
- The supplier will lose the right to payment of a cancellation charge if the required lay-by statement is not given to the consumer (or it is false, misleading or deceptive), if the supplier breaches any term of the lay-by or if the goods are not available for delivery when it was agreed they would be available.
- Contracting out of the provisions is prohibited.

The proposed new provisions will form part of the Fair Trading Act 1987 as Part 5B containing the following sections:

Section 60E contains a definition of "lay-by" and makes it clear that the goods that are the subject of a lay-by need not be in existence at the time the lay-by is entered into.

Fair Trading (Lay-by) Amendment 1993

Section 60F requires the consumer to be given a written statement (a "lay-by statement") containing the terms or a summary of the terms of the lay-by. Examples are given of the sorts of things that the lay-by statement would contain. The consequences of the consumer not being given a lay-by statement or of the statement being false, misleading or deceptive are dealt with in section 60I.

Section 60G allows the consumer to cancel the lay-by at any time before the goods are delivered.

Section 60H enables the supplier to cancel the lay-by if the consumer breaches a term of the lay-by (for example, by missing a payment). The supplier must first give the consumer an opportunity to make the missed payment by informing the consumer that the lay-by will be cancelled if the payment is not made within 7 days (or longer if the supplier wishes).

Section 60I entitles the supplier to payment of a cancellation charge when a lay-by is cancelled under section 60G or 60H. All other payments are required to be refunded to the consumer. The supplier is not entitled to the cancellation charge if the supplier has breached a term of the lay-by, the goods were not available for delivery as agreed or a proper lay-by statement was not given to the consumer.

Section 60J provides that the supplier is limited to cancelling the lay-by and keeping any allowable cancellation charge if the consumer breaches a term of the lay-by.

Section 60K provides that the supplier is not entitled to demand payment in full before the date provided for final payment by the terms of the lay-by.

Section 60L imposes a limit on the cancellation charge payable when a lay-by is cancelled. The charge is not to exceed the supplier's reasonable selling costs and an amount for loss of value of the goods. The onus is on the supplier to establish his or her reasonable selling costs and any loss of value and to establish that loss of value could not have been avoided by reasonable diligence.

Section 60M prohibits a lay-by containing terms that exclude, modify or restrict the operation of the new provisions ("contracting out") and makes it an offence for a supplier to enter into such a lay-by.

Section 60N makes it clear that the new provisions do not affect any other rights that the consumer may have under a lay-by.

Section 60O provides that the new provisions do not affect any other Act or law to the extent that does not exclude, modify or restrict the operation of the new provisions.

The Bill also amends the Fair Trading Act 1987 to extend the enforcement provisions of that Act to the new provisions for lay-bys and to include a transitional provision to continue the existing law for lay-bys entered into under the Lay-by Sales Act 1943 before its repeal.

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 gives effect to the Schedule of amendments to the Fair Trading Act 1987.

Clause 4 repeals the Lay-by Sales Act 1943.

Schedule 1 makes the amendments to the Fair Trading Act 1987 explained above.

FIRST PRINT

FAIR TRADING (LAY-BY) AMENDMENT BILL 1993

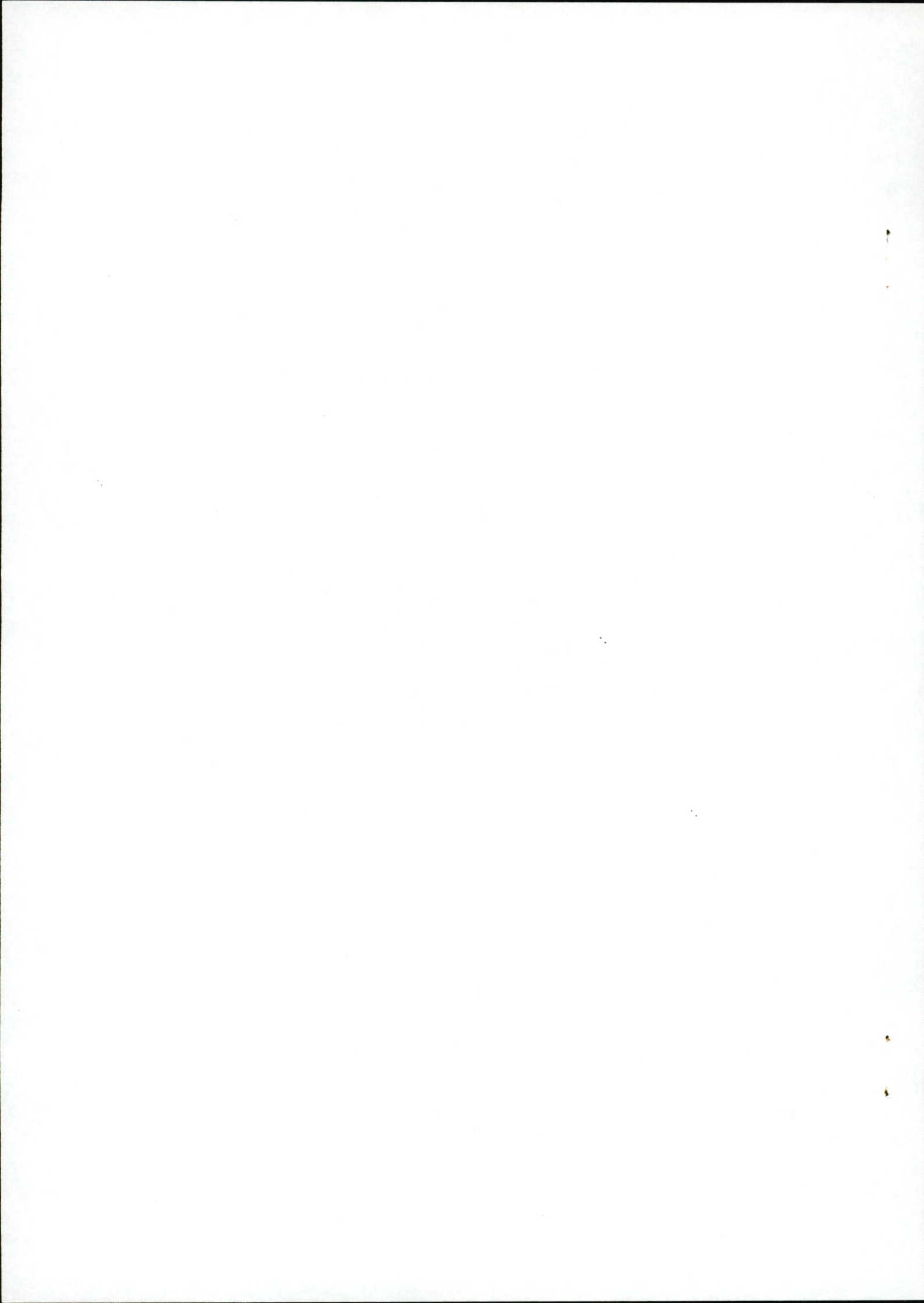
NEW SOUTH WALES



TABLE OF PROVISIONS

1. Short title
2. Commencement
3. Amendment of Fair Trading Act 1987 No. 68
4. Repeal of Lay-by Sales Act 1943 No. 36

SCHEDULE 1—AMENDMENTS



FAIR TRADING (LAY-BY) AMENDMENT BILL 1993

NEW SOUTH WALES



No. , 1993

A BILL FOR

An Act to amend the Fair Trading Act 1987 to make provision with respect to lay-by sales; to repeal the Lay-by Sales Act 1943; and for related purposes.

Fair Trading (Lay-by) Amendment 1993

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Fair Trading (Lay-by) Amendment Act 1993.

5 Commencement

2. This Act commences on a day or days to be appointed by proclamation.

Amendment of Fair Trading Act 1987 No. 68

3. The Fair Trading Act 1987 is amended as set out in Schedule 1.

10 Repeal of Lay-by Sales Act 1943 No. 36

4. The Lay-by Sales Act 1943 is repealed.

SCHEDULE 1—AMENDMENTS

(Sec. 3)

(1) Part 5B:

15 After section 60D, insert:

PART 5B—LAY-BY SALES

Meaning of "lay-by"

60E. (1) A lay-by is the supply of goods on terms (express or implied) which provide that:

- 20 (a) the goods will not be delivered to the consumer until the whole of the price has been paid; and
- (b) the price is required or allowed to be paid by 3 or more instalments (for this purpose a deposit is considered to be an instalment).

25 (2) The fact that the purchase price is allowed to be paid by less than 3 instalments does not prevent there being a lay-by, so long as payment by 3 or more instalments is allowed also.

Fair Trading (Lay-by) Amendment 1993

SCHEDULE 1—AMENDMENTS—*continued*

(3) A supply of goods which would be a lay-by except for the fact that the price is required to be paid by less than 3 instalments is taken to be a lay-by if the supplier has described, represented or advertised it as being a lay-by. 5

(4) The goods need not be in existence or in the supplier's possession when a lay-by is entered into.

Consumer must be given written statement of lay-by terms

60F. (1) The consumer under a lay-by must be given a written statement (a "lay-by statement") containing the terms or a summary of the terms of the lay-by. 10

(2) The statement must be given to the consumer when the lay-by is entered into and must be clearly legible, readily understandable and written in the English language. The statement may be written in another language if that language is understood by the consumer. 15

(3) The following are examples of some of the matters that the terms of a lay-by would provide for and which would appear in the lay-by statement: 20

- the purchase price of the goods
- any deposit paid and balance outstanding
- the dates on which instalments are due
- any cancellation charge payable
- the date by which the final instalment must be paid. 25

Consumer can cancel lay-by

60G. (1) The consumer can cancel a lay-by by notifying the supplier in writing that the consumer wants to cancel, but this can only be done before the goods are delivered.

(2) The supplier can accept the cancellation of a lay-by even if cancellation is not notified in writing. 30

(3) Section 60I provides for refunds, cancellation charges and other matters when a lay-by is cancelled.

Supplier can cancel if consumer breaches lay-by term

60H. (1) The supplier can cancel a lay-by if the consumer breaches a term of the lay-by (for example, by being late with a payment). 35

Fair Trading (Lay-by) Amendment 1993

SCHEDULE 1—AMENDMENTS—*continued*

5 (2) However, the supplier must first give the consumer notice that the lay-by will be cancelled if the consumer does not rectify the breach within a specified period (in the example, by making the payment). The period specified must not be less than 7 days.

10 (3) The notice to the consumer must be in writing unless the consumer accepts notice given in some other way (such as by telephone), but it must not be a term of the lay-by that the consumer agrees to accept notice given other than in writing.

15 (4) The lay-by is cancelled at the end of the period specified in the notice unless the consumer rectifies the breach before then or the supplier agrees not to cancel.

(5) Section 60I provides for refunds, cancellation charges and other matters when a lay-by is cancelled.

What happens when a lay-by is cancelled

20 60I. (1) When a lay-by is cancelled (whether by the supplier or the consumer):

(a) the supplier must refund to the consumer all money paid by the consumer under the lay-by (except any amount that the supplier is allowed to keep under paragraph (b)); and

25 (b) the supplier is allowed to keep the “**cancellation charge**” (the amount specified in the lay-by statement as the amount the consumer must pay if the consumer cancels or the lay-by is cancelled because the consumer fails to make a payment); and

30 (c) the supplier is entitled to recover any unpaid cancellation charge from the consumer as a debt if the amounts paid by the consumer under the lay-by are not enough to cover the cancellation charge.

(2) However, the supplier cannot keep or recover any cancellation charge (or any other money) if:

35 (a) the supplier has breached any term of the lay-by; or

(b) the goods were not available for delivery to the consumer when the terms of the lay-by indicated they would be available; or

Fair Trading (Lay-by) Amendment 1993

SCHEDULE 1—AMENDMENTS—*continued*

- (c) the lay-by statement given to the consumer does not comply with section 60F, is misleading or deceptive or contains a material false representation as to the terms of the lay-by. 5
- (3) A lay-by statement can provide that the cancellation charge is to be an amount calculated in a particular way (rather than by providing that it is to be a particular amount).
Supplier's only remedies are those provided by this Part
- 60J. (1) If a term of a lay-by is breached by the consumer or the lay-by is cancelled, the supplier is not entitled to damages or to enforce any other remedy in respect of the breach or cancellation except the remedies specifically provided by this Part. 10
- (2) In particular, the supplier is not entitled to keep or recover any money from the consumer except as specifically provided by this Part. 15
- Supplier cannot demand early payment**
- 60K. If it is a term of a lay-by that payment in full must be made by a fixed or ascertainable date, the supplier is not entitled to demand payment before that date. 20
- Cancellation charge cannot exceed a reasonable amount**
- 60L. (1) The cancellation charge that a supplier is allowed to keep or recover under this Part is not to exceed the sum of the following amounts: 25
- (a) an amount sufficient to recoup the supplier for reasonable selling costs (including storage costs and administrative expenses) in respect of the lay-by;
- (b) an amount that equates to any loss of value of the goods (whether due to deterioration or otherwise) between when the lay-by was entered into and when the lay-by was cancelled. 30
- (2) The supplier has the onus of establishing any loss of value of the goods and his or her reasonable selling costs.
- (3) The supplier must also establish that any loss of value could not have been avoided by the exercise of reasonable diligence on the supplier's part, otherwise the loss of value is to be disregarded. 35

Fair Trading (Lay-by) Amendment 1993

SCHEDULE 1—AMENDMENTS—*continued*

Contracting out etc. prohibited

5 60M. (1) A term of a lay-by is void to the extent that it would operate to exclude, modify or restrict the operation of this Part.

 (2) A supplier must not enter into a lay-by if a term of the lay-by would (but for subsection (1)) operate to exclude, modify or restrict the operation of this Part.

 Maximum penalty: 50 penalty units.

10 **Other rights of consumer not affected**

 60N. This Part does not affect any rights that a consumer may have otherwise than under this Part, such as the right to sue for damages for breach of a term of the lay-by.

Other laws not affected

15 60O. (1) This Part does not affect the operation of any other Act or law (for example, the Sale of Goods Act 1923) with respect to a lay-by, to the extent that does not exclude, modify or restrict the operation of this Part.

20 (2) The terms of a lay-by are not limited by this Part and include any terms implied by any other Act or law, to the extent that does not exclude, modify or restrict the operation of this Part.

(2) Sections 62, 65, 66, 67, 71:

 After "5A" wherever occurring, insert ", 5B".

25 (3) Sections 68, 69:

 Omit "4 or 5" wherever occurring, insert instead "4, 5 or 5B".

(4) Section 72:

30 Omit "5 or 8" wherever occurring, insert instead "5, 5B or 8".

Fair Trading (Lay-by) Amendment 1993

SCHEDULE 1—AMENDMENTS—*continued*

- (5) Schedule 5 (Savings and transitional provisions):
- (a) After clause 11, insert:
- Fair Trading (Lay-by) Amendment Act 1993**
- 11A. Part 5B (Lay-by Sales) of this Act does not apply to a lay-by sale within the meaning of the Lay-by Sales Act 1943 made before the repeal of that Act and that Act continues to apply to the sale as if it had not been repealed. 5
- (b) In clause 12 (1), after “this Act”, insert “or the Fair Trading (Lay-by) Amendment Act 1993”. 10
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FAIR TRADING (LAY-BY) AMENDMENT BILL

SECOND READING SPEECH

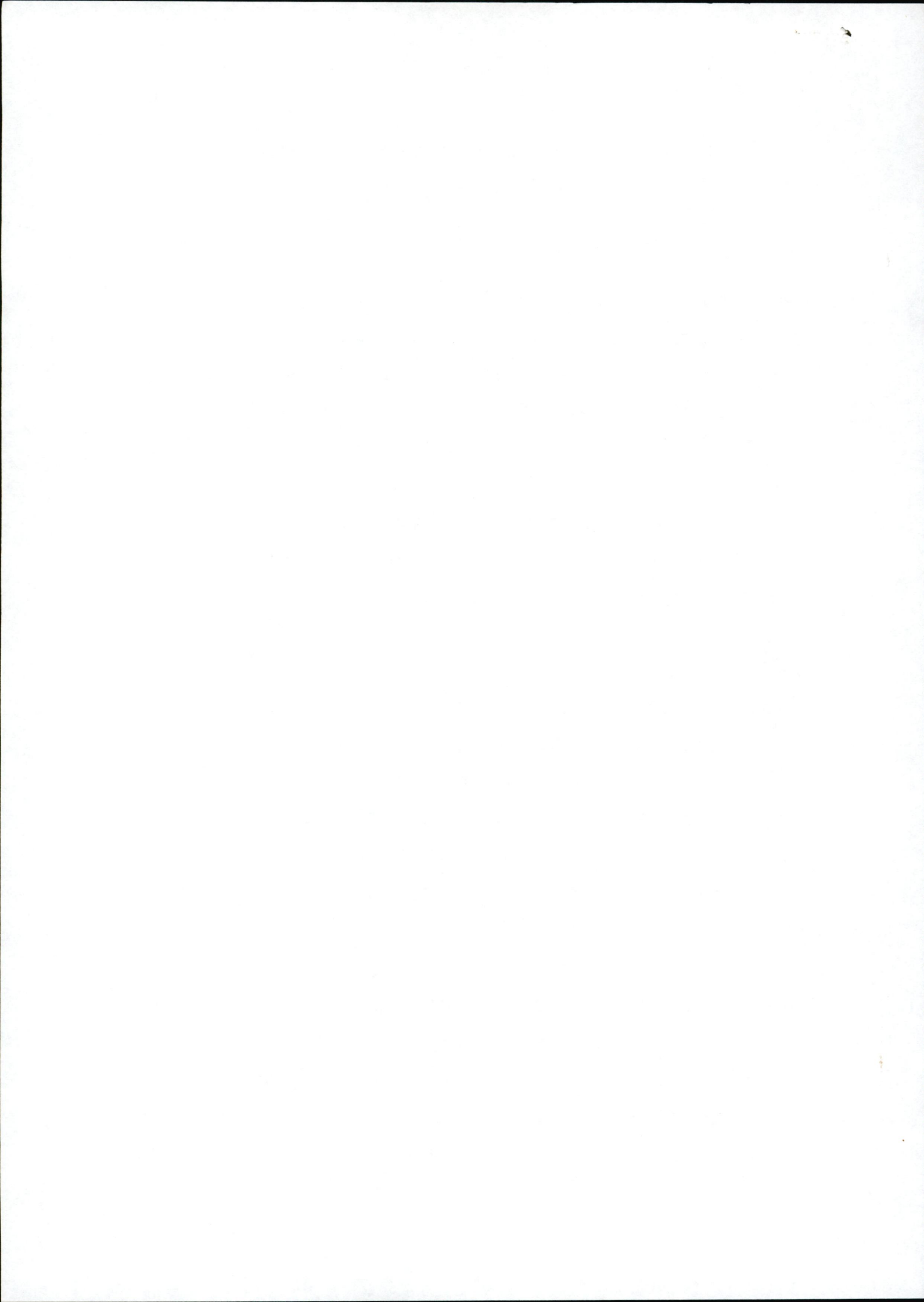
LEGISLATIVE COUNCIL

THE PURPOSE OF THIS BILL IS TO REMOVE UNDUE RESTRICTIONS ON LAY-BY SALES TRANSACTIONS BY REPEALING THE LAY-BY SALES ACT 1943, AND TO PROVIDE FOR A NEW SIMPLIFIED LAY-BY SCHEME BY AMENDING THE FAIR TRADING ACT 1987 TO INCORPORATE APPROPRIATE PROVISIONS.

THE NEW PROVISIONS WILL ESTABLISH CONSUMER REMEDIES THROUGH A CLEAR REFUND STRUCTURE IN THE EVENT OF THE ABSENCE OR INACCURACY OF A WRITTEN LAY-BY STATEMENT.

THE MAJOR PROBLEM AREA HAS BEEN DISPUTES BETWEEN SUPPLIER AND CONSUMER ABOUT THE AMOUNT OF REFUND, OR INDEED THE LACK OF ANY REFUND, AFTER A CANCELLATION, OR WHAT HAPPENS WHEN THE GOODS ARE NOT AVAILABLE. CONSUMERS GENERALLY THINK THEY SHOULD GET ALL THEIR MONEY BACK, AND SUPPLIERS OFTEN THINK THAT THEY CAN KEEP THE DEPOSIT OR SOME OTHER GREATER AMOUNT. DEPENDING ON THE CIRCUMSTANCES, BOTH MAY BE RIGHT, BUT THE OLD ACT IS NOT ALWAYS CLEAR OR EASILY UNDERSTOOD.

THE OLD ACT WAS FOUND TO BE OVERLY-PRESCRIPTIVE, INCOMPREHENSIBLE IN PLACES, AND OUTDATED. IT IS NOT ACTIVELY ENFORCED BECAUSE IT DOES NOT PROVIDE ANY DETERRENT TO OFFENDERS NOR ANY REMEDIES FOR CONSUMER LOSS. IN RESPONSE TO COMMUNITY FEEDBACK, THE PROPOSED NEW PROVISIONS FILL THE NEED

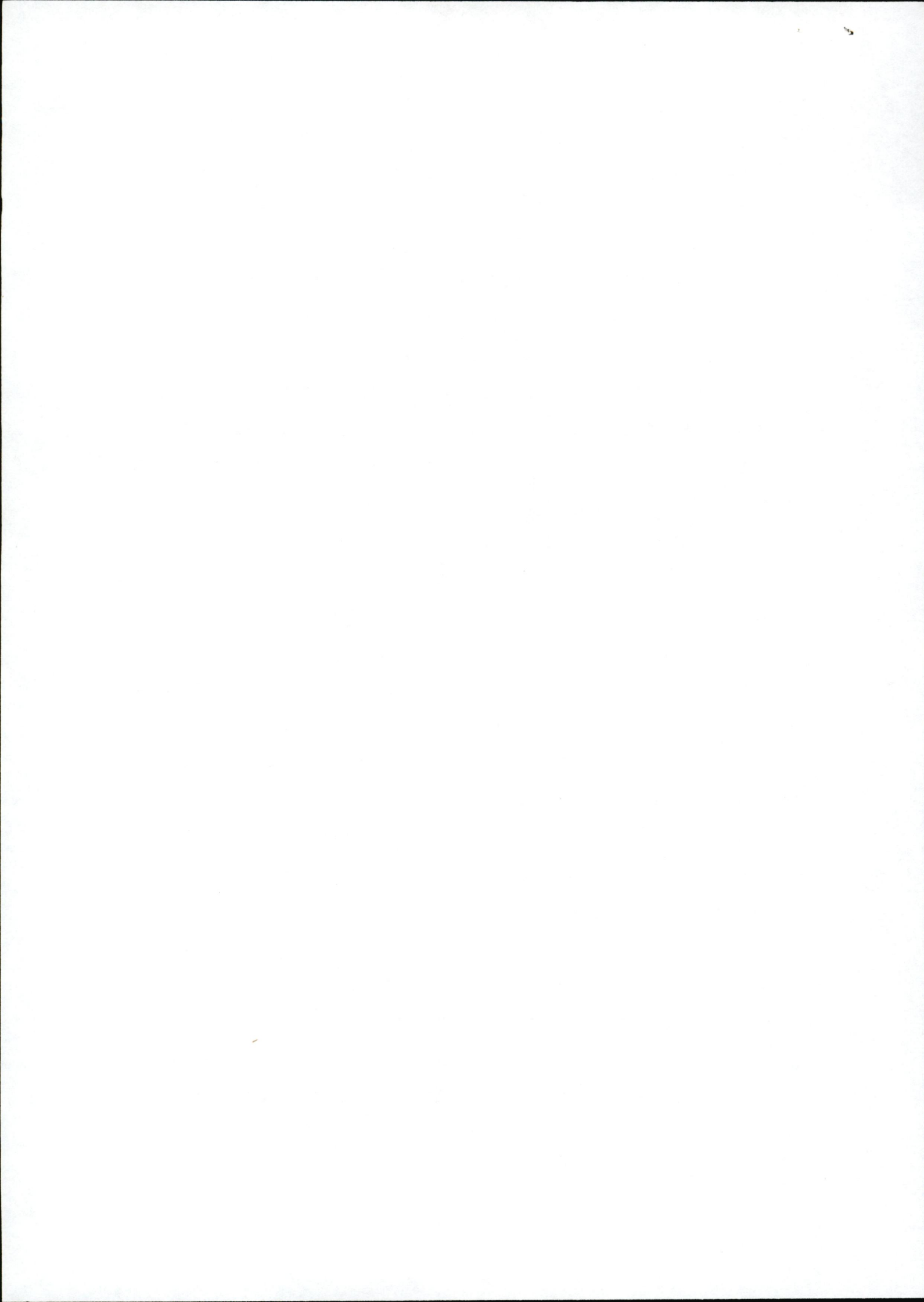


TO CLARIFY THE RIGHTS AND REMEDIES OF BOTH THE SUPPLIER AND THE CONSUMER.

ALTHOUGH MUCH OF ANY LAY-BY ARRANGEMENT IS LEFT TO THE CONSUMER AND SUPPLIER TO DECIDE UPON, THE KEYSTONE PROVISION OF THE PROPOSED NEW SCHEME WILL BE A REQUIREMENT FOR THE SUPPLIER TO GIVE TO THE CONSUMER A WRITTEN STATEMENT (THE "LAY-BY STATEMENT") CONTAINING ALL THE RELEVANT TERMS OF THE TRANSACTION AT THE TIME OF ENTERING THE LAY-BY. WITHOUT ACTUALLY PRESCRIBING THE TERMS , THE PROPOSED PROVISION GIVES SOME EXAMPLES OF WHAT MAY BE CONSIDERED AS IMPORTANT AND RELEVANT TERMS, SUCH AS THE CANCELLATION FEE.

IT IS UP TO THE SUPPLIER TO DECIDE WHAT INFORMATION IS RELEVANT OR NOT, AND WHETHER A STATEMENT IS GIVEN AS A SALES DOCKET OR A RECEIPT OR AN ENVELOPE OR ANYTHING ELSE. THE NEW SCHEME WILL ALLOW THE CONSUMER TO CANCEL THE LAY-BY AT ANY TIME BEFORE ITS COMPLETION, SUBJECT TO THE SPECIFIED CANCELLATION CHARGE. IT ALSO ALLOWS THE SUPPLIER TO CANCEL IF THE CONSUMER HAS DEFAULTED ON PAYMENTS, SUBJECT TO THE SPECIFIED CANCELLATION CHARGE. ALL OTHER MONEYS MUST BE REFUNDED.

FAILURE TO COMPLY WITH THE FUNDAMENTAL REQUIREMENT OF PROVIDING A LAY-BY STATEMENT WILL NOT BE AN OFFENCE, BUT WILL LEAD DIRECTLY TO CLEAR REMEDIES FOR THE CONSUMER. THE SUPPLIER WILL NOT BE ALLOWED TO KEEP THE CANCELLATION CHARGE IF:



- THE SUPPLIER HAS BREACHED ANY TERM OF THE LAY-BY (SUCH AS SUPPLYING GOODS WHICH ARE NOT AS ORDERED)
- THE GOODS WERE NOT SUPPLIED AT ALL, OR
- THERE WAS NOT A WRITTEN LAY-BY STATEMENT, OR THERE WAS NO CANCELLATION CHARGE SPECIFIED IN THE LAY-BY STATEMENT, OR ANY TERM WAS MISLEADING, DECEPTIVE OR MATERIALLY FALSE.

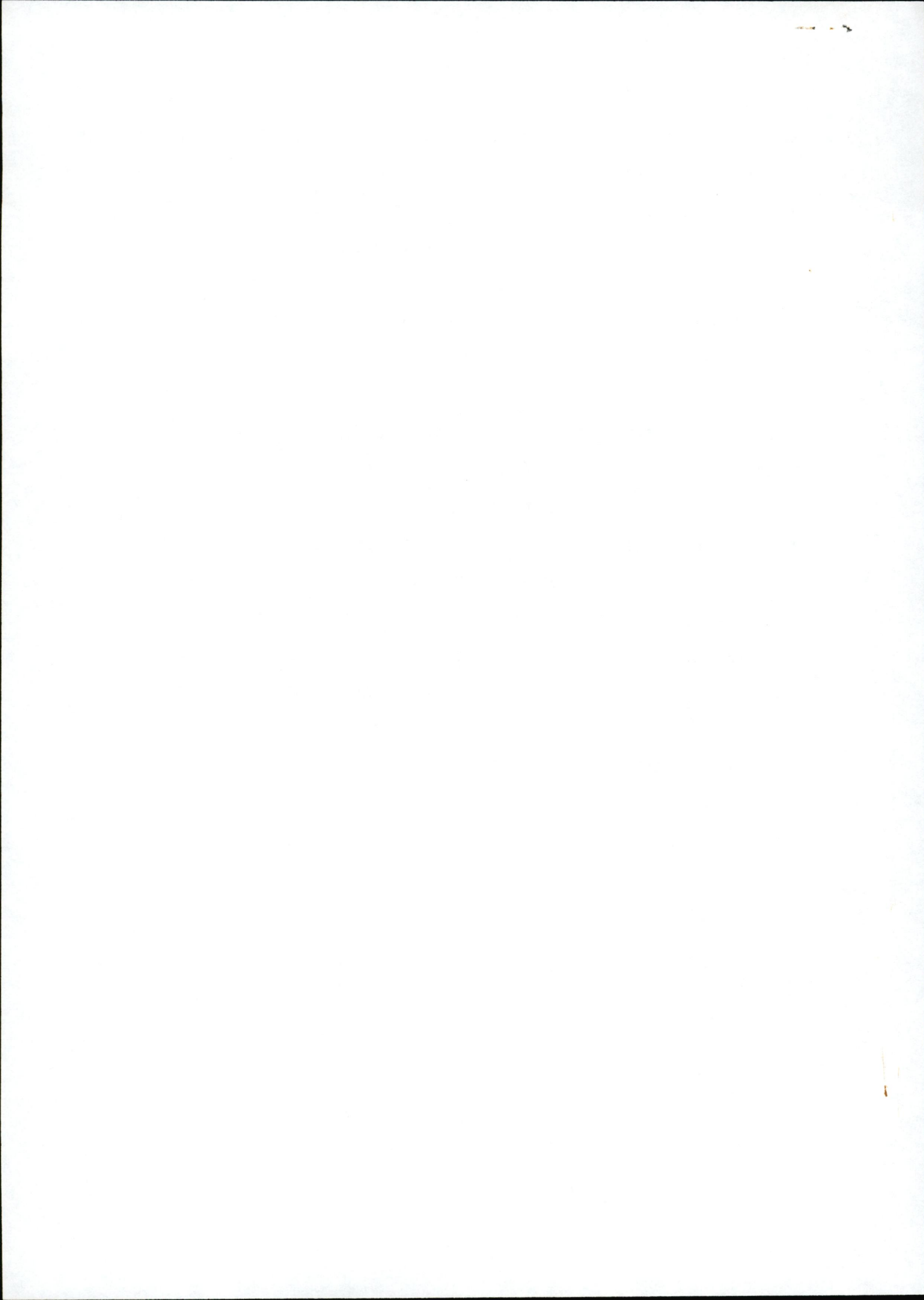
THE PROPOSED SCHEME IMPOSES A LIMIT ON THE CANCELLATION CHARGE PAYABLE WHEN THE LAY-BY IS CANCELLED. THE CHARGE IS NOT TO EXCEED THE SUPPLIER'S REASONABLE SELLING COSTS AND AN AMOUNT, IF APPLICABLE, FOR LOSS OF VALUE OF THE GOODS. THE ONUS IS ON THE SUPPLIER TO ESTABLISH THOSE REASONABLE SELLING COSTS, AND ANY LOSS OF VALUE, AND THAT THE LOSS OF VALUE COULD NOT HAVE BEEN AVOIDED. THE ISSUES OF "WHAT IS REASONABLE" AND "WHEN IS A LOSS OF VALUE CHARGEABLE" WILL BE PART OF A PROGRAM OF EDUCATION FOR BOTH CONSUMERS AND SUPPLIERS.

ALTHOUGH THE CANCELLATION CHARGE SPECIFIED IN THE UPFRONT LAY-BY STATEMENT MAY BE TAKEN AS AN AGREEMENT BETWEEN THE TWO PARTIES, THE PASSING OF TIME BETWEEN EARLY OR LATER CANCELLATION MAY VARY THE REASONABLENESS OF ANY OSTENSIBLE SELLING COSTS. IT IS ALSO EXPECTED THAT ANY CASES OF LOSS OF VALUE WILL BE INFREQUENT. IN ANY EVENT, THE CONSUMER MAINTAINS A RIGHT TO DISPUTE THESE MATTERS IN A COURT OR TRIBUNAL.

THE NEW SCHEME ALSO PROVIDES THAT THE SUPPLIER WILL NOT BE ENTITLED TO DEMAND FULL PAYMENT BEFORE THE END OF THE LAY-BY PERIOD. IT WILL ALSO BE AN OFFENCE TO "CONTRACT OUT" OF THE NEW PROVISIONS; THAT IS, TO INCLUDE A TERM IN THE LAY-BY STATEMENT WHICH EXCLUDES, MODIFIES OR RESTRICTS THE OPERATION OF THESE PROVISIONS. THE MAXIMUM PENALTY FOR THAT OFFENCE WILL BE \$5000.

THE BILL PROVIDES FOR MISCELLANEOUS AMENDMENTS TO THE FAIR TRADING ACT TO EXTEND OTHER REMEDIAL PROVISIONS OF THAT ACT TO THE NEW PART. THESE PROPOSALS AS A WHOLE REPRESENT A RECOGNITION THAT LAY-BYS ARE AN INCREASINGLY POPULAR BUSINESS ARRANGEMENT FOR SUPPLIERS TO ATTRACT CUSTOMERS, AND FOR CONSUMERS TO ORGANISE THEIR SHOPPING WITHOUT RESORTING TO OVER-USE OF CREDIT CARDS. IT IS A SYSTEM OF TRADING WORTHY OF PRESERVATION. ALLOWING TIME FOR FURTHER CONSULTATION WITH THE RETAIL TRADERS ASSOCIATION TO ENSURE CONSISTENCY OF PROMOTIONAL MATERIALS, COMMENCEMENT IS PROPOSED FOR AUGUST.

I COMMEND THE BILL.



FAIR TRADING (LAY-BY) AMENDMENT ACT 1993 No. 25

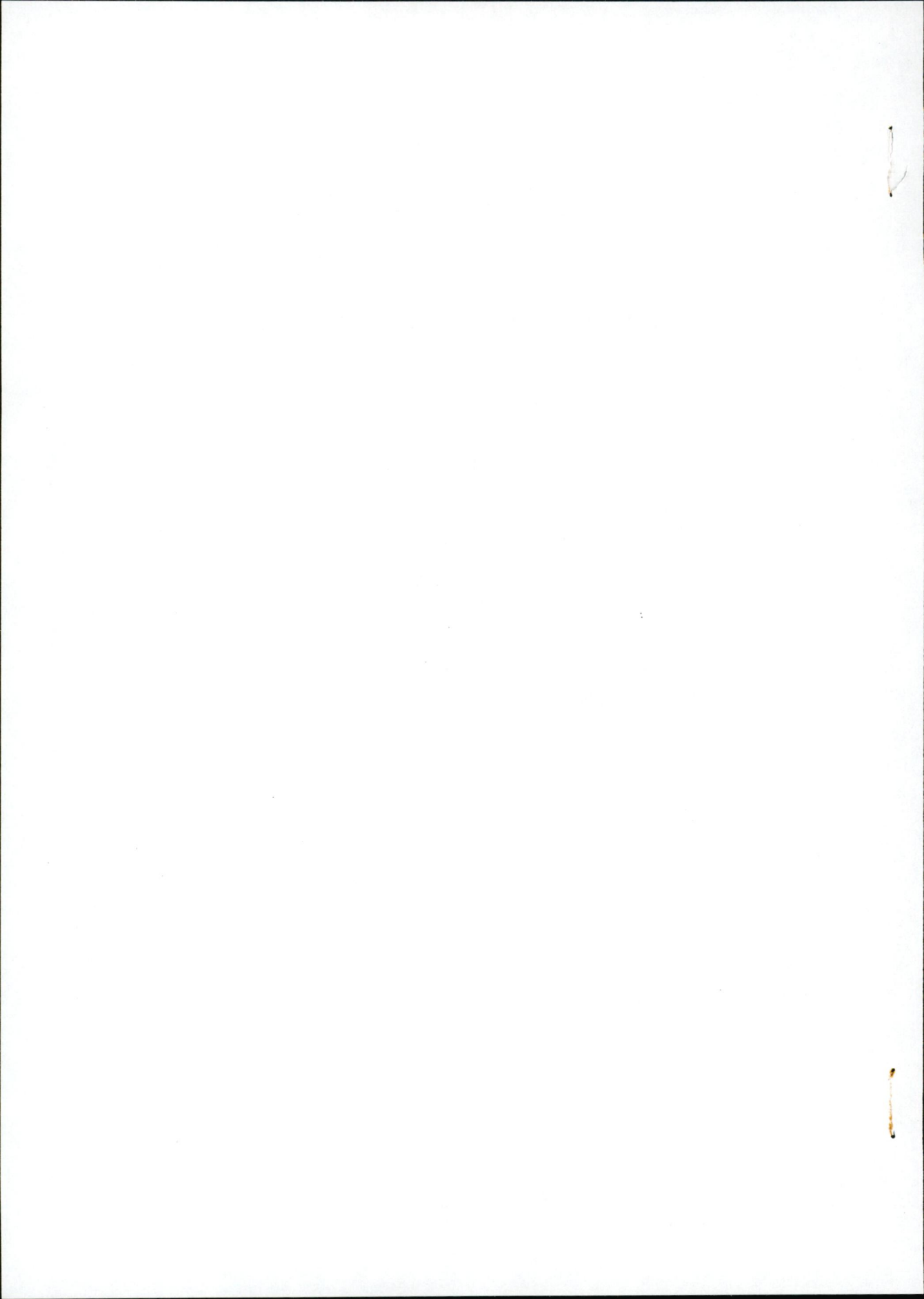
NEW SOUTH WALES



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4. Repeal of Lay-by Sales Act 1943 No. 36

SCHEDULE 1—AMENDMENTS



FAIR TRADING (LAY-BY) AMENDMENT ACT 1993 No. 25

NEW SOUTH WALES



Act No. 25, 1993

An Act to amend the Fair Trading Act 1987 to make provision with respect to lay-by sales; to repeal the Lay-by Sales Act 1943; and for related purposes. [Assented to 8 June 1993]

Fair Trading (Lay-by) Amendment Act 1993 No. 25

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Fair Trading (Lay-by) Amendment Act 1993.

Commencement

2. This Act commences on a day or days to be appointed by proclamation.

Amendment of Fair Trading Act 1987 No. 68

3. The Fair Trading Act 1987 is amended as set out in Schedule 1.

Repeal of Lay-by Sales Act 1943 No. 36

4. The Lay-by Sales Act 1943 is repealed.

SCHEDULE 1—AMENDMENTS

(Sec. 3)

(1) Part 5B:

After section 60D, insert:

PART 5B—LAY-BY SALES

Meaning of “lay-by”

60E. (1) A lay-by is the supply of goods on terms (express or implied) which provide that:

- (a) the goods will not be delivered to the consumer until the whole of the price has been paid; and
- (b) the price is required or allowed to be paid by 3 or more instalments (for this purpose a deposit is considered to be an instalment).

(2) The fact that the purchase price is allowed to be paid by less than 3 instalments does not prevent there being a lay-by, so long as payment by 3 or more instalments is allowed also.

SCHEDULE 1—AMENDMENTS—*continued*

(3) A supply of goods which would be a lay-by except for the fact that the price is required to be paid by less than 3 instalments is taken to be a lay-by if the supplier has described, represented or advertised it as being a lay-by.

(4) The goods need not be in existence or in the supplier's possession when a lay-by is entered into.

Consumer must be given written statement of lay-by terms

60F. (1) The consumer under a lay-by must be given a written statement (a "**lay-by statement**") containing the terms or a summary of the terms of the lay-by.

(2) The statement must be given to the consumer when the lay-by is entered into and must be clearly legible, readily understandable and written in the English language. The statement may be written in another language if that language is understood by the consumer.

(3) The following are examples of some of the matters that the terms of a lay-by would provide for and which would appear in the lay-by statement:

- the purchase price of the goods
- any deposit paid and balance outstanding
- the dates on which instalments are due
- any cancellation charge payable
- the date by which the final instalment must be paid.

Consumer can cancel lay-by

60G. (1) The consumer can cancel a lay-by by notifying the supplier in writing that the consumer wants to cancel, but this can only be done before the goods are delivered.

(2) The supplier can accept the cancellation of a lay-by even if cancellation is not notified in writing.

(3) Section 60I provides for refunds, cancellation charges and other matters when a lay-by is cancelled.

Supplier can cancel if consumer breaches lay-by term

60H. (1) The supplier can cancel a lay-by if the consumer breaches a term of the lay-by (for example, by being late with a payment).

Fair Trading (Lay-by) Amendment Act 1993 No. 25

SCHEDULE 1—AMENDMENTS—*continued*

(2) However, the supplier must first give the consumer notice that the lay-by will be cancelled if the consumer does not rectify the breach within a specified period (in the example, by making the payment). The period specified must not be less than 7 days.

(3) The notice to the consumer must be in writing unless the consumer accepts notice given in some other way (such as by telephone), but it must not be a term of the lay-by that the consumer agrees to accept notice given other than in writing.

(4) The lay-by is cancelled at the end of the period specified in the notice unless the consumer rectifies the breach before then or the supplier agrees not to cancel.

(5) Section 60I provides for refunds, cancellation charges and other matters when a lay-by is cancelled.

What happens when a lay-by is cancelled

60I. (1) When a lay-by is cancelled (whether by the supplier or the consumer):

- (a) the supplier must refund to the consumer all money paid by the consumer under the lay-by (except any amount that the supplier is allowed to keep under paragraph (b)); and
- (b) the supplier is allowed to keep the “**cancellation charge**” (the amount specified in the lay-by statement as the amount the consumer must pay if the consumer cancels or the lay-by is cancelled because the consumer fails to make a payment); and
- (c) the supplier is entitled to recover any unpaid cancellation charge from the consumer as a debt if the amounts paid by the consumer under the lay-by are not enough to cover the cancellation charge.

(2) However, the supplier cannot keep or recover any cancellation charge (or any other money) if:

- (a) the supplier has breached any term of the lay-by; or
- (b) the goods were not available for delivery to the consumer when the terms of the lay-by indicated they would be available; or

SCHEDULE 1—AMENDMENTS—*continued*

(c) the lay-by statement given to the consumer does not comply with section 60F, is misleading or deceptive or contains a material false representation as to the terms of the lay-by.

(3) A lay-by statement can provide that the cancellation charge is to be an amount calculated in a particular way (rather than by providing that it is to be a particular amount).

Supplier's only remedies are those provided by this Part

60J. (1) If a term of a lay-by is breached by the consumer or the lay-by is cancelled, the supplier is not entitled to damages or to enforce any other remedy in respect of the breach or cancellation except the remedies specifically provided by this Part.

(2) In particular, the supplier is not entitled to keep or recover any money from the consumer except as specifically provided by this Part.

Supplier cannot demand early payment

60K. If it is a term of a lay-by that payment in full must be made by a fixed or ascertainable date, the supplier is not entitled to demand payment before that date.

Cancellation charge cannot exceed a reasonable amount

60L. (1) The cancellation charge that a supplier is allowed to keep or recover under this Part is not to exceed the sum of the following amounts:

- (a) an amount sufficient to recoup the supplier for reasonable selling costs (including storage costs and administrative expenses) in respect of the lay-by;
- (b) an amount that equates to any loss of value of the goods (whether due to deterioration or otherwise) between when the lay-by was entered into and when the lay-by was cancelled.

(2) The supplier has the onus of establishing any loss of value of the goods and his or her reasonable selling costs.

(3) The supplier must also establish that any loss of value could not have been avoided by the exercise of reasonable diligence on the supplier's part, otherwise the loss of value is to be disregarded.

Fair Trading (Lay-by) Amendment Act 1993 No. 25

SCHEDULE 1—AMENDMENTS—*continued*

Contracting out etc. prohibited

60M. (1) A term of a lay-by is void to the extent that it would operate to exclude, modify or restrict the operation of this Part.

(2) A supplier must not enter into a lay-by if a term of the lay-by would (but for subsection (1)) operate to exclude, modify or restrict the operation of this Part.

Maximum penalty: 50 penalty units.

Other rights of consumer not affected

60N. This Part does not affect any rights that a consumer may have otherwise than under this Part, such as the right to sue for damages for breach of a term of the lay-by.

Other laws not affected

60O. (1) This Part does not affect the operation of any other Act or law (for example, the Sale of Goods Act 1923) with respect to a lay-by, to the extent that does not exclude, modify or restrict the operation of this Part.

(2) The terms of a lay-by are not limited by this Part and include any terms implied by any other Act or law, to the extent that does not exclude, modify or restrict the operation of this Part.

(2) Sections 62, 65, 66, 67, 71:

After "5A" wherever occurring, insert ", 5B".

(3) Sections 68, 69:

Omit "4 or 5" wherever occurring, insert instead "4, 5 or 5B".

(4) Section 72:

Omit "5 or 8" wherever occurring, insert instead "5, 5B or 8".

Fair Trading (Lay-by) Amendment Act 1993 No. 25

SCHEDULE 1—AMENDMENTS—*continued*

(5) Schedule 5 (Savings and transitional provisions):

(a) After clause 11, insert:

Fair Trading (Lay-by) Amendment Act 1993

11A. Part 5B (Lay-by Sales) of this Act does not apply to a lay-by sale within the meaning of the Lay-by Sales Act 1943 made before the repeal of that Act and that Act continues to apply to the sale as if it had not been repealed.

(b) In clause 12 (1), after “this Act”, insert “or the Fair Trading (Lay-by) Amendment Act 1993”.

[*Minister's second reading speech made in—
Legislative Assembly on 28 April 1993
Legislative Council on 19 May 1993*]

