

GORDON BORRIE
and AUBREY L. DIAMOND



— THE —
CONSUMER,
SOCIETY
— AND THE —
LAW

The fourth edition, revised and updated,
of the classic guide



GORDON BORRIE
AND AUBREY L. DIAMOND

THE CONSUMER, SOCIETY
AND THE LAW

FOURTH EDITION



PENGUIN BOOKS

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THE CONSUMER, SOCIETY
AND THE LAW

Gordon Borrie was born in 1931 and educated at Llandudno and at Manchester University. He was a Harmsworth Scholar at the Middle Temple, where he was called to the Bar in 1952, and became a Bencher in 1980. He became Director General of Fair Trading in 1976 after several years as Professor of English Law at the University of Birmingham. He twice stood for Parliament, is author of a textbook on *Commercial Law* (now in its fifth edition) and is a member of the Law Commissions' Advisory Panel on Contract Law. Gordon Borrie was a member of the Parole Board for England and Wales 1971-4 and of the Council of the Consumers' Association 1972-5. He is married to a Canadian.

Aubrey Diamond was born in London in 1923, served with the R.A.F. during the Second World War, and then studied law. He is a professor of law at London University and is Director of the Institute of Advanced Legal Studies. He was a Law Commissioner from 1971 to 1976 and has been a practising solicitor, and a visiting professor at the University of East Africa, at Stanford University in California and at Melbourne University. He is Chairman of I.B.A.'s Advertising Advisory Committee. He is also President of the National Federation of Consumer Groups, a Vice-President of the Institute of Trading Standards Administration and a Council member of the Law Society. He was a member of the Consumer Council from 1963 to 1971 and a Council member of the Consumers' Association. Aubrey Diamond is married to a doctor and has two children.

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PREFACE TO THE FOURTH EDITION

THE law never stands still. Hardly a month passes without some significant development – new Acts of Parliament, decisions of the courts, governmental regulations, reports by official or unofficial bodies – which must be considered by anyone trying to convey a picture of the law as it affects the citizen. Since this book was first published much that we criticized has changed for the better. This fourth edition includes references to recent court cases and to Acts of Parliament such as the Consumer Credit Act 1974, the Unfair Contract Terms Act 1977, the Consumer Safety Act 1978, the Sale of Goods Act 1979 and the Weights and Measures Act 1979.

We would like to record our thanks for the valuable help and advice in writing this book which was generously given to us by our good friend Sir Jack Jacob, until recently Senior Master of the Queen's Bench Division. For the third edition Mrs Valentine Korah, Reader in English Law at University College, London, helped us to re-write Chapters 11 and 12 which were re-arranged on her advice: we are most grateful to her for her willing assistance. Finally, Gordon Borrie, who now holds an official appointment, stresses that the personal views expressed in this book are those of the authors alone.

November, 1980.

G.B.

A.L.D.

INTRODUCTION

Is there any real need for consumer protection? In the simple transactions of the market place, no doubt the consumer is his own best guide. When he buys a pound of tomatoes, he has only himself to blame if they are unripe. Yet, even in medieval times, the law stepped in to protect the buyer of adulterated wine or mouldy bread. Now, with an enormous variety of goods available for purchase, many of them pre-packed or mechanical or of intricate workmanship, so that any deficiencies are inevitably hidden, far greater consumer protection is called for. In the complex field of consumer services too – repairers, dry cleaners, garages, insurance companies – legal rules are required to redress the natural imbalance between the individual consumer and ‘Them’.

Until the establishment in 1965 of the Law Commission there was no government agency charged with the general responsibility of seeing that the existing law was adequate for the needs of the day or of initiating proposals to reform it. Among the public, however, there has for some time been a growing realization that the law as it stands does not give sufficient protection to the consumer.

Retailers, manufacturers, and those who provide the manifold consumer services have long joined together in trade organizations and associations to promote their respective interests. It is only within the last twenty-five years that consumers too have recognized the need for organization, and the growth of the consumer movement has been a major phenomenon of recent years. As recently as 1955, consumers had no collective voice. Today some 600,000 people subscribe to *Which?*, published by the

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Consumers' Association; there are over eighty Consumer Groups throughout the country, with about twenty thousand members; and the Advisory Centre for Education publishes independent information and comment on schools, universities, and teaching methods in *Where?* These developments are, of course, paralleled in other countries, not only in Europe and America.

For the first time, ordinary people, as buyers of goods and users of services, have their own pressure groups. Consumer organization already seems to have made a considerable impact on manufacturers and retailers, and in 1959 the Government appointed a Committee, under the chairmanship of Sir Joseph Molony QC, to report on what changes in the law were desirable 'for the further protection of the consuming public'. The Committee's lengthy report was published in July 1962. It dealt with a large number of topics vital to the consumer, from safety standards to hire purchase, from advertising to manufacturers' 'guarantees', though not, regrettably, with consumer services. The Committee made 214 separate recommendations. We shall have some criticisms to make of a number of points in the Report but no one can deny its significance. It is bound to stand out as a landmark, and changes in the law, designed to provide greater consumer protection, have now been made – notably by the Trade Descriptions Act of 1968.

The Press and the political parties have been taking a much more lively interest in consumer matters. This is to be welcomed although, naturally, there are differences of approach in the policy statements put forward by the different political groups. Following the suggestions of the Molony Committee, a Conservative Government appointed a national Consumer Council in June 1963. It was envisaged as 'the authoritative and considered voice of the consumer', exerting its influence both on trade and

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on government. Unfortunately it survived for less than eight years: early in 1971 it was wound up, a new Conservative Government saying that its functions could be carried out by private enterprise. The Consumer Council sponsored valuable research, it engaged in important educational activities, and it certainly made the consumer's voice heard and noticed. The saving of money which prompted its demise soon proved to be an ill-considered economy: in November 1972 the Government recognized its earlier error and appointed for the first time a Minister with special responsibility for consumer affairs who soon afterwards introduced the Fair Trading Act 1973 (see p. 152 below). This Act provided for the appointment of a Director General of Fair Trading with special responsibility for keeping under review commercial activities relating to goods and services supplied to consumers. A National Consumer Council was set up in 1975 and survived the change from a Labour to a Conservative Government in 1979.

The militant march of the consumer has resulted in the publication of a number of books which attempt to guide the consumer in the many transactions into which he enters, to tell him what his legal rights are, and to advise him how to exercise them. This book is not another. There is, it must be admitted, a considerable amount of practical law in this book, and the consumer may find here guidance on particular problems. But our main purpose was not to write a legal textbook or a handbook of do's and don'ts for consumers. It was to describe how the law has evolved: how it became what it is today and how it might evolve in the future; and to try to evaluate how far it serves the ends of society, and in particular the consumer, in the second half of the twentieth century.

Consumer transactions cover such a wide field that we are conscious of the staccato effect of the ensuing chap-

ters. After tracing the growth of modern law from its early beginnings, we seek to show how Victorian ideas of freedom and sanctity of contract, embodied in court decisions, stand in the way of much needed reform. Too often, to borrow the words of a former Master of the Rolls, 'the dead hand of the past fastens on the living present'. Lawyers will recognize that the early chapters are largely concerned with the law of contract and with various aspects of the law of sale of goods, while hire purchase (considered in the sixth chapter) is closely related. Then we range from consumer services and bailments to banking, insurance, and travel. Two chapters are devoted to the post-war legislation on monopolies and restrictive practices, including resale price maintenance. In the final chapter, an attempt is made to draw the threads together.

Convinced as we are of the need and value of legislating for improvements in the law, we have to admit that 'you cannot legislate for fools'. No legislation is going to change us overnight into a nation of knowledgeable, prudent, and discriminating shoppers. Law reform has to be accompanied by consumer education. We would like to see the work of the consumer organizations in this field supplemented not only by greater press and television coverage but also by the schools giving consumer matters a prominent place in their curricula.

Our concern throughout will be with English law, though we have, where necessary, drawn parallels and ideas from American and Commonwealth sources. Scottish law, although similar in many matters of detail, is fundamentally part of a different legal tradition, and nothing in this book can be regarded as authoritative north of the Tweed.

To lawyers, we ought to explain a perhaps unconventional matter of referring to judges. We take it that the lay reader is more concerned with the personal identity of the individual judge than with his judicial office, so that