

## MERCHANDISE MARKS BILL

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### EXPLANATORY NOTE

THIS Bill, like the Patents, Designs, and Trade Marks Acts of 1953, is consequential on the report of the Commission which was appointed in April 1948 under the chairmanship of the Solicitor-General, Mr H. E. Evans, Q.C., to inquire into and report upon the law of New Zealand relating to patents, designs, and trade marks. The report was published as parliamentary paper H-10A of 1950. Paragraphs 297 to 303 of the report relate to merchandise marks.

The Bill consolidates with minor amendments the provisions now contained in the Patents, Designs, and Trade Marks Act 1908 and in section 87 (2) of the Trade Marks Act 1953. *Clauses 3 to 8 and clause 14* are new and are based on provisions which have been enacted in the United Kingdom in the Merchandise Marks Acts of 1926 and 1953.

Marginal notes alongside each clause of the Bill show the corresponding provisions in the present New Zealand legislation or the provisions of the United Kingdom legislation on which they are based.

*Clauses 1 and 2* relate to the Short Title, commencement, and interpretation of the Bill. Attention is drawn to the definition of the term "advertisement" which does not appear in the present New Zealand or United Kingdom legislation. The inclusion of this definition makes it clear that *clause 12 (4)* applies to false trade descriptions in radio advertisements. Attention is also directed to the definition of the term "trade description". Section 1 (1) of the Merchandise Marks Act 1953 of the United Kingdom made the definition of the term in the United Kingdom legislation extend to any description as to the fitness for purpose, strength, performance, or behaviour of any goods. The definition in the Bill contains no corresponding provision.

*Clause 3* provides that the Governor-General may, by Order in Council, require either imported or New Zealand made goods of any specified class or description to bear an indication of origin. The Order in Council must specify in each case the manner in which the indication of origin is to be applied to the goods and the point of time at which they are to bear the indication of origin, e.g. the time of their manufacture, importation, or sale. The Minister may grant provisional

exemption from any such Order in Council for a period of up to twelve months. The clause goes further than the corresponding United Kingdom provision which does not provide for goods made in the United Kingdom to bear an indication of origin.

*Clause 4* makes it unlawful to sell, except under certain conditions, goods imported into New Zealand bearing the name or trade mark of a New Zealand manufacturer or trader or the name of any place or district in New Zealand unless the name or mark is accompanied by an indication of origin. The Minister may exempt any class of goods from the operation of the clause.

*Clause 5* provides that the Minister may refer any application or matter arising in connection with the operation of *clause 3* or *clause 4* to the Board of Trade for its recommendations.

*Clauses 6 and 7* prescribe penalties for the removal of marks which are required as aforesaid and for failure to mark where so required.

*Clause 8* deals with the application of the said marking provisions to blends and mixtures.

*Clauses 9 to 12* deal with offences in connection with trade names, trade marks, and trade descriptions, e.g., certain types of forgery, and false trade descriptions. They follow substantially provisions at present in force in New Zealand.

*Clause 13* repeats the present New Zealand provisions under which persons employed in the ordinary course of business and servants may be exempt from liability in certain cases.

*Clause 14* follows section 6 of the Merchandise Marks Act 1926 (U.K.) under which an employer may be exempt from liability in certain cases.

*Clauses 15 to 17* follow the present New Zealand provisions relating to the method of describing trade marks in pleadings, the punishment of accessories, and the limitation of prosecutions.

*Clause 18* prescribes the general penalties which may be imposed under the Act in cases where no other penalty is specified.

*Clause 19* repeats, with verbal modifications, provisions of the present New Zealand legislation which enable articles which contravene the legislation to be forfeited in cases where the owner is unknown or cannot be found. It provides for the destruction or disposition of forfeited articles at the discretion of the Secretary for Industries and Commerce or the Minister, and for marks which contravene the legislation to be obliterated before the goods are disposed of. The Courts are empowered to direct the reimbursement of an innocent party out of the proceeds of sale.

*Clause 20* repeats the present New Zealand section relating to implied warranties on the sale of marked goods.

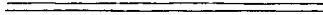
*Clause 21* enables a trade description to be used, without contravening the provisions of the Bill relating to false trade descriptions, to indicate a particular class or method of manufacture of goods to which the trade description was lawfully and generally applied at the commencement of the Bill. It follows the present New Zealand provision.

*Clause 22* provides that goods which are liable to forfeiture under *clause 18* shall be prohibited imports for the purposes of section 46 of the Customs Act 1913. They would therefore be liable to seizure and forfeiture under the Customs procedure.

*Clause 23* provides for the Bill to apply in the Island territories.

*Clause 24* contains provisions similar to those in the present New Zealand legislation so as to make it clear that the Bill does not take away any obligations which otherwise exist.

*Clause 25 and the Schedule* contain the normal provisions in connection with repeals, revocations, and savings.



Hon. Mr Watts

## MERCHANDISE MARKS

### ANALYSIS

Title.	11. Forging trade mark.
1. Short Title and commencement.	12. Advertisements and other applications of marks and descriptions.
2. Interpretation.	
<i>Certain Goods to Bear Indication of Origin</i>	<i>General</i>
3. Power to require indication of origin.	13. Exemption of employees in certain cases.
4. Imported goods bearing name or trade mark of New Zealand manufacturer or trader not to be sold unless accompanied by indication of origin.	14. Power of employer to exempt himself from penalty on conviction of actual offender.
5. Matters under section 3 or section 4 may be referred to Board of Trade.	15. Description of trade mark in pleading.
6. Penalty on removal of any required mark from goods.	16. Punishment of accessories.
7. Offences arising from failure to mark.	17. Limitation of prosecution.
8. Special provisions in respect of blends and mixtures.	18. General penalty for offences.
<i>False Trade Descriptions, etc.</i>	19. Forfeiture.
9. Offences as to trade marks and trade descriptions.	20. Implied warranty on sale of marked goods.
10. Application of false trade description.	21. Provisions as to false description not to apply in certain cases.
	22. Importation of certain goods prohibited.
	23. Application of Act to Island territories.
	24. Savings in respect of liabilities.
	25. Repeals, revocation, and savings. Schedule.

### A BILL INTITULED

AN ACT to consolidate and amend certain enactments of Title.  
the General Assembly relating to merchandise marks.

BE IT ENACTED by the General Assembly of New  
5 Zealand in Parliament assembled, and by the authority  
of the same, as follows:

No. 37—1

Short Title and commencement.

1. (1) This Act may be cited as the Merchandise Marks Act 1954.

(2) This Act shall come into force on a day to be appointed for the commencement thereof by the Governor-General by Proclamation. 5

Interpretation.

Patents, Designs, and Trade Marks Act 1908, No. 140, ss. 83, 85 (2)

(Reprint of Statutes, Vol. VI, p. 644)

Merchandise Marks Act 1926 (U.K.), s. 10

Merchandise Marks Act 1953 (U.K.), s. 1

1950, No. 85

1953, No. 66

2. (1) In this Act and in any Order in Council made under this Act, unless the context otherwise requires,—

“Advertisement” means any words, whether written or spoken, or any picture, drawing, or figure— 10

(a) Inserted in any newspaper or other periodical publication printed and published in New Zealand; or

(b) Brought to the notice of members of the public in New Zealand in any other manner whatsoever: 15

“Board of Trade” means the Board of Trade established under the Board of Trade Act 1950:

“Certification trade mark” means a mark registered as a certification trade mark upon an application under section forty-seven of the Trade Marks Act 1953; and includes any mark which is used upon or in connection with goods for the purpose of indicating that they are goods of the proprietor of the mark by virtue of certification: 20 25

“Covering” includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame, or wrapper: 30

“Dealer” includes any servant or employee of a dealer:

“False trade description” means a trade description which is false or misleading in a material respect as regards the goods to which it is applied; and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise where that alteration makes the description false or misleading in a material respect; and also includes a trade description (to whichever of the matters mentioned in the definition of that term in this section it relates) if it is likely to be misunderstood as, or mistaken for, an indication of 35 40

5 the same or some other such matter which  
would be false or misleading in a material  
respect as regards the goods to which the de-  
scription is applied; and the fact that a trade  
description is a trade mark or part of a trade  
10 mark shall not prevent the trade description  
from being a false trade description within the  
meaning of this Act; but no trade mark or  
part of a trade mark shall be treated as a false  
description in relation to any goods to which  
the trade mark or part of a trade mark is  
applied if the following conditions are satisfied:

15 (a) On the day this Act is passed the  
trade mark either is registered under the Trade  
Marks Act 1953 or is in use to indicate a con-  
nection in the course of trade between those  
goods and the proprietor of the trade mark;  
and

20 (b) The trade mark as applied is used to  
indicate connection in the course of trade  
between the goods and the person who is the  
proprietor of the trade mark or between the  
goods and a person who is registered under  
25 section thirty-seven of the Trade Marks Act  
1953 as a registered user of the trade mark;  
and

(c) The person who is the proprietor of the  
trade mark is the same person as, or a  
successor in title to, the proprietor on the day  
30 this Act is passed:

“Goods” means anything which is the subject of  
trade, manufacture, or merchandise:

“Imported goods” does not include—

35 (a) Goods which since the date of their  
importation have undergone in New Zealand  
any treatment or process resulting in a  
substantial change in the goods; or

40 (b) Goods produced or manufactured in  
New Zealand which after exportation are  
brought back into New Zealand, including any  
such goods which have undergone abroad any  
treatment or process not resulting in a sub-  
stantial change in the goods:

- “ Indication of origin ” in relation to any goods, means a definite, clear, conspicuous indication in the English language of the country in which the goods were manufactured or produced: 5
- “ Label ” includes any band or ticket:
- “ Manufacturer ” includes any servant or employee of a manufacturer:
- “ Mark ” includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, 10 or any combination thereof:
- “ Minister ” means the Minister of Industries and Commerce:
- “ Name ” includes any abbreviation of a name:
- “ Person ” includes any servant or employee of a 15 person:
- “ Proprietor ” includes any servant or employee of a proprietor:
- “ Sale ”—
- (a) Includes, subject as hereinafter pro- 20  
vided, sale wholesale as well as sale by retail:  
Provided that references to exposure for  
sale in sections *four* and *seven* of this Act or  
(unless the order expressly provides to the  
contrary) in any Order in Council made under 25  
this Act shall not include exposure for sale  
wholesale by a person being a wholesale  
dealer:
- (b) Does not include—
- (i) A sale of goods for consignment 30  
by the vendor to a person out-  
side New Zealand; or
- (ii) A sale of secondhand goods; or
- (iii) The sale of any foodstuffs at any 35  
hotel or restaurant or other  
premises for consumption thereon  
or the sale of any foodstuffs which  
have undergone a process of  
cooking, curing, or preserving in 40  
New Zealand:

“Trade description” —

(a) Means any description, statement, or other indication, direct or indirect,—

(i) As to the number, quantity, measure, gauge, or weight of any goods; or

(ii) As to the standard of quality of any goods according to a classification commonly used or recognized in the trade; or

(iii) As to the place or country in which any goods, and the material or substance thereof, were made or produced; or

(iv) As to the mode of manufacturing or producing any goods; or

(v) As to the material or substance of which any goods are composed; or

(vi) As to any goods being the subject of an existing patent, privilege, or copyright; and

(b) Includes—

(i) The use of any figure, word, or mark which according to the custom of the trade is commonly taken to be an indication of any of those matters; and

(ii) Anything likely to be misunderstood as, or mistaken for an indication of any of those matters:

“Trade mark” means any trade mark within the meaning of the Trade Marks Act 1953; and includes a certification trade mark, and any mark which is used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of the mark by virtue of manufacture, selection, certification, dealing with, or offering for sale: 1953, No. 66

“Trader” includes any servant or employee of a trader.

(2) For the purposes of this Act goods shall be deemed to be manufactured or made in any place if they have undergone in that place any treatment or process resulting in substantial change in the goods.



*Certain Goods to Bear Indication of Origin*

Power to  
require  
indication of  
origin.

Merchandise  
Marks Act  
1926 (U.K.),  
ss. 2, 3

3. (1) The Governor-General may from time to time, by Order in Council,—

(a) Direct that goods of any class or description specified in the order shall, in the case of goods intended for importation into New Zealand at the time of their importation or exposure for sale in New Zealand, or in the case of goods manufactured in New Zealand at the time of their manufacture or exposure for sale in New Zealand, bear an indication of origin: 5

(b) Prohibit the sale or the exposure for sale in New Zealand of goods of any class or description specified in the order unless they bear an indication of origin: 10

(c) Exclude specified items from any class or description of goods specified in the order or in any other Order in Council made under this section. 20

(2) An Order in Council under this section shall specify in every case—

(a) The manner in which the indication of origin is to be applied to the goods; and

(b) The date on which the order is to come into force (not being a date earlier than three months from the date of the making of the order, except in the case of an order revoking a previous order either entirely or as respects some of the goods to which that order relates, or an order made for amending a previous order in consequence of a direction having been given with respect to that order under the provisions of this section relating to provisional exemptions); and 25 30 35

(c) Whether the goods are to bear the indication of origin at the time of importation or of manufacture or of exposure for sale wholesale.

(3) If, where an Order in Council has been made under this Act with respect to any goods, it is shown to the satisfaction of the Minister by persons appearing to him to have a substantial interest in the matter that the application of the provisions of the order, or of some of those provisions, to any particular class or description of those goods has caused, or is likely to cause, injury or hardship to the said persons, or any of them, the Minister may, by notice in the *Gazette*, direct that the order, or any particular provisions of the order, shall cease to apply to goods of that class or description or shall apply to those goods subject only to such modifications and conditions as the Minister thinks fit, and the order shall, while the direction is in force, have effect subject thereto. A direction under this subsection may at any time be withdrawn by the Minister, and shall not in any case continue in force after the date on which any amending Order in Council is made or after the expiration of twelve months from the date on which the direction was given, whichever date is the earlier.

(4) Every Order in Council made under this section shall be laid before Parliament within twenty-eight days after the date of the making thereof if Parliament is then in session, and, if not, shall be laid before Parliament within twenty-eight days after the date of the commencement of the next ensuing session.

4. (1) It shall not be lawful to sell, expose for sale, or (by way of advertising goods of some kind) distribute, in New Zealand, any imported goods to which there is applied any name or trade mark or words, being or purporting to be the name or trade mark of any manufacturer, dealer, or trader in New Zealand or the name of any place or district in New Zealand or words which would be likely to associate the goods with New Zealand, unless the name, mark, or words are accompanied by an indication of origin.

(2) If the Minister is satisfied, after considering such representations (if any) as may be made to him by any persons appearing to have a substantial interest in the matter, that, having regard to the special circumstances of the trade, difficulties would arise if this section applied to goods of any class or description, or

Imported goods bearing name or trade mark of New Zealand manufacturer or trader not to be sold unless accompanied by indication of origin.

Merchandise Marks Act 1926 (U.K.), s. 1

Merchandise Marks Act 1953 (U.K.), s. 3 (1)

goods sold under any particular designation, and that public interests in New Zealand would not be materially prejudiced by exempting the goods from the operation of this section, he may, by notice in the *Gazette*, direct that this section shall not apply to those goods, or that goods shall not be treated as falling under this section by reason only that they are so designated. 5

(3) This section shall not have effect in respect of the application of a name or trade mark to articles used or to be used for any of the following purposes, that is to say, as coverings, labels, reels, or otherwise as articles in or with which goods manufactured or produced in New Zealand are or are to be sold or exposed for sale if— 10

(a) The name or trade mark so applied is the name or trade mark of a manufacturer of or a dealer or a trader in those goods in New Zealand and the name or trade mark was applied with his consent; or 15

(b) The trade mark is a certification trade mark and it relates or is to relate to those goods, and was so applied by or with the consent of the proprietor of the certification trade mark or by another in accordance with his authorization under the regulations relating to the certification trade mark. 20

(4) This section (except subsection *two* thereof) shall not come into operation until the expiration of six months from the date of the commencement of this Act. 25

5. The Minister may from time to time refer any application or matter arising in connection with the operation of section *three* or section *four* of this Act to the Board of Trade for its recommendation. 30

Matters under section 3 or section 4 may be referred to Board of Trade.

Merchandise Marks Act 1926 (U.K.), s. 4

Penalty on removal of any required mark from goods.

Merchandise Marks Act 1926 (U.K.), s. 8

6. If any person removes, alters, or obliterates an indication of origin which, in compliance with the requirements of section *three* of this Act or an Order in Council made under section *four* of this Act, was borne by the goods at the time of their importation or exposure for sale wholesale, he shall be deemed to have acted in contravention of that provision or Order in Council 35

unless he proves to the satisfaction of the Court dealing with the case that the removal, alteration, or obliteration was not for the purpose of concealing the origin of the goods at the time of their sale or exposure for sale.

5 7. (1) Subject to the provisions of this section, every person who sells, exposes for sale, or distributes by way of advertisement, any goods in contravention of the foregoing provisions of this Act, or acts in contravention of or fails to comply with any such provision or any  
10 Order in Council made under section *three* of this Act, commits an offence and shall be liable on summary conviction to a fine not exceeding fifty pounds; and the Court may in the case of a second or subsequent offence also order the goods in relation to which the offence has  
15 been committed to be forfeited.

(2) If any person advertises or offers for sale as being goods of a particular brand or make or otherwise under a specific designation, by means of an illustration or by means of any written matter, any goods of a  
20 class or description which are required by any Order in Council under section *three* of this Act to bear an indication of origin, he shall, if he does not include in the advertisement or offer an indication of the origin of the goods, and subject to the provisions of this section, be  
25 deemed to have acted in contravention of an Order in Council made under that section. This subsection shall not apply in the case of any advertisement made, issued, or published before the date on which the order was made.

(3) Where any person sells, or exposes for sale, any  
30 goods, of which some (being goods to which an Order in Council under section *three* of this Act applies) form a distinguishable part, and that part is reasonably capable of having applied to it an indication of origin in manner required by the order, he shall, for the purposes of this  
35 section, be deemed to have sold, or exposed for sale, that part, and the provisions of this section shall apply accordingly.

(4) It shall not within New Zealand be lawful to sell or offer for sale by sample goods of a class or description  
40 to which an Order in Council under section *three* of this Act applies unless the required indication of origin is

Offences arising from failure to mark.  
Merchandise Marks Act 1926 (U.K.), s. 5

applied to the samples or unless particulars corresponding to the particulars which would be contained in such an indication are communicated in writing to the person to whom the samples are submitted, and if any person acts in contravention of the provisions of this subsection he shall, subject to the provisions of this section, be deemed to have acted in contravention of an Order in Council made under section *three* of this Act. 5

(5) A person shall not be guilty of an offence against this section if he proves— 10

(a) That having taken all reasonable precautions against committing such an offence he had at the time of the commission of the alleged offence no reason to suspect that the goods were goods to which the foregoing provisions of this Act or an Order in Council made under section *three* of this Act applied, and that on a demand made by or on behalf of the prosecutor he gave all the information in his power with respect to the persons from whom he obtained the goods; or 15 20

(b) That otherwise he had acted innocently.

Special provisions in respect of blends and mixtures. Merchandise Marks Act 1926 (U.K.), s. 10 (2)

8. Section *four* of this Act shall not extend to blends or mixtures, and an Order in Council made under section *three* of this Act with respect to goods of any class or description shall not extend to blends or mixtures consisting of or containing those goods unless the order expressly so provides, and, where any Order in Council so provides, the indication of origin to be given in respect of the blends or mixtures shall, notwithstanding anything in this Act, be an indication in such form as the order prescribes. The provisions of this section shall not apply to any blend or mixture produced by a process of manufacture from materials of different kinds. 25 30

#### *False Trade Descriptions, etc.* 35

Offences as to trade marks and trade descriptions. 1908, No. 140, s. 82 (1), (2) Merchandise Marks Act 1953 (U.K.), s. 4

9. (1) Subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, every person commits an offence against this Act who—

(a) Forges any trade mark; or  
(b) Falsely applies to goods any trade mark or any mark so nearly resembling a trade mark as to be likely to deceive; or 40

- (c) Makes any die, block, machine, or other instrument for the purpose of forging or of being used for forging a trade mark; or
- 5 (d) Applies any false trade description to goods; or
- (e) Disposes of or has in his possession any die, block, machine, or other instrument for the purpose of forging a trade mark; or
- (f) Falsely represents that goods offered for sale were manufactured or made in New Zealand; or
- 10 (g) Uses any word, mark, or sign likely to mislead any person as to the real or actual manufacturer or maker of goods, or the place where the goods were made or manufactured; or
- 15 (h) Causes any of the things specified in this subsection to be done.

(2) Every person commits an offence against this Act who sells, or exposes, or has in his possession for sale, or for any purpose of trade or manufacture, any

20 goods or things to which any forged trade mark or false trade description is applied, or to which any trade mark or mark so nearly resembling a trade mark as to be likely to deceive is falsely applied, as the case may be, unless he proves—

- 25 (a) That, having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade mark, mark, or trade
- 30 description; and that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained the goods or things; or
- 35 (b) That otherwise he had acted innocently.

10. (1) The provisions of this Act relating to the application of a false trade description to goods shall extend to the application to goods of any such figures, words, or marks, or arrangement or combination thereof,

40 whether including a trade mark or not, as are likely to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are.

Application of  
false trade  
description.  
1908, No. 140,  
s. 83 (2), (3)

(2) The provisions of this Act relating to the application of a false trade description to goods, or respecting goods to which a false trade description is applied, shall extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if the name or initials were a trade description; and for the purpose of this enactment the expression "false name or initials" means, as applied to any goods, any name or initials of a person which—

(a) Are not a trade mark or part of a trade mark; and

(b) Are identical with or a colourable imitation of the name or initials of a person who carries on business in connection with goods of the same description, and who has not authorized the use of the name or initials; and

(c) Are either those of a fictitious person or of some person not carrying on business in connection with the goods.

11. (1) A person shall be deemed to forge a trade mark who—

(a) Without the assent of the proprietor of the trade mark, makes that trade mark or a mark so nearly resembling that trade mark as to be likely to deceive; or

(b) Falsifies any genuine trade mark, whether by alteration, addition, effacement, or otherwise.

(2) Any trade mark or mark so made or falsified is in this Act referred to as a forged trade mark.

(3) In any prosecution for forging a trade mark the burden of proving the assent of the proprietor shall lie on the defendant.

12. (1) A person shall be deemed to apply a trade mark, mark, or trade description to goods who—

(a) Applies it to the goods themselves; or

(b) Applies it to any covering, label, reel, or other thing in or with which the goods are sold or exposed or had in possession for any purpose of sale, trade, or manufacture; or

Forging trade  
mark.  
1908, No. 140,  
s. 84

Advertisements  
and other  
applications of  
marks and  
descriptions.  
1908, No. 140,  
s. 85  
1953, No. 66,  
s. 87 (2)

(c) Places, encloses, or annexes any goods which are sold or exposed or had in possession for any purpose of sale, trade, or manufacture in, with, or to any covering, label, reel, or other thing to which that trade mark, mark, or trade description has been applied; or

(d) Uses a trade mark, or mark, or trade description in any manner likely to lead to the belief that the goods in connection with which it is used are designated or described by that trade mark, mark, or trade description.

(2) A trade mark, mark, or trade description shall be deemed to be applied to goods whether it is woven or impressed or otherwise worked into, or annexed, or affixed to the goods, or to any covering, label, reel, or other thing in or with the goods.

(3) A person shall be deemed falsely to apply to goods a trade mark or mark who, without the assent of the proprietor, applies that trade mark or mark, or one so nearly resembling it as to be likely to deceive; and in any prosecution for falsely applying a trade mark or mark to goods the burden of proving the assent of the proprietor shall lie on the defendant.

(4) For the purposes of paragraph (d) of subsection one of this section, goods delivered in pursuance of a request made by reference to a trade mark or mark or trade description appearing in any sign, advertisement, invoice, wine list, business letter, business paper, or other commercial communication shall be deemed to be goods in connection with which the trade mark, mark, or trade description is used.

### General

13. (1) Where a defendant is charged with making any die, block, machine, or other instrument for the purpose of forging or being used for forging a trade mark or with falsely applying to goods any trade mark or any mark so nearly resembling a trade mark as to be likely to deceive, or with applying to goods any false trade description, or causing any of the things in this section mentioned to be done, and proves—

Exemption of employees in certain cases. 1908, No. 140, ss. 86, 97 (3)



- (a) That in the ordinary course of his business he is employed on behalf of other persons to make dies, blocks, machines, or other instruments for making or being used in making trade marks, or, as the case may be, for applying marks or descriptions to goods, and that in the case which is the subject of the charge he was so employed by some person resident in New Zealand, and was not interested in the goods by way of profit or commission dependent on the sale of the goods; and 5 10
- (b) That he took reasonable precautions against committing the offence charged; and
- (c) That he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade mark, mark, or trade description; and 15
- (d) That he gave to the prosecutor all the information in his power with respect to the persons on whose behalf the trade mark, mark, or trade description was applied,— 20

he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he has given due notice to him that he will rely on the above defence. 25

(2) Nothing in this Act shall be construed so as to render liable to any prosecution or punishment any servant of a master resident in New Zealand who acts in good faith in obedience to the instructions of that master, and, on demand made by or on behalf of the prosecutor, has given full information as to his master. 30

14. Where an employer or principal is charged with the offence of having acted in contravention of, or of having failed to comply with any provision of this Act or of any Order in Council made under this Act he shall be entitled on information duly laid by him and on giving not less than three days' notice of his intention to the prosecution to have any other person whom he charges as the actual offender brought before the Court at the time appointed for hearing the charge, and if, after the commission of the offence has been proved, 35 40

Power of  
employer to  
exempt  
himself  
from penalty  
on conviction  
of actual  
offender.

Merchandise  
Marks Act  
1926 (U.K.),  
s. 6

the employer or principal proves to the satisfaction of the Court that he has used due diligence to enforce compliance with the provisions of this Act or of the order, and that the said other person had committed the offence in question without his consent, connivance, or wilful default, the said other person shall, subject to the provisions of subsection *five* of section *seven* of this Act, be convicted of the offence, and the employer or principal shall be exempt from any penalty. The person so convicted shall, in the discretion of the Court, be also liable to pay any costs incidental to the proceedings:

Provided that the prosecution shall in any such case have the right to cross-examine the employer or principal if he gives evidence, and any witnesses called by him in support of his charge, and to call rebutting evidence.

15. In any indictment, pleading, proceeding, or document in which any trade mark or forged trade mark is intended to be mentioned it shall be sufficient, without further description and without any copy or facsimile, to state that mark or forged mark to be a trade mark or forged trade mark.

Description of  
trade mark  
in pleading.  
1908, No. 140,  
s. 88

16. Every person who (being in New Zealand) procures, counsels, aids, abets, or is accessory to the commission out of New Zealand of any act which if committed in New Zealand would under this Act be an offence punishable on indictment shall be guilty of that offence as a principal, and be liable to be indicted, proceeded against, tried, and convicted in any place in New Zealand in which he may be as if the offence had been committed there.

Punishment of  
accessories.  
1908, No. 140,  
s. 90

17. No prosecution for an offence against this Act shall be commenced after the expiration of three years from the date of the commission of the offence, or after the expiration of one year from the first discovery thereof by the prosecutor, whichever first happens.

Limitation of  
prosecution.  
1908, No. 140,  
s. 93

18. (1) Every person who commits an offence against this Act for which no penalty is provided elsewhere than in this section shall be liable on conviction on indictment—

General  
penalty for  
offences.  
1908, No. 140,  
s. 82 (3)

(a) To imprisonment with or without hard labour for a term not exceeding two years, or to a fine not exceeding five hundred pounds, or to both such imprisonment and such fine; and

(b) If the Court so directs, to forfeit to Her Majesty every chattel, article, instrument, or thing by means of or in relation to which the offence was committed.

1952, No. 41

Forfeiture.

1908, No. 140,  
ss. 82 (4), 91

(2) Every such offence may be dealt with by a Magistrate under and subject to the provisions of the Summary Jurisdiction Act 1952 as if it were an offence in respect of which a Magistrate has summary jurisdiction under that Act. 5

19. (1) Where any articles (including goods, chattels, instruments, and things) would be liable to forfeiture under section *seven* of this Act if the owner was convicted of a second offence against this Act, or under section *eighteen* of this Act if the owner was convicted of an offence against this Act, and the owner is unknown or cannot be found, an application to a Magistrate's Court may be made for the purpose only of enforcing the forfeiture, and any Magistrate may cause notice to be advertised stating that, unless cause is shown to the contrary at the time and place specified in the notice, the articles will be forfeited; and at that time and place any Magistrate, unless the owner or any person on his behalf or other person interested in the articles shows cause to the contrary, may order the articles or any of them to be forfeited. 15 20 25

(2) Subject to the provisions of this section and to any directions of the Court which orders the forfeiture, any such articles which are forfeited under the foregoing provisions of this Act may be sold, destroyed, or otherwise disposed of as the Secretary for Industries and Commerce or the Minister may direct. 30

(3) Subject to the provisions of paragraph (b) of subsection *four* of this section, where any such articles which are forfeited under the foregoing provisions of this Act are sold, the proceeds of sale shall be applied in the like manner as if the proceeds were a fine incurred under this Act. 35

See Reprint  
of Statutes,  
Vol. VII, p. 97

(4) Where any such articles are forfeited under the foregoing provisions of this Act, or under the Customs Act 1913 in consequence of the operation of section *twenty-two* of this Act,— 40

(a) If the articles are not destroyed, all trade marks or trade descriptions which are on the articles in contravention of this Act or of any Order in Council made under section *three* of this Act shall be obliterated before the articles are sold or otherwise disposed of:

(b) If the Court which orders the forfeiture or any Magistrate so directs, any innocent party may be reimbursed out of the proceeds of any such sale or disposition any loss he may have innocently sustained in dealing with the articles.

(5) Any such direction may be given by the Court which orders the forfeiture at the time when it is ordering the forfeiture, or by any Magistrate on an application made to a Magistrate's Court in that behalf by any interested person.

20. On the sale or in the contract for the sale of any goods to which a trade mark, mark, or trade description has been applied, the vendor shall be deemed to warrant that the trade mark or mark is a genuine one and not forged or falsely applied, and that the trade description is not a false trade description within the meaning of this Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the purchaser.

Implied warranty on sale of marked goods. 1908, No. 140, s. 94

21. Where on the coming into operation of this Act a trade description was lawfully and generally applied to goods of a particular class or manufactured by a particular method, to indicate the particular class or method of manufacture of the goods, the provisions of this Act with respect to false trade descriptions shall not apply to that trade description when so applied:

Provisions as to false description not to apply in certain cases. 1908, No. 140, s. 95

Provided that where the trade description includes the name of a place or country, and is calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced, and the goods were not actually made or produced in that place or country, this section shall not apply unless there is added to the trade description immediately before or after the name of that place or country, in an equally

conspicuous manner with that name, the name of the place or country in which the goods and the material or substance thereof were actually made or produced, with a statement that they were made or produced there.

Importation  
of certain  
goods  
prohibited.  
1908, No. 140,  
s. 96

See Reprint  
of Statutes,  
Vol. VII,  
p. 114

22. (1) All goods which if exposed for sale in New Zealand would be liable to forfeiture under paragraph (b) of subsection *one* of section *eighteen* of this Act are hereby prohibited to be imported into New Zealand, and shall be deemed to be included among goods prohibited to be imported under section forty-six of the Customs Act 1913, subject to the following provisions, that is to say:

- (a) Before detaining any such goods, or taking any further proceedings with a view to the forfeiture thereof under the Customs Act 1913, the Minister of Customs may require the regulations under this section, whether as to information, security, conditions, or other matters, to be complied with, and may satisfy himself, in accordance with those regulations, that the goods are such as are prohibited by this section to be imported:
- (b) The provisions of subsection *four* of section *nineteen* of this Act shall apply in connection with any such goods which are forfeited under the Customs Act 1913:
- (c) The Governor-General may from time to time, by Order in Council, make regulations, either general or special, respecting the detention and forfeiture of goods the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and forfeiture, and may by any such regulations determine the information, notices, and security to be given, and the evidence requisite for any of the purposes of this section, and the mode of verifying any such evidence.
- (d) Regulations so made may apply to all goods the importation of which is prohibited by this section, or to any class or classes of those goods or of offences in relation to those goods:

(e) Regulations so made may provide that the informant shall reimburse the Minister of Customs all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention.

(2) All regulations made under this Act shall be laid before Parliament within twenty-eight days after the date of the making thereof if Parliament is then in session, and if not, shall be laid before Parliament within twenty-eight days after the date of the commencement of the next ensuing session.

23. (1) This Act shall be in force in the Tokelau Islands.

Application of Act to Island territories.

(2) Section six hundred and thirty-five of the Cook Islands Act 1915 is hereby amended—

See Reprint of Statutes, Vol. II, p. 778

(a) By omitting from subsection one the words “ The Patents, Designs, and Trade Marks Act 1911 ”, and substituting the words “ The Patents Act 1953, the Designs Act 1953, the Trade Marks Act 1953, and the Merchandise Marks Act 1954 ”:

(b) By omitting from subsections one, two, and three the words “ that Act ” in each place where they occur, and substituting in each case the words “ those Acts ”.

(3) Section three hundred and fifty-eight of the Samoa Act 1921 is hereby amended—

See Reprint of Statutes, Vol. II, p. 862

(a) By omitting from subsection one the words “ The Patents, Designs, and Trade Marks Act 1911 ”, and substituting the words “ The Patents Act 1953, the Designs Act 1953, the Trade Marks Act 1953, and the Merchandise Marks Act 1954 ”:

(b) By omitting from subsection one and also from subsection two the words “ that Act ”, and substituting in each case the words “ those Acts ”.

24. (1) This Act shall not exempt any person from any action, suit, or other proceeding which might, but for the provisions of this Act, be brought against him.

Savings in respect of liabilities. 1908, No. 140, s. 97 (1), (2)

(2) Nothing in this Act shall entitle any person to refuse to make a complete discovery or to answer any question or interrogatory in any action, but such discovery or answer shall not be admissible in evidence against that person in any prosecution for an offence against this Act. 5

25. (1) The enactments specified in the Schedule to this Act are hereby repealed.

(2) The Marking of Clothing Control Order 1944 is hereby revoked. 10

(3) Without limiting the provisions of the Acts Interpretation Act 1924, it is hereby declared that the repeal of any provision by this Act shall not affect any document made or any thing whatsoever done under the provision so repealed or under any corresponding former provision, and every such document or thing, so far as it is subsisting or in force at the time of the repeal and could have been made or done under this Act, shall continue and have effect as if it had been made or done under the corresponding provision of this Act and as if that provision had been in force when the document was made or the thing was done. 15 20

Repeals,  
revocation,  
and savings.  
*Gazette* 1944,  
Vol. III,  
p. 1432  
See Reprint  
of Statutes,  
Vol. VIII,  
p. 568

Schedule.

Section 25 (1)

SCHEDULE

ENACTMENTS REPEALED

1908, No. 140—

The Patents, Designs, and Trade Marks Act 1908. (Reprint of Statutes, Vol. VI, p. 644.)

1908, No. 192—

The Tobacco Act 1908: Section 19. (Reprint of Statutes, Vol. VII, p. 237.)

1913, No. 43—

The Footwear Regulation Act 1913. (Reprint of Statutes, Vol. III, p. 236.)

1915, No. 49—

The Footwear Regulation Amendment Act 1915. (Reprint of Statutes, Vol. III, p. 239.)

1953, No. 66—

The Trade Marks Act 1953: Section 87 (2).