

# **Trade Marks (International Treaties and Enforcement) Amendment Bill**

Government Bill

## **Explanatory note**

### **General policy statement**

This Bill is an omnibus Bill that will amend the Trade Marks Act 2002 and the Copyright Act 1994. It is intended that the Bill be divided into 2 separate Bills at the committee of the whole House stage: a Trade Marks (International Treaties and Enforcement) Amendment Bill and a Copyright Amendment Bill.

A trade mark is a unique identifier (such as a word, brand, logo, colour, slogan, three-dimensional shape or even a sound) that enables a business to easily distinguish its goods and services from those supplied by other traders. It is used in marketing to provide consumer recognition that goods and services of a given quality originate from a particular trader.

Trade marks are registered by the Commissioner of Trade Marks under the Trade Marks Act 2002 (the **Trade Marks Act**) after an examination process.

The Bill gives effect to the Government's decisions to—

- accede to the Madrid Protocol Relating to the Madrid Agreement (the **Madrid Protocol**):

- accede to the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (the **Nice Agreement**):
- ratify the Singapore Treaty on the Law of Trademarks (the **Singapore Treaty**):
- empower the Ministry of Economic Development (the **Ministry**) and the New Zealand Customs Service (**Customs**) to enforce the criminal offence provisions under the Trade Marks Act and the Copyright Act 1994 (the **Copyright Act**) related to counterfeit goods and pirated works (**counterfeits**):
- address a number of miscellaneous issues with the Trade Marks Act.

### **Madrid Protocol**

The Madrid Protocol provides a system that simplifies the procedures required for a trade mark owner to protect his or her trade marks overseas. Joining the Madrid Protocol will provide New Zealand trade mark owners with the possibility of having their trade marks protected overseas by filing 1 application for registration of a trade mark with the Intellectual Property Office of New Zealand and designating one or more overseas countries who are also members of the Madrid Protocol where protection is sought. Overseas trade mark owners would also be able to use the Madrid Protocol to protect their trade marks in New Zealand.

Joining the Madrid Protocol would also simplify the subsequent management of overseas registered trade marks. It is possible to renew or record subsequent changes to the trade mark registration in each country using the Madrid Protocol through a single procedural step, rather than making a request directly in each country.

The Bill introduces amendments to the Trade Marks Act to facilitate the implementation of the international registration regime for trade marks under the Madrid Protocol, including providing for regulations to be made for the purposes of giving effect to New Zealand's obligations under the Madrid Protocol.

### **Nice Agreement**

The Nice Agreement provides a classification system for goods and services for the purposes of registering trade marks (the **Nice Clas-**

**sification**). Those countries that are party to the Nice Agreement must apply the Nice Classification to registered trade marks, although those countries not party may still apply the Nice Classification. New Zealand has applied the Nice Classification to registered trade marks for many years.

The Nice Classification is updated on a 5 yearly cycle and parties to the Nice Agreement meet on a semi-regular basis to consider amendments to it. By becoming party to the Nice Agreement New Zealand would be permitted to participate in those meetings and potentially influence the future development of the Nice Classification so that it best meets the needs of New Zealand businesses.

The Bill clarifies that the latest edition of the Nice Classification must be used with all new applications for the registration of a trade mark under the Trade Marks Act.

### **Singapore Treaty**

The Singapore Treaty aims to make national trade mark registration systems more user-friendly and to reduce business compliance costs for trade mark owners. It does this through the simplification and international harmonisation of national registration procedures. The Singapore Treaty does not, however, seek to harmonise substantive trade mark law.

The majority of the standards and rules in the Singapore Treaty relate to the procedures of trade marks offices and, in particular, are constructed to make clear what a trade marks office can and cannot require from applicants.

Ratifying the Singapore Treaty enables New Zealand to contribute to the realisation of the treaty's aim to make national and regional trade mark registration systems more user-friendly. Joining the Singapore Treaty provides an opportunity for New Zealand to send a clear signal to the international community of its commitment to provide an efficient and effective trade mark registration regime that is consistent with international practice.

The Bill contains amendments to the Trade Marks Act, including providing for regulations to be made, for the purpose of giving effect to New Zealand's obligations under the Singapore Treaty that will bring it into conformity with the standards and rules set out in the Singapore Treaty.

## **Enforcement**

There is a growing problem around the world relating to the manufacture, distribution, and sale of counterfeits. New Zealand is experiencing a similar steady growth in the sale of counterfeits; most being sourced from overseas.

The illegitimate sale of counterfeits deprives trade mark and copyright owners and their licensees (“right holders”) and legitimate retailers of income and, therefore, ultimately undermines the profitability of businesses. In addition to having a wider negative economic impact, the sale of counterfeits can lead to an entrenchment in society of the acceptance and consumption of counterfeits, which is likely to result in health and safety risks because of poor materials and substandard processes used in the manufacture of counterfeits, and a disregard for the law.

Consistent with New Zealand’s international obligations under Article 61 of the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights, both the Trade Marks Act and the Copyright Act include criminal offences for cases of wilful counterfeiting or piracy on a commercial scale. Penalties for a person convicted of manufacturing, importing and/or selling counterfeits consist of fines of up to \$150,000 or imprisonment for a term not exceeding 5 years.

The Bill will empower the Ministry and Customs to play an active role in enforcing the criminal offences under the Trade Marks Act and the Copyright Act alongside and in co-operation with other enforcement agencies and right holders. The focus for Customs enforcement will be at the border, whilst the Ministry will focus its efforts on post-border enforcement.

The enforcement powers contained in this Bill will provide the Ministry and Customs with warranted search and seizure powers and the ability to share information with other enforcement agencies, such as the New Zealand Police, to assist in identifying persons involved in the commissioning of a criminal offence.

Customs is to be provided with non-warranted powers to seize counterfeits when counterfeits come within the control of Customs at the border.

Furthermore, there are a range of circumstances where applying for and executing a search warrant by the Ministry would be impractical,

because of the transient and itinerant nature of offenders selling counterfeits and the nature of some counterfeits, which can pose a public health and safety risk. In order to address this type of offending, the Bill provides the Ministry with some limited powers to undertake search and seizure of counterfeits being offered for sale within areas and at places open to the public without a search warrant.

### **Miscellaneous issues**

The Bill also contains a number of clauses that aim to address several minor or technical matters within the Trade Marks Act. These include:

- repealing section 81 of the Trade Marks Act:
- further clarification of section 97A of the Trade Marks Act to ensure that registered trade marks cannot be used to frustrate legitimate parallel importing:
- providing the chief executive of Customs with discretion to suspend a border protection notice from having effect under certain conditions and for the notice to be reinstated if the grounds for its suspension no longer apply:
- clarifying that under section 140 of the Trade Marks Act a border protection notice expires when the registration of the trade mark to which the notice relates is cancelled, revoked, declared invalid, or has expired:
- clarifying that under section 175 of the Trade Marks Act it is the chief executive of the Ministry who is responsible for appointing the Commissioner of Trade Marks and Assistant Commissioners of Trade Marks and that they are employees of the Ministry of Economic Development.

### **Clause by clause analysis**

*Clause 1* is the Title clause. It is proposed that the Bill will be divided at the committee of the whole House stage, with each Part becoming a separate Bill.

*Clause 2* is the commencement clause. It provides that specified provisions come into force on the day after the date of Royal assent and that the remaining provisions of the Bill (which deal with enforcement officers, enforcement powers of customs officers, and the registration of titles to trade marks) come into force on a date to be

appointed by the Governor-General. This is necessary to allow regulations to be made.

## Part 1 Trade Marks Act 2002

*Clause 3* provides that this Part amends the Trade Marks Act 2002 (the Act).

*Clause 4* amends section 5, which relates to interpretation.

*Clause 5* amends section 31 to provide that, for the purposes of registration of trade marks, goods and services must be classified according to whichever edition of the Nice Classification is in force at the time of the application for registration. (A definition of Nice Classification is inserted by *clause 4(1)*).

*Clause 6* substitutes *new section 53*, which relates to the power of the Commissioner of Trade Marks to issue a further certificate of registration. The heading to the current provision refers to a replacement certificate of registration. However, the Commissioner may issue a further certificate in circumstances other than when a certificate is lost or destroyed. *New section 53* clarifies this by omitting any reference to a replacement certificate and providing that the Commissioner may issue a further certificate of registration if an application is made in the prescribed manner and any prescribed fee is paid.

*Clause 7* amends section 66 by repealing section 66(1)(a) and (b), which relate to revocation of the registration of a trade mark on the ground of non-use, and substituting *new section 66(1)(a)*, and by inserting *new subsection (1A)*. *New section 66(1)(a)* does away with the distinction currently made in section 66(1)(a) and (b) between a trade mark that has not been put to genuine use for a continuous period of 3 years or more from the date of actual registration and a trade mark that has been used, but whose use has been suspended for an uninterrupted period of 3 years. It sets out a single ground for revocation on the basis of non-use, namely that the trade mark has not, during a continuous period of 3 years or more, been put to genuine use in the course of trade in New Zealand by the owner of the mark in relation to goods or services in respect of which it was registered. *New subsection (1A)* defines a continuous period for the purposes of *new section 66(1)(a)*.

*Clause 8* makes minor consequential amendments to section 67 as a result of the repeal of section 66(1)(b).

*Clause 9* substitutes *new section 78(a) and (c)*, which relate to the Commissioner's power to alter the register of trade marks. *New section 78(a)* removes the current reference to a licensee's request to allow his or her name or address to be altered on the register. This is a consequential amendment resulting from termination of the voluntary licensee registration system (*see clause 12*). *New section 78(c)* allows the Commissioner to alter or remove an existing memorandum that relates to a trade mark, in addition to exercising the existing power to enter a new memorandum.

*Clause 10* repeals section 81, relating to the Commissioner's power to issue a certificate stating whether or not the proposed assignment or transmission of an application or trade mark is likely to deceive or confuse. This power has proved redundant in practice.

*Clause 11* repeals section 82(2) to (4) and substitutes *new section 82(2) to (5)*, which relate to change of ownership of a trade mark, to bring the section into line with the requirements of the Singapore Treaty. Currently, an application to register a change of ownership may only be made by the new owner of a trade mark. The amendments allow for an application to be made by either the previous owner or the new owner of the trade mark.

*Clause 12* repeals the heading above section 83 and sections 83, 84, 86, and 87 with the effect of terminating the system of voluntary registration of licensees. *Clause 12(2)* consequentially revokes all registrations of licensees under section 84.

*Clause 13* amends section 95, which sets out certain uses, in accordance with honest practices in industrial or commercial matters, that do not constitute infringement of a registered trade mark. *New section 95(d)* adds use of a trade mark to indicate the intended purpose of the goods (in particular as accessories or spare parts) or services.

*Clause 14* substitutes *new section 97*, which relates to further uses of registered trade marks that do not constitute infringement, as a consequence of *new section 95(d)*.

*Clause 15* substitutes *new section 97A*, to clarify the circumstances in which a registered trade mark is not infringed by its use in relation to parallel imported goods.

*Clause 16* amends section 118, which refers to the application of certain provisions of the Criminal Justice Act 1985 concerning the imposition of the sentence of reparation, so that the section expressly applies the equivalent provisions of the Sentencing Act 2002 (which repealed the Criminal Justice Act 1985).

*Clause 17* inserts *new subpart 2A* of Part 4, which relates to legal proceedings. *New subpart 2A* provides for enforcement officers. It deals with—

- appointment and functions of enforcement officers (*new sections 134A to 134C*):
- an enforcement officer's power of entry and examination without warrant (*new sections 134D and 134E*):
- entry and search under warrant by an enforcement officer or a member of the police (*new sections 134F to 134N*):
- various powers and duties of persons exercising powers of entry and examination without warrant or entry and search under warrant (*new sections 134P to 134S*):
- retention, return, and disposal of things seized (*new sections 134T to 134W*):
- powers of police (*new section 134X*):
- privileges a person has, for the purposes of *new subpart 2A*, for communications with legal advisers (including registered patent attorneys) and for preparatory materials for proceedings, and the power of a District Court Judge to determine the validity of a claim to privilege (*new section 134Y*):
- disclosure of information between agencies (*new section 134Z*):
- immunity of enforcement officers and persons assisting enforcement officers and members of the police (*new section 134ZA*).

*Clause 18* amends section 135, which relates to interpretation in subpart 3 of Part 4 (border protection measures).

*Clause 19* inserts *new sections 139A to 139C*, which relate to a notice given by the owner of a registered trade mark to the chief executive of the New Zealand Customs Service (**Customs**) under section 137 (requesting detention of infringing goods that are in, or come into,



the control of Customs) that has been accepted by the chief executive under section 139. These provisions—

- allow the chief executive to suspend a notice accepted under section 139 if the chief executive is satisfied that the information held in respect of the notice is not correct, no longer current, or that an obligation under an indemnity given for an amount in respect of the notice has not been complied with. Before suspending the notice, the chief executive must advise the person who gave the notice, in writing, of his or her intention to suspend, give reasons, give at least 20 working days for the person to respond, and consider any response made in the time allowed (*new section 139A*):
- require the chief executive to notify the person in writing if he or she decides to suspend the accepted notice (*new section 139B*):
- allow the chief executive to reinstate an accepted notice suspended under *new section 139A* if the chief executive is satisfied that the grounds for the suspension no longer apply (*new section 139C*).

*Clause 20* substitutes *new section 140*, which relates to the duration of a notice accepted under section 139. *New section 140(1)* replicates the existing section but adds that an accepted notice does not remain in force if registration of the trade mark to which it relates has been cancelled, revoked, declared invalid, or has expired. *New section 140(2)* provides that a notice is not in force during the period of any suspension under *new section 139A*.

*Clause 21* inserts *new headings and new sections 155A to 155K*, which deal with the enforcement powers of customs officers. *New sections 155A to 155G* provide that—

- a customs officer may seize imported goods in the control of Customs if he or she has reasonable grounds to believe that they are evidence of an offence against sections 120 to 124, or are of significant relevance to the investigation of such an offence (*new section 155A*):
- the chief executive may give a notice requiring a person to produce documents or to appear and to answer questions relevant to determining whether goods in the control of Customs should be seized or released, if a customs officer believes on

reasonable grounds that the person has imported the goods in breach of the Act or has acted as agent of the importer (*new sections 155B and 155C*):

- a District Court Judge, on the application of a customs officer, may make an order requiring a person to produce documents for inspection by a customs officer if the Judge is satisfied that there are reasonable grounds for believing that the person has documents that are evidence of, or are of significant relevance to the investigation of, an offence against any of sections 120 to 124 in respect of imported goods (*new sections 155D and 155E*). *New section 155F* sets out a customs officer's powers in respect of documents produced under an order made under *new section 155E*:
- a customs officer may apply for a search warrant, which may be issued where there are reasonable grounds for believing that there is in, on, over, or under the place or thing to be searched any thing that is evidence of, or of significant relevance to the investigation of, an offence against any of sections 120 to 124 in respect of imported goods (*new section 155G*).

*New section 155H* sets out that the privilege against self-incrimination as provided in section 60 of the Evidence Act 2006 applies to a notice given under *new section 155B* to produce documents, a notice given under *new section 155C* to answer questions, and an order made by a District Court Judge under *new section 155E* to produce documents. A District Court Judge is able to determine whether a particular claim of the privilege is valid. Section 63 of the Evidence Act 2006 (which requires disclosure in certain circumstances in civil proceedings) does not apply to an order made under *section 155E*.

*New section 155I(1)* sets out the privileges for communications with legal advisers (including registered patent attorneys) and for preparatory materials for proceedings that will apply if a person could assert the privilege in a criminal proceeding and if he or she is required to produce documents or appear before a customs officer and answer questions under a notice under *new section 155B or 155C*, produce documents under an order made under *new section 155E*, or if a search warrant is issued under *new section 155G*. *New section 155I(2) and (3)* clarify that legal professional privilege cannot be asserted in respect of accounting records for trust accounts or nominee companies. The validity of a claim to privilege may be determined

by a District Court Judge on the application of a customs officer or a member of the police (*new section 155I(5) and (6)*).

*New section 155J* creates offences for refusing or failing, without reasonable excuse, to comply with a notice under *new section 155B*, a notice under *new section 155C*, or an order under *new section 155E*. The penalty for each offence, in the case of an individual, is imprisonment for a term not exceeding 6 months or a fine not exceeding \$10,000, and in the case of a body corporate, is a fine not exceeding \$50,000.

*New section 155K* provides immunity for customs officers and persons assisting customs officers in respect of the exercise of powers under the Act if certain conditions are met.

*Clause 22* repeals section 175(1) and substitutes *new section 175(1) and (1A)*, relating to the appointment of the Commissioner and Assistant Commissioners of Trade Marks. *New section 175(1) and (1A)* clarify that the person who must make the appointments to these positions is the chief executive of the Ministry, that the appointments may be held in conjunction with other offices in the Ministry, and that persons appointed to these positions are employees of the Ministry.

*Clause 23* amends section 182, which lists what the register of trade marks must contain, by substituting *new paragraph (d)*. This removes the names and addresses of licensees from the list (a consequential amendment as a result of the termination of the voluntary licensee registration system by *clause 12*), and substitutes memoranda referred to in *new section 78(c)*.

*Clause 24* amends section 199 to provide for making regulations—

- concerning the division of trade marks (*new section 199(b)(ia)*);
- requiring a person to give security or indemnity or both for certain costs incurred by Customs (*new section 199(e)(i)*);
- prescribing forms for the purposes of the Act (*new section 199(j)*).

*Clause 25* inserts *new section 199A* to provide for making regulations for the purpose of giving effect to the Madrid Protocol.

*Clause 26* makes consequential amendments to the Trade Marks Regulations 2003 as a result of the new definition of Nice Classi-

fication inserted by *clause 4* and the amendment to section 31 by *clause 5*.

*Clause 27* updates a reference that was overlooked at the time the Trade Marks Act 1953 was repealed by the Trade Marks Act 2002. It substitutes, in Schedule 1 of the Trans-Tasman Mutual Recognition Act 1997, a reference to the Trade Marks Act 2002 for a reference to the Trade Marks Act 1953.

## Part 2 Copyright Act 1994

*Clause 28* provides that this Part amends the Copyright Act 1994.

*Clause 29* amends section 2, which relates to interpretation, by inserting definitions of terms used in *new Part 6A*.

*Clause 30* repeals section 87 and substitutes *new sections 87 to 87B*. This amendment is identical to the amendment made by section 48 of the Copyright (New Technologies) Amendment Act 2008 repealing section 87 and substituting new sections 87 to 87B (which is not yet in force; under section 2 of that Act, section 48 must be brought into force by Order in Council), except that it omits the words “or a communication work for which a subscription fee must be paid in order to receive it” from *new section 87(1)*. The inclusion of those words meant that an exception to infringement of copyright that was intended to apply was inadvertently removed. That exception relates to the situation where a broadcast or programme is one for which a subscription fee must be paid and the public can view the broadcast or programme without paying an admission fee (for example, showing a broadcast in a bar or restaurant). *Clause 30(1)* substitutes *new sections 87 to 87B* in the manner originally intended and *clause 30(2)* consequentially repeals section 48 of the Copyright (New Technologies) Amendment Act 2008.

*Clause 31* inserts *new Part 6A*, which provides for enforcement officers. The provisions of *new Part 6A (new sections 134A to 134ZA)* are the same as the enforcement provisions inserted by *clause 17* into the Trade Marks Act 2002 (also as *new sections 134A to 134ZA*).

*Clause 32* amends section 135, which relates to interpretation in Part 7 (border protection measures), to insert definitions of terms used in *new sections 136A to 136D* and *new sections 144 to 144I*.

*Clauses 33 and 34* relate to a notice given by a copyright owner to the chief executive of Customs under section 136(1) that has been accepted by the Chief Executive under section 136(3). A notice under section 136(1) is the equivalent of a notice given under section 137 of the Trade Marks Act 2002. The person giving the notice claims that an item is a work in which the person owns copyright and requests the chief executive to detain pirated copies of the item that are in, or come into, the control of Customs. *Clause 33* repeals section 136(4) and *clause 34* inserts *new sections 136A to 136D*. These new provisions have the same effect in relation to a notice accepted by the chief executive under section 136(3) as *new sections 139A to 139C and 140* of the Trade Marks Act 2002 have in relation to a notice accepted under section 139 of that Act (*see clauses 19 and 20*).

*Clause 35* inserts a *new heading and new sections 144 to 144I*, providing for enforcement powers of customs officers. These new provisions are equivalent to *new sections 155A to 155J* of the Trade Marks Act 2002 (*see clause 21*).

*Clause 36* inserts a new heading above section 145.

*Clause 37* amends section 146 to add persons who assist customs officers to the list of persons who have immunity under that section for things done in the exercise of powers, duties, or functions under Part 7 (border protection measures). This is related to *new section 144F*, under which a search warrant may be issued to a customs officer. A search warrant issued under that section confers a power to call persons to assist (*see new sections 144F(3) and 134M(1)(b)*).

*Clause 38* repeals section 188 and inserts *new sections 188 to 188B*. This amendment is identical to the amendment made to section 188 by section 85 of the Copyright (New Technologies) Amendment Act 2008 (which is not yet in force; under section 2 of that Act, section 85 must be brought into force by Order in Council), except that it omits the words “or a communication work for which a subscription fee must be paid in order to receive it” from *new section 188(1)*. For the same reasons as set out in relation to the amendment made by *clause 30*, the inclusion of those words meant that an exception to infringement of copyright that was intended to apply was inadvertently removed. *Clause 38(1)* substitutes *new sections 188 to 188B* in the manner originally intended and *clause 38(2)* consequentially repeals section 85 of the Copyright (New Technologies) Amendment Act 2008.

*Clause 39* amends section 234 to broaden the power to make regulations prescribing various forms so that it is wide enough to cover new provisions on enforcement officers (*new sections 134B and 134I*) and enforcement powers of customs officers (*new sections 144A and 144B*).

## Regulatory impact statement

### Singapore Treaty

#### Statement of the nature and magnitude of the problem and the need for government action

A trade mark is a unique identifier (word, brand, logo, colour, slogan, three-dimensional shape, and sometimes even a sound) that enables a business to easily distinguish its goods and services from those supplied by other traders. It is used as a marketing tool so that consumers can recognise the product of a particular trader, thereby providing low cost information to consumers and creating incentives for business to invest in quality products and services. During the financial year ending 30 June 2005, the Intellectual Property Office of New Zealand (**IPONZ**) received 27 937 applications to register trade marks, registered 21 089 trade marks and received renewal notices for 10 014 trade mark registrations.

In March 2006, member states, which include New Zealand and Australia, of the World Intellectual Property Organization (**WIPO**) adopted at the conclusion of a Diplomatic Conference the Singapore Treaty on the Law of Trademarks (the **Singapore Treaty**). The Singapore Treaty aims to make national trade mark registration systems more user-friendly and to reduce business compliance costs, both for applicants for the registration of a trade mark and for trade mark registrants. This is achieved through the simplification and international harmonisation of trade mark registration procedures.

The majority of the provisions in the Singapore Treaty relate to the procedures of trade mark offices and, in particular, they are constructed to make it clear what a trade mark office can and cannot require from an applicant for registration of a trade mark or a trade mark registrant. While the Trade Marks Act 2002 (the **Trade Marks Act**) incorporates many of the standards prescribed by the Singapore

Treaty, there are a number of provisions that either do not currently meet those standards or are inconsistent with international best practice. Therefore unless New Zealand amends the Trade Marks Act it is unable to join the Singapore Treaty.

Trade marks legislation that is inconsistent with the Singapore Treaty or international best practice can:

- impose unnecessary compliance costs on businesses that use trade marks:
- impose unnecessary restrictions on how trade marks can be handled:
- hinder the alignment of our trade mark system with that of our trading partners, especially Australia.

There are 3 areas of the Trade Marks Act inconsistent with the provisions of the Singapore Treaty. These are:

Division of trade mark registrations into several registrations:

Currently the regulation making powers only enable procedures, requirements and other matters to be prescribed for the division of an application for registration of a trade mark into several applications. No provision is made for the owner of a trade mark registration to be able to divide his or her registration into 2 or more registrations. The Singapore Treaty requires that such a provision be available to registrants.

Assignment and transmission of title to a trade mark:

The Trade Marks Act only permits the new owner of a trade mark to whom title to the trade mark has been assigned or transmitted may apply to the Commissioner of Trade Marks (the **Commissioner**) for registration of the person's title. There is no fee payable to register an assignment or transmission of title. No provision is made for a person assigning or transmitting title to a trade mark (the **previous owner**) to another person to apply to register the change in ownership of a trade mark. The Singapore Treaty requires a trade mark office to accept an application to register a change of ownership from either the previous owner or the new owner.

Registration of a person as a licensee:

The Singapore Treaty does not require that provision be made for licensees to be registered, but if registration is provided then contracting parties must adhere to certain standards and rules, such as the maximum information a request to register a licensee may contain.

While the Trade Marks Act provides that licensees may be voluntarily registered (there is no fee payable for doing this), the information that must be provided and the evidence requirements are different to those permitted by the Singapore Treaty. Furthermore, under the Trade Marks Act if the licensee is not registered, the licensee is barred from taking action against infringement of the registered trade mark and from lodging a border protection notice to prevent the importation of counterfeit goods. Furthermore, there is no requirement for licensees or trade mark owners to keep the information on registered licensees up to date, and there are business compliance costs associated with doing so. There are no statistics available on the number of licensees not registered in New Zealand or on the number of registered licensees where the information is not current.

In Australia, the registration of a licensee is not a prerequisite for a licensee to have the ability to take action against infringement of the trade mark or to lodge a border protection notice with Customs. The matter of whether a licensee can take action against infringement or lodge a border protection notice is determined first by the licence agreement between the trade mark owner and the licensee. Unregistered licensees in New Zealand are therefore at a disadvantage when compared to their equivalents in Australia.

### **Statement of the public policy objectives**

The primary public policy objective is to provide a more efficient and cost effective trade mark registration regime under the Trade Marks Act that:

- streamlines and simplifies trade mark registration procedures:
- more closely aligns trade mark registration procedures and requirements with New Zealand's leading trade partners, in particular, Australia:
- minimises compliance costs for business.



The secondary public policy objective is to ratify the Singapore Treaty.

**Statement of feasible options (regulatory and/or non-regulatory) that may constitute viable means for achieving the desired objectives**

*Status quo*

New Zealand is not party to the Singapore Treaty.

The key features of the status quo sections are discussed in the problem section. The status quo is not preferred because the Trade Marks Act does not meet the public policy objectives.

*Preferred Option – amend the Trade Marks Act to be consistent with the Singapore Treaty*

Division of trade mark registrations into several registrations

Amend section 199(b) relating to regulation making powers concerning procedures, requirements, and other matters for the division of an application for the registration of a trade mark into several applications, so that regulations can also be made in respect of procedures, requirements, and other matters for the division of a trade mark registration into several registrations. It is anticipated that the procedures to be prescribed for dividing a trade mark registration in the Trade Mark Regulations 2003 (the **Regulations**) will mirror those currently provided for dividing applications for registering a trade mark, that is the trade mark registrant would need to make an application to the Commissioner to divide the registration.

Assignment and transmission of title to a trade mark

Amend section 82 to permit the previous owner of a trade mark who is assigning or transmitting title to the trade mark to another person to also apply to the Commissioner. Whether the previous owner or the new owner applied to register the assignment or transmission of title to the trade mark would be a matter for the 2 parties to determine.

### Registration of a person as a licensee

Repeal sections 83 to 86, 182(d) and 199(c) to remove the provisions governing the registration of a person as a licensee (ie, amend the Trade Marks Act so that a person cannot be registered as a licensee). The definition of **licensee** under section 5(1) would also be amended to mean a person other than the owner of the trade mark, who is authorised to use the trade mark by, and subject to the control of the owner. In addition, all existing registrations of licensees would be cancelled and removed from the trade marks register. The provisions in the Trade Marks Act governing the actions of licensees in respect of infringement and border protection measures be aligned with the Australian Trade Marks Act 1995 so that the matter of whether a licensee can take action against infringement or lodge a border protection notice is determined by the licence agreement between the trade mark owner and the licensee.

### **Statement of the net benefit of the proposal, including the total regulatory costs (administrative, compliance and economic costs) and benefits (including non-quantifiable benefits) of the proposal, and other feasible options**

#### *Government*

Amending the Trade Marks Act would allow New Zealand to become party to the Singapore Treaty and, therefore, would contribute to the realisation of the aims of the Singapore Treaty to make national trade mark registration systems more user-friendly and to reduce business compliance costs, both for applicants for the registration of a trade mark and for trade mark registrants. It would also assist to align trade mark registration procedures with our major trading partners, in particular Australia, and send a clear signal to the international community of New Zealand's commitment to provide an efficient and effective trade mark registration regime that is consistent with international best practise.

Amendment would also contribute to the development of a seamless trans-Tasman business environment, or "single economic market", and towards fulfilling the mandate in the 2000 Closer Economic Relations Memorandum of Understanding on the Co-ordination of Business Law that the 2 countries explore "the potential for more

closely co-ordinating the granting and recognition of registered intellectual property rights”.

Since the Singapore Treaty does not seek to harmonise substantive trade mark law, becoming party to that treaty would not impact on the Government’s ability to achieve specific policy objectives in the trade marks area, such as, for example, responding to Treaty of Waitangi claims.

IPONZ is fully third-party funded and, therefore, there would be no financial implications for the government arising from amendments to the Trade Marks Act. It is anticipated that the proposed changes to the Trade Marks Act and its regulations to enable New Zealand to become party to the Singapore Treaty would result in a minor reduction to IPONZ’s administrative costs associated with maintaining the trade marks register. It is not possible to quantify this reduction in administrative costs.

#### *Trade mark owners and users of trade marks*

The likely business compliance costs are discussed in more detail in the business compliance cost statement below.

#### *Division of trade mark registrations into several registrations*

The decision to divide a registration would be a voluntary and initiated by the registrant. There would be business compliance costs associated with making an application to divide a trade mark registration for the trade mark owner. The process for doing so has not yet been developed, but it will be prescribed in the Regulations. It is anticipated that no fee would be payable by the registrant to make such an application.

#### *Assignment and transmission of title to a trade mark*

There would be business compliance costs associated with a previous owner applying to assign or transmit a trade mark application or registration. These costs are expected to be similar to the costs currently faced when a new owner applies to register change in title to the trade mark and they are discussed in more detail in the business compliance cost statement below.

*Registration of trade mark licensees*

Removal of the provisions relating to the voluntary registration of a person as a licensee under the preferred option will reduce business compliance costs. These costs are discussed further in the business compliance cost statement.

Removal of these provisions would also decrease the publicly available information on the register about who is licensed to use a registered trade mark. The impact of this cannot be measured as many licensees are not registered, and for those that are the information on the licensee available from the trade marks register is likely to be out of date.

*Society*

Because of the narrow scope of the proposed amendments to the Trade Marks Act under the preferred option, they are not expected to have any noticeable impact for consumers or on the range or costs of goods and services available in New Zealand.

**Statement of consultation undertaken***Stakeholder consultation*

The Ministry of Economic Development (**MED**) released a discussion paper entitled *International Trade Mark Treaties* in March 2006, which considered, amongst other things, New Zealand becoming party to the Singapore Treaty and key amendments that would be required to the Trade Marks Act and its associated regulations. Six submissions from patent attorneys and law practitioners were received on the matter of accession and amendments to the Trade Marks Act and its associated regulations. Submissions favoured joining the Singapore Treaty, as this would assist to align New Zealand's trade mark registration regime with our leading trade partners.

A J Park were concerned amendment to section 82 to allow the original owner of title to a trade mark to register a change of ownership did not make practical sense and had the potential to cause difficulties for the new owner. It was suggested, for example, that there is potential for confusion if the new owner is not aware that an assignment has been recorded and the records of the entities involved are

likely to be inconsistent and in some cases wrong. Officials note that the provisions in the Singapore Treaty regarding changes to ownership require a trade marks office to accept an application for change of ownership from either the original owner or the new owner.

A J Park were also concerned that the original proposal in the discussion paper to align the provisions concerning the registration of a person as a licensee with the Australian Trade Marks Act 1995 would not result in any benefits and the registration of licensees often causes costs and confusion. Furthermore, they considered that the Commissioner should not play any role in between the trade mark owner and a licensee, and nor should there be any practical or legal effects from the registration of a licensee. It was their view that there were not any practical or legal effects at present. Officials agree with the A J Park's submission on the registration of licensees and the preferred option now proposes to remove the provisions relating to the voluntary registration of licenses and to cancel all existing licensee registrations.

#### *Government department/agency consultation*

The following departments and ministries have been consulted on the proposal: the Ministry of Consumer Affairs, the Ministry of Culture and Heritage, the New Zealand Customs Service, the Ministry of Foreign Affairs and Trade, the Ministry of Justice, Te Puni Kokiri, and Treasury. No concerns were raised.

#### **Business compliance cost statement**

The source of new compliance costs would include learning of the amendments to the Trade Marks Act, specifically:

- information that would be required for any application by the trade mark owner to divide a trade mark registration and the time taken to complete such an application; and
- information that would be required for an application by the previous owner to register a change of ownership of title to a trade mark and time taken to complete such an application.

The current sources of compliance costs that would be eliminated by the proposed changes include:

- information that would be required for an application to register a change of ownership of title to a trade mark where a licensee was previously registered; and
- information and procedures for registering a person as a licensee, amending such a registration and the cancellation of such a registration and the time taken to complete appropriate application forms.

Parties likely to be affected will be trade mark owners, trade mark agents (such as law firms and patent attorney firms), who act on behalf of trade owners, and other interested parties including businesses who use trade marks under licence agreements. It is not possible to identify the numbers of such parties or their size, but they range from small businesses to large multinational businesses.

The new sources of compliance costs cannot be quantified until provisions are developed for the Regulations for the procedures relating to the division of a trade mark registration and registration of a change of ownership by the original trade mark owner. They are expected to be very small as these new provisions are expected to mirror existing provisions in the Regulations, ie, mirror the existing provisions for a new owner registering title to a trade mark and for a trade mark applicant to apply to divide his or her application into 2 or more applications for registration of a trade mark. In relation to registering a change of title to a trade mark, currently the new owner of the trade mark must bear the business compliance costs associated with registering a change of ownership. Under the preferred option, either the original owner or the new owner would bear these costs or the costs would be shared between the 2 parties, as determined in any assignment or transmission agreement.

Steps that will be taken to minimise compliance costs include: IPONZ would publish information on the various changes outlined in the preferred option, as well as publishing a set of sample application forms setting out the mandatory information required for any application to divide a trade mark registration into several registrations, and for an application to register a change of ownership by the original trade mark owner assigning or transmitting title of a trade mark to another person.

## Madrid Protocol

### **Statement of the nature and magnitude of the problem and the need for government action**

A trade mark is a unique identifier (word, brand, logo, colour, slogan, three-dimensional shape, and sometimes even a sound or smell) that enables a business easily to distinguish its goods and services from those supplied by other traders. It is used as a marketing tool so that consumers can recognise the product of a particular trader, thereby providing low-cost information to consumers and creating incentives for business to invest in quality products and services. Trade mark law in New Zealand is governed by the Trade Marks Act and the Regulations.

Seeking trade mark protection overseas can be a time-consuming and expensive exercise for businesses. This can create a barrier to businesses, particularly small businesses, looking to expand into overseas markets.

Currently, if a New Zealand business wants to protect its trade marks overseas, it must apply separately in each country and comply with each country's information, language, currency, and procedural requirements. The subsequent management of any trade marks registered overseas, such as renewing a registration or recording a change of address or ownership, similarly involves a process of applying separately in each country, complying with each country's requirements and paying multiple fees. Often businesses must also employ trade mark agents to act on their behalf to register a trade mark and to subsequently maintain that trade mark registration. The number of New Zealand businesses who seek trade mark protection overseas per annum is not known.

If an overseas business wants to protect its trade marks in New Zealand, it must apply directly to IPONZ and provide all information in English, pay prescribed fees in New Zealand dollars and comply with our unique procedural requirements. During the financial year ending 30 June 2005 IPONZ received 27 937 applications to register trade marks, registered 21 089 trade marks, and received renewal notices for 10 014 trade mark registrations. Approximately half of the applications to register trade marks originated from

overseas businesses either trading in New Zealand, or looking to sell their goods and/or services in New Zealand.

The WIPO administers the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (the **Madrid Protocol**) that provides access to the “Madrid system” for the international registration of trade marks. There are 68 countries party to the Madrid Protocol, including New Zealand’s leading trade partners. The Madrid system enables a trade mark owner to have a trade mark protected in one or more countries by filing one application (an **international application**) directly with his or her local trade mark office in English, French, or Spanish, paying 1 fee and designating 1 or more overseas countries where the Madrid system is available and where protection is sought.

The Madrid system also provides for a business to manage its trade marks by filing a single application in 1 language and paying 1 fee to, for example, renew a trade mark registration or to record a change in address or ownership. Only those businesses resident in a country party to the Madrid Protocol are able to take advantage of the Madrid system to protect their trade marks in countries that are party to the Madrid Protocol.

### **Statement of the public policy objectives**

The public policy objectives are:

- to reduce compliance costs associated with seeking and maintaining trade mark protection both in New Zealand and overseas; and
- to encourage and facilitate businesses to expand into overseas markets; and
- to more closely align New Zealand’s trade marks regime with our leading trade partners and, in particular, Australia.



**Statement of feasible options (regulatory and/or non-regulatory)  
that may constitute viable means for achieving the desired  
objectives**

*Status quo*

New Zealand businesses seeking trade mark protection overseas must apply for protection individually in each country where that protection is desired and comply with each country's unique registration requirements. Overseas businesses seeking trade mark protection in New Zealand must apply directly to IPONZ and comply with all New Zealand's requirements. The status quo is not preferred because it does not meet the public policy objectives.

*Preferred Option – amend the Trade Marks Act to implement the  
Madrid system in New Zealand as provided for under the Madrid  
Protocol Relating to the Madrid Agreement*

To implement the Madrid system in New Zealand, the Trade Marks Act would be amended to provide for:

- New Zealand businesses to file an international application under the Madrid system to register their trade marks in countries party to the Madrid Protocol with the International Bureau of WIPO (the **IB**) through IPONZ:
- the receipt of international registrations granted by the IB under the Madrid system designating New Zealand:
- the examination of international registration for compliance with Part 2 of the Trade Marks Act (ie, the grounds upon which the Commissioner may refuse registration of a trade mark in New Zealand):
- following examination and the completion of any opposition in New Zealand to any international registration designating New Zealand, for the international registration to have effect as if it were an ordinary national registration in New Zealand:
- the maintenance of international registrations in New Zealand, such as renewal of international registrations every 10 years, recording changes in the address of the international registrant and changes in ownership of the international registration:

- other miscellaneous administrative provisions, such as fees and communications with the IB concerning international applications and international registrations.

**Statement of the net benefit of the proposal, including the total regulatory costs (administrative, compliance and economic costs) and benefits (including non-quantifiable benefits) of the proposal, and other feasible options**

*Government*

Amending the Trade Marks Act and the Regulations would allow New Zealand to accede to the Madrid Protocol and make the Madrid system available to both New Zealand and overseas business. It would also assist to: align New Zealand's trade marks regime with our major trading partners, such as Australia; add credibility to New Zealand's trade mark regime; and send a clear signal to the international community of New Zealand's commitment to provide an efficient and effective trade mark registration regime.

Since Australia is party to the Madrid Protocol, accession would contribute to the development of a more seamless trans-Tasman business environment, or "single economic market". It would also contribute towards fulfilling the mandate in the 2000 Closer Economic Relations Memorandum of Understanding on the Co-ordination of Business Law that the 2 countries explore "the potential for more closely co-ordinating the granting and recognition of registered intellectual property rights".

The Madrid Protocol does not seek to harmonise substantive trade mark law. Becoming party to the Madrid Protocol would not, therefore, impact on the Government's ability to achieve specific policy objectives in the trade marks area, such as responding to Treaty of Waitangi claims.

IPONZ is fully third-party funded and there would be no financial implications for the government arising from the proposed amendments to the Trade Marks Act. There would be some one-off administrative costs for IPONZ to develop and implement procedures for administering the Madrid system and to update the trade marks register to accommodate the Madrid system. For example, IPONZ staff would need to be trained on the changes to the Trade Marks Act and in the

implementation of procedures for administering the Madrid system. Costs would also be incurred by IPONZ in developing client information about the use of the Madrid system and educating trade mark agents and New Zealand businesses on the use of the Madrid system. These costs have not yet been quantified.

There would be on-going costs for IPONZ related to its on-going administration of the Madrid system in New Zealand, such as acting as a Receiving Office for the IB for international applications. These costs would be recovered through fees payable by the users of the Madrid system, such as IPONZ handling fees and Madrid system fees payable by users in relation to applications and registrations applying to New Zealand.

#### *Businesses*

The main advantages for businesses in using the Madrid system arise from the simplicity of the international registration system and the financial savings made when maintaining the protection of their trade marks abroad. The Madrid system also reduces, and in some cases may eliminate, the need for a trade mark owner to employ the services of a trade mark agent in each country where protection is sought.

The aim of the Madrid system is to reduce business compliance costs associated with the simultaneous protection of a trade mark in multiple countries. The costs are discussed in more detail below in the business compliance cost statement.

New Zealand resident businesses would have the option of using the Madrid system to simplify the process of obtaining trade mark protection overseas in countries party to the Madrid Protocol and thereby potentially to reduce business compliance costs associated with protecting trade marks overseas. The extent of any reduction in the business compliance costs achievable under the Madrid system cannot be quantified. Any cost deduction would be variable and depend on a variety of factors including the number of countries where protection was being sought and, particularly, whether registration of the trade mark would require the assistance of a trade mark agent.

Overseas businesses resident in a country party to the Madrid Protocol would have the option of using the Madrid system to protect their trade marks and to maintain their protection in New Zealand and, therefore, benefit from a reduction in business compliance costs as-

sociated with protecting a trade mark in New Zealand. Those that choose to use the Madrid system may be able to avoid some or all of the costs associated with obtaining and maintaining trade mark protection in New Zealand.

#### *Trade mark agents*

Anecdotal evidence from Australia following its accession to the Madrid Protocol suggests that New Zealand trade mark agents would face a short-term (around 1 to 2 years) reduction in revenue from overseas clients as those clients switch to using the Madrid system in New Zealand. The impact of any reduced revenue cannot be quantified, but is likely to be felt the most by smaller firms who may rely heavily on overseas trade mark work for a substantial portion of their income. Overseas experience suggests that this impact is likely to be mitigated over the longer term as some of the lost revenue can be expected to be recouped by additional work from both New Zealand and overseas businesses related to the greater utilisation of the Madrid system. Trade mark agents would also incur some business compliance costs, which are discussed further in the business compliance cost statement below.

In addition, WIPO makes available detailed information on the Madrid system covering all aspects of how it works and this information is readily available both in paper and electronic form (via its website dedicated to the Madrid system).

#### *Society*

No costs to consumers would result from accession to the Madrid Protocol. Making the Madrid system available to overseas businesses to protect their trade marks in New Zealand may encourage them to consider New Zealand as a possible market for their goods and services, where they might not have ordinarily done so. This in turn may lead to a gradual increase in the range of goods and services marketed in New Zealand.

## Statement of consultation undertaken

### *Stakeholder consultation*

MED released a discussion paper entitled *International Trade Mark Treaties* in March 2006, which considered, amongst other things, New Zealand's accession to the Madrid Protocol. Seven out of the eight submissions received on the Madrid Protocol supported accession. Submitters generally acknowledged that overseas businesses, rather than local businesses, would be more likely to use the Madrid system and benefit from New Zealand's accession. They did, however, broadly support accession.

Submissions from New Zealand patent attorneys considered that New Zealand businesses and, in particular, their clients would not use the Madrid system to protect trade marks overseas, particularly because of their small size. They were concerned that few benefits would accrue for New Zealand businesses from accession. Officials note that the Madrid system is principally designed to assist exporting businesses and, in particular, the businesses exporting to several countries at a time. The greater the number of overseas markets being exported to, the greater the potential financial savings that can be achieved through using the Madrid system. While local businesses may not choose to use the Madrid system, officials believe that this does not justify preventing overseas businesses from taking advantage of the Madrid system to protect their trade marks in New Zealand.

Patent attorneys were also concerned that accession would result in a substantial reduction in revenue from overseas clients. For example, A J Park considered that accession to the Madrid Protocol would cost trade mark firms around \$5 million annually, with flow-on effects such as loss of jobs. Officials note that this loss of revenue equates to the financial savings that would accrue to overseas businesses annually from New Zealand's accession. A J Park conceded that protecting the income of New Zealand trade mark firms should not be a priority in determining whether New Zealand joined the Madrid Protocol. As noted above, overseas experience suggests that this loss in income would be mitigated over time.

Other concerns raised by patent attorneys were: that accession to the Madrid Protocol would result in more trade marks being registered in New Zealand, and thereby reduce the "pool" of available trade marks

available to New Zealand businesses to use; that it would increase the number of trade marks registered in New Zealand that are not actually used; make it more difficult for trade mark firms to “clear” trade marks for use by New Zealand businesses; and increase the number of trade mark conflicts between businesses. Officials note that such issues are common to all businesses operating in larger markets than New Zealand and they are an unavoidable consequence of economic growth and increased global trade. Officials also note that trade mark firms are most likely to benefit from increased numbers of trade marks registered in New Zealand and any increase in trade mark conflicts between businesses.

*Government department/agency consultation*

The following departments and ministries have been consulted on the proposal: the Ministry of Consumer Affairs, the Ministry for Culture and Heritage, the New Zealand Customs Service, the Ministry of Foreign Affairs and Trade, the Ministry of Justice, Te Puni Kōkiri, and Treasury. No concerns were raised.

**Business compliance cost statement**

It would be for a business to choose on a case-by-case basis whether to file direct national applications for the registration of its trade marks overseas, or to take advantage of the filing mode provided by the Madrid system.

A business seeking trade mark protection overseas would face the following sources of compliance costs in each country:

- understanding the differences between countries’ trade mark regimes:
- completing unique application and request forms for each country:
- providing the information required in the form acceptable to each country:
- employing the services of a trade mark agent in each country:
- translating all documents and communications (if the country is not an English speaking country):
- paying fees in the currency of the country.

If a business chooses to use the Madrid system, it would be able to reduce and in some cases eliminate the sources of compliance costs outlined above. New Zealand businesses using the Madrid system for the first time would, however, incur the business compliance cost of learning how the Madrid system operates and its requirements.

Becoming party to the Madrid Protocol would require all New Zealand trade mark agents to incur the costs associated with learning and understanding the requirements of the Madrid system, so as to be able to advise their clients on when it would be appropriate to take advantage of the Madrid system to protect trade marks overseas.

Parties likely to be affected will be trade mark owners, trade mark agents (such as law firms and patent attorney firms), who act on behalf of trade owners, and other interested parties. It is not possible to identify the numbers of such parties, but they range from individuals and small firms to large multinational businesses and firms.

Steps that will be taken to minimise compliance costs include:

- IPONZ running seminars and workshops on using the Madrid system for trade mark agents and businesses:
- IPONZ publishing information on the Madrid Protocol including the proposed procedures and benefits:
- publishing a set of sample forms.

## Nice Agreement

### **Statement of the nature and magnitude of the problem and the need for government action**

The Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (the **Nice Agreement**) provides a classification system for goods and services for the purposes of registering trade marks (the **Nice Classification**). Countries that are party to the Nice Agreement must apply the Nice Classification to registered trade marks. Other countries are free to adopt and use the Nice Classification. Whilst New Zealand is not party to the Nice Agreement, the use of the Nice Classification has been mandated for many years under the Trade Marks Act 1953 (now repealed) and more recently under the Trade Marks Act.

Some 1 600 Third Schedule trade marks registrations are not classified under the Nice Classification. They were registered before

1953 and some date back to the beginning of the 20th century. These registrations prevent New Zealand from becoming party to the Nice Agreement. They also result in added administrative costs for the IPONZ, as it must maintain 2, rather than 1, searchable trade mark registers. The existence of 2 trade mark registers imposes time and search costs upon IPONZ (during the examination of applications to register trade marks) and the public, from having to understand and access 2 different classifications systems and from having to search 2 separate registers to find if a particular trade mark has been registered in New Zealand.

Furthermore, New Zealand has been unable to participate in the five-yearly cycle of reviews of the Nice Classification conducted by countries that are party to the Nice Agreement. Therefore, it has been unable to influence whether the development of the Nice Classification best meets the needs of New Zealand businesses and IPONZ.

#### **Statement of the public policy objectives**

The public policy objective is to provide for efficient and effective searching of the trade marks register.

#### **Statement of feasible options (regulatory and/or non-regulatory) that may constitute viable means for achieving the desired objectives**

Non-regulatory options

##### *Option 1 – Status quo*

There are 2 trade mark registers, 1 containing around 1 600 Third Schedule registrations registered before 1953 and 1 containing over 200 000 trade mark registrations classified under the Nice Classification.

Under the Regulations, the owners of the Third Schedule registered trade marks may voluntarily request (free of charge) that their registrations be converted into the Nice Classification. Few Third Schedule registrants have made such requests.

This option is not preferred because it will not lead to the timely conversion of Third Schedule registrations into the Nice classification.



*Option 2 – Commissioner of Trade Marks invites registrant to convert*

The **Commissioner** would write to each Third Schedule registrant and invite them to apply voluntarily to convert their registration into the Nice Classification. This option is also not preferred. While it is anticipated that some registrants would take up the Commissioner's invitation, it is likely that some would not. Reasons for not taking up the invitation could include the cost of expert advice to determine the most appropriate Nice class(es) for the registration and/or that conversion may result in the registration being divided into several Nice classes, which would increase the renewal fees payable by the registrant.

Regulatory options

*Option 3 (preferred) – amend the Regulations*

Amend the Regulations to provide a procedure for the Commissioner to initiate the re-classification of Third Schedule registrations to the Nice Classification. The Commissioner would write to the registrant proposing a suitable Nice Classification and providing for the registrant to either accept the Nice class(es) as proposed or provide an alternative classification to the satisfaction of the Commissioner within a specified period. The normal appeal procedures specified in the Regulations would apply in situations where the registrant disagrees with the Commissioner's decisions regarding conversion. Where a conversion results in a registration being converted into 2 or more classes of the Nice Classification system, additional renewal fees related to the number of classes would be payable upon the expiry of the registration.

**Statement of the net benefit of the proposal, including the total regulatory costs (administrative, compliance and economic costs) and benefits (including non-quantifiable benefits) of the proposal, and other feasible options**

*Government*

The Commissioner would have a mechanism with which to convert all Third Schedule registrations into the Nice Classification in

a timely manner. Having a single register of trade marks would reduce IPONZ administration costs and simplify searches of the trade marks register.

IPONZ is fully third-party funded and there would be no financial implications for the government arising from amendments to the Trade Marks Act. There will be a minor cost to IPONZ associated with initiating the conversion of those trade mark registrations currently not classified in the Nice Classification. This cost would be met from within existing MED baselines.

Following conversion of Third Schedule registrations, New Zealand would be able to become party to the Nice Agreement and, therefore, be able to contribute to the future development of the Nice Classification. As the Nice Agreement does not seek to harmonise substantive trade mark law, joining would not impact on the Government's ability to achieve specific policy objectives in the trade marks area, such as responding to Treaty of Waitangi claims.

#### *Businesses*

For the large majority of businesses who have registered trade marks or who use registered trade marks, there will be no costs arising from the conversion of the Third Schedule registrations into the Nice Classification. For the large majority of businesses, searching the trade mark register would become more efficient and effective as a result of needing to only search 1 register of trade marks under 1 classification system.

Following conversion and accession to the Nice Agreement, New Zealand businesses who own trade marks may benefit from New Zealand's participation in the development of the Nice Classification, especially where classification issues arise from New Zealand vernacular not used elsewhere, or where businesses provide unique products or services not encompassed by the Nice Classification.

There will be some minor unquantified costs for the owners of the 1 600 registered trade marks not classified under the Nice Classification, associated with identifying the most suitable classes of Nice Classifications into which their registration should be converted. Where conversion results in a registration being converted into several classes of the Nice Classification, the owner would need to pay additional fees to renew the registration. The fee for renewing

a trade mark registration is \$250 (exclusive of GST) per class (a trade mark may be registered for 1 or more classes of goods and/or services).

### **Statement of consultation undertaken**

#### *Stakeholder consultation*

MED released a discussion paper entitled *International Trade Mark Treaties* in March 2006, which considered, amongst other things, New Zealand's accession to the Nice Agreement and key amendments that would be required to the Trade Marks Act and the Regulations to facilitate accession. Six submissions were received on the Nice Agreement. Submissions were generally in favour of conversion of the Third Schedule registrations into the Nice Classification and of New Zealand acceding to the Nice Classification.

Several submissions raised concerns at the possible costs to the 1 600 Third Schedule registrants arising from conversion. Some submissions suggested that additional renewal fees should be waived either at the first subsequent expiry of the registration or in perpetuity. Officials agree that some registrants would face additional renewal costs, but disagree that such registrants should be compensated. Where registrants of Third Schedule registrations have previously voluntarily converted their registrations into the Nice Classification, no compensation for additional renewal fees has been available.

Further, the registrants of Third Schedule registrations will have had the benefit of lower renewal fees than other owners for more than 50 years and should for the future be in the same position as other registrants with regards to renewal fees (ie, other registrants should not be required to subsidise Third Schedule registrants).

### **Business compliance cost statement**

Overall there will be a reduction in compliance costs associated with searching a single trade marks register under 1 classification system. For the owners of the 1 600 trade marks not classified under the Nice Classification, there would be, in some cases, compliance costs associated with the process of conversion and, in particular, seeking expert advice from a trade mark agent to identify the most appropriate Nice class(es), because of the broad nature of specification of

goods for which the trade mark is registered. The likely cost of seeking expert advice from a trade mark agent has not been quantified and is expected to vary depending of the complexity of classification issues that arise during the conversion processes.

It is estimated that the owners of around 200 Third Schedule registrations may need to seek expert advice from a trade mark agent related to the conversion of their registrations. The size of the businesses affected is not known and the conversion process is likely to affect both New Zealand and overseas businesses. It is also likely that a small number of businesses will own 2 or more Third Schedule registrations.

Steps that will be taken to minimise compliance costs include: IPONZ providing information to affected Third Schedule registrants on the conversion process. In order to assist to reduce conversion costs for affected registrants, the Commissioner would initiate the conversion processes by suggesting an appropriate conversion to the registrant.

## **MED Enforcement**

### **Statement of the nature and magnitude of the problem and the need for government action**

There is a growing problem around the world related to the manufacture, distribution, and sale of counterfeited goods and pirated works (**counterfeits**). For example, the World Customs Organization estimates counterfeiting and piracy accounts for 5 to 7% of global merchandise trade, estimated to be equivalent to lost sales of as much as US\$512 billion. The World Health Organization estimates that up to 10% of medicines sold worldwide are counterfeit.

Goods typically targeted by counterfeiters are those items sold at “premium” prices and well in excess of the cost to manufacture. Counterfeits can provide a ready source of income for terrorist organisations and organised crime. Typically fashion clothing, footwear, fashion accessories (like perfume, sun glasses, hand bags, caps, watches, and jewellery), movies, music, and software are usually counterfeited. Many other types of goods, however, are also being counterfeited such as auto parts, motorcycles, cigarettes,

cosmetics, medicines, sports equipment such as golf clubs, toys, and foodstuffs. Many of these items can pose serious health risks.

New Zealand is not immune to the problem of counterfeits, although New Zealand does not yet appear to face problems associated with counterfeits that pose a risk to public safety such as medicines, foodstuffs, and auto and machinery parts. The New Zealand Customs Service (**Customs**) has reported that the volumes of counterfeited goods they have detained have risen by over 400% since July 2000 with over 260 000 items detained by them last year as suspected of being counterfeits. Since Customs works on an intelligence and risk assessment basis, and cannot inspect every shipment of goods entering New Zealand, the true volume of counterfeits will be substantially higher than detention statistics suggest.

The Trade Marks Act and the Copyright Act 1994 (the **Copyright Act**) provide criminal offences against the manufacture, importation and sale of counterfeits to deter the trade in counterfeits. **MED** has determined that the infrequent and ad hoc prosecutions by government agencies of these criminal offences is contributing to the growth of counterfeits being offered for sale in New Zealand. Greater volumes of counterfeits being offered for sale can lead to reduced profits by trade mark owners and copyright holders (**right holders**) and entrenchment in society of the acceptance and consumption of counterfeits, whilst ignoring the law, the potential health risks and the wider impacts on the economy as a whole.

#### **Statement of the public policy objectives**

The public policy objective is to reduce the trade in New Zealand of counterfeits and to deter people becoming involved in that trade through increased prosecution of the criminal offences provided under the Trade Marks Act and the Copyright Act by a government agency.

**Statement of feasible options (regulatory and/or non-regulatory)  
that may constitute viable means for achieving the desired  
objectives***Status quo*

Under the Trade Marks Act it is a criminal offence for a person who with the intention of obtaining a gain for himself or herself or any other person or of causing loss to any person to counterfeit a registered trade mark; to falsely apply a registered trade mark to goods or services; to make or oppose an object for making copies of a registered trade mark; or to import or sell goods with a falsely applied registered trade mark.

The Copyright Act provides that it is a criminal offence, other than under a copyright licence, to—

- make for sale or hire:
- import (other than for private and domestic use):
- possess in the course of business with a view to committing any act of infringing the copyright
- in the course of business sell or let for hire, offer or expose for sale or hire, exhibit in public, or distribute otherwise than in the course of business to such an extent as to affect prejudicially the copyright owner:

an object that is, and the person knows is, an infringing copy of a copyright work.

It is also an offence to make an object specifically designed or adapted for making copies or a particular copyright work or to have such an object in that person's possession, knowing that the object is to be used to make infringing copies for sale or hire or for use in the course of business.

Both Acts provide that every person who commits such an offence is liable on summary conviction to a fine of up to \$150 000 or imprisonment for a term of up to 5 years. Neither Act, however, provides any government agency with any investigative and prosecution powers to facilitate enforcement of these criminal offences. The police are considered to be the only government agency with the necessary investigative and prosecutorial powers to undertake enforcement action under the Trade Marks Act and the Copyright Act.

Lack of resources and expertise within the police prevents them prioritising the enforcement of the criminal offences. The level of enforcement activity is not sufficient to achieve the policy objective.

### **Non-Regulatory Options**

#### *Option 1 – Provide police with additional resources.*

Under this option police would be allocated an additional \$664 050 of government funding to prioritise enforcement of the criminal offences under the Trade Marks Act and the Copyright Act.

This option was rejected because there was no guarantee that the additional resources provided would be used by police to prioritise enforcement of the criminal offences under the Trade Marks Act and the Copyright Act over all other forms of criminal offending.

#### *Option 2 – Make another government agency with funding responsible for enforcement*

Under this option another government agency with an existing enforcement role and experience, such as the Commerce Commission, Department of Internal Affairs, Customs or the NEU of MED would be made responsible for enforcement action under the Trade Marks Act and the Copyright Act and provided an additional \$664 050 of government funding for such enforcement activity.

This option was rejected because none of these other government agencies have available to them any investigative and prosecutorial powers to undertake any enforcement of the criminal offences under the Trade Marks Act and the Copyright Act. Enforcement action would still be dependent on the availability of Police resources to, for example, obtain and execute search warrants to obtain evidence for a prosecution.

## Regulatory Options

### *Option 3 – Provide another government agency with investigative and prosecutorial powers under the Trade Marks Act and the Copyright Act*

Under this option the Trade Marks Act and the Copyright Act would be amended to give either the Commerce Commission, New Zealand Customs Service, or Department of Internal Affairs with suitable investigative and prosecutorial powers to take enforcement action.

This option is not preferred. While these agencies have an indirect interest in preventing the trade in counterfeits under other legislation, making any one of them responsible under the Trade Marks Act and the Copyright Act would not be a good fit to their existing activities and legislative responsibilities. For example, making Customs responsible for prosecutions would require expanding their role to post-border activities.

### *Option 4 (preferred option) – Provide the National Enforcement Unit of MED with additional resources and investigative and prosecution powers under the Trade Marks Act and the Copyright Act to enable the National Enforcement Unit to play a role enforcing the criminal offences*

Under this option the NEU would be provided with an additional \$664 050 in government funding and the Trade Marks Act and the Copyright Act would be amended to provide the NEU with the powers to:

- apply for, be granted and execute search warrants to:
  - enter and search a place:
  - use any assistance that is reasonable in the circumstances, including the use of right holders as technical experts:
  - use any force for gaining entry and for breaking open any article or thing that is reasonable in the circumstances:
  - search for and remove documents, objects, articles, or things that the person executing the warrant believes on reasonable grounds may be relevant:



- take copies of documents, or extracts from documents, that the person executing the warrant believes may be relevant:
- require a person to reproduce, or assist any person executing the warrant to reproduce in usable form, information recorded or stored in a document or computer:
- use information from other government agencies, such as New Zealand Customs and New Zealand Police, to determine whether a person is complying, or has complied, with either Act and for detecting contraventions of either Act:
- undertake in limited circumstances non-search warranted search and seizures to:
  - enter a place where:
    - the occupier consents to entry:
    - the place is a public place; or
    - the place is a place of business and is open for carrying on business and the NEU officer only enters parts of the place that are open to the public; and
  - seize property and documents where the NEU officer has reasonable grounds to believe it breaches, is being used in breach, or is evidence of a breach of the either the Trade Marks Act or the Copyright Act for both evidential purposes and to deprive the person of property which is counterfeit in nature for use in a criminal prosecution.

Any person from whom any property has been seized without a search warrant would be able to apply to the District Court for an order directing that the property be returned to that person. The person applying for such an order would need to satisfy the court that there are no grounds for the property to be continued to be held, such as that the seized goods were not counterfeits.

This option would not alter the responsibilities of other government agencies, such as Customs' administration of the border protection measures under the Trade Marks Act and the Copyright Act or the Commerce Commission's responsibilities under the Fair Trading Act 1986, nor would it substitute or otherwise negate the responsibilities

right holders have to take civil action to enforce their trade mark or copyright rights.

**Statement of the net benefit of the proposal, including the total regulatory costs (administrative, compliance and economic costs) and benefits (including non-quantifiable benefits) of the proposal, and other feasible options**

**Government**

There are several reasons why the NEU is the preferred choice for making responsible enforcement. The Trade Marks Act and the Copyright Act are the primary responsibility of MED and the NEU is an established enforcement unit with the Ministry with a wide range of experience investigating and prosecuting various forms of regulatory crime. Furthermore, the NEU also has established links with other government agencies that have existing roles enforcing legislation against various forms of regulatory crime.

Having the NEU play a role in enforcing the criminal offences would be expected to result in an increase in the number of prosecutions by the Crown of the criminal offences under the Trade Marks Act and the Copyright Act, particularly against repeat and serious offenders. This in turn is expected to lead to a reduction in the trade of counterfeits in New Zealand. Other benefits likely are:

- enhancement the deterrent effect of the criminal offences under the Trade Marks Act and the Copyright Act and therefore deter future offending:
- assist the New Zealand Customs Services to maintain the efficiency and effectiveness of its administration of the border protection measures provided under the Trade Marks Act and the Copyright Act:
- allow the New Zealand Police to have greater freedom to concentrate its limited resources in other areas of criminal offending:
- reduce the chance that acceptance and consumption of counterfeits would become entrenched in society:
- lower the risk of counterfeits that pose a health risk being sold in New Zealand:

- send a clear signal to the international community that New Zealand does not tolerate trade in counterfeits and, therefore, reduction in the risk that New Zealand would be targeted by terrorist groups and crime gangs as a market for counterfeits and a ready source of income for them:
- ensure that the law is not brought into disrepute from an absence of enforcement action.

The proposed powers outlined in the preferred option are very similar to the powers to be prescribed to the NEU under the draft Major Events Management Bill. Since major sports events are a popular target for the sale of counterfeits, consistency in the investigative powers between the proposed Major Events Management Bill and the amendments proposed to the Trade Marks Act and the Copyright Act would ensure that the NEU would be able to simultaneously discharge its responsibilities under the three separate Acts in an efficient and effective manner.

There would be a cost to government of \$664 050 dollars to fund the NEU's proposed enforcement role during the first year of enforcement activity rising to \$964 465 for the third and outlying years.

### **Industry**

Right holders are likely to benefit in a number of ways from enforcement action by NEU. While these benefits cannot be quantified, enforcement action by the NEU is expected to lead to a reduction in manufacture, importation, and sale of counterfeits in New Zealand through a deterrent effect. A reduction in the sale of counterfeits is likely to result in increased sales for right holders and increase their profits from the New Zealand market. A reduction in sales of counterfeits is also likely to increase the reputation of the quality of right holders' goods, since right holders would not have to compete against poor quality "knock off" items being offered for sale. This in turn may also assist to increase sales for right holders.

This in turn is likely to reduce right holders' costs of doing business in New Zealand.

There will still be some unquantified costs to right holders arising from the need to support the NEU's enforcement activity arising from for example collecting and sharing intelligence with the NEU to identify offenders and providing expert evidence to support prosecutions.

No business compliance costs, however, are anticipated to arise from this proposal.

### **Society**

The proposal is likely to increase consumer confidence in the quality and source of goods they purchase. In addition, there is likely to be a reduction in the risk that consumers would be affected by counterfeits that pose a health and safety risk.

### **Statement of consultation undertaken**

The proposal to create a role for the NEU to provide enforcement for the criminal offences and to amend the Trade Marks Act and the Copyright Act to facilitate investigations has been discussed with a range of right holders, their legal representatives and retailing bodies such as the New Zealand Retailers Association Inc. and the New Zealand Sports Industry Association Inc. who have expressed a particular interest in combating the sale of counterfeits. Stakeholders are broadly supportive of the proposal for NEU to play a role in the enforcement of the criminal offences under the Trade Marks Act and the Copyright Act and the proposed investigative and prosecutorial powers.

In developing this proposal, the Ministry of Economic Development has consulted with the following government departments and agencies: the Treasury; the New Zealand Customs Service; the Ministry of Justice; the Department of Internal Affairs; the New Zealand Police; the Ministry of Consumer Affairs; the Commerce Commission; the Ministry for Culture and Heritage; Te Puni Kōkiri; and the Ministry of Foreign Affairs and Trade. The Department of the Prime Minister and Cabinet has been informed.

### **Customs Enforcement**

#### *Executive summary*

Border interceptions of counterfeit and pirated goods by Customs contribute to a global partnership aimed at reducing this trade. A worldwide increase in the amount of counterfeit and pirated goods being traded, and the weak level of deterrence against such imports, has contributed to a backlog in Customs' workload. Allowing Cus-

toms to take some prosecutions related to imported counterfeit and pirated goods would be an effective way of helping to manage this problem. It is proposed that Customs is empowered to take such prosecutions. In many cases this would be more efficient than the police or the NEU of MED taking the prosecutions.

To enable Customs to undertake this role it will require explicit supporting powers under the Trade Marks Act and the Copyright Act. The proposed supporting powers would enable Customs to undertake warranted searches, retain certain goods, require information to be supplied and to copy information.

#### *Adequacy statement*

Customs has reviewed this Regulatory Impact Statement (**RIS**), and has determined it is adequate according to the criteria agreed by Cabinet. The Regulatory Impact Analysis Unit decided not to review this RIS because it considered the Cabinet paper's proposal would not significantly impact on economic growth.

#### *Status quo and problem*

Internationally, trade in counterfeit and pirated goods has been increasing, with New Zealand subject to the same trend. In New Zealand volumes of trade mark and copyright infringing goods intercepted by Customs have continued to increase each year. In 2004/05 185 000 infringing items were detained by Customs. This increased to 260 000 items in 2005/06. The issue of trade in counterfeit and pirated goods is receiving increasing attention internationally, with governments around the world considering new measures to tackle the issue, including giving customs agencies the powers to take prosecutions and ex officio powers to act on their own behalf against trade mark and copyright importing infringements.

In August 2006 Cabinet agreed that the NEU of MED should be responsible for enforcing trade mark and copyright offences defined in the Trade Marks Act and the Copyright Act [CAB Min (06) 32/12]. This includes offences related to the importation of counterfeit and pirated goods. No additional funding has, however, been given to the NEU to undertake such enforcement action. The police is also able to use its general powers to enforce trade mark and copyright

criminal offences, but resource constraints mean that investigations of this type are low priority.

### **Customs activities**

Border interceptions of counterfeit and pirated goods by Customs contribute to a global partnership aimed at reducing trade in these goods.

Customs' current activities are based on the border protection measures set out in the Trade Marks Act and the Copyright Act. This legislation is consistent with measures described in the internationally recognised *Agreement on Trade-related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods*. Customs' activities are predicated on rights owners lodging a notice requesting the detention of goods that appear to infringe their rights.

### **Problem definition**

The global increase in trade of counterfeit and pirated goods, and the low level of deterrence against importing such goods into New Zealand, have contributed to some operational pressure within Customs. For example, there is a backlog of about 6 months in Customs' investigations of possible trade mark and copyright infringements. The backlog impacts on the availability of Customs' resources to undertake other types of work, such as drug and objectionable material investigations. It has also precipitated a shortage of secure storage facilities for detained goods.

A few importers repeatedly import counterfeit and pirated goods. Although enforcement could be better managed by taking some prosecutions against such importations, and in most cases Customs is better placed than other agencies to do this, Customs is not currently able to take this action.

### *Objectives*

The main objective of the change being sought is to help to reduce the importation of counterfeit or pirated goods (as compared with the status quo). A secondary objective is to reduce the backlog in Customs' investigations of possible trade mark and copyright infringements.

### *Alternative options*

#### *Alternative Option 1 – Increase Resources Allocated to Customs IPR Investigations*

Option 1 would not require legislative change. However it would not increase the deterrence against recidivist importers of counterfeit and pirated goods. Although an increase in resources might reduce the backlog of Customs investigations in the short term, any reduction is unlikely to be sustained over the medium and longer terms<sup>1</sup>.

#### *Alternative option 2 – Provide additional funding to the NEU, tagged for prosecuting importers of counterfeit or pirated goods*

Option 2 would not require legislative change. Although it would increase the level of enforcement against importers of counterfeit or pirated goods, it would not deliver the outcomes sought in the most efficient way. This is because in most cases Customs will already be in possession of the necessary information and evidence to prosecute importers of counterfeit and pirated goods.

### *Preferred option*

#### **Description of the preferred option**

Under this option Customs would be able to take prosecutions against a person importing or possessing any imported goods which would constitute a breach of the criminal offence provisions of sections 120 to 124 of the Trade Marks Act and sections 131, 198, and 226 of the Copyright Act. To enable this to occur certain investigation powers would be made available:

##### *Investigative powers related to goods under Customs' control*

- (a) without a warrant, seize any goods subject to the control of Customs that a Customs officer has reasonable grounds to believe is evidence of, or has significant relevance to, an investigation of certain offences under the Trade Marks Act or the Copyright Act:

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<sup>1</sup> In the past year Customs realigned its investigative branch in an effort to better focus its resources. This change was, in part, a response to increasing IPR detentions and the expectation that importations of counterfeit and pirated goods would continue to rise. Following this realignment the backlog of IPR investigations initially decreased, but this trend was not sustained.

- (b) require, by notice in writing, any person (other than an officer of a central government department) believed to have imported goods or to have been involved in their import as an agent to supply (within a reasonable time) documents and other recorded information related to goods that are still under Customs' control for the purpose of determining whether the goods should be retained or released:
- (c) require any person (other than an officer of a central government department) believed to have imported goods or to have been involved in the import as an agent to appear at a reasonable time and place, specified in writing, and to answer questions relevant to an investigation of goods that are still under Customs' control for the purpose of determining whether the goods should be retained or released:
- (d) make recordings of any oral answers given under the terms of the previous recommendation, and use these recordings as evidence:  
*Other investigative powers*
- (e) apply for a judicial order authorising the production of documents and other recorded information believed to be evidence of, or to be material of significant relevance to, the investigation of an offence in respect of imported goods:
- (f) apply for a search warrant to search any place or thing, believed to contain evidence or material of significant relevance to an investigation of an offence in respect of imported goods, under the statutory provisions referred to in recommendation 5, at any reasonable time of the day or night and in doing so use any assistance and any force that is reasonable in the circumstances:
- (g) seize any goods specified in the warrant:
- (h) retain lawfully seized goods, subject to a court order for return of the goods, for the purpose of investigation or prosecution of an offence:
- (i) dispose of perishable seized goods at the discretion of the Chief Executive, subject to any order of the court:
- (j) take photographs or sound or video recordings of the place or thing searched, and of any thing found in that place, if the person executing the warrant has reasonable grounds to believe that the photographs or sound or video recordings may



be relevant in any proceedings arising from the execution of the warrant:

- (k) copy a document or part of a document where there are reasonable grounds to believe that it may be seized under the search power:

In addition, it would be an offence to deliberately withhold information requested under the provisions of (b) or (e) above, or to refuse to be interviewed under the provisions of recommendation (c) above.

Following legislation enabling Customs to take such prosecutions, Customs and NEU would clarify more precisely their respective roles in relation to trade mark and copyright enforcement.

### **Impacts of the preferred option**

Although trade mark and copyright prosecution may impact on Customs' resources available to take other types of prosecution, discretionary decisions about when to allocate these resources are already made on a regular basis.

Enabling Customs to take prosecutions would help to reduce the overall amount of counterfeit and pirated goods being imported, as compared to the status quo. It could result in a net reduction of Customs' work related to counterfeit and pirated goods by reducing subsequent offending. Compared to the status quo, it would also tend to reduce the backlog in Customs' investigations.

This proposal is not expected to place any compliance costs on businesses.

### *Implementation and review*

If Government wishes to enable Customs to take such prosecutions, the Trade Marks (International Treaties and Enforcement) Amendment Bill provides a convenient vehicle for the necessary legislative amendments. Customs will be able to undertake these prosecutions as soon as the Bill has received Royal assent.

The effectiveness of Customs' trade mark and copyright prosecutions would be evaluated through any changes in the:

- trends in the volumes of goods detained by Customs for trade mark and copyright investigations; and

- trends in the backlog of Customs' unallocated trade mark and copyright investigations.

### *Consultation*

The Treasury; the Ministry of Economic Development; the Ministry of Justice; the Department of Internal Affairs, the New Zealand Police, the Ministry of Consumer Affairs; the Commerce Commission; the Ministry for Culture and Heritage; and the Ministry of Foreign Affairs and Trade have been consulted in the development of this paper. The Department of the Prime Minister and Cabinet and Te Puni Kōkiri have been informed.

Owners of intellectual property rights are expected to approve any increase in deterrence to the importation of counterfeit and pirated goods. Consultation with them over the proposed powers was not therefore undertaken.

MED and the Law Commission were concerned that the powers sought by Customs did not go beyond what was appropriate to prosecute importers of counterfeit and pirated goods. This concern was taken account of in developing the preferred option.

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*Hon Judith Tizard*

**Trade Marks (International  
Treaties and Enforcement)  
Amendment Bill**

Government Bill

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**The Parliament of New Zealand enacts as follows:**

- 1 Title**  
This Act is the Trade Marks (International Treaties and Enforcement) Amendment Act **2008**.



**2 Commencement**

- (1) **Sections 4 to 10, 12 to 16, 18 to 20, 22 to 27, 30, 32 to 34, and 37**, come into force on the day after the date on which this Act receives the Royal assent.
- (2) The rest of this Act comes into force on a date to be appointed by the Governor General by Order in Council; and 1 or more Orders in Council may be made appointing different dates for different provisions and different purposes. 5

**Part 1**

**Trade Marks Act 2002**

10

**3 Principal Act amended**

This **Part** amends the Trade Marks Act 2002.

**4 Interpretation**

- (1) Section 5(1) is amended by inserting the following definitions in their appropriate alphabetical order: 15
- “**document**, for the purposes of **subpart 2A of Part 4** and **sections 155B and 155D to 155F**, means—
- “(a) any material, whether or not it is signed or otherwise authenticated, that bears symbols (including words and figures), images, or sounds or from which symbols, images, or sounds can be derived, and includes— 20
- “(i) a label, marking, or other writing that identifies or describes a thing of which it forms a part, or to which it is attached:
- “(ii) a book, map, plan, graph, or drawing: 25
- “(iii) a photograph, film, or negative; and
- “(b) information electronically recorded or stored, and information derived from that information
- “**International Bureau** means the International Bureau of the World Intellectual Property Organization 30
- “**Madrid Protocol** means the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, adopted at Madrid on 27 June 1989, as amended from time to time

“**Ministry** means the department of State that, with the authority of the Prime Minister, is responsible for the administration of this Act

“**Nice Agreement** means the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks adopted at Nice on 15 June 1957, as amended from time to time 5

“**Nice Classification** means the classification of goods and services for the registration of marks published from time to time under the Nice Agreement 10

“**protected international trade mark (New Zealand)** means a trade mark that is entitled to protection in New Zealand under the Madrid Protocol”.

(2) Paragraph (b) of the definition of **applicant** in section 5(1) is amended by adding “; and”. 15

(3) The definition of **applicant** in section 5(1) is amended by adding the following paragraphs:

“(c) in **sections 134G, 134H, and 134K**, means the applicant for a search warrant; and

“(d) in **section 134U** means the applicant for the order referred to in that section”. 20

(4) Section 5(1) is amended by repealing the definition of **chief executive** and substituting the following definition:

“**chief executive**,—

“(a) in subpart 3 of Part 4 (border protection measures), has the meaning set out in section 135; and 25

“(b) in the rest of this Act, means the chief executive of the Ministry”.

(5) Section 5(1) is amended by repealing the definition of **Court** and substituting the following definition: 30

“**court**—

“(a) means the High Court; and

“(b) for the purposes of sections 126 to 134, and **134T to 134V**, includes a District Court or a Judge of that court”.

(6) Section 5(1) is amended by repealing the definition of **licensee** and substituting the following definition: 35

- “**licensee**, in relation to a trade mark, means a person whose use of the trade mark is authorised by, and subject to the control of, the owner of the trade mark”.
- (7) Section 5(1) is amended by repealing the definition of **series of trade marks** and substituting the following definition: 5
- “**series of trade marks** means a number of trade marks for the same goods or description of goods or the same services or description of services (as the case may be) that—
- “(a) resemble each other in their material particulars; and
- “(b) differ only in respect of 1 or more of the following matters: 10
- “(i) statements of the goods or services for which they are, or are proposed to be, used:
- “(ii) statements of number, price, quality, or names of places: 15
- “(iii) other matters of a non-distinctive character that do not substantially affect the identity of the trade marks:
- “(iv) colour”.
- 5 Classification of trade marks** 20
- Section 31 is amended by repealing subsection (1) and substituting the following subsection:
- “(1) Goods and services must be classified, for the purpose of registration of a trade mark, according to the edition of the Nice Classification in effect at the time of application for registration of the trade mark.” 25
- 6 New section 53 substituted**
- Section 53 is repealed and the following section substituted:
- “**53 Reissuing certificate of registration** 30
- The Commissioner may issue a further certificate of registration if—
- “(a) an application for a further certificate of registration has been made in the prescribed manner; and
- “(b) the prescribed fee, if any, has been paid.”

**7 Grounds for revoking registration of trade mark**

(1) Section 66(1) is amended by repealing paragraphs (a) and (b) and substituting the following paragraph:

“(a) that at no time during a continuous period of 3 years or more was the trade mark put to genuine use in the course of trade in New Zealand, by the owner for the time being, in relation to goods or services in respect of which it is registered.”

(2) Section 66 is amended by inserting the following subsection after subsection (1):

“(1A) For the purposes of **subsection (1)(a), continuous period** means a period that commences from a date after the actual date of registration and continues uninterrupted up to the date 1 month before the application for revocation.”

(3) Section 66(3) is amended by—

- (a) omitting “grounds” and substituting “ground”; and
- (b) omitting “or (b)”.

**8 Onus of proof for revocation of registration of trade mark for non-use**

(1) Section 67 is amended by omitting “or (b)” in the first place where it appears.

(2) Section 67 is amended by repealing paragraph (a) and substituting the following paragraph:

“(a) provide proof of the use of the trade mark if the ground in section 66(1)(a) forms the basis for the application; or”.

**9 Alteration of register**

(1) Section 78 is amended by repealing paragraph (a) and substituting the following paragraph:

“(a) at the request of the owner of the trade mark, allow the owner’s name or address to be altered on the register.”

(2) Section 78 is amended by repealing paragraph (c) and substituting the following paragraph:

“(c) at the request of the owner,—  
“(i) enter a memorandum that relates to the trade mark, provided that the memorandum does not

in any way extend the rights given by the existing registration of the trade mark; or

- “(ii) alter a memorandum, provided that the alteration does not in any way extend the rights given by the existing registration of the trade mark; or 5
- “(iii) remove a memorandum, provided that the removal does not in any way extend the rights given by the existing registration of the trade mark.”

**10 Section 81 repealed** 10  
Section 81 is repealed.

**11 Registration of title to trade mark**

Section 82 is amended by repealing subsections (2) to (4) and substituting the following subsections:

- “(2) If title to a trade mark is assigned or transmitted after the date the trade mark is registered, either of the following persons may apply to the Commissioner to register the new owner’s title: 15
  - “(a) the person registered as the owner of the trade mark:
  - “(b) the person to whom the trade mark has been assigned or transmitted. 20
- “(3) On proof of the new owner’s title, the Commissioner—
  - “(a) must register the new owner as the owner of the trade mark in relation to the goods or services in respect of which the assignment or transmission has effect; and 25
  - “(b) may issue a replacement certificate of registration in the name of the new owner; and
  - “(c) must cause any assignment, transmission, or other document produced in evidence of title, or a copy of any of those documents, to be filed for public record. 30
- “(4) If title to a trade mark is assigned or transmitted before the actual date of registration, either of the following persons may apply to the Commissioner to change the name of the applicant on the application:
  - “(a) the applicant for registration of the trade mark: 35
  - “(b) the person to whom the trade mark has been assigned or transmitted.

- “(5) On proof of the new owner’s title, the Commissioner must—  
“(a) change the name of the applicant on the application; and  
“(b) cause any assignment, transmission, or other document produced in evidence of title, or a copy of any of those documents, to be filed for public record.” 5
- 12 Heading above section 83 and sections 83, 84, 86, and 87 repealed**
- (1) The heading above section 83 and sections 83, 84, 86, and 87 are repealed.
- (2) All registrations of licensees under section 84 are revoked. 10
- 13 No infringement for honest practices**
- (1) Section 95(c)(ii) is amended by adding “; or”.
- (2) Section 95 is amended by adding the following paragraph:  
“(d) the trade mark to indicate the intended purpose of the goods (in particular as accessories or spare parts) or services.” 15
- 14 New section 97 substituted**  
Section 97 is repealed and the following section substituted:
- “**97 No infringement for use in relation to certain identical or similar goods** 20  
A trade mark registered in respect of goods is not infringed by its use in relation to identical or similar goods connected in the course of trade with the owner or licensee if, as to those goods or a bulk of which they form part,—  
“(a) the owner or licensee has applied the trade mark and has not later removed or obliterated it; or 25  
“(b) the owner or licensee has consented to the use of the trade mark.”
- 15 New section 97A substituted**  
Section 97A is repealed and the following section substituted: 30  
“**97A Exhaustion of rights conferred by registered trade mark**  
“(1) A registered trade mark is not infringed by the use of the trade mark (including use for the purpose of advertising) in relation to goods that have been put on the market anywhere in the

- world under that trade mark under any 1 or more of the following circumstances:
- “(a) by the owner:
  - “(b) with the owner’s express or implied consent:
  - “(c) by an associated person of the owner. 5
- “(2) For the purposes of **subsection (1)(c)**, a person is **an associated person of the owner** if—
- “(a) they are in the same group of companies; or
  - “(b) they are both bodies corporate and they consist of substantially the same members or are directly or indirectly 10  
under the control of the same persons; or
  - “(c) either of them has effective control of the other’s use of the trade mark; or
  - “(d) a third person has effective control of the use of the trade 15  
mark by each of them.
- “(3) For the purposes of **subsection (2)**,—
- “(a) **group of companies** means a holding company and its subsidiaries within the meaning of section 5 of the Companies Act 1993; and
  - “(b) a person has **effective control** of the use of a trade 20  
mark if that person may authorise the use of the trade mark or has significant influence over how it is used, regardless of how that authorisation or influence arises (for example, whether directly or indirectly and whether 25  
by way of proprietary interest, contract, arrangement, understanding, a combination of those things, or otherwise).”
- 16 Application of Criminal Justice Act 1985**
- (1) The heading to section 118 is amended by omitting “**Criminal Justice Act 1985**” and substituting “**Sentencing Act 2002**”. 30
  - (2) Section 118(a) is amended by omitting “section 22(1)(b) of the Criminal Justice Act 1985” and substituting “section 32(1)(a) and (c) of the Sentencing Act 2002”.
- 17 New subpart 2A of Part 4 inserted**
- The following subpart is inserted after section 134: 35

## “Subpart 2A—Enforcement officers

“*Appointment and functions of enforcement  
officers*“**134A Chief executive may appoint enforcement officers**

The chief executive may appoint enforcement officers, on a 5  
permanent or temporary basis, to perform the functions set  
out in **section 134C** and exercise the powers conferred on  
an enforcement officer by this Act.

“**134B Authority to act as enforcement officer**

- “(1) The chief executive must issue a warrant of appointment to 10  
every person appointed as an enforcement officer.
- “(2) A warrant of appointment must—
- “(a) be in the prescribed form; and
  - “(b) bear the photograph and signature of the holder; and
  - “(c) contain a statement of the power conferred by **section** 15  
**134D**; and
  - “(d) contain any other prescribed particulars.
- “(3) A warrant of appointment is, in the absence of evidence to the  
contrary, sufficient proof that the holder of the warrant may  
exercise the powers conferred on an enforcement officer. 20
- “(4) A person who ceases to be an enforcement officer must return  
the person’s warrant of appointment.
- “(5) A person who fails to comply with **subsection (4)** commits  
an offence and is liable on summary conviction to a fine not  
exceeding \$1,000. 25

“**134C Functions of enforcement officer**

An enforcement officer must, to the extent that is reasonably  
practicable, promote compliance with this Act by carrying out  
the following functions:

- “(a) gathering information relating to offences under this 30  
Act:
- “(b) investigating offences under this Act:
- “(c) reporting to the chief executive on any matters relating  
to the enforcement officer’s functions.



*“Enforcement officer’s power of entry and  
examination without warrant*

**“134D Enforcement officer’s power of entry and examination  
without warrant**

- “(1) For the purpose of carrying out his or her functions, an enforcement officer may enter and examine any place (**place A**) where goods are being offered for sale, exposed for sale, or publicly displayed if— 5
- “(a) place A is in a public place and the entry is made when place A is open to the public; or 10
  - “(b) place A is a place of business and the entry is made—
    - “*(i)* when it is open for carrying on business; and
    - “*(ii)* only to those parts of it that are open to the public; or
  - “*(c)* the occupier of place A consents to the entry and examination after the enforcement officer has informed the occupier— 15
    - “*(i)* of the purpose of the entry and examination; and
    - “*(ii)* that the occupier may refuse to give consent to the entry and examination; and 20
    - “*(iii)* that the occupier may revoke his or her consent at any time; and
    - “*(iv)* that any thing seized during the examination may be used in evidence in proceedings.
- “*(2)* In **subsection (1)**,— 25
- “**place A**—
  - “*(a)* includes (without limitation)—
    - “*(i)* a structure or tent, whether fully or partly erected; and
    - “*(ii)* a stand or stall; and 30
    - “*(iii)* a vehicle; and
    - “*(iv)* a caravan, trailer, or other conveyance; but
  - “*(b)* does not include a private dwellinghouse
- “**public place** means any place that is open to or being used by the public, with or without payment by the public of a charge. 35
- “*(3)* For the purposes of this section, any person who appears to be under 14 years of age may not be treated as the occupier.

**“134E What enforcement officer and person assisting may do when exercising power of entry and examination without warrant**

- “(1) The power of entry and examination conferred by **section 134D** authorises an enforcement officer to do any of the following: 5
- “(a) examine the place and all things, including any document: 5
  - “(b) seize any thing that he or she has reasonable grounds to believe is evidence of, or of significant relevance to the investigation of, an offence under this Act: 10
  - “(c) bring and use in or on the place equipment for the purposes of carrying out the examination: 10
  - “(d) take photographs or sound or video recordings of the place, and of any thing found in that place, if the enforcement officer has reasonable grounds to believe that the photographs or sound or video recordings may be relevant in any proceedings (including future proceedings) related to the entry and examination: 15
  - “(e) take any person to the place to assist him or her with the examination. 20
- “(2) A person who assists an enforcement officer exercising the power of entry and examination may, under the direction of the enforcement officer,—
- “(a) exercise any of the powers described in **subsection (1)(a), (c), and (d)**; and 25
  - “(b) seize any thing that the enforcement officer determines may lawfully be seized. 25
- “(3) If an enforcement officer enters and examines a place under **section 134D(1)(c)** and the occupier revokes his or her consent, the officer and any person assisting the enforcement officer must immediately stop the examination and leave the place. 30
- “(4) **Subsection (3)** is subject to **subsection (5)**. 30
- “(5) The enforcement officer may, before leaving the place, seize any thing already identified by him or her before the revocation of consent as a thing that he or she has reasonable grounds to believe is evidence of, or of significant relevance to the investigation of, an offence under this Act. 35

- “(6) If a member of the police assists an enforcement officer, nothing in this section prevents that member of the police from exercising any power ordinarily exercisable by him or her.
- “(7) **Sections 134P to 134S** contain further provisions that apply to an enforcement officer’s power of entry and examination. 5

*“Entry and search under search warrant*

**“134F Enforcement officer or member of police may apply for search warrant**

- “(1) An enforcement officer or a member of the police may apply for a search warrant to search a place or thing. 10
- “(2) Any District Court Judge, Justice, Community Magistrate, or any Registrar (not being a member of the police) (the **issuing officer**) may, on an application by an enforcement officer or a member of the police, issue a search warrant to search a place or thing if the issuing officer is satisfied that there are reasonable grounds for believing that— 15
- “(a) an offence under this Act has been, or is being, committed at the place or involving the thing; or
- “(b) there is at, in, on, over, or under the place or thing, any thing that is— 20
- “(i) evidence of an offence under this Act; or
- “(ii) intended to be used for the purpose of committing an offence under this Act.
- “(3) **Sections 134G to 134S** apply in respect of every search warrant applied for and issued under this section. 25

**“134G Application for search warrant**

- “(1) An application for a search warrant must contain, in reasonable detail, the following particulars:
- “(a) the name of the applicant:
- “(b) the provision of this Act authorising the making of the application: 30
- “(c) the grounds on which the application is made:
- “(d) the address or other description of the place or thing proposed to be searched:

- “(e) a description of the item or items believed to be at, in, on, over, or under the place or thing that are sought by the applicant:
- “(f) the period for which the warrant is sought:
- “(g) if the applicant wants to be able to execute the warrant on more than 1 occasion, the grounds on which execution on more than 1 occasion is believed to be necessary. 5
- “(2) The issuing officer may require the applicant to supply further information concerning the grounds on which the search warrant is sought. 10
- “(3) The applicant must disclose in the application—
- “(a) details of any other application for a search warrant that the applicant knows to have been made within the previous 3 months in respect of the place or thing proposed to be searched: 15
- “(b) the result of that application or those applications.
- “(4) The applicant must, before making an application for a search warrant, make reasonable inquiries within the agency in which the applicant is employed or engaged for the purpose of complying with **subsection (3)**. 20
- “(5) The issuing officer may authorise the search warrant to be executed on more than 1 occasion during the period in which the warrant is in force if he or she is satisfied that this is required for the purposes for which the warrant is being issued.
- “**134H Mode of application for search warrant** 25
- “(1) Unless **subsection (3)** applies, an application for a search warrant—
- “(a) must be in writing; and
- “(b) may be transmitted to the issuing officer electronically. 30
- “(2) The applicant must appear in person before the issuing officer, unless **subsection (3)** applies.
- “(3) An issuing officer may allow an application for a search warrant to be made verbally (for example, by telephone call) and excuse the applicant from making a personal appearance if the issuing officer is satisfied that— 35

- “(a) the delay that would be caused by requiring an applicant to appear in person would compromise the effectiveness of the search; and
  - “(b) the question of whether the warrant should be issued can properly be determined on the basis of a verbal communication (including the information described in **paragraph (c)**); and 5
  - “(c) the information required by **section 134G(1) to (3)** has been supplied to the issuing officer.
- “(4) An issuing officer who allows an application for a search warrant to be made verbally must record the grounds for the application as soon as practicable. 10
- “134I Form and content of search warrant**
- “(1) Every search warrant issued must be in the prescribed form.
  - “(2) Every search warrant issued must be directed generally to every enforcement officer and every member of the police. 15
  - “(3) A search warrant—
    - “(a) may be executed by any of the persons to whom it is directed:
    - “(b) may be subject to any conditions specified in the warrant that the issuing officer considers reasonable: 20
    - “(c) may be executed only once, unless execution on more than 1 occasion is authorised.
  - “(4) Every search warrant must contain, in reasonable detail, the following particulars: 25
    - “(a) the name of the issuing officer and the date of issue:
    - “(b) the provision of this Act authorising the issue of the warrant:
    - “(c) that the person executing the warrant may use any assistance that is reasonable in the circumstances: 30
    - “(d) that the person executing the warrant may use any force that is reasonable in the circumstances to enter or break open or access any place being searched, or any area within that place, or any thing being searched or thing found: 35
    - “(e) the address or description of the place or thing that may be searched:
    - “(f) a description of what may be seized:

- “(g) the period during which the warrant may be executed, being—
- “(i) a period specified by the issuing officer not exceeding 14 days from the date of issue; or
- “(ii) if the issuing officer is satisfied that a period of longer than 14 days is necessary for execution, a period specified by the issuing officer not exceeding 30 days from the date of issue: 5
- “(h) any conditions specified by the issuing officer under **subsection (3)(b)**: 10
- “(i) if the warrant may be executed on more than 1 occasion, the number of times that the warrant may be executed.

**“134J Transmission of search warrant**

If it is not possible for the person charged with executing the warrant to have it in his or her possession at the time of execution, 1 of the following documents (which is deemed for all purposes to constitute the warrant) may be executed: 15

- “(a) a facsimile or other electronic copy of a warrant issued by the issuing officer:
- “(b) a copy of the text of a warrant, made at the direction of the issuing officer, and endorsed to that effect by the person who made the copy. 20

**“134K Retention of documents**

- “(1) A copy of every written application for a search warrant or, in the case of a verbal application, the written record of the application made by the issuing officer, must be retained at the District Court at which, or the District Court that is closest to the place at which, the application was made, until,— 25
- “(a) in a case where a search warrant is issued, the completion of any proceedings in respect of which the search warrant may be in issue; and 30
- “(b) in any other case, the expiry of 2 years after the documents were first retained by the District Court.
- “(2) An applicant to whom a search warrant is issued must retain the warrant, a copy of the application (if made in written form), and all documents tendered by the applicant in support of the application until,— 35

- “(a) in the case of a warrant that is executed, the completion of any proceedings in respect of which the validity of the warrant may be in issue; and
- “(b) in any other case, the destruction or transfer of the warrant and other documents is required by the Public Records Act 2005 or any other enactment or rule of law. 5

**“134L When search warrant is executed**

A search warrant is executed when the person executing the warrant— 10

- “(a) has seized all the items specified in the warrant; or
- “(b) leaves the place or thing being searched and does not return within 4 hours.

**“134M Powers of entry and search under warrant**

“(1) Every search warrant authorises the person executing it to do any of the following: 15

- “(a) to enter and search the place or thing that the person is authorised to enter and search, and any item or items found in that place, at any time that is reasonable in the circumstances: 20
- “(b) to request any person to assist with the entry and search (including, without limitation, a member of a hapu or an iwi if the place to be entered is of cultural or spiritual significance to that hapu or iwi):
- “(c) to use any force that is reasonable for the purposes of the entry and search: 25
- “(d) to seize any thing authorised to be seized:
- “(e) to bring and use in or on the place or thing searched any equipment, to use any equipment found on the place or thing, and to extract any electricity from the place or thing to operate the equipment that it is reasonable to use in the circumstances, for the purposes of carrying out the entry and search: 30
- “(f) to copy any document, or part of a document, that may lawfully be seized: 35
- “(g) to take photographs or sound or video recordings of the place or thing searched, and of any thing found in that

place, if the person exercising the power has reasonable grounds to believe that the photographs or sound or video recordings may be relevant in any proceedings related to the entry and search.

- “(2) The person executing the warrant may, in a manner and for the duration that is reasonable for the purposes of carrying out the search,— 5
- “(a) secure the place or thing searched, any area within that place or thing, or any thing found within that place or thing; and 10
- “(b) exclude any person from the place or thing searched, or from any area within the place or thing, or give any other reasonable direction to such a person, if the person carrying out the search has reasonable grounds to believe that the person will obstruct or hinder the exercise of the power. 15
- “(3) The powers conferred by this section are subject to any conditions imposed under **section 134I(3)(b)**.
- “(4) Section 198B of the Summary Proceedings Act 1957 applies with all necessary modifications as if for each reference to a constable there were substituted a reference to the person authorised to execute the search warrant. 20

**“134N Powers of persons called to assist**

- “(1) Every person called on to assist a person executing a warrant is subject to the control of the person executing the warrant. 25
- “(2) Every person called on to assist a person executing a warrant may do any of the following:
- “(a) enter the place or thing to be searched:
- “(b) while in the company and under the direction of the person executing the warrant, use reasonable force in respect of any property for the purposes of carrying out the entry and search: 30
- “(c) search areas within the place or thing that the person executing the warrant determines may lawfully be searched: 35
- “(d) seize any thing that the person executing the warrant determines may lawfully be seized:



- “(e) take photographs and sound and video recordings of the place or thing and things found in the place or thing if the person executing the warrant determines that those things may lawfully be done:
- “(f) bring in or on to the place or thing and use any equipment, make use of any equipment found on the place or thing, or extract electricity from the place or thing for the purposes of operating the equipment that the person executing the warrant determines may lawfully be used: 5
- “(g) copy any document, or part of a document, that the person executing the warrant determines may lawfully be copied. 10
- “(3) If a member of the police is assisting another person executing the warrant, that member of the police may exercise any power ordinarily exercisable by him or her. 15
- “(4) The person executing the warrant must—
- “(a) accompany any assistant on the first occasion when the assistant enters the place or thing to be searched; and
- “(b) provide such other supervision of any assistant as is reasonable in the circumstances. 20

*“General provisions that apply to powers of entry and search and entry and examination*

“**134O Application of sections 134P to 134S**

- “(1) **Sections 134P to 134S** apply in respect of every search warrant issued under this Act. 25
- “(2) **Sections 134P(1) and 134Q to 134S** apply in respect of the power of entry and examination conferred by **section 134D**.
- “(3) In **sections 134P to 134S**,—
- “(a) **power of entry and search** means the power of entry and search under a search warrant issued under this Act; and 30
- “(b) **power of entry and examination** means the power of entry and examination under **section 134D**.

**“134P Powers and duties of person exercising power of entry  
and search or power of entry and examination**

- “(1) A person exercising a power of entry and search or a power of entry and examination must,—
- “(a) before initial entry into or onto the place or thing to be searched or examined,— 5
- “(i) announce his or her intention to enter and search or to enter and examine the place or thing under a statutory power; and
- “(ii) identify himself or herself; and 10
- “(b) before or on initial entry into or onto the place or thing to be searched or examined,—
- “(i) give the occupier of the place or thing a copy of the search warrant or, in the case of an examination, a copy of **section 134D**, (the **authority**) that authorises him or her to conduct the entry and search or entry and examination; and 15
- “(ii) produce to the occupier of the place or thing evidence of his or her identity (which may include details of a unique identifier instead of a name). 20
- “(2) The person exercising a power of entry and search is not required to comply with **subsection (1)** if he or she believes on reasonable grounds that—
- “(a) no person is lawfully present in or on the place or thing to be searched; or 25
- “(b) compliance with **subsection (1)** would—
- “(i) endanger the safety of any person; or
- “(ii) prejudice the successful exercise of the power of entry and search; or
- “(iii) prejudice ongoing investigations under this Act. 30
- “(3) The person exercising a power of entry and search may use reasonable force in order to effect entry into or onto the place or thing if—
- “(a) **subsection (2)** applies; or
- “(b) following a request, the person present refuses entry or does not allow entry within a reasonable time. 35
- “(4) If the occupier is not present at any time during the exercise of a power of entry and search, the person carrying out the search must,—

- “(a) on completion of the search, leave a copy of the authority referred to in **subsection (1)(b)(i)** and the notice referred to in **subsection (5)** in a prominent position at the place or on the thing; or
  - “(b) if this is not reasonably practicable, provide the copy of the authority referred to in **subsection (1)(b)(i)** and the notice referred to in **subsection (5)** to the occupier no later than 7 days after the execution of the warrant. 5
- “(5) The notice required by **subsection (4)** is a written notice containing the following particulars: 10
- “(a) the date and time of the commencement and completion of the search:
  - “(b) the name or unique identifier of the person who had overall responsibility for that search:
  - “(c) the address of the office to which inquiries should be made: 15
  - “(d) if nothing is seized, the fact that nothing was seized:
  - “(e) if any thing was seized, the fact that seizure occurred and, if an inventory is not provided at the same time under **section 134Q**, that an inventory of the things seized will be provided to the occupier or person in charge of the place or thing no later than 7 days after the seizure. 20
- “(6) For the purposes of this section and **section 134Q**, any person who appears to be under 14 years of age may not be treated as the occupier. 25
- “(7) **Subsections (4) and (5)** are subject to **sections 134R and 134S**.

“**134Q Inventory of items seized**

- “(1) A person who exercises a power of entry and search or a power of entry and examination must, at the time he or she seizes any thing, or as soon as practicable after the seizure of any thing, and in any case not later than 7 days after that seizure, provide to the occupier, and to every other person whom the person who carried out the search or examination has reason to believe is the owner of the thing that was seized,— 30
- “(a) written notice specifying what was seized; and 35

- “(b) a copy of the authority referred to in **section 134P(1)(b)(i)**.
- “(2) A written notice referred to in **subsection (1)(a)**—
- “(a) must contain information about the extent to which a person from whom a thing was seized or the owner of the thing has a right—
- “(i) to have access to the thing; and
- “(ii) to have access to any document relating to the application for a search warrant or the exercise of the power of entry and examination that led to the seizure; and
- “(b) must contain information about the right to bring a claim that any privileged or confidential information has been seized; but
- “(c) need not be provided to the occupier if the person who carries out the search or examination is satisfied that none of the items seized are owned by the occupier.
- “(3) If the occupier is not present at the time of seizure, the written notice referred to in **subsection (1)(a)** and a copy of the authority referred to in **section 134P(1)(b)(i)** may be provided to the occupier by leaving the notice in a prominent position at the place or on the thing.
- “(4) A person who exercises a power of entry and search or a power of entry and examination must make reasonable inquiries for the purposes of complying with **subsections (1) and (2)**.
- “(5) **Subsection (1)** is subject to **subsections (2) and (3)**.
- “(6) This section is subject to **sections 134R and 134S**.
- “**134R Compliance with certain provisions may be deferred in certain circumstances**
- “(1) A person exercising a power of entry and search or a power of entry and examination may apply to a District Court Judge for an order postponing the obligation to comply with **section 134P(4) or (5)** (in the case of a power of entry and search) or **134Q** on the grounds that compliance would—
- “(a) endanger the safety of any person; or

- “(b) prejudice ongoing investigations under this Act or exercises of the power of entry and search or the power of entry and examination on subsequent occasions.
- “(2) An application may be made under **subsection (1)**,—
- “(a) in the case of a search warrant, at the time of the initial application or until the expiry of 7 days after the warrant is finally executed; and 5
- “(b) in the case of the power of entry and examination, until the expiry of 7 days after the power of entry and examination is exercised. 10
- “(3) On an application under **subsection (1)**, the District Court Judge may make an order postponing for a specified period not exceeding 12 months the obligation to comply with **section 134P(4) or (5) or 134Q**, if the Judge is satisfied on either ground set out in **subsection (1)**. 15
- “**134S Further extension to, or dispensation from, obligation to comply with certain provisions**
- “(1) A person who has obtained an order under **section 134R(3)** may, before the expiry of that order, apply to a District Court Judge for a further order for postponement of, or dispensation from, the obligation to comply with **section 134P(4) or (5) or 134Q** on the grounds set out in **section 134R(1)**. 20
- “(2) An application for a further postponement may only be made on 1 occasion.
- “(3) On an application under **subsection (1)**, the District Court Judge may postpone for a further specified period not exceeding 12 months, or order a permanent dispensation from, the obligation to comply with **section 134P(4) or (5) or 134Q**, if the Judge is satisfied on either ground set out in **section 134R(1)**. 25 30
- “(4) A District Court Judge may not grant, under **subsection (3)**, any postponement of, or dispensation from, an obligation in respect of any thing that has been seized, unless the thing seized is a copy of any information taken or made.

*“Provisions relating to things seized***“134T Period things seized may be retained**

- “(1) A thing seized under this Act may be retained by the Commissioner of Police or by the chief executive while it is required for the purposes of investigating or prosecuting an offence under this Act. 5
- “(2) **Subsection (1)** is subject to—
- “(a) any order of the court under **section 134U**; and
- “(b) **section 134W**.
- “(3) If a thing seized is no longer required for the purposes of investigating or prosecuting an offence under this Act, the Commissioner of Police or the chief executive must return it to the person he or she believes is entitled to it. 10
- “(4) The Commissioner of Police or chief executive may apply to the court for an order for directions as to the disposition of the thing if— 15
- “(a) the person who is entitled to it cannot be found; or
- “(b) the Commissioner of Police or chief executive is in doubt about who is entitled to it.
- “(5) On an application under **subsection (4)**, the court may make such order concerning the disposition of the thing that it thinks appropriate in the circumstances. 20

**“134U Application for order to return things seized**

- “(1) A person who claims to be entitled to a thing seized may apply to the court for an order that the thing be delivered to him or her. 25
- “(2) On an application under **subsection (1)**, the court may make an order for delivery of the thing to the applicant if it is satisfied—
- “(a) that the applicant is the person entitled to it; and 30
- “(b) that it would be contrary to the interests of justice for the thing to be retained, having regard to—
- “(i) the gravity of the alleged offence in respect of which the thing is being retained; and
- “(ii) any loss or damage to the applicant caused, or likely to be caused, by retention of the thing; and 35

- “(iii) the likely evidential value of the thing, having regard to any other evidence held by the Commissioner of Police or the chief executive, as the case may be; and
- “(iv) whether the evidential value of the thing can be adequately preserved by means other than its retention. 5

“**134V Disposal of things seized**

- “(1) In any proceedings for an offence relating to a thing seized, the court may, either at the trial or on an application, order— 10
  - “(a) that the thing be delivered to the person who appears to the court to be entitled to it; or
  - “(b) that the thing otherwise be disposed of in the manner that the court thinks appropriate; or
  - “(c) if a person is convicted of an offence to which the thing relates,— 15
    - “(i) that the thing be forfeited to the Crown; or
    - “(ii) that the thing be disposed of as the court directs at the expense of the convicted person.
- “(2) If the court makes an order under **subsection (1)(c)**, it may order that the convicted person pay any reasonable costs incurred by the Commissioner of Police or chief executive in retaining the thing for the purpose of the proceedings. 20
- “(3) If no order for delivery, forfeiture, or disposal is made in respect of a thing seized and retained for the purpose of proceedings, it must, on completion of the proceedings, be returned by the Commissioner of Police or the chief executive to the person entitled to it. 25
- “(4) The Commissioner of Police or chief executive may apply to the court for an order for directions as to the disposition of the thing if— 30
  - “(a) the person who is entitled to it cannot be found; or
  - “(b) the Commissioner of Police or chief executive is in doubt about who is entitled to it.
- “(5) On an application under **subsection (4)**, the court may make any order concerning the disposition of the thing that it thinks appropriate in the circumstances. 35

**“134W Disposal of perishable things**

If, in the opinion of the Commissioner of Police or chief executive, a thing seized may rot, spoil, deteriorate, or otherwise perish, he or she may dispose of it in the way and at the price (if any) or the cost he or she may determine.

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*“Powers of police***“134X Powers of police**

Every member of the police has all, and may exercise any, of the powers of an enforcement officer under this subpart.

*“Miscellaneous*

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**“134Y Privileges**

“(1) If, in a criminal proceeding, a person could assert a privilege under section 54 or 56 of the Evidence Act 2006 in respect of a communication or information, that person has the same privilege for the purposes of an examination under **section 134D** and a search warrant issued under **section 134F**.

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“(2) **Subsection (3)** applies to documents that are books of account or accounting records referred to in section 55(1) of the Evidence Act 2006.

“(3) The application, by **subsection (1)**, of section 54 of the Evidence Act 2006 (which relates to the privilege for communications with legal advisers) does not prevent, limit, or affect—

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“(a) the issue or execution of a search warrant under **section 134F**; or

“(b) the admissibility, in a criminal proceeding under this Act, of any evidence that relates to the contents of a document to which this subsection applies obtained as a result of a search warrant issued under **section 134F**.

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“(4) A person who has a privilege under this section has the right—

“(a) to prevent the examination under **section 134D**, or the search under a warrant issued under **section 134F**, of any communication or information to which the privilege would apply if it were sought to be disclosed in a criminal proceeding; and

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“(b) to require the return of any such communication or information if it is seized by a person exercising the power

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of examination under **section 134D** or search under a warrant issued under **section 134F** pending determination of the claim to privilege.

- “(5) If a person asserts a claim to privilege under this section in respect of any communication or information, an enforcement officer or a member of the police may apply to a District Court Judge for an order determining whether or not the claim to privilege is valid; and, for the purpose of determining any such application, the District Court Judge may require the communication or information to be produced to him or her. 5 10
- “(6) A District Court Judge may, on the application of an enforcement officer or a member of the police, disallow a privilege claimed under this section if the Judge is satisfied that the claim to privilege would, under section 67(1) of the Evidence Act 2006, be disallowed in a proceeding. 15
- “(7) Section 65 of the Evidence Act 2006 (which relates to waiver of privilege) applies in respect of any privilege under this section.
- “**134Z Disclosure of information**
- “(1) The chief executive (or any employee of the Ministry authorised in that behalf), the Chief Executive of the New Zealand Customs Service (or any employee of the New Zealand Customs Service authorised in that behalf), and the Commissioner of Police (or any member of the police authorised in that behalf) may disclose information to each other, on request, for the purpose of investigating and prosecuting offences under this Act. 20 25
- “(2) Information obtained under **subsection (1)** must not be disclosed except—
- “(a) to the persons authorised under that subsection; or 30
- “(b) for the purpose of any proceedings that have been commenced or that are reasonably in contemplation and that are connected with a matter in relation to which those persons perform their duties.
- “(3) No obligation as to secrecy or other restriction on the disclosure of information imposed by any enactment or otherwise prevents a disclosure under this section. 35

**“134ZA No liability if functions performed or powers exercised in good faith**

- “(1) This section applies to—
- “(a) an enforcement officer:
  - “(b) a person who assists an enforcement officer or a member of the police under this subpart: 5
  - “(c) a member of the police who exercises any power of an enforcement officer under this subpart.
- “(2) No person to whom this section applies is liable for any act done or omitted to be done by the person in the performance or intended performance of his or her functions or the exercise or intended exercise of his or her powers under this Act if the person acted— 10
- “(a) in good faith; and
  - “(b) in a reasonable manner; and 15
  - “(c) in the reasonably held belief that the prerequisites for the performance of any function or the exercise of any power had been satisfied.”

**18 Interpretation**

Section 135 is amended by inserting the following definitions in their appropriate alphabetical order: 20

“**accepted notice** means a notice given under section 137 that has been accepted by the chief executive under section 139

“**Customs** means the New Zealand Customs Service”.

**19 New sections 139A to 139C inserted** 25

The following sections are inserted after section 139:

**“139A Chief executive may suspend accepted notice**

- “(1) The chief executive may suspend an accepted notice if the chief executive is satisfied that—
- “(a) the information held in respect of the accepted notice is not correct or is no longer current; or 30
  - “(b) there has been a failure to comply with a requirement concerning the giving of security or indemnity or both; or

- “(c) there has been a failure to comply with an obligation under an indemnity given for an amount in respect of the accepted notice.
- “(2) Before suspending an accepted notice, the chief executive must— 5
- “(a) give written advice of the chief executive’s intention to suspend the accepted notice to—
- “(i) the person who gave the notice under section 137; or
- “(ii) if the chief executive has received notification of an assignment or transmission of the trade mark to which the notice relates, the person notified as the current owner of the trade mark; and 10
- “(b) include in or with the advice a statement of the chief executive’s reasons; and 15
- “(c) give the person to whom the advice is given not less than 20 working days to respond; and
- “(d) consider any response made by that person to the chief executive within the time allowed.
- “(3) The written advice under **subsection (2)** may be given— 20
- “(a) by delivering it to that person; or
- “(b) by posting it to the most recent address for that person that has been notified to the chief executive.
- “**139B Notice of suspension**
- “(1) If the chief executive decides to suspend an accepted notice, the chief executive must give written notice of the suspension to the person referred to in **section 139A(2)(a)**. 25
- “(2) The notice of suspension may be given—
- “(a) by delivering it to that person; or
- “(b) by posting it to the most recent address for that person that has been notified to the chief executive. 30
- “**139C Chief executive may reinstate accepted notice**
- The chief executive may reinstate an accepted notice suspended under **section 139A** if the chief executive is satisfied that the grounds for the suspension no longer apply.” 35

- 20 Duration of accepted notice**  
 Section 140 is repealed and the following section substituted:  
**“140 Duration of accepted notice**  
 “(1) An accepted notice remains in force for the period specified in the notice unless— 5  
     “(a) it is revoked by the claimant by notice in writing; or  
     “(b) the court orders, in proceedings under section 153, that the notice be discharged; or  
     “(c) registration of the trade mark to which the notice relates has been cancelled, revoked, declared invalid, or has expired. 10  
 “(2) However, an accepted notice is not in force during the period of any suspension under **section 139A.**”
- 21 New headings and sections 155A to 155K inserted** 15  
 The following headings and sections are inserted after section 155:  
     *“Enforcement powers of customs officers*  
**“155A Customs officer may seize goods in control of Customs**  
 “(1) A customs officer may seize any imported goods that are in the control of the Customs if the officer has reasonable cause to believe that they are evidence of, or of significant relevance to the investigation of, an offence under any of sections 120 to 124. 20  
 “(2) The provisions of **sections 134T to 134W** apply with all necessary modifications in respect of any imported goods seized under this section, and in applying those provisions every reference to the chief executive must be read as a reference to the chief executive of the New Zealand Customs Service. 25
- “155B Chief executive may require person to produce documents concerning goods in control of Customs** 30  
 “(1) If a customs officer believes on reasonable grounds that goods in the control of the Customs have been imported in breach of this Act, the chief executive may, by notice in writing, require any person whom the customs officer believes to have imported the goods, or any person whom the customs offi- 35

- cer believes to have acted as agent of that person, to produce to a customs officer for inspection any specified document or class of documents in the person’s possession or control that the customs officer considers relevant to determining whether the goods should be seized under **section 155A** or released. 5
- “(2) A notice under this section requiring a person to produce any document must—
- “(a) be in the prescribed form; and
  - “(b) specify the customs officer to whom the person must produce the document; and 10
  - “(c) specify a reasonable time and place at which the document must be produced; and
  - “(d) be served on the person by—
    - “(i) delivering it to him or her in person; or
    - “(ii) posting it to the person’s address or delivering it to a box at a document exchange that the person is using at the time; or 15
    - “(iii) sending it by fax machine to a telephone number used by the person for the transmission of documents by fax; or 20
    - “(iv) if the person is a registered user of a Customs computerised entry processing system, by transmitting it by electronic means to the person in accordance with the normal procedure of operation of the relevant Customs computerised entry processing system in relation to that person. 25
- “(3) A customs officer to whom a document is produced for inspection may do 1 or more of the following:
- “(a) inspect the document;
  - “(b) take extracts from the document; 30
  - “(c) make copies of the document.
- “**155C Chief executive may require person to appear and answer questions concerning goods in control of Customs**
- “(1) If a customs officer believes on reasonable grounds that goods in the control of the Customs have been imported in breach of this Act, the chief executive may, by notice in writing, require any person whom the customs officer believes to have imported the goods, or any person whom the customs officer 35

believes to have acted as agent of that person, to appear before a customs officer and to answer questions that the customs officer considers relevant to determining whether the goods should be seized under **section 155A** or released.

- “(2) A notice under this section requiring a person to appear before a customs officer and to answer questions must — 5
- “(a) be in the prescribed form; and
  - “(b) specify the customs officer before whom the person must appear; and
  - “(c) specify a reasonable time and place at which the person must appear; and 10
  - “(d) be served on the person by —
    - “(i) delivering it to him or her in person; or
    - “(ii) posting it to the person’s address or delivering it to a box at a document exchange that the person is using at the time; or 15
    - “(iii) sending it by fax machine to a telephone number used by the person for the transmission of documents by fax; or
    - “(iv) if the person is a registered user of a Customs computerised entry processing system, by transmitting it by electronic means to the person in accordance with the normal procedure of operation of the relevant Customs computerised entry processing system in relation to that person. 20 25

“**155D Customs officer may apply for production order**

- “(1) If a customs officer believes on reasonable grounds that a person has in his or her possession, custody, or control, 1 or more documents that are evidence of, or may be of significant relevance to the investigation of, an offence against any of sections 120 to 124 in respect of imported goods, the customs officer may apply to a District Court Judge for an order requiring the person to produce the documents for inspection by a customs officer. 30
- “(2) An application by a customs officer for an order under **sub-section (1)** must be in writing, made on oath, and must— 35
- “(a) set out, in reasonable detail, the grounds for the application; and

“(b) provide details of the documents in respect of which the order is sought.

“**155E Judge may order documents to be produced**

“(1) If an application is made under **section 155D** and the District Court Judge is satisfied that there are reasonable grounds to believe that the person in respect of whom the order is sought has in that person’s possession, custody, or control, 1 or more documents that are evidence of, or may be of significant relevance to the investigation of, an offence against any of sections 120 to 124 in respect of imported goods, the District Court Judge may order the person to produce those documents for inspection by a customs officer. 5 10

“(2) An order under **subsection (1)**—

“(a) must specify—

“(i) when the documents are to be produced for inspection; and 15

“(ii) the place where the documents are to be produced for inspection; and

“(iii) the customs officer to whom the documents are to be produced for inspection; and 20

“(b) may be subject to any further terms and conditions the District Court Judge thinks fit.

“**155F Powers of customs officer to whom documents produced**

A customs officer to whom any document is produced for inspection under an order under **section 155E** may do 1 or more of the following: 25

“(a) inspect the document:

“(b) take extracts from the document:

“(c) make copies of the document.

“**155G Issue of search warrants to customs officers**

“(1) A customs officer may apply for a search warrant to search a place or thing. 30

“(2) Any District Court Judge, Justice, Community Magistrate, or Registrar (the **issuing officer**) may, on an application by a customs officer, issue a warrant if the issuing officer is satisfied that there are reasonable grounds for believing that there is in, 35

on, over, or under the place or thing any thing that is evidence of, or of significant relevance to the investigation of, an offence against any of sections 120 to 124 in respect of imported goods.

- “(3) **Sections 134G to 134S** apply with all necessary modifications in respect of every search warrant applied for and issued under this section. 5
- “(4) **Sections 134T to 134W** apply with all necessary modifications in respect of any thing seized under a search warrant issued under this section, and in applying those provisions every reference to the chief executive must be read as a reference to the chief executive of the New Zealand Customs Service. 10

“**155H Privilege against self-incrimination**

- “(1) A notice under **section 155B or 155C**, or an order under **section 155E**, does not affect the privilege against self-incrimination that an individual may have under section 60 of the Evidence Act 2006. 15
- “(2) Any assertion of a privilege against self-incrimination must be based on section 60 of the Evidence Act 2006.
- “(3) If any individual refuses to produce any information or document or to answer any question on the ground that it is a privileged communication under section 60 of the Evidence Act 2006, a customs officer or a member of the police may apply to a District Court Judge for an order determining whether the claim of privilege is valid; and, in respect of any such application, the individual must offer sufficient evidence to enable the District Court Judge to assess whether self-incrimination is reasonably likely if the individual produced the information or the document or answered the question. 20 25
- “(4) To avoid doubt, nothing in this section affects the application of section 65 of the Evidence Act 2006 (which relates to waiver of privilege) in respect of the privilege against self-incrimination that a person may have under section 60 of that Act. 30
- “(5) Section 63 of the Evidence Act 2006 does not apply to an order made under **section 155E**. 35



**“155I Other privileges**

- “(1) If, in a criminal proceeding, a person could assert a privilege under section 54 or 56 of the Evidence Act 2006 in respect of a communication or information, that person has the same privilege for the purposes of a notice issued under **section 155B or 155C**, an order made under **section 155E**, and a search warrant issued under **section 155G**. 5
- “(2) **Subsection (3)** applies to documents that are books of account or accounting records referred to in section 55(1) of the Evidence Act 2006. 10
- “(3) The application, by **subsection (1)**, of section 54 of the Evidence Act 2006 (which relates to the privilege for communications with legal advisers) does not prevent, limit, or affect—
- “(a) the issue of a notice under **section 155B** in respect of a document to which this subsection applies or the obligation to comply with such a notice; or 15
- “(b) the making of an order under **section 155E** in respect of a document to which this subsection applies or the obligation to comply with such an order; or
- “(c) the issue of a search warrant under **section 155G** in respect of a document to which this subsection applies; or 20
- “(d) the admissibility, in a criminal proceeding under this Act, of any evidence that relates to the contents of a document to which this subsection applies obtained under a notice issued under **section 155B**, an order made under **section 155E**, or a search warrant issued under **section 155G**. 25
- “(4) A person who has a privilege under this section has the right—
- “(a) to refuse to disclose a communication or information to which the privilege would apply if it were sought to be disclosed in a criminal proceeding; and 30
- “(b) to prevent the search of any such communication or information; and
- “(c) to require the return of any such communication or information if it is seized by a person exercising a power of search pending determination of the claim to privilege. 35

- “(5) If a person asserts a claim to privilege under this section in respect of any communication or information, a customs officer or a member of the police may apply to a District Court Judge for an order determining whether the claim to privilege is valid; and, for the purpose of determining any such application, the District Court Judge may require the communication or information to be produced to him or her. 5
- “(6) A District Court Judge may, on the application of a customs officer or a member of the police, disallow a privilege claimed under this section if the Judge is satisfied that the claim to privilege would, under section 67(1) of the Evidence Act 2006, be disallowed in a proceeding. 10
- “(7) Section 65 of the Evidence Act 2006 (which relates to waiver of privilege) applies in respect of any privilege under this section. 15

“**155J Offences**

- “(1) No person may, without reasonable excuse, refuse or fail to comply with a notice given under **section 155B**.
- “(2) No person who is required by a notice given under **section 155C** to appear before a customs officer and to answer questions may, without reasonable excuse,— 20
- “(a) refuse or fail to appear before the customs officer in accordance with the notice; or
- “(b) refuse to answer any question.
- “(3) No person may, without reasonable excuse, refuse or fail to comply with an order made under **section 155E**. 25
- “(4) Every person who breaches any of **subsections (1) to (3)** commits an offence and is liable on summary conviction,—
- “(a) in the case of an individual, to imprisonment for a term not exceeding 6 months or to a fine not exceeding \$10,000; and 30
- “(b) in the case of a body corporate, to a fine not exceeding \$50,000.

“*Miscellaneous*

- “**155K No liability if powers exercised in good faith** 35
- “(1) This section applies to—

- “(a) a customs officer; and
  - “(b) a person who assists a customs officer under this subpart.
- “(2) No person to whom this section applies is liable for any act done or omitted to be done by the person in the exercise or intended exercise of his or her powers under this Act if the person acted—
- “(a) in good faith; and
  - “(b) in a reasonable manner; and
  - “(c) in the reasonably held belief that the prerequisites for the exercise of any power had been satisfied.”

**22 Commissioner and Assistant Commissioners of Trade Marks**

Section 175 is amended by repealing subsection (1) and substituting the following subsections:

- “(1) The chief executive of the Ministry must appoint, under the State Sector Act 1988,—
- “(a) the Commissioner of Trade Marks; and
  - “(b) as many Assistant Commissioners of Trade Marks as may be necessary for the purposes of this Act.
- “(1A) These persons are employees of the Ministry, and those appointments may be held separately or in conjunction with any other office in the Ministry.”

**23 Contents of register**

Section 182 is amended by repealing paragraph (d) and substituting the following paragraph:

- “(d) memoranda referred to in **section 78(c)**.”

**24 Regulations**

- (1) Section 199(b) is amended by inserting the following subparagraph after subparagraph (i):
- “(ia) providing for the division of a registration of a trade mark into several registrations.”
- (2) Section 199 is amended by repealing the heading above paragraph (c) and paragraph (c).

- (3) Section 199(e) is amended by repealing subparagraph (i) and substituting the following subparagraph:
- “(i) requiring a person to give security or an indemnity or both, subject to any conditions determined by the Chief Executive of the New Zealand Customs Service, for any costs incurred by the New Zealand Customs Service in relation to any 1 or more of the detention of goods, the disposal of goods, or the recovery of sums owed:” 5
- (4) Section 199 is amended by repealing paragraph (j) and substituting the following paragraph: 10
- “(j) prescribing forms for the purposes of this Act; and those regulations may require—
- “(i) the inclusion in, or attachment to, forms of specified information or documents: 15
- “(ii) forms to be signed by specified persons:”.

## 25 New section 199A inserted

The following section is inserted after section 199:

### “199A Regulations: Madrid Protocol

The Governor-General may, by Order in Council, make regulations for the purpose of giving effect in New Zealand to the Madrid Protocol, including providing for any of the following: 20

- “(a) making applications for international registration by way of the Patent Office as office of origin:
- “(b) procedures to be followed where the basic New Zealand application for registration ceases to be in force: 25
- “(c) procedures to be followed where the Patent Office receives from the International Bureau, or any body specified in the regulations, a request for extension of protection to New Zealand: 30
- “(d) the effects of a successful request for extension of protection to New Zealand:
- “(e) transforming an application for an international registration, or an international registration, into a national application for registration: 35
- “(f) communicating information to the International Bureau:

- “(g) requiring fees to be paid in respect of applications for international registrations, extensions of protection, and renewals, and prescribing the amounts of those fees:
- “(h) the application of the following provisions to a protected international trade mark (New Zealand): 5
  - “(i) section 105 (unjustified proceedings):
  - “(ii) subpart 2 of Part 4 (criminal proceedings):
  - “(iii) subpart 3 of Part 4 (border protection measures).”

*Consequential amendments*

- 26 Amendments to Trade Marks Regulations 2003** 10
  - (1) The section amends the Trade Marks Regulations 2003.
  - (2) Regulation 3 is amended by revoking the definition of **Nice Classification** and substituting the following definition:
    - “**Nice Classification** has the meaning given to it in section 5(1) of the Act”.
  - (3) Regulation 44 is amended by revoking paragraph (c) and substituting the following paragraph:
    - “(c) the class or classes of the edition of the Nice Classification in effect at the time of the application in which registration is sought; and”.
  - (4) Regulations 143 and 144 and Part 17 are revoked. 15 20
- 27 Amendments to Trans-Tasman Mutual Recognition Act 1997**
  - (1) This section amends the Trans-Tasman Mutual Recognition Act 1997. 25
  - (2) Schedule 1 is amended by omitting the item relating to the Trade Marks Act 1953 and substituting the following item:
    - “Trade Marks Act 2002”.

**Part 2**  
**Copyright Act 1994** 30

- 28 Principal Act amended**
  - This **Part** amends the Copyright Act 1994.

**29 Interpretation**

Section 2(1) is amended by inserting the following definitions in their appropriate alphabetical order:

“**Chief Executive**,—

“(a) for the purposes of **Part 6A**, means the Chief Executive of the Ministry; and 5

“(b) for the purposes of Part 7, has the meaning set out in section 135

“**document**, for the purposes of **Part 6A** and **sections 144A and 144C to 144E**, means— 10

“(a) any material, whether or not it is signed or otherwise authenticated, that bears symbols (including words and figures), images, or sounds, or from which symbols, images, or sounds can be derived, and includes—

“(i) a label, marking, or other writing that identifies or describes a thing of which it forms part, or to which it is attached: 15

“(ii) a book, map, plan, graph, or drawing:

“(iii) a photograph, film, or negative; and

“(b) information electronically recorded or stored, and information derived from that information 20

“**Ministry** means the department of State that, with the authority of the Prime Minister, is responsible for the administration of the Act”.

**30 New sections 87 to 87B substituted** 25

(1) Section 87 is repealed and the following sections are substituted:

“**87 Free public playing or showing of communication work**

“(1) The free public playing or showing of a communication work (other than a communication work to which **section 87A** applies) does not infringe any copyright in— 30

“(a) the communication work; or

“(b) any sound recording or film included in the communication work.

“(2) For the purposes of this section, the public playing or showing of a communication work is not free if— 35

“(a) the audience has paid for admission to—

- “(i) the place where the communication work is played or shown (which in this section is called the **venue**); or
- “(ii) any place of which the venue is a part; or
- “(b) goods or services are supplied at the venue or a place of which it forms part at prices that—
  - “(i) are substantially attributable to the facilities afforded for hearing or seeing the communication work; or
  - “(ii) exceed those usually charged there and that are partly attributable to those facilities; or
- “(c) the venue is a hotel, motel, camping ground, or any other place that admits persons for a fee for purposes of temporary accommodation, and the audience is made up of persons residing at that hotel, motel, camping ground, or other place.
- “(3) For the purposes of **subsection (2)(a)**, the following persons must not be treated as having paid for admission to the venue:
  - “(a) a person admitted as a resident or an inmate of a place (other than a hotel, motel, camping ground, or any other place to which **subsection (2)(c)** applies):
  - “(b) a person admitted as a member of a club or society where the payment is only for membership of the club or society and the provision of facilities for hearing or seeing communication works is only incidental to the main purposes of the club or society.

**“87A Free public playing or showing of communication work that is simultaneous with reception**

- “(1) This section applies to the playing or showing of a communication work that—
  - “(a) is made for reception in the area in which it is played or shown; and
  - “(b) is not a communication work for which a subscription fee must be paid in order to receive it; and
  - “(c) is played or shown simultaneously upon reception of the communication work.

- “(2) The free public playing or showing of a communication work to which this section applies does not infringe any copyright in—
- “(a) the communication work; or
  - “(b) any sound recording or film that is played or shown in public by reception of the communication work. 5
- “(3) For the purposes of this section, the public playing or showing of a communication work is not free if—
- “(a) the audience has paid for admission to the place where the communication work is played or shown (which in this section is called the **venue**), including any place of which the venue is a part; or 10
  - “(b) goods or services are supplied at the venue or a place of which it forms part at prices that—
    - “(i) are substantially attributable to the facilities afforded for hearing or seeing the communication work; or 15
    - “(ii) exceed those usually charged there and that are partly attributable to those facilities.
- “(4) For the purposes of **subsection (3)(a)**, the following persons must not be treated as having paid for admission to the venue: 20
- “(a) a person admitted as a resident or an inmate of a place (including a person residing in a hotel, motel, camping ground, or any other place that admits persons for a fee for the purpose of temporary accommodation): 25
  - “(b) a person admitted as a member of a club or society where the payment is only for membership of the club or society and the provision of facilities for hearing or seeing communication works is only incidental to the main purposes of the club or society. 30

“**87B Assessment of damages for infringement of copyright in sound recording or film**

Where the making of a communication work is an infringement of copyright, the fact that the work was heard or seen in public by the reception of the communication work must be taken into account in assessing the damages for the infringement.” 35



- (2) Section 48 of the Copyright (New Technologies) Amendment Act 2008 is consequentially repealed.

**31 New Part 6A inserted**

The following Part is inserted after section 134:

**“Part 6A**

5

**“Enforcement officers**

*“Appointment and functions of enforcement officers*

**“134A Chief Executive may appoint enforcement officers**

The Chief Executive may appoint enforcement officers, on a permanent or temporary basis, to perform the functions set out in **section 134C** and exercise the powers conferred on an enforcement officer by this Act. 10

**“134B Authority to act as enforcement officer**

“(1) The Chief Executive must issue a warrant of appointment to every person appointed as an enforcement officer. 15

“(2) A warrant of appointment must—

“(a) be in the prescribed form; and

“(b) bear the photograph and signature of the holder; and

“(c) contain a statement of the power conferred by **section 134D**; and 20

“(d) contain any other prescribed particulars.

“(3) A warrant of appointment is, in the absence of evidence to the contrary, sufficient proof that the holder of the warrant may exercise the powers conferred on an enforcement officer. 25

“(4) A person who ceases to be an enforcement officer must return the person’s warrant of appointment.

“(5) A person who fails to comply with **subsection (4)** commits an offence and is liable on summary conviction to a fine not exceeding \$1,000. 30

**“134C Functions of enforcement officer**

An enforcement officer must, to the extent that is reasonably practicable, promote compliance with this Act by carrying out the following functions:

- “(a) gathering information relating to offences under this Act:
- “(b) investigating offences under this Act:
- “(c) reporting to the Chief Executive on any matters relating to the enforcement officer’s functions. 5

*“Enforcement officer’s power of entry and  
examination without warrant*

**“134D Enforcement officer’s power of entry and examination  
without warrant**

- “(1) For the purpose of carrying out his or her functions, an enforcement officer may enter and examine any place (**place A**) where goods are being offered for sale, exposed for sale, or publicly displayed if— 10
  - “(a) place A is in a public place and the entry is made when place A is open to the public; or 15
  - “(b) place A is a place of business and the entry is made—
    - “(i) when it is open for carrying on business; and
    - “(ii) only to those parts of it that are open to the public; or
  - “(c) the occupier of place A consents to the entry and examination after the enforcement officer has informed the occupier— 20
    - “(i) of the purpose of the entry and examination; and
    - “(ii) that the occupier may refuse to give consent to the entry and examination; and 25
    - “(iii) that the occupier may revoke his or her consent at any time; and
    - “(iv) that any thing seized during the examination may be used in evidence in proceedings.
- “(2) In **subsection (1)**,— 30
  - “**place A**—
    - “(a) includes (without limitation)—
      - “(i) a structure or tent, whether fully or partly erected; and
      - “(ii) a stand or stall; and 35
      - “(iii) a vehicle; and
      - “(iv) a caravan, trailer, or other conveyance; but
    - “(b) does not include a private dwellinghouse

- “**public place** means any place that is open to or being used by the public, with or without payment by the public of a charge.
- “(3) For the purposes of this section, any person who appears to be under 14 years of age may not be treated as the occupier.
- “**134E What enforcement officer and person assisting may do when exercising power of entry and examination without warrant** 5
- “(1) The power of entry and examination conferred by **section 134D** authorises an enforcement officer to do any of the following: 10
- “(a) examine the place and all things, including any document:
- “(b) seize any thing that he or she has reasonable grounds to believe is evidence of, or of significant relevance to the investigation of, an offence under this Act: 15
- “(c) bring and use in or on the place equipment for the purposes of carrying out the examination:
- “(d) take photographs or sound or video recordings of the place, and of any thing found in that place, if the enforcement officer has reasonable grounds to believe that the photographs or sound or video recordings may be relevant in any proceedings (including future proceedings) related to the entry and examination: 20
- “(e) take any person to the place to assist him or her with the examination. 25
- “(2) A person who assists an enforcement officer exercising the power of entry and examination may, under the direction of the enforcement officer,—
- “(a) exercise any of the powers described in **subsection (1)(a), (c), and (d)**; and 30
- “(b) seize any thing that the enforcement officer determines may lawfully be seized.
- “(3) If an enforcement officer enters and examines a place under **section 134D(1)(c)** and the occupier revokes his or her consent, the officer and any person assisting the enforcement officer must immediately stop the examination and leave the place. 35
- “(4) **Subsection (3)** is subject to **subsection (5)**.

- “(5) The enforcement officer may, before leaving the place, seize any thing already identified by him or her before the revocation of consent as a thing that he or she has reasonable grounds to believe is evidence of, or of significant relevance to the investigation of, an offence under this Act. 5
- “(6) If a member of the police assists an enforcement officer, nothing in this section prevents that member of the police from exercising any power ordinarily exercisable by him or her.
- “(7) **Sections 134P to 134S** contain further provisions that apply to an enforcement officer’s power of entry and examination. 10

*“Entry and search under search warrant*

**“134F Enforcement officer or member of police may apply for search warrant**

- “(1) An enforcement officer or a member of the police may apply for a search warrant to search a place or thing. 15
- “(2) Any District Court Judge, Justice, Community Magistrate, or any Registrar (not being a member of the police) (the **issuing officer**) may, on an application by an enforcement officer or a member of the police, issue a search warrant to search a place or thing if the issuing officer is satisfied that there are reasonable grounds for believing that— 20
- “(a) an offence under this Act has been, or is being, committed at the place or involving the thing; or
- “(b) there is at, in, on, over, or under the place or thing, any thing that is— 25
- “(i) evidence of an offence under this Act; or
- “(ii) intended to be used for the purpose of committing an offence under this Act.
- “(3) **Sections 134G to 134S** apply in respect of every search warrant applied for and issued under this section. 30

**“134G Application for search warrant**

- “(1) An application for a search warrant must contain, in reasonable detail, the following particulars:
- “(a) the name of the applicant:
- “(b) the provision of this Act authorising the making of the application: 35

- “(c) the grounds on which the application is made:
  - “(d) the address or other description of the place or thing proposed to be searched:
  - “(e) a description of the item or items believed to be at, in, on, over, or under the place or thing that are sought by the applicant: 5
  - “(f) the period for which the warrant is sought:
  - “(g) if the applicant wants to be able to execute the warrant on more than 1 occasion, the grounds on which execution on more than 1 occasion is believed to be necessary. 10
- “(2) The issuing officer may require the applicant to supply further information concerning the grounds on which the search warrant is sought.
- “(3) The applicant must disclose in the application—
- “(a) details of any other application for a search warrant that the applicant knows to have been made within the previous 3 months in respect of the place or thing proposed to be searched: 15
  - “(b) the result of that application or those applications.
- “(4) The applicant must, before making an application for a search warrant, make reasonable inquiries within the agency in which the applicant is employed or engaged for the purpose of complying with **subsection (3)**. 20
- “(5) The issuing officer may authorise the search warrant to be executed on more than 1 occasion during the period in which the warrant is in force if he or she is satisfied that this is required for the purposes for which the warrant is being issued. 25

**“134H Mode of application for search warrant**

- “(1) Unless **subsection (3)** applies, an application for a search warrant— 30
- “(a) must be in writing; and
  - “(b) may be transmitted to the issuing officer electronically.
- “(2) The applicant must appear in person before the issuing officer, unless **subsection (3)** applies.
- “(3) An issuing officer may allow an application for a search warrant to be made verbally (for example, by telephone call) and 35

- excuse the applicant from making a personal appearance if the issuing officer is satisfied that—
- “(a) the delay that would be caused by requiring an applicant to appear in person would compromise the effectiveness of the search; and 5
  - “(b) the question of whether the warrant should be issued can properly be determined on the basis of a verbal communication (including the information described in **paragraph (c)**); and
  - “(c) the information required by **section 134G(1) to (3)** has been supplied to the issuing officer. 10
- “(4) An issuing officer who allows an application for a search warrant to be made verbally must record the grounds for the application as soon as practicable.
- “**134I Form and content of search warrant** 15
- “(1) Every search warrant issued must be in the prescribed form.
  - “(2) Every search warrant issued must be directed generally to every enforcement officer and every member of the police.
  - “(3) A search warrant—
    - “(a) may be executed by any of the persons to whom it is directed: 20
    - “(b) may be subject to any conditions specified in the warrant that the issuing officer considers reasonable:
    - “(c) may be executed only once, unless execution on more than 1 occasion is authorised. 25
  - “(4) Every search warrant must contain, in reasonable detail, the following particulars:
    - “(a) the name of the issuing officer and the date of issue:
    - “(b) the provision of this Act authorising the issue of the warrant: 30
    - “(c) that the person executing the warrant may use any assistance that is reasonable in the circumstances:
    - “(d) that the person executing the warrant may use any force that is reasonable in the circumstances to enter or break open or access any place being searched, or any area within that place, or any thing being searched or thing found: 35

- “(e) the address or description of the place or thing that may be searched:
- “(f) a description of what may be seized:
- “(g) the period during which the warrant may be executed, being— 5
  - “(i) a period specified by the issuing officer not exceeding 14 days from the date of issue; or
  - “(ii) if the issuing officer is satisfied that a period of longer than 14 days is necessary for execution, a period specified by the issuing officer not exceeding 30 days from the date of issue: 10
- “(h) any conditions specified by the issuing officer under **subsection (3)(b)**:
- “(i) if the warrant may be executed on more than 1 occasion, the number of times that the warrant may be executed. 15

“**134J Transmission of search warrant**

If it is not possible for the person charged with executing the warrant to have it in his or her possession at the time of execution, 1 of the following documents (which is deemed for all purposes to constitute the warrant) may be executed: 20

- “(a) a facsimile or other electronic copy of a warrant issued by the issuing officer:
- “(b) a copy of the text of a warrant, made at the direction of the issuing officer, and endorsed to that effect by the person who made the copy. 25

“**134K Retention of documents**

“(1) A copy of every written application for a search warrant or, in the case of a verbal application, the written record of the application made by the issuing officer, must be retained at the District Court at which, or the District Court that is closest to the place at which, the application was made, until,— 30

- “(a) in a case where a search warrant is issued, the completion of any proceedings in respect of which the search warrant may be in issue; and
- “(b) in any other case, the expiry of 2 years after the documents were first retained by the District Court. 35

- “(2) An applicant to whom a search warrant is issued must retain the warrant, a copy of the application (if made in written form), and all documents tendered by the applicant in support of the application until,—
- “(a) in the case of a warrant that is executed, the completion 5  
of any proceedings in respect of which the validity of the warrant may be in issue; and
  - “(b) in any other case, the destruction or transfer of the warrant and other documents is required by the Public Records Act 2005 or any other enactment or rule of 10  
law.

“**134L When search warrant is executed**

A search warrant is executed when the person executing the warrant—

- “(a) has seized all the items specified in the warrant; or 15
- “(b) leaves the place or thing being searched and does not return within 4 hours.

“**134M Powers of entry and search under warrant**

- “(1) Every search warrant authorises the person executing it to do any of the following: 20
- “(a) to enter and search the place or thing that the person is authorised to enter and search, and any item or items found in that place, at any time that is reasonable in the circumstances:
  - “(b) to request any person to assist with the entry and search 25  
(including, without limitation, a member of a hapu or an iwi if the place to be entered is of cultural or spiritual significance to that hapu or iwi):
  - “(c) to use any force that is reasonable for the purposes of the entry and search: 30
  - “(d) to seize any thing authorised to be seized:
  - “(e) to bring and use in or on the place or thing searched any equipment, to use any equipment found on the place or thing, and to extract any electricity from the place or thing to operate the equipment that it is reasonable to 35  
use in the circumstances, for the purposes of carrying out the entry and search:



- “(f) to copy any document, or part of a document, that may lawfully be seized:
- “(g) to take photographs or sound or video recordings of the place or thing searched, and of any thing found in that place, if the person exercising the power has reasonable grounds to believe that the photographs or sound or video recordings may be relevant in any proceedings related to the entry and search. 5
- “(2) The person executing the warrant may, in a manner and for the duration that is reasonable for the purposes of carrying out the search,— 10
- “(a) secure the place or thing searched, any area within that place or thing, or any thing found within that place or thing; and
- “(b) exclude any person from the place or thing searched, or from any area within the place or thing, or give any other reasonable direction to such a person, if the person carrying out the search has reasonable grounds to believe that the person will obstruct or hinder the exercise of the power. 15 20
- “(3) The powers conferred by this section are subject to any conditions imposed under **section 134I(3)(b)**.
- “(4) Section 198B of the Summary Proceedings Act 1957 applies with all necessary modifications as if for each reference to a constable there were substituted a reference to the person authorised to execute the search warrant. 25
- “134N Powers of persons called to assist**
- “(1) Every person called on to assist a person executing a warrant is subject to the control of the person executing the warrant.
- “(2) Every person called on to assist a person executing a warrant may do any of the following: 30
- “(a) enter the place or thing to be searched:
- “(b) while in the company and under the direction of the person executing the warrant, use reasonable force in respect of any property for the purposes of carrying out the entry and search: 35

- “(c) search areas within the place or thing that the person executing the warrant determines may lawfully be searched:
- “(d) seize any thing that the person executing the warrant determines may lawfully be seized: 5
- “(e) take photographs and sound and video recordings of the place or thing and things found in the place or thing if the person executing the warrant determines that those things may lawfully be done:
- “(f) bring in or on to the place or thing and use any equipment, make use of any equipment found on the place or thing, or extract electricity from the place or thing for the purposes of operating the equipment that the person executing the warrant determines may lawfully be used: 10
- “(g) copy any document, or part of a document, that the person executing the warrant determines may lawfully be copied. 15
- “(3) If a member of the police is assisting another person executing the warrant, that member of the police may exercise any power ordinarily exercisable by him or her. 20
- “(4) The person executing the warrant must—
- “(a) accompany any assistant on the first occasion when the assistant enters the place or thing to be searched; and
- “(b) provide such other supervision of any assistant as is reasonable in the circumstances. 25
- “General provisions that apply to powers of entry and search and entry and examination*
- “**134O Application of sections 134P to 134S**
- “(1) **Sections 134P to 134S** apply in respect of every search warrant issued under this Act. 30
- “(2) **Sections 134P(1) and 134Q to 134S** apply in respect of the power of entry and examination conferred by **section 134D**.
- “(3) In **sections 134P to 134S**,—
- “(a) **power of entry and search** means the power of entry and search under a search warrant issued under this Act; 35  
and

“(b) **power of entry and examination** means the power of entry and examination under **section 134D**.

“**134P Powers and duties of person exercising power of entry and search or power of entry and examination**

- “(1) A person exercising a power of entry and search or a power of entry and examination must,— 5
- “(a) before initial entry into or onto the place or thing to be searched or examined,—
- “(i) announce his or her intention to enter and search or to enter and examine the place or thing under a statutory power; and 10
- “(ii) identify himself or herself; and
- “(b) before or on initial entry into or onto the place or thing to be searched or examined,—
- “(i) give the occupier of the place or thing a copy of the search warrant or, in the case of an examination, a copy of **section 134D**, (the **authority**) that authorises him or her to conduct the entry and search or entry and examination; and 15
- “(ii) produce to the occupier of the place or thing evidence of his or her identity (which may include details of a unique identifier instead of a name). 20
- “(2) The person exercising a power of entry and search is not required to comply with **subsection (1)** if he or she believes on reasonable grounds that— 25
- “(a) no person is lawfully present in or on the place or thing to be searched; or
- “(b) compliance with **subsection (1)** would—
- “(i) endanger the safety of any person; or
- “(ii) prejudice the successful exercise of the power of entry and search; or 30
- “(iii) prejudice ongoing investigations under this Act.
- “(3) The person exercising a power of entry and search may use reasonable force in order to effect entry into or onto the place or thing if— 35
- “(a) **subsection (2)** applies; or
- “(b) following a request, the person present refuses entry or does not allow entry within a reasonable time.

- “(4) If the occupier is not present at any time during the exercise of a power of entry and search, the person carrying out the search must,—
- “(a) on completion of the search, leave a copy of the authority referred to in **subsection (1)(b)(i)** and the notice referred to in **subsection (5)** in a prominent position at the place or on the thing; or 5
- “(b) if this is not reasonably practicable, provide the copy of the authority referred to in **subsection (1)(b)(i)** and the notice referred to in **subsection (5)** to the occupier no later than 7 days after the execution of the warrant. 10
- “(5) The notice required by **subsection (4)** is a written notice containing the following particulars:
- “(a) the date and time of the commencement and completion of the search: 15
- “(b) the name or unique identifier of the person who had overall responsibility for that search:
- “(c) the address of the office to which inquiries should be made:
- “(d) if nothing is seized, the fact that nothing was seized: 20
- “(e) if any thing was seized, the fact that seizure occurred and, if an inventory is not provided at the same time under **section 134Q**, that an inventory of the things seized will be provided to the occupier or person in charge of the place or thing no later than 7 days after the seizure. 25
- “(6) For the purposes of this section and **section 134Q**, any person who appears to be under 14 years of age may not be treated as the occupier.
- “(7) **Subsections (4) and (5)** are subject to **sections 134R and 134S.** 30

“**134Q Inventory of items seized**

- “(1) A person who exercises a power of entry and search or a power of entry and examination must, at the time he or she seizes any thing, or as soon as practicable after the seizure of any thing, and in any case not later than 7 days after that seizure, provide to the occupier, and to every other person whom the 35

- person who carried out the search or examination has reason to believe is the owner of the thing that was seized,—
- “(a) written notice specifying what was seized; and
  - “(b) a copy of the authority referred to in **section 134P(1)(b)(i)**. 5
- “(2) A written notice referred to in **subsection (1)(a)**—
- “(a) must contain information about the extent to which a person from whom a thing was seized or the owner of the thing has a right—
    - “(i) to have access to the thing; and 10
    - “(ii) to have access to any document relating to the application for a search warrant or the exercise of the power of entry and examination that led to the seizure; and
  - “(b) must contain information about the right to bring a claim that any privileged or confidential information has been seized; but 15
  - “(c) need not be provided to the occupier if the person who carries out the search or examination is satisfied that none of the items seized are owned by the occupier. 20
- “(3) If the occupier is not present at the time of seizure, the written notice referred to in **subsection (1)(a)** and a copy of the authority referred to in **section 134P(1)(b)(i)** may be provided to the occupier by leaving the notice in a prominent position at the place or on the thing. 25
- “(4) A person who exercises a power of entry and search or a power of entry and examination must make reasonable inquiries for the purposes of complying with **subsections (1) and (2)**.
- “(5) **Subsection (1)** is subject to **subsections (2) and (3)**.
- “(6) This section is subject to **sections 134R and 134S**. 30
- “**134R Compliance with certain provisions may be deferred in certain circumstances**
- “(1) A person exercising a power of entry and search or a power of entry and examination may apply to a District Court Judge for an order postponing the obligation to comply with **section 134P(4) or (5)** (in the case of a power of entry and search) or **134Q** on the grounds that compliance would— 35

- “(a) endanger the safety of any person; or  
“(b) prejudice ongoing investigations under this Act or exercises of the power of entry and search or the power of entry and examination on subsequent occasions.
- “(2) An application may be made under **subsection (1)**,— 5  
“(a) in the case of a search warrant, at the time of the initial application or until the expiry of 7 days after the warrant is finally executed; and  
“(b) in the case of the power of entry and examination, until the expiry of 7 days after the power of entry and examination is exercised. 10
- “(3) On an application under **subsection (1)**, the District Court Judge may make an order postponing for a specified period not exceeding 12 months the obligation to comply with **section 134P(4) or (5) or 134Q**, if the Judge is satisfied on either ground set out in **subsection (1)**. 15
- “**134S Further extension to, or dispensation from, obligation to comply with certain provisions**
- “(1) A person who has obtained an order under **section 134R(3)** may, before the expiry of that order, apply to a District Court Judge for a further order for postponement of, or dispensation from, the obligation to comply with **section 134P(4) or (5) or 134Q** on the grounds set out in **section 134R(1)**. 20
- “(2) An application for a further postponement may only be made on 1 occasion. 25
- “(3) On an application under **subsection (1)**, the District Court Judge may postpone for a further specified period not exceeding 12 months, or order a permanent dispensation from, the obligation to comply with **section 134P(4) or (5) or 134Q**, if the Judge is satisfied on either ground set out in **section 134R(1)**. 30
- “(4) A District Court Judge may not grant, under **subsection (3)**, any postponement of, or dispensation from, an obligation in respect of any thing that has been seized, unless the thing seized is a copy of any information taken or made. 35

*“Provisions relating to things seized*

**“134T Period things seized may be retained**

- “(1) A thing seized under this Act may be retained by the Commissioner of Police or by the Chief Executive while it is required for the purposes of investigating or prosecuting an offence under this Act. 5
- “(2) **Subsection (1)** is subject to—
- “(a) any order of the court under **section 134U**; and
  - “(b) **section 134W**.
- “(3) If a thing seized is no longer required for the purposes of investigating or prosecuting an offence under this Act, the Commissioner of Police or the Chief Executive must return it to the person he or she believes is entitled to it. 10
- “(4) The Commissioner of Police or Chief Executive may apply to the court for an order for directions as to the disposition of the thing if— 15
- “(a) the person who is entitled to it cannot be found; or
  - “(b) the Commissioner of Police or Chief Executive is in doubt about who is entitled to it.
- “(5) On an application under **subsection (4)**, the court may make such order concerning the disposition of the thing that it thinks appropriate in the circumstances. 20

**“134U Application for order to return things seized**

- “(1) A person who claims to be entitled to a thing seized may apply to the court for an order that the thing be delivered to him or her. 25
- “(2) On an application under **subsection (1)**, the court may make an order for delivery of the thing to the applicant if it is satisfied—
- “(a) that the applicant is the person entitled to it; and 30
  - “(b) that it would be contrary to the interests of justice for the thing to be retained, having regard to—
- “(i) the gravity of the alleged offence in respect of which the thing is being retained; and
  - “(ii) any loss or damage to the applicant caused, or likely to be caused, by retention of the thing; and 35

- “(iii) the likely evidential value of the thing, having regard to any other evidence held by the Commissioner of Police or the Chief Executive, as the case may be; and
- “(iv) whether the evidential value of the thing can be adequately preserved by means other than its retention. 5

**“134V Disposal of things seized**

- “(1) In any proceedings for an offence relating to a thing seized, the court may, either at the trial or on an application, order— 10
  - “(a) that the thing be delivered to the person who appears to the court to be entitled to it; or
  - “(b) that the thing otherwise be disposed of in the manner that the court thinks appropriate; or
  - “(c) if a person is convicted of an offence to which the thing relates,— 15
    - “(i) that the thing be forfeited to the Crown; or
    - “(ii) that the thing be disposed of as the court directs at the expense of the convicted person.
- “(2) If the court makes an order under **subsection (1)(c)**, it may order that the convicted person pay any reasonable costs incurred by the Commissioner of Police or Chief Executive in retaining the thing for the purpose of the proceedings. 20
- “(3) If no order for delivery, forfeiture, or disposal is made in respect of a thing seized and retained for the purpose of proceedings, it must, on completion of the proceedings, be returned by the Commissioner of Police or the Chief Executive to the person entitled to it. 25
- “(4) The Commissioner of Police or Chief Executive may apply to the court for an order for directions as to the disposition of the thing if— 30
  - “(a) the person who is entitled to it cannot be found; or
  - “(b) the Commissioner of Police or Chief Executive is in doubt about who is entitled to it.
- “(5) On an application under **subsection (4)**, the court may make any order concerning the disposition of the thing that it thinks appropriate in the circumstances. 35



**“134W Disposal of perishable things**

If, in the opinion of the Commissioner of Police or Chief Executive, a thing seized may rot, spoil, deteriorate, or otherwise perish, he or she may dispose of it in the way and at the price (if any) or the cost he or she may determine.

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*“Powers of police*

**“134X Powers of police**

Every member of the police has all, and may exercise any, of the powers of an enforcement officer under this Part.

*“Miscellaneous*

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**“134Y Privileges**

“(1) If, in a criminal proceeding, a person could assert a privilege under section 54 or 56 of the Evidence Act 2006 in respect of a communication or information, that person has the same privilege for the purposes of an examination under **section 134D** and a search warrant issued under **section 134F**.

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“(2) **Subsection (3)** applies to documents that are books of account or accounting records referred to in section 55(1) of the Evidence Act 2006.

“(3) The application, by **subsection (1)**, of section 54 of the Evidence Act 2006 (which relates to the privilege for communications with legal advisers) does not prevent, limit, or affect—

20

“(a) the issue or execution of a search warrant under **section 134F**; or

“(b) the admissibility, in a criminal proceeding under this Act, of any evidence that relates to the contents of a document to which this subsection applies obtained as a result of a search warrant issued under **section 134F**.

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“(4) A person who has a privilege under this section has the right—

“(a) to prevent the examination under **section 134D**, or the search under a warrant issued under **section 134F**, of any communication or information to which the privilege would apply if it were sought to be disclosed in a criminal proceeding; and

30

“(b) to require the return of any such communication or information if it is seized by a person exercising the power

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of examination under **section 134D** or search under a warrant issued under **section 134F** pending determination of the claim to privilege.

- “(5) If a person asserts a claim to privilege under this section in respect of any communication or information, an enforcement officer or a member of the police may apply to a District Court Judge for an order determining whether or not the claim to privilege is valid; and, for the purpose of determining any such application, the District Court Judge may require the communication or information to be produced to him or her. 5 10
- “(6) A District Court Judge may, on the application of an enforcement officer or a member of the police, disallow a privilege claimed under this section if the Judge is satisfied that the claim to privilege would, under section 67(1) of the Evidence Act 2006, be disallowed in a proceeding. 15
- “(7) Section 65 of the Evidence Act 2006 (which relates to waiver of privilege) applies in respect of any privilege under this section.
- “**134Z Disclosure of information**
- “(1) The Chief Executive (or any employee of the Ministry authorised in that behalf), the Chief Executive of the New Zealand Customs Service (or any employee of the New Zealand Customs Service authorised in that behalf), and the Commissioner of Police (or any member of the police authorised in that behalf) may disclose information to each other, on request, for the purpose of investigating and prosecuting offences under this Act. 20 25
- “(2) Information obtained under **subsection (1)** must not be disclosed except—
- “(a) to the persons authorised under that subsection; or 30
- “(b) for the purpose of any proceedings that have been commenced or that are reasonably in contemplation and that are connected with a matter in relation to which those persons perform their duties.
- “(3) No obligation as to secrecy or other restriction on the disclosure of information imposed by any enactment or otherwise prevents a disclosure under this section. 35

**“134ZA No liability if functions performed or powers exercised  
in good faith**

- “(1) This section applies to—
- “(a) an enforcement officer:
  - “(b) a person who assists an enforcement officer or a member 5  
of the police under this Part:
  - “(c) a member of the police who exercises any power of an  
enforcement officer under this Part.
- “(2) No person to whom this section applies is liable for any act  
done or omitted to be done by the person in the performance 10  
or intended performance of his or her functions or the exercise  
or intended exercise of his or her powers under this Act if the  
person acted—
- “(a) in good faith; and
  - “(b) in a reasonable manner; and 15
  - “(c) in the reasonably held belief that the prerequisites for  
the performance of any function or the exercise of any  
power had been satisfied.”

**32 Definitions**

Section 135 is amended by inserting the following definitions 20  
in their appropriate alphabetical order:

“**accepted notice** means a notice given under section 136(1)  
that has been accepted by the Chief Executive under section  
136(3)

“**Customs** means the New Zealand Customs Service”. 25

**33 Notice may be given to Chief Executive**

Section 136 is amended by repealing subsection (4).

**34 New sections 136A to 136D inserted**

The following sections are inserted after section 136:

**“136A Chief Executive may suspend accepted notice 30**

- “(1) The Chief Executive may suspend an accepted notice if the  
Chief Executive is satisfied that—
- “(a) the information held in respect of the accepted notice is  
not correct or is no longer current; or

- “(b) there has been a failure to comply with a requirement concerning the giving of security or indemnity or both; or
- “(c) there has been a failure to comply with an obligation under an indemnity given for an amount in respect of the accepted notice. 5
- “(2) Before suspending an accepted notice, the Chief Executive must—
- “(a) give written advice of the Chief Executive’s intention to suspend the accepted notice to— 10
- “(i) the person who gave the notice under section 136; or
- “(ii) if the Chief Executive has received notification of an assignment or transmission of the copyright to which the notice relates, the person notified as the current owner of the copyright; and 15
- “(b) include in or with the advice a statement of the Chief Executive’s reasons; and
- “(c) give the person to whom the advice is given not less than 20 working days to respond; and 20
- “(d) consider any response made by that person to the Chief Executive within the time allowed.
- “(3) The written advice under **subsection (2)** may be given—
- “(a) by delivering it to that person; or
- “(b) by posting it to the most recent address for that person that has been notified to the Chief Executive. 25

“**136B Notice of suspension**

- “(1) If the Chief Executive decides to suspend an accepted notice, the Chief Executive must give written notice of the suspension to the person referred to in **section 136A(2)(a)**. 30
- “(2) The notice of suspension may be given—
- “(a) by delivering it to that person; or
- “(b) by posting it to the most recent address for that person that has been notified to the Chief Executive.

**“136C Chief Executive may reinstate accepted notice**

The Chief Executive may reinstate an accepted notice suspended under **section 136A** if the Chief Executive is satisfied that the grounds for the suspension no longer apply.

**“136D Duration of accepted notice**

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**“(1)** An accepted notice remains in force for the period specified in the notice unless—

**“(a)** it is revoked by the claimant by notice in writing; or

**“(b)** the court orders, in proceedings under section 141(1), that the notice be discharged.

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**“(2)** However, an accepted notice is not in force during the period of any suspension under **section 136A.**”

**35 New heading and sections 144 to 144I inserted**

The following heading and sections are inserted after section 143:

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*“Enforcement powers of Customs officers*

**“144 Customs officer may seize goods in control of Customs**

**“(1)** A Customs officer may seize any imported goods that are in the control of the Customs if the officer has reasonable cause to believe that they are evidence of, or of significant relevance to the investigation of, an offence against section 131, 198, or 226C.

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**“(2)** The provisions of **sections 134T to 134W** apply with all necessary modifications in respect of any imported goods seized under this section and in applying those provisions every reference to the Chief Executive must be read as a reference to the Chief Executive of the New Zealand Customs Service.

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**“144A Chief Executive may require person to produce documents concerning goods in control of Customs**

**“(1)** If a Customs officer believes on reasonable grounds that goods in the control of the Customs have been imported in breach of this Act, the Chief Executive may, by notice in writing, require any person whom the Customs officer believes to have imported the goods, or any person whom the Customs officer believes to have acted as agent of that person, to produce to

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- a Customs officer for inspection any specified document or class of documents in the person's possession or control that the Customs officer considers relevant to determining whether the goods should be seized under **section 144** or released.
- “(2) A notice under this section requiring a person to produce any document must— 5
- “(a) be in the prescribed form; and
  - “(b) specify the Customs officer to whom the person must produce the document; and
  - “(c) specify a reasonable time and place at which the document must be produced; and 10
  - “(d) be served on the person by—
    - “(i) delivering it to him or her in person; or
    - “(ii) posting it to the person's address or delivering it to a box at a document exchange that the person is using at the time; or 15
    - “(iii) sending it by fax machine to a telephone number used by the person for the transmission of documents by fax; or
    - “(iv) if the person is a registered user of a Customs computerised entry processing system, by transmitting it by electronic means to the person in accordance with the normal procedure of operation of the relevant Customs computerised entry processing system in relation to that person. 20 25
- “(3) A Customs officer to whom a document is produced for inspection may do 1 or more of the following:
- “(a) inspect the document;
  - “(b) take extracts from the document;
  - “(c) make copies of the document. 30
- “**144B Chief Executive may require person to appear and answer questions concerning goods in control of Customs**
- “(1) If a Customs officer believes on reasonable grounds that goods in the control of the Customs have been imported in breach of this Act, the Chief Executive may, by notice in writing, require any person whom the Customs officer believes to have imported the goods, or any person whom the Customs officer believes to have acted as agent of that person, to appear before 35

- a Customs officer and to answer questions that the Customs officer considers relevant to determining whether the goods should be seized under **section 144** or released.
- “(2) A notice under this section requiring a person to appear before a Customs officer and to answer questions must — 5
- “(a) be in the prescribed form; and
- “(b) specify the Customs officer before whom the person must appear; and
- “(c) specify a reasonable time and place at which the person must appear; and 10
- “(d) be served on the person by—
- “(i) delivering it to him or her in person; or
- “(ii) posting it to the person’s address or delivering it to a box at a document exchange that the person is using at the time; or 15
- “(iii) sending it by fax machine to a telephone number used by the person for the transmission of documents by fax; or
- “(iv) if the person is a registered user of a Customs computerised entry processing system, by transmitting it by electronic means to the person in accordance with the normal procedure of operation of the relevant Customs computerised entry processing system in relation to that person. 20
- “**144C Customs officer may apply for production order** 25
- “(1) If a Customs officer believes on reasonable grounds that a person has in his or her possession, custody, or control, 1 or more documents that are evidence of, or may be of significant relevance to the investigation of, an offence against section 131, 198, or 226C in respect of imported goods, the Customs officer may apply to a District Court Judge for an order requiring the person to produce the documents for inspection by a Customs officer. 30
- “(2) An application by a Customs officer for an order under **subsection (1)** must be in writing, made on oath, and must— 35
- “(a) set out, in reasonable detail, the grounds for the application; and

“(b) provide details of the documents in respect of which the order is sought.

**“144D Judge may order documents to be produced**

“(1) If an application is made under **section 144C** and the District Court Judge is satisfied that there are reasonable grounds to believe that the person in respect of whom the order is sought has in that person’s possession, custody, or control, 1 or more documents that are evidence of, or may be of significant relevance to the investigation of, an offence against section 131, 198, or 226C in respect of imported goods, the District Court Judge may order the person to produce those documents for inspection by a Customs officer. 5 10

“(2) An order under **subsection (1)**—

“(a) must specify—

“(i) when the documents are to be produced for inspection; and 15

“(ii) the place where the documents are to be produced for inspection; and

“(iii) the Customs officer to whom the documents are to be produced for inspection; and 20

“(b) may be subject to any further terms and conditions the District Court Judge thinks fit.

**“144E Powers of Customs officer to whom documents produced**

A Customs officer to whom any document is produced for inspection under an order under **section 144D** may do 1 or more of the following: 25

“(a) inspect the document:

“(b) take extracts from the document:

“(c) make copies of the document.

**“144F Issue of search warrants to Customs officers**

“(1) A Customs officer may apply for a search warrant to search a place or thing. 30

“(2) Any District Court Judge, Justice, Community Magistrate, or Registrar (the **issuing officer**) may, on an application by a Customs officer, issue a warrant if the issuing officer is satisfied that there are reasonable grounds for believing that there is in, 35



on, over, or under the place or thing any thing that is evidence of, or of significant relevance to the investigation of, an offence against section 131, 198, or 226C in respect of imported goods.

“(3) **Sections 134G to 134S** apply with all necessary modifications in respect of every search warrant applied for and issued under this section. 5

“(4) **Sections 134T to 134W** apply with all necessary modifications in respect of any thing seized under a search warrant issued under this section, and in applying those provisions every reference to the Chief Executive must be read as a reference to the Chief Executive of the New Zealand Customs Service. 10

“**144G Privilege against self-incrimination**

“(1) A notice under **section 144A or 144B**, or an order under **section 144D**, does not affect the privilege against self-incrimination that an individual may have under section 60 of the Evidence Act 2006. 15

“(2) Any assertion of a privilege against self-incrimination must be based on section 60 of the Evidence Act 2006.

“(3) If any individual refuses to produce any information or document or to answer any question on the ground that it is a privileged communication under section 60 of the Evidence Act 2006, a Customs officer or a member of the police may apply to a District Court Judge for an order determining whether the claim of privilege is valid; and, in respect of any such application, the individual must offer sufficient evidence to enable the District Court Judge to assess whether self-incrimination is reasonably likely if the individual produced the information or the document or answered the question. 20 25

“(4) To avoid doubt, nothing in this section affects the application of section 65 of the Evidence Act 2006 (which relates to waiver of privilege) in respect of the privilege against self-incrimination that a person may have under section 60 of that Act. 30

“(5) Section 63 of the Evidence Act 2006 does not apply to an order under **section 144D**. 35

**“144H Other privileges**

- “(1) If, in a criminal proceeding, a person could assert a privilege under section 54 or 56 of the Evidence Act 2006 in respect of a communication or information, that person has the same privilege for the purposes of a notice issued under **section 144A or 144B**, an order made under **section 144D**, and a search warrant issued under **section 144F**. 5
- “(2) **Subsection (3)** applies to documents that are books of account or accounting records referred to in section 55(1) of the Evidence Act 2006. 10
- “(3) The application, by **subsection (1)**, of section 54 of the Evidence Act 2006 (which relates to the privilege for communications with legal advisers) does not prevent, limit, or affect—
- “(a) the issue of a notice under **section 144A** in respect of a document to which this subsection applies or the obligation to comply with such a notice; or 15
  - “(b) the making of an order under **section 144D** in respect of a document to which this subsection applies or the obligation to comply with such an order; or
  - “(c) the issue of a search warrant under **section 144F** in respect of a document to which this subsection applies; or 20
  - “(d) the admissibility, in a criminal proceeding under this Act, of any evidence that relates to the contents of a document to which this subsection applies obtained under a notice issued under **section 144A**, an order made under **section 144D**, or a search warrant issued under **section 144F**. 25

**“144I Offences**

- “(1) No person may, without reasonable excuse, refuse or fail to comply with a notice given under **section 144A**. 30
- “(2) No person who is required by a notice given under **section 144B** to appear before a Customs officer and to answer questions may, without reasonable excuse,—
- “(a) refuse or fail to appear before the Customs officer in accordance with the notice; or 35
  - “(b) refuse to answer any question.

- “(3) No person may, without reasonable excuse, refuse or fail to comply with an order made under **section 144D**.
- “(4) Every person who breaches any of **subsections (1) to (3)** commits an offence and is liable on summary conviction,—
- “(a) in the case of an individual, to imprisonment for a term not exceeding 6 months or to a fine not exceeding \$10,000; and
- “(b) in the case of a body corporate, to a fine not exceeding \$50,000.”
- 36 New heading inserted above section 145** 10  
The following heading is inserted above section 145: “*Miscellaneous matters*”.
- 37 Protection of persons acting under authority of Act**
- (1) Section 146 is amended by inserting “nor any person who assists a Customs officer” after “Chief Executive nor any Customs officer”. 15
- (2) Section 146 is amended by inserting “or any person who assists a Customs officer” after “Chief Executive or any Customs officer”.
- 38 New sections 188 to 188B substituted** 20
- (1) Section 188 is repealed and the following sections are substituted:
- “188 Free public playing or showing of communication work**
- “(1) The free public playing or showing of a communication work (other than a communication work to which **section 188A** applies) does not infringe a right under this Part in relation to a performance or recording included in—
- “(a) the communication work; or
- “(b) any sound recording or film that is played or shown in public by reception of the communication work. 30
- “(2) For the purposes of this section, the public playing or showing of a communication work is not free if—
- “(a) the audience has paid for admission to—

- “(i) the place where the communication work is played or shown (which in this section is called the **venue**); or
- “(ii) any place of which the venue is a part; or
- “(b) goods or services are supplied at the venue or a place of which it forms part at prices that— 5
- “(i) are substantially attributable to the facilities afforded for hearing or seeing the communication work; or
- “(ii) exceed those usually charged there and that are partly attributable to those facilities; or 10
- “(c) the venue is a hotel, motel, camping ground, or any other place that admits persons for a fee for the purposes of temporary accommodation, and the audience is made up of persons residing at that hotel, motel, camping ground, or other place. 15
- “(3) For the purposes of **subsection (2)(a)**, the following persons must not be treated as having paid for admission to the venue:
- “(a) a person admitted as a resident or an inmate of a place (other than a hotel, motel, camping ground, or any other place to which **subsection (2)(c)** applies): 20
- “(b) a person admitted as a member of a club or society where the payment is only for membership of the club or society and the provision of facilities for hearing or seeing communication works is only incidental to the main purposes of the club or society. 25
- “188A Free public playing or showing of communication work that is simultaneous with reception**
- “(1) This section applies to the playing or showing of a communication work that— 30
- “(a) is made for reception in the area in which it is played or shown; and
- “(b) is not a communication work for which a subscription fee must be paid in order to receive it; and
- “(c) is played or shown simultaneously upon reception of the communication work. 35

- “(2) The free public playing or showing of a communication work to which this section applies does not infringe a right under this Part in relation to a performance or recording included in—
- “(a) the communication work; or
  - “(b) any sound recording or film that is played or shown in public by reception of the communication work. 5
- “(3) For the purposes of this section, the public playing or showing of a communication work is not free if—
- “(a) the audience has paid for admission to the place where the communication work is played or shown (which in this section is called the **venue**), including any place of which the venue is a part; or 10
  - “(b) goods or services are supplied at the venue or a place of which it forms part at prices that—
    - “(i) are substantially attributable to the facilities afforded for hearing or seeing the communication work; or 15
    - “(ii) exceed those usually charged there and that are partly attributable to those facilities.
- “(4) For the purposes of **subsection (3)(a)**, the following persons must not be treated as having paid for admission to the venue: 20
- “(a) a person admitted as a resident or an inmate of a place (including a person residing in a hotel, motel, camping ground, or any other place that admits persons for a fee) for the purpose of temporary accommodation: 25
  - “(b) a person admitted as a member of a club or society where the payment is only for membership of the club or society and the provision of facilities for hearing or seeing communication works is only incidental to the main purposes of the club or society. 30

**“188B Assessment of damages for infringement of rights under this Part in relation to performance or recording**

Where the making of a communication work is an infringement of rights under this Part in relation to a performance or recording, the fact that the work was heard or seen in public by the reception of the communication work must be taken into account in assessing the damages for the infringement.” 35

- (2) Section 85 of the Copyright (New Technologies) Amendment Act 2008 is consequentially repealed.

**39 Regulations**

Section 234 is amended by repealing paragraph (m) and substituting the following paragraph: 5

“(m) prescribing forms for the purposes of this Act; and those regulations may require—

“(i) the inclusion in, or attachment to, forms of specified information or documents:

“(ii) forms to be signed by specified persons:” 10

**40 Transitional provision relating to sections 144, 144C, 144D, and 144F**

**Sections 144, 144C, 144D, and 144F** (as inserted by **section 35** of this Act) apply in respect of an offence against section 226C only after the commencement of section 90 of the Copyright (New Technologies) Amendment Act 2008. 15

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