

THE TRADE DESCRIPTIONS ACT, 1977

No. 9 of 1977

Date of Assent: 13th July, 1977

Date of Commencement: By Notice

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An Act of Parliament to replace the Merchandise Marks Act by fresh provisions prohibiting misdescriptions of goods, services, accommodation and facilities provided in the course of trade; to prohibit false or misleading indications as to the price of goods; to confer powers to require information or instructions relating to goods to be marked on or to accompany the goods or to be included in advertisements; and for purposes incidental to and connected with the foregoing

ENACTED by the Parliament of Kenya, as follows:—

PART I—PRELIMINARY

1. This Act may be cited as the Trade Descriptions Act, 1977, and shall come into operation on such date as the Minister may, by Notice in the Gazette, appoint.

commencement.
Short title and

2. (1) In this Act, unless the context otherwise requires—
 “advertisement” includes a catalogue, a circular and a price list;

General
interpretation.

“goods” includes ships and aircraft, things attached to land and growing crops;

Cap. 513.

“Inspector” means an inspector of weights and measures appointed under section 27 of the Weights and Measures Act;

“the Minister” means the Minister for the time being responsible for matters relating to commerce;

“premises” includes any place and any stall, vehicle, ship, or aircraft;

“ship” includes any boat and any other description of vessel used in navigation;

“trade” includes business and profession.

(2) For the purposes of this Act—

(a) a person exposing goods for supply, or having goods in his possession for supply, shall be deemed to offer to supply them;

(b) a trade description or statement published in any newspaper, book or periodical, or in any film or sound or television broadcast, shall not be deemed to be a trade description applied or statement made in the course of a trade unless it is or forms part of an advertisement.

PART II—FALSE TRADE DESCRIPTIONS AND OTHER
MISSTATEMENTS

Prohibition of
false trade
descriptions.

3. Any person who, in the course of any trade—

(a) applies a false trade description to any goods; or

(b) supplies or offers to supply any goods to which a false trade description is applied,

shall be guilty of an offence.

False or
misleading
indications
as to price.

4. (1) If any person offering to supply goods of any description gives, by whatever means, any false indication to the effect that the price at which the goods are offered is equal to or less than—

(a) a recommended price; or

(b) the price at which the goods, or goods of the same description, were previously offered by him,

or is less than such a price by a specified amount, he shall be guilty of an offence.

(2) If any person offering to supply any goods gives, by whatever means, any indication likely to be taken as an indication that the goods are being offered at a price less than that at which they are in fact offered, he shall be guilty of an offence.

(3) For the purpose of this section—

(a) an indication that goods were previously offered at a higher price or at a particular price—

(i) shall be treated as an indication that they were so offered by the person giving the indication, unless it is expressly stated that they were so offered by others and it is not expressed or implied that they were, or might have been, so offered also by that person; and

(ii) shall be treated, unless the contrary is expressed, as an indication that they were so offered within the preceding six months for a continuous period of not less than twenty-eight days and where, under this subparagraph, an indication is so treated, the burden of proving that the indication so treated was not false shall lie upon the person by whom the indication was given;

(b) an indication as to a recommended price—

(i) shall be treated, unless the contrary is expressed, as an indication that it is a price recommended by the manufacturer or producer; and

(ii) shall be treated, unless the contrary is expressed, as an indication that it is a price recommended generally for supply by retail in the area where the goods are offered;

(c) anything likely to be taken as an indication as to a recommended price or as to the price at which goods were previously offered shall be treated as such an indication;

(d) a person advertising goods as available for supply shall be taken as offering to supply them.

False representation as to the supply of goods or services.

False or misleading statements as to services, etc.

5. If any person, in the course of any trade, gives, by whatever means, any false indication, direct or indirect, that any goods or services supplied by him are of a kind supplied to any person he shall be guilty of an offence.

6. (1) It shall be an offence for any person, in the course of any trade—

(a) to make a statement which he knows to be false; or

(b) recklessly to make a statement which is false.

as to any of the following matters—

(i) the provision in the course of any trade of any services, accommodation or facilities;

(ii) the nature of any services, accommodation or facilities provided in the course of any trade;

(iii) the time at which, manner in which, or persons by whom, any services, accommodation, or facilities are so provided;

(iv) the examination, approval or evaluation, by any person of any services, accommodation or facilities so provided;

(v) the location or amenities of any accommodation so provided.

(2) For the purposes of this section—

(a) anything (whether or not a statement as to any of the matters specified in subsection (1) of this section) likely to be taken for such a statement as to any of those matters as would be false shall be deemed to be a false statement as to that matter; and

(b) a statement made regardless of whether it is true or false shall be deemed to be made recklessly, whether or not the person making it had reasons for believing that it might be false.

(3) In relation to any services consisting of or including the application of any treatment or process or the carrying out of any repair, the matters specified in subsection (1) of this section shall be taken to include the effect of the treatment, process or repair.

(4) Where it appears to the Minister that it would be in the interest of persons for whom any services, accommodation or facilities are provided in the course of any trade that any

expressions used with respect thereto should be understood as having any definite meanings, the Minister may by order in the Gazette assign such meanings to those expressions when used as, or as part of, such statements as are mentioned in this section with respect to those services, accommodation or facilities; and where such a meaning is so assigned to an expression it shall be deemed for the purposes of this Act to have that meaning when so used.

(5) In this section "false" means false to a material degree and "services" does not include anything done under a contract of service.

7. Where a false trade description is applied to any goods outside Kenya and the false indication, or one of the false indications, given, or likely to be taken as given, thereby is an indication of the place of manufacture, production, processing or reconditioning of the goods or any part thereof, the importation of the goods shall be prohibited and any person or persons handling or dealing in such goods shall be guilty of an offence.

Prohibition of importation of goods bearing false indication of origin.

PART III—DEFINITION AND EXPANSION OF TERMS

8. (1) For the purposes of this Act, "trade description" means any indication, direct or indirect, and by whatever means given, of any of the following matters with respect to any goods or parts of goods —

"Trade description" defined.

- (a) identity, quantity, size or gauge;
- (b) method of manufacture, production, processing or reconditioning;
- (c) composition;
- (d) fitness for purpose, strength, performance, behaviour or accuracy;
- (e) any physical characteristics not included in the preceding paragraphs;
- (f) testing by any person and results thereof;
- (g) approval by any person or conformity with a type approved by any person;
- (h) place or date of manufacture, production, processing or reconditioning;
- (i) person by whom manufactured, produced, processed or reconditioned;
- (j) other history including previous ownership or use.

(2) The matters specified in subsection (1) of this section shall be taken—

(a) in relation to any animal, to include sex, breed or cross, fertility and soundness;

(b) in relation to any semen, to include the identity and characteristics of the animal from which it was taken and measure of dilution.

(3) In this section “quantity” includes length, width, height, area, volume, capacity, weight and number.

(4) Notwithstanding the previous provisions of this section, any description or mark applied in pursuance of the Seeds and Plant Varieties Act, shall be deemed not to be a trade description for the purposes of this Act.

Cap. 326.

“False trade description” defined.

9. For the purposes of this Act, “false trade description” includes—

(a) any trade description which is false to a material degree;

(b) any trade description which, though not false, is misleading, that is to say, is likely to be taken for such an indication of any of the matters specified in section 8 of this Act as would be false to a material degree;

(c) anything which, though not a trade description, is likely to be taken for an indication of any of those matters and, as such an indication, would be false to a material degree;

(d) any false indication, or anything which would be false which is likely to be taken as an indication, that any goods comply with a standard specified or recognized by, or implied by the approval of, any person, where there is no such person or no standard so specified, recognized or implied.

Applying a trade description to goods.

10. (1) For the purposes of this Act, a person shall be taken to apply a trade description to goods if he—

(a) affixes or annexes it to, or in any manner makes it on, or incorporates it with—

(i) the goods themselves; or

(ii) anything in, on, or with which the goods are supplied; or

(b) places the goods in, on, or with anything which the trade description has been affixed or annexed to, marked on, or incorporated with, or places any such thing with the goods; or

(c) uses the trade description in any manner likely to be taken as referring to the goods.

(2) An oral statement may amount to the use of a trade description.

(3) Where goods are supplied in pursuance of a request in which a trade description is used and the circumstances are such as to make it reasonable to infer that the goods are supplied as goods corresponding to that trade description, the person supplying the goods shall be deemed to have applied that trade description to the goods.

11. (1) Where in any advertisement a trade description is used in relation to any class of goods the trade description shall be taken as referring to all goods of the class, whether or not in existence at the time the advertisement is published—

(a) for the purpose of determining whether an offence has been committed under paragraph (a) of section 3 of this Act; and

(b) where goods of the class are supplied or offered to be supplied by a person publishing or displaying the advertisement, also for the purpose of determining whether an offence has been committed under paragraph (b) of that section.

(2) In determining for the purposes of this section whether any goods are of a class to which a trade description used in an advertisement relates, regard shall be had not only to the form and content of the advertisement but also to the time, place, manner and frequency of its publication and all other matters making it likely or unlikely that a person to whom the goods are supplied would think of the goods as belonging to the class to which the trade description is used in the advertisement.

(3) Where it appears to the Minister necessary or expedient in the interest of persons to whom any goods are to be supplied that any description of advertisements of the goods should contain or refer to any information (whether or

Trade
descriptions
used in
advertisements.

not amounting to or including a trade description) relating to the goods, the Minister may, by order in the Gazette, impose requirements as to the inclusion of that information, or of an indication of the means by which it may be obtained, in such description of advertisements of the goods as may be specified in the order.

(4) An order under subsection (3) of this section may specify the form and manner in which any information or indication is to be included in advertisements of any description and may make different provisions for different circumstances.

(5) Where an advertisement of any goods to be supplied in the course of any trade fails to comply with any requirement imposed under subsection (3) of this section, any person who publishes the advertisement shall be guilty of an offence.

Definition orders.

12. Where it appears to the Minister—

(a) that it would be in the interest of persons to whom any goods are supplied; or

(b) that it would be in the interest of persons by whom any goods are exported and would not be contrary to the interest of persons to whom such goods are supplied in Kenya,

that any expressions used in relation to the goods should be understood as having definite meanings, the Minister may, by order in the Gazette, assign such meanings either—

(i) to those expressions when used in the course of a trade as, or as part of, a trade description applied to the goods; or

(ii) to those expressions when so used in such circumstances as may be specified in the order,

and where a meaning is so assigned to an expression it shall be deemed for the purposes of this Act to have that meaning when used as mentioned in paragraph (i) or (ii) of this section.

Marking orders.

13. (1) Where it appears to the Minister necessary or expedient in the interest of persons to whom any goods are supplied that the goods should be marked with or accompanied by any information (whether or not amounting to or including a trade description) or instruction relating to

the goods, the Minister may, by order in the Gazette, impose requirements for securing that the goods are so marked or accompanied, and regulate or prohibit the supply of goods with respect to which the requirements are not complied with; and the requirements may extend to the form and manner in which the information or instruction is to be given.

(2) Where an order under this section is in force with respect to goods of any description, any person who, in the course of any trade, supplies or offers to supply goods of that description in contravention of the order shall be guilty of an offence.

(3) An order under this section may make different provisions for different circumstances and may, in the case of goods supplied in circumstances where the information or instruction required by the order would not be conveyed until after delivery, require the whole or part thereof to be also displayed near the goods.

14. (1) A requirement imposed by an order under section 11 or 13 of this Act in relation to any goods shall not be confined to goods manufactured or produced in any one country, or any one of a number of countries, or to goods manufactured or produced outside any one or more countries, unless—

- (a) it is imposed with respect to a description of goods in the case of which the Minister is satisfied that the interest of persons in Kenya to whom goods of that description are supplied will be sufficiently protected if the requirement is also confined; and
- (b) the Minister is satisfied that the order is compatible with the international obligations of Kenya.

(2) Where any requirement with respect to any goods are for the time being imposed by an order under section 11 or 13 of this Act and the Minister is satisfied, on the representation of persons appearing to the Minister to have a substantial interest in the matter, that greater hardship would be caused to such persons if the requirements continued to apply than is justified by the interest of persons to whom the goods concerned are supplied, the power of the Minister to relax or discontinue the requirements by a further order may be exercised without the consultation and notice required by subsection (2) of section 30 of this Act.

**Provisions
supplemental
to sections
11 and 13.**

PART IV—GENERAL PROVISIONS AS TO OFFENCES

General
penalty.

15. A person guilty of an offence under this Act shall be liable to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding two years, or to both such fine and imprisonment.

Offences by
corporations.

16. Where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent and connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Accessories to
offences
committed
abroad.

17. Any person who, in Kenya, assists in or induces the commission in any other country of an act in respect of goods which, if the act were committed in Kenya, would be an offence under section 3 of this Act, shall be guilty of an offence, but only if—

(a) the false trade description concerned is an indication (or anything likely to be taken as an indication) that the goods or any part thereof were manufactured, produced, processed or reconditioned in Kenya: or

(b) the false description concerned—

(i) consists of or comprises an expression (or anything likely to be taken as an expression) to which a meaning is assigned by an order made under paragraph (b) of section 12 of this Act; and

(ii) where that meaning is so assigned only in circumstances specified in the order, the trade description is used in those circumstances.

18. Where the commission by any person of an offence under this Act is due to the act or default of some other person, that other person shall be guilty of the offence, and a person may be charged with and convicted of the offence by virtue of this section whether or not proceedings are taken against the first-mentioned person.

Offences due to fault of other person.

PART V—DEFENCES

19. (1) In any proceedings for an offence under this Act it shall, save as hereinafter provided, be a defence for the person charged to prove—

Defence of mistake, accident, etc.

- (a) that the commission of the offence was due to a mistake, or to reliance on information supplied to him, or to the act or default of another person, or to an accident or other cause beyond his control; and
- (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by himself or any person under his control.

(2) Where a defence under subsection (1) of this section involves the allegation that the commission of the offence was due to the act or default of another person or to information supplied by another person, the person charged shall not, without the leave of the court, be entitled to rely on that defence unless, within a period ending seven clear days before the hearing, he has served on the prosecutor a notice in writing giving such information identifying or assisting in the identification of that other person as was then in his possession.

(3) In any proceedings for an offence under this Act of supplying or offering to supply goods to which a false trade description is applied, it shall be a defence for the person charged to prove that he did not know, and could not with reasonable diligence have ascertained, that the goods did not conform to the description or that the description had been applied to the goods.

20. In proceedings for an offence under this Act committed by the publication of an advertisement, it shall be a defence for the person charged to prove that he is a person whose business it is to publish, or to arrange for the publication of, advertisements and that he received the advertisement

Innocent publication of advertisement.

for publication in the ordinary course of business and did not know and had no reason to suspect that its publication would amount to an offence under this Act.

PART VI—ENFORCEMENT

Powers of
Inspectors.

21. (1) An Inspector, at all reasonable hours and on production, if required, of his credentials, may—

- (a) for the purpose of ascertaining whether any offence under this Act has been committed, inspect any goods and enter any premises other than premises used only as a dwelling;
- (b) if he has reasonable cause to suspect that an offence under this Act has been committed and for the purpose of ascertaining whether it has been committed, require any person carrying on a trade, or employed in connexion with a trade, to produce any books or documents relating to the trade and may take copies of, or of any entry in, any such book or document;
- (c) if he has reasonable cause to believe that an offence under this Act has been committed, seize and detain any goods for the purpose of ascertaining, by testing or otherwise, whether the offence has been committed;
- (d) seize and detain any goods or documents which he has reason to believe may be required as evidence in proceedings for an offence under this Act;
- (e) for the purpose of exercising his powers under this subsection but only if and to the extent that it is reasonably necessary in order to secure that the provisions of this Act and of any order made thereunder are duly observed, require any person having authority to do so to break open any container or open any vending machine and, if that person does not comply with the requirement, the Inspector may do so himself.

(2) An Inspector seizing any goods or documents under this section shall so inform the person from whom they are seized and, in the case of goods seized from a vending machine, the person whose name and address are stated on

the machine as being those of the proprietor or, if no name and address are so stated, the occupier of the premises on which the machine stands or to which it is affixed.

(3) If a magistrate, on sworn information in writing—

(a) is satisfied that there is reasonable ground to believe either—

(i) that any goods, books or documents which an Inspector has power under this section to inspect are on any premises and that their inspection is likely to disclose evidence of the commission of an offence under this Act; or

(ii) that any offence under this Act has been, is being, or is about to be committed on any premises; and

(b) is also satisfied either—

(i) that admission to the premises has been or is likely to be refused and that notice of intention to apply for a warrant under this section has been given to the occupier; or

(ii) that an application for admission, or the giving of such a notice, would defeat the object of the entry, or that the premises are unoccupied, or that the occupier is temporarily absent and it might defeat the object of the entry to await his return,

the magistrate may by warrant under his hand, which shall continue in force for a period of one month, authorize an Inspector to enter the premises, if need be by force.

(4) An Inspector entering any premises by virtue of this section may take with him such other persons and such equipment as may appear to him to be necessary; and on leaving any premises which he has so entered by virtue of a warrant he shall, if the premises are unoccupied or the occupier is temporarily absent, leave them as effectively secured against trespassers as he found them.

(5) If any person discloses to any other person—

(a) any information with respect to any manufacturing process or trade secret obtained by him in premises which he has entered by virtue of this section; or

(b) any information obtained by him in pursuance of this Act,

he shall be guilty of an offence unless the disclosure was made in or for the purposes of the performance by him or any other person of functions under this Act.

(6) If any person who is not an Inspector purports to act as such under this section he shall be guilty of a cognizable offence.

(7) Nothing in this section shall be taken to compel the production by an advocate of a document containing a privileged communication made by or to him in that capacity or to authorize the taking possession of any such document which is in his possession.

**Obstruction of
Inspector.**

22. (1) Any person who—

(a) wilfully obstructs an Inspector acting in pursuance of this Act; or

(b) wilfully fails to comply with any requirement properly made to him by an Inspector under section 21 of this Act; or

(c) without reasonable cause fails to give an Inspector so acting any other assistance or information which the Inspector may reasonably require of him for the purposes of this Act,

shall be guilty of an offence.

(2) Any person who, in giving any such information as is mentioned in subsection (1) of this section, makes any statement which he knows to be false shall be guilty of an offence.

(3) Nothing in this section shall be construed as requiring a person to answer any question or give any information if to do so might incriminate him.

**Notice of
tests.**

23. Where any goods seized by an Inspector under this Act are submitted to any test, the Inspector shall inform the person mentioned in subsection (2) of section 21 of this Act of the result of such test, and shall, where as a result of the test proceedings for an offence under this Act are instituted against any person, allow that person to have the goods tested on his own behalf if it is reasonably practicable to do so.

24. (1) The Minister may by regulations provide that certificates issued by such persons as may be specified in the regulations in relation to such matters as may be so specified shall, subject to this section, be received in evidence of those matters in any proceedings under this Act.

Evidence by
certificate.

(2) A certificate under regulations made in pursuance of this section shall not be received in evidence—

- (a) unless the party against whom it is to be given in evidence has been served with a copy of the certificate not less than seven days before the hearing; or
- (b) if that party has, not less than three days before the hearing, served on the other party a notice requiring the attendance of the person issuing the certificate.

(3) For the purposes of this section, any document purporting to be a certificate shall be deemed to be such unless the contrary is shown.

PART VII—MISCELLANEOUS

25. (1) The fact that a trade description is, or is part of, a trade mark within the meaning of the Trade Marks Act does not prevent it from being a false trade description when applied to any goods, except where the following conditions are satisfied—

Trade marks
containing
trade
descriptions.
Cap. 506.

- (a) that it could have been lawfully applied to the goods if this Act had not been passed; and
- (b) that at the relevant date the trade mark either is registered under the Trade Marks Act or is in use to indicate a connexion in the course of trade between such goods and the proprietor of the trade mark; and
- (c) that the trade mark as applied is used to indicate such a connexion between the goods and the proprietor of the trade mark or a person registered under section 31 of the Trade Marks Act as a registered user of the trade mark; and
- (d) that the person who is the proprietor of the trade mark is the same person as, or a successor in title of, the proprietor at the relevant date.

(2) In this section, "relevant date" means the date on which this Act is published in the Gazette.

Saving for
civil rights.

26. A contract for the supply of goods shall not be void or unenforceable by reason only of a contravention of any provision of this Act.

Country of
origin.

27. (1) For the purposes of this Act, goods shall be deemed to have been manufactured or produced in the country in which they last underwent a treatment or process resulting in a substantial change.

(2) The Minister may, by order in the Gazette, specify—

(a) in relation to any description of goods, what treatment or process is to be regarded for the purposes of this section as resulting or not resulting in a substantial change;

(b) in relation to any description of goods of which different parts were manufactured or produced in different countries, or of goods assembled in a country different from that in which their parts were manufactured or produced, in which of those countries the goods are to be regarded for the purposes of this Act as having been manufactured or produced.

Market research
experiments.

28. (1) In this section, "market research experiment" means any activities conducted for the purpose of ascertaining the opinion of persons (in this section referred to as "participants") of—

(a) any goods; or

(b) anything in, on, or with which, the goods are supplied;
or

(c) the appearance or any other characteristic of the goods or of any such thing; or

(d) the name or description under which the goods are supplied.

(2) This section applies to any market research experiment with respect to which the following conditions are satisfied—

(a) that any participant to whom any goods are supplied in the course of the experiment is informed, at or before the time at which they are supplied to him,

that they are supplied for such a purpose as is mentioned in subsection (1) of this section; and

- (b) that no consideration in money or money's worth is given by a participant for the goods or any goods supplied to him for comparison.

(3) Neither section 3 nor section 13 of this Act shall apply in relation to goods supplied or offered to be supplied, whether to a participant or any other person, in the course of a market research experiment to which this section applies.

29. The Minister may, by order in the Gazette, exempt any goods which are intended for despatch to a destination outside Kenya from any or all of the provisions of this Act.

Exemption of goods for export.

30. (1) The Minister shall not make any order under this Act which relates to agricultural or horticultural produce, whether processed or not, or to animal feeding stuffs or ingredients thereof, or to fertilizers, or to anything used as a pesticide or for similar purposes, without the concurrence of the Minister for the time being responsible for matters relating to agriculture.

General provisions relating to orders.

(2) The following provisions shall, save as otherwise expressly provided, apply to the making by the Minister of any order under this Act—

- (a) before making the order the Minister shall consult with such organizations as appears to him to be representative of interests substantially affected by it, and shall publish, in such manner as the Minister thinks appropriate, notice of his intention to make the order; and
- (b) the order shall not be made until the expiration of a period of twenty-eight days from the publication of the notice and may be then made with such modifications (if any) as the Minister may think appropriate having regard to any representations received by him;
- (c) notwithstanding any other written law, no order shall be made with retrospective application.

31. (1) Where any goods are seized and detained under section 21 of this Act, they shall be returned, less any portion thereof which has been reasonably utilized for the purpose of

Disposal of goods seized.

any test, to the person from whom they were seized within a period of three months after the date of seizure unless within such period some person is charged with an offence under this Act and it is alleged that such offence was committed in relation to or in connexion with such goods.

(2) Where a prosecution for an offence under this Act is commenced within the period mentioned in subsection (1) of this section, and any person is convicted of that offence, the court may order that any goods seized and detained under section 21 of this Act in relation to or in connexion with which such offence was committed shall be forfeited to the Government, but in the absence of any such order such goods shall be returned at the conclusion of the proceedings to the person from whom they were seized.

Repeal of
Cap. 505.

32. The Merchandise Marks Act is hereby repealed.