

## WESTERN AUSTRALIA

ANNO QUINQUAGESIMO SECUNDO

VICTORIÆ REGINÆ

No. 6

An Act to consolidate and amend the Law relating to  
Fraudulent Marks on Merchandise.

[Assented to 26th November, 1888.]

**B**E it enacted by His Excellency the Governor of Western Australia and its Dependencies, by and with the advice and consent of the Legislative Council thereof, as follows:—

1. This Act may be cited as 'The Merchandise Marks Act, 1888.'

Short title

2. (1) Every person who—

Offences as to  
trade marks and  
trade descriptions

(a) Forges any trade mark ; or

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

(c) Makes any die, block, machine, or other instrument for the purpose of forging, or of being used for forging, a trade mark ; or

(d) Applies any false trade description to goods ; or

(e) Disposes of or has in his possession any die, block, machine, or other instrument for the purpose of forging a trade mark ; or

(f) Causes any of the things above mentioned to be done,

shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be guilty of an offence against this Act.

(2) Every person who sells, or exposes for, or has in his possession for sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied, or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied, as the case may be, shall be guilty of an offence against this Act, unless he prove—

(a) That having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade mark, mark, or trade description ; and

(b) That on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things ; or

(c) That otherwise he had acted innocently.

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(3) Every person guilty of an offence against this Act shall be liable—

(I.) On conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding two years, or to fine, or to both imprisonment and fine; or

(II.) On summary conviction to imprisonment, with or without hard labour, for a term not exceeding four months, or to a fine not exceeding Twenty pounds, and in the case of a second or subsequent conviction to imprisonment, with or without hard labour, for a term not exceeding six months, or to a fine not exceeding Fifty pounds; and

(III.) In any case to forfeit to Her Majesty every chattel, article, instrument, or thing by means of or in relation to which the offence has been committed.

(4) The Court before whom any person is convicted under this section may order any forfeited articles to be destroyed or otherwise disposed of as the Court thinks fit.

(5) If any person feels aggrieved by any conviction made by a Court of summary jurisdiction, he may appeal therefrom to the Supreme Court.

(6) Any person charged with an offence under this section before a Court of summary jurisdiction shall, on appearing before the Court, and before the charge is gone into, be informed of his right to be tried on indictment, and if he requires, be so tried accordingly.

## Definitions

3. (1) For the purposes of this Act—

The expression 'trade mark' means a trade mark registered in the register of trade marks kept under 'The Patents, Designs, and Trade Marks Act, 1884,' and includes any trade mark which, either with or without registration, is protected by law in any British possession or Foreign State to which the provisions of the one hundred and third section of the Imperial Statute known as 'The Patents, Designs, and Trade Marks Act, 1883,' are, under Order in Council, for the time being applicable:

The expression 'trade description' means any description, statement, or other indication direct or indirect:

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

(b) As to the place or country in which any goods were made or produced, or

(c) As to the mode of manufacturing or producing any goods, or

(d) As to the material of which any goods are composed, or

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

and the use of any figure, word, or mark which, according

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to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of this Act.

The expression 'false trade description' means a trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect, and the fact that a trade description is a trade mark, or part of a trade mark, shall not prevent such trade description being a false trade description within the meaning of this Act.

The expression 'goods' means anything which is the subject of trade, manufacture, or merchandise.

The expressions 'person,' 'manufacturer,' 'dealer' or 'trader,' and 'proprietor,' include any body of persons corporate or unincorporate.

The expression 'name' includes any abbreviation of a name.

The expression 'Collector of Customs' shall include a Sub-Collector of Customs, except for the purpose of making regulations as in the 14th section mentioned.

(2) The provisions of this Act respecting the application of a false trade description to goods shall extend to the application to goods of any such figures, words, or marks, or arrangement or combination thereof, whether including a trade mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are.

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

- (a) Are not a trade mark, or part of a trade mark, and
- (b) Are identical with, or a colourable imitation of the name or initials of a person carrying on business in connection with goods of the same description, and not having authorised the use of such name or initials, and
- (c) Are either those of a fictitious person or of some person not *bonâ fide* carrying on business in connection with such goods.

4. A person shall be deemed to forge a trade mark who either—

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

Forging trade  
mark

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

and any trade mark or mark so made or falsified is in this Act referred to as a forged trade mark.

Provided that in any prosecution for forging a trade mark the burden of proving the assent of the proprietor shall lie on the defendant.

Applying marks  
and descriptions

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

(a) Applies it to the goods themselves ; or

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

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

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

(2) The expression 'covering' includes any stopper, case, bottle, vessel, box, cover, capsule, case, frame, or wrapper ; and the expression 'label' includes any band or ticket.

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

(3) A person shall be deemed to falsely apply to goods a trade mark or mark who without the assent of the proprietor of a trade mark applies such trade mark, or a mark so nearly resembling it as to be calculated to deceive.

Provided that in any prosecution for falsely applying a trade mark or mark to goods, the burden of proving the assent of the proprietor shall lie on the defendant.

Exemption of  
certain persons  
employed in  
ordinary course  
of business

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

(a) That in the ordinary course of his business he is employed, on behalf of other persons, to make dies, blocks, machines, or other instruments for making, or being used in making, trade marks, or as the

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case may be, to apply marks or descriptions to goods, and that in the case which is the subject of the charge he was so employed by some person resident in the Colony, and was not interested in the goods by way of profit or commission, dependent on the sale of such goods; and

- (b) That he took reasonable precautions against committing the offence charged; and
- (c) That he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark, or trade description; and
- (d) That he gave to the prosecutor all the information in his power with respect to the persons on whose behalf the trade mark, mark, or trade description was applied—

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

7. Where a watch case has thereon any words or marks which constitute, or are by common repute considered as constituting, a description of the country in which the watch was made, and the watch bears no description of the country where it was made, those words or marks shall *prima facie* be deemed to be a description of that country within the meaning of this Act, and the provisions of this Act, with respect to goods to which a false trade description has been applied, and with respect to selling or exposing for or having in possession for sale, or any purpose of trade or manufacture, goods with a false trade description, shall apply accordingly, and for the purposes of this section the expression 'watch' means all that portion of a watch which is not the watch case.

Application of  
Act to watches

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

Trade mark how  
described in  
pleading

9. In any prosecution for an offence against this Act,—

Rules as to evi-  
dence

(1) A defendant, and his wife, or her husband, as the case may be, may, if the defendant thinks fit, be called as a witness, and, if called, shall be sworn and examined, and may be cross-examined and re-examined in like manner as any other witness.

(2) In the case of imported goods, evidence of the port of shipment shall be *prima facie* evidence of the place or country in which the goods were made or produced.

10. Any person who, being within the Colony, procures, counsels, aids, abets, or is accessory to the commission, without the Colony, of any act, which, if committed in the Colony, would under this Act be a misdemeanour, shall be guilty of that misdemeanour as a principal, and be liable to be indicted, proceeded against, tried, and convicted in any district or place in the Colony in which he may be as if the misdemeanour had been there committed.

Punishment of  
accessories

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Search Warrant

11.-(1) When, upon information of an offence against this Act, a justice has issued either a summons requiring the defendant charged by such information to appear to answer to the same, or a warrant for the arrest of such defendant, and either the said justice on or after issuing such summons or warrant, or any other justice, is satisfied by information on oath that there is reasonable cause to suspect that any goods or things by means of or in relation to which such offence has been committed are in any house or premises of the defendant, or otherwise in his possession or under his control in any place, such justice may issue a warrant under his hand by virtue of which it shall be lawful for any constable named or referred to in the warrant to enter such house, premises, or place at any reasonable time by day, and to search there for and seize and take away those goods or things; and any goods or things seized under any such warrant shall be brought before a Court of summary jurisdiction for the purpose of its being determined whether the same are or are not liable to forfeiture under this Act.

(2) If the owner of any goods or things which, if the owner thereof had been convicted, would be liable to forfeiture under this Act, is unknown or cannot be found, an information or complaint may be laid for the purpose only of enforcing such forfeiture, and a Court of summary jurisdiction may cause notice to be advertised stating that, unless cause is shown to the contrary at the time and place named in the notice, such goods or things will be forfeited, and at such time and place the Court, unless the owner or any person on his behalf, or other person interested in the goods or things, shows cause to the contrary, may order such goods or things or any of them to be forfeited.

(3) Any goods or things forfeited under this section, or under any other provision of this Act, may be destroyed or otherwise disposed of, in such manner as the Court by which the same are forfeited may direct, and the Court may, out of any proceeds which may be realised by the disposition of such goods (all trade marks and trade descriptions being first obliterated), award to any innocent person any loss he may have innocently sustained in dealing with such goods.

Costs of defence  
or prosecution

12. On any prosecution under this Act the Court may order costs to be paid to the defendant by the prosecutor or to the defendant, having regard to the information given by and the conduct of the defendant and prosecutor respectively.

Limitation of  
prosecution

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

Prohibition on  
importation

14. Whereas it is expedient to make further provision for prohibiting the importation of goods which, if sold, would be liable to forfeiture under this Act: be it therefore enacted as follows:—

(1) All such goods, and also all goods of foreign manufacture bearing any name or trade mark being or purporting to be the name or trade mark of any manufacturer, dealer, or trader in the Colony, unless such name or trade mark is accompanied by a definite indication

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of the country in which the goods were made or produced, are hereby prohibited to be imported into the Colony.

(2) Before detaining any such goods, or taking any further proceedings with a view to the forfeiture thereof under the law relating to the Customs, the Collector of Customs may require the regulations under this section, whether as to information, security, conditions, or other matters, to be complied with, and may satisfy himself in accordance with those regulations that the goods are such as are prohibited by this section to be imported.

(3) The Collector of Customs may from time to time make, revoke and vary regulations, either general or special, respecting the detention and forfeiture of goods the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and forfeiture, and may by such regulations determine the information, notices, and security to be given, and the evidence requisite for any of the purposes of this section, and the mode of verification of such evidence.

(4) Where there is on any goods a name which is identical with or a colourable imitation of the name of a place in the Colony, that name, unless accompanied by the name of the country in which such place is situate, shall be treated for the purposes of this section as if it were the name of a place in the Colony.

(5) Such regulations may apply to all goods the importation of which is prohibited by this section, or different regulations may be made respecting different classes of such goods or of offences in relation to such goods.

(6) The Collector of Customs, in making, varying, and administering the regulations, and generally in the administration of this section, whether in exercise of any discretion or opinion, or otherwise, shall act under the control of the Governor in Executive Council.

(7) The regulations may provide for the informant reimbursing the Collector of Customs all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention.

(8) All regulations under this section shall be published in the 'Government Gazette' of Western Australia.

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

Implied warranty on sale of marked goods

16. Where, at the passing of this Act, a trade description is lawfully and generally applied to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods, the provisions of this Act with respect to false trade descriptions shall not apply to such trade description: Provided that where such trade description includes the

Provisions of Act as to false description not to apply in certain cases

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

Savings

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

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

(3) Nothing in this Act shall be construed so as to render liable to any prosecution or punishment any servant of a master resident in the Colony who *bonâ fide* acts in obedience to the instructions of such master, and, on demand made by or on behalf of the prosecutor, has given full information as to his master.

False representa-  
tion as to Royal  
Warrant, &c.

18. Any person who falsely represents that any goods are made by a person holding a Royal Warrant, or made for the service of Her Majesty, or made for any of the Royal Family, or made for any Government Department either in the United Kingdom or in any of Her Majesty's possessions, shall be liable, on summary conviction, to a penalty not exceeding Twenty pounds.

F. NAPIER BROOME,  
GOVERNOR.