

# WHITEWASHING AUSTRALIA'S HISTORY OF STIGMATISING TRADE MARKS AND COMMERCIAL IMAGERY

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*The colonial and Commonwealth Trade Mark Registers reveal an extensive and neglected history of stigmatising representations of marginalised groups. This article documents part of this history. It presents a selection of objectionable racist and sexist trade marks within their socio-historical contexts, and comments on their lingering effects in the Australian public sphere. For marginalised groups, these stigmatising trade marks and associated commercial imagery contributed to the promulgation of enduring racist and sexist tropes in the Australian public sphere, notwithstanding historical and contemporary objections to such pernicious representations. Coming to terms with the communicative and other damage caused by stigmatising trade marks not only helps us to grapple with their destructive legacy, but also underscores the importance of ensuring proactive legislative or practical administrative prescriptions in safeguarding the interests of stigmatised groups in the trade mark registration system.*

*Readers are advised that this article contains highly offensive, demeaning and derogatory representations of Indigenous Australians, Black and ethnic minorities. While these may cause offence, they have been included here so as to provide a more accurate historic account of the Register.*

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## I INTRODUCTION

The often championed and widely held view is that the Register of Trade Marks (the ‘Register’) is an unmitigated public good: a source of valuable (albeit imperfect) information, as well as a historic record of proprietary rights. Government bureaucracies charged with managing intellectual property (‘IP’) rights frequently emphasise that trade marks are also benign: ‘[T]hrough their proliferation and diversity’ they play an ‘important part’ in the ‘growth of trade in Australia and the development of our economy’.<sup>1</sup> If IP Australia’s website contains a selection of famous Australian trade marks and reflects its hall of fame,<sup>2</sup> this article, by contrast, documents the Register’s hall of shame. The purpose of this article is to provide a more critical assessment of registrable marks than the celebratory narrative offered by IP Australia. The historical record suggests that dehumanising, derogatory and disparaging trade marks — what this article calls ‘stigmatising trade marks’ — are a longstanding and integral part of the history of the Register. The research on stigmatising marks presented here emerges from many years of archival research, involving the rigorous physical review of hundreds of individual trade mark applications and bound volumes of colonial and Commonwealth Trade Mark Registers stored in the National Archives of Australia (‘NAA’) in Canberra and Sydney.

Australian decision-makers appear to have taken no steps to prevent the registration of stigmatising marks and have failed to utilise the prohibition on

<sup>1</sup> ‘110 Years of Trade Marks’, *IP Australia* (Web Page, 28 June 2016) <<https://www.ipaustralia.gov.au/about-us/news-and-community/news/110-years-trade-marks>>, archived at <<https://perma.cc/4JWL-CW43>>; IP Australia concedes here that trade marks reflect ‘changes in social, cultural and nationalistic attitudes of past generations’. See also Productivity Commission, *Intellectual Property Arrangements* (Inquiry Report No 78, 23 September 2016) 374–5.

<sup>2</sup> See, eg, ‘Trade Marks During WWI: The Anzac Brand’, *IP Australia* (Web Page, 7 February 2018) <<https://www.ipaustralia.gov.au/understanding-ip/getting-started-ip/educational-materials-and-resources/ip-rights-wwi/trade-marks-wwi>>, archived at <<https://perma.cc/7MUW-4KDS>>; ‘110 Years of Trade Marks’ (n 1).

registering scandalous marks.<sup>3</sup> This article, however, will not engage with this absolute ground for refusal and the limited Anglo-Australian case law relating to this statutory provision.<sup>4</sup> Rather, the scholarly aim here is to paint a more complete and accurate picture of the Register's role in reflecting and perpetuating Australian attitudes towards marginalised Others. This research is needed in part because exposing and acknowledging the stigmatising history of the Register is an important step towards reconciliation with marginalised groups. What is more, understanding this history may well assist decision-makers in not repeating past wrongs.

A stronger regulatory response is warranted against stigmatising trade marks because they contain negative stereotypes and harmful associations that militate against the referenced group fully participating in the public sphere. Without this response, the referenced group faces a hostile public sphere, where they are afforded less dignity and respect than non-referenced groups. This creates significant communicative obstacles for referenced marginalised groups, who must first overcome the deleterious effects of stigmatising trade marks before engaging fully with the dominant (non-referenced group) on an equal platform. This article suggests the need for this robust regulatory approach — but without fleshing out its legislative form — notwithstanding legitimate concerns about the potential impact on freedom of expression.<sup>5</sup>

<sup>3</sup> The relevant current provision is s 42 of the *Trade Marks Act 1995* (Cth), which provides that '[a]n application for the registration of a trade mark must be rejected if: (a) the trade mark contains or consists of scandalous matter; or (b) its use would be contrary to law'. Its legislative ancestors in federal trade mark legislation were *Trade Marks Act 1955* (Cth) s 28 and, before that, *Trade Marks Act 1905* (Cth) s 114. There were also colonial equivalents: see, eg, *Trade Marks Registration Act 1876* (Vic) (40 Vict, No 539) s 8.

<sup>4</sup> Suffice it to say for present purposes that s 42 of the *Trade Marks Act 1995* (Cth) requires significant law reform so that it is better equipped to address the concerns raised in this article, especially as they affect marginalised groups. For a concise treatment of the relevant law and practice relating to this provision, see generally Robert Burrell and Michael Handler, *Australian Trade Mark Law* (Oxford University Press, 2<sup>nd</sup> ed, 2016) 164–9; Mark Davison and Ian Horak, *Shanahan's Australian Law of Trade Marks & Passing Off* (Lawbook, 6<sup>th</sup> ed, 2016) 249–50 [25.730]; David Price, Colin Bodkin and Fady Aoun, *Intellectual Property: Commentary and Materials* (Lawbook, 6<sup>th</sup> ed, 2017) 671–5 [13.500].

<sup>5</sup> It is beyond the scope of this paper to offer this legislative solution, but any reform is likely to encounter some challenges, such as identifying the relevant legal test and audience in determining registrability, arguably unwarranted concerns by free speech activists, and the dilemma of so-called 'reclamation' of stigmatising trade marks by referenced groups — points that were considered in the recent US Supreme Court decision of *Matal v Tam*, 137 S Ct 1744 (2017) which held, by majority, that the disparagement provision in 15 USC § 1052(a) was unconstitutional on the grounds that it violated the Free Speech Clause of the First Amendment: *United States Constitution* amend 1.

The article is organised as follows. Part II describes the publicity and other functions of Australian Trade Mark Registers and outlines the various roles trade marks perform according to trade mark theory, with a particular focus on the role of cultural and communicative interests in a trade mark system that is more commonly viewed as being concerned with economic regulation. After setting out a brief history on the colonial and Commonwealth trade mark registration systems, Part III then documents examples of stigmatising trade marks — first racist and then gendered marks — on colonial and Commonwealth Trade Mark Registers. In doing so, these marks are situated in their broader socio-economic, legal and historical contexts. This involves a brief discussion of gendered norms and prevailing prejudicial attitudes, particularly towards Aboriginal and Torres Strait Islander peoples, and paranoia towards the idea of an ‘Asian invasion’ that gripped early colonial and post-Federation Australia. Part IV offers an insight into the real harm caused by discriminatory practices and representations of marginalised groups. These representations, then, should not be dismissed as merely unopposed products of their time or not harmful in context. The historical record in fact demonstrates that minority/stigmatised groups did object to stigmatising representations, but that these pleas were largely ignored by dominant societal interests. Finally, Part V concludes and identifies lessons that may be learnt by decision-makers in the Australian trade mark registration system.

## II ON THE VARIOUS ROLES OF TRADE MARKS AND TRADE MARK REGISTERS

Modern trade marks perform different roles and serve a range of often-competing interests. This article adopts the ‘authoritative model of trade signs’<sup>6</sup> emerging from the unanimous High Court decision of *Campomar Sociedad Limitada v Nike International Ltd* (‘*Campomar*’).<sup>7</sup> The *Campomar* model, as advocated by Patricia Loughlan, establishes the strong link between a trade mark’s different roles and interests: specifically, the badge of origin, personal property and cultural resource roles are ‘strongly related’ to the interests of consumers, traders and the public, respectively.<sup>8</sup>

<sup>6</sup> Patricia Loughlan, ‘The Campomar Model of Competing Interests in Australian Trade Mark Law’ (2005) 27(8) *European Intellectual Property Review* 289, 289 (‘The Campomar Model’).

<sup>7</sup> (2000) 202 CLR 45 (‘*Campomar*’).

<sup>8</sup> Loughlan, ‘The Campomar Model’ (n 6) 289.

In their first and most traditional role — also referred to as the ‘badge of origin’ function — trade marks operate as indicia of the trade origin of the marked goods or services. The interests of consumers qua consumers are primarily at stake here. When trade marks serve as accurate guarantees of trade source, they are said to minimise consumer confusion, as well as reduce search costs in future purchasing decisions, thereby facilitating efficient trade in goods and services.<sup>9</sup> Through their previous exposure to marked goods or services, consumers are able to more easily differentiate between competing products and services, which provides them with confidence that they can again benefit from similar, if not identical, consumptive experiences in repeat purchases.<sup>10</sup> Trade marks in this context are effective conduits for communicative interaction between their owners and consumers.

In their second role, trade marks are ‘personal property’, capable of accumulating value and turning that value to account in a range of ways. The High Court in *Campomar* speaks of Australian trade marks legislation creating a ‘statutory species of property protected by the action against infringement’ and transforming ‘this property to valuable account by licensing or assignment’.<sup>11</sup> Although this personal property role is broadly

<sup>9</sup> See, eg, William M Landes and Richard A Posner, ‘The Economics of Trademark Law’ (1988) 78(3) *Trademark Reporter* 267. Although this analysis ‘rests on a very particular approach to economics, one arguably not shared by the majority of economists’ (ie ‘Chicago economics’): Jonathan Aldred, ‘The Economic Rationale of Trade Marks: An Economist’s Critique’ in Lionel Bently, Jennifer Davis and Jane C Ginsburg (eds), *Trade Marks and Brands: An Interdisciplinary Critique* (Cambridge University Press, 2008) 267, 267.

<sup>10</sup> See Mark P McKenna, ‘The Normative Foundations of Trademark Law’ (2007) 82(5) *Notre Dame Law Review* 1839, 1844: ‘It would be difficult to overstate the level of consensus among commentators that the goal of trademark law is — and always has been — to improve the quality of information in the marketplace and thereby reduce consumer search costs.’ Although more recent scholarship has affirmed this basic principle as still providing the best explanatory value for trade mark protection, the problems of ‘genericness’ and abandonment of trade marks by traders have been identified as adding to, rather than decreasing, consumer search costs: see, eg, Stacey L Dogan and Mark A Lemley, ‘A Search-Costs Theory of Limiting Doctrines in Trademark Law’ (2007) 97(6) *Trademark Reporter* 1223.

<sup>11</sup> *Campomar* (n 7) 65 [42] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ). See also *JT International SA v Commonwealth* (2012) 250 CLR 1, 43 [81] (Gummow J) (*JT International*); *Trade Marks Act 1995* (Cth) s 21. For earlier judicial treatment of the nature of property in a mark, see *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, 34 (Windeyer J) (*Colbeam Palmer*), cited with approval in *Campomar* (n 7) 68 [48] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ). Referring to the *Trade Marks Act 1955* (Cth), Windeyer J observed that ‘it can hardly be said that a registered trade mark is not a species of property of the person whom the statute describes as its registered proprietor, and which ... permits [assignment]’: *Colbeam Palmer* (n 11) 34 (citations omitted).

representative of traders' interests, it is inextricably connected to the badge of origin role. This is because, as explained above, rational consumers that have enjoyed consumptive experiences with marked goods or services will seek out those same goods or services in future purchasing decisions. This creates a virtuous cycle: traders are incentivised (but not legally obligated) to create and maintain consistently high standards (or at least those tolerated by the market) as well as ensure (some) quality control in the delivery of their goods or services. In this way, Crennan J more recently explained that the 'core function of a trade mark [is] distinguishing the registered owner's goods from those of another, thereby attracting and maintaining goodwill'.<sup>12</sup>

Thus, an effective and robust system of trade mark registration and enforcement consequently permits these traders to 'preserve their goodwill'.<sup>13</sup> To put it differently, through the course of this trade, a pecuniary value may be assigned to this goodwill so that they become 'assets'.<sup>14</sup> Whether this property interest is properly characterised as a proxy for the trader's goodwill or, as the trade marks per se, it is clear that trade marks become significant assets in their own right. For example, in the latest Interbrand ranking of the 'Top 100' global brands, Apple is once more ranked as the most valuable global brand and is estimated to have a brand value of USD214,480 million.<sup>15</sup>

These trader and consumer interests occupy positions of central importance in modern Australian trade mark law,<sup>16</sup> although they are often in

<sup>12</sup> *JT International* (n 11) 105 [293].

<sup>13</sup> Lee B Burgunder, 'An Economic Approach to Trademark Genericism' (1985) 23(3) *American Business Law Journal* 391, 394.

<sup>14</sup> See *JT International* (n 11) 49–50 [106] (Gummow J), quoting *Federal Commissioner of Taxation v Murray* (1998) 193 CLR 605, 615 [23] (Gaudron, McHugh, Gummow and Hayne JJ).

<sup>15</sup> 'Best Global Brands 2018 Rankings', *Interbrand* (Web Page, 2018) <<https://www.interbrand.com/best-brands/best-global-brands/2018/ranking/>>, archived at <<https://perma.cc/SUX8-T2UT>>. See also 'Best Global Brands 2017 Rankings', *Interbrand* (Web Page, 2017) <<http://interbrand.com/best-brands/best-global-brands/2017/ranking/>>, archived at <<https://perma.cc/D4KJ-UVCM>>.

<sup>16</sup> See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 27 September 1995, 1909–10 (Michael Lee, Minister for Communications and the Arts and Minister for Tourism).

conflict.<sup>17</sup> The High Court in *Campomar* recognised the fundamental friction<sup>18</sup> between these interests:

Australian legislation has manifested from time to time a varying accommodation of commercial and the consuming public's interests. There is the interest of consumers in recognising a trade mark as a badge of origin of goods or services and in avoiding deception or confusion as to that origin. There is the interest of traders, both in protecting their goodwill through the creation of a statutory species of property protected by the action against infringement, and in turning this property to valuable account by licensing or assignment.<sup>19</sup>

But these commercial interests are not the only relevant interests in trade mark law. As the High Court in *Campomar* was careful to point out, the 'exploitation of a trade mark registration ... may involve questions of *public interest*'.<sup>20</sup> Interests other than purely commercial or consumer interests should be factored into trade mark regulation and decision-making, because it is now clear (and accepted by the High Court) that trade marks are much more than pieces of personal property or mere signifiers of trade origin:

[T]rade marks may [also] play a significant role in *ordinary public and commercial discourse*, supplying vivid metaphors and compelling imagery disconnected from the traditional function of marks to indicate source or origin of goods.<sup>21</sup>

Although badge of origin and property roles are undeniably of great importance in trade mark law, focusing on this couplet of roles arguably leads to an

<sup>17</sup> For a classic statement in United States trade mark law reflecting the dominance of these interests, see *Hanover Star Milling Co v Metcalf*, 240 US 403, 412 (Pitney J for the majority) (1916). For the classic UK statement, see *Aristoc Ltd v Rysta Ltd* [1945] AC 68, 96 (Lord Macmillan).

<sup>18</sup> For an account of the friction between the badge of origin function and the property function in modern trade mark law, see especially Patricia Loughlan, 'Trade Marks: Property Rights and Their Limits' (2005) 31(2) *Monash University Law Review* 273 ('Property Rights and Their Limits').

<sup>19</sup> *Campomar* (n 7) 65 [42] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

<sup>20</sup> *Ibid* 67 [45] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ) (emphasis added). The High Court cited the 'law with respect to restrictive trade practices' as one such example of the type of public interest considerations that may be relevant to the exploitation of a trade mark registration.

<sup>21</sup> *Ibid* 67 [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ) (emphasis added).

underappreciation of an important third role and connected interest: namely, the cultural or broader communicative role of trade marks and the correlative public interest. Likewise, the ‘essential function’<sup>22</sup> doctrine developed by the Court of Justice of the European Union fails to give adequate normative attention to a trade mark’s cultural role and, in any event, because this is mainly an Australian article, its importance can be discounted for present purposes.

Ascertaining the exact parameters and import of this cultural or societal resource role has proved challenging,<sup>23</sup> but trade marks here are conceived as ‘significant constructors of our social and visual realities, constitutive elements of consumer [and non-consumer] consciousness, icons of popular culture and blistering semiotic conductors.’<sup>24</sup> The cultural resource role is

<sup>22</sup> The ‘essential function’ is guaranteeing the ‘origin’ — its additional functions include guaranteeing ‘quality’, and ‘communication, investment or advertising’: *L’Oréal SA v Bellure NV* (C-487/07) [2009] ECR I-5185, I-5251 [58]. For a critical discussion of these functions and relevant case law, see William Cornish, David Llewelyn and Tanya Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (Sweet & Maxwell, 8<sup>th</sup> ed, 2013) 643–9; James Mellor et al, *Kerly’s Law of Trade Marks and Trade Names* (Sweet & Maxwell, 15<sup>th</sup> ed, 2011) 7–13. For a discussion of the potential imbalance to the European trade mark system caused by the essential function doctrine, see especially Dev S Gangjee, ‘Property in Brands: The Commodification of Conversation’ in Helena R Howe and Jonathan Griffiths (eds), *Concepts of Property in Intellectual Property Law* (Cambridge University Press, 2013) 29.

<sup>23</sup> See, eg, Jason Bosland, ‘The Culture of Trade Marks: An Alternative Cultural Theory Perspective’ (2005) 10(2) *Media & Arts Law Review* 99; Rosemary J Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Duke University Press, 1998); Robert C Denicola, ‘Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols’ [1982] (2) *Wisconsin Law Review* 158; Thomas D Drescher, ‘The Transformation and Evolution of Trademarks: From Signals to Symbols to Myth’ (1992) 82(3) *Trademark Reporter* 301; Rochelle Cooper Dreyfuss, ‘Expressive Genericity: Trademarks as Language in the Pepsi Generation’ (1990) 65(3) *Notre Dame Law Review* 397; Rochelle Cooper Dreyfuss, ‘Reconciling Trademark Rights and Expressive Values: How to Stop Worrying and Learn to Love Ambiguity’ in Graeme B Dinwoodie and Mark D Janis (eds), *Trademark Law and Theory: A Handbook of Contemporary Research* (Edward Elgar, 2008) 261; Sonia K Katyal, ‘Trademark Intersectionality’ (2010) 57(6) *UCLA Law Review* 1601; Dorean M Koenig, ‘Joe Camel and the First Amendment: The Dark Side of Copyrighted and Trademark-Protected Icons’ (1994) 11(3) *Thomas M Cooley Law Review* 803; Alex Kozinski, ‘Trademarks Unplugged’ (1993) 68(4) *New York University Law Review* 960; Jessica Litman, ‘Breakfast with Batman: The Public Interest in the Advertising Age’ (1999) 108(7) *Yale Law Journal* 1717; Patricia Loughlan, ‘Protecting Culturally Significant Uses of Trade Marks (Without a First Amendment)’ (2000) 22(7) *European Intellectual Property Review* 328; Megan Richardson, ‘Trade Marks and Language’ (2004) 26(2) *Sydney Law Review* 193.

<sup>24</sup> Loughlan, ‘The Campomar Model’ (n 6) 292. Before the *Campomar* (n 7) decision, Loughlan described the trade mark’s ‘cultural resource’ role as constituting ‘a vital part, not just of

often described in a context which focuses on the need that individuals may have to reproduce or reference a trade mark in ways that interfere with the interests of trade mark owners. Thus, it has variously been described as involving ‘the interest of the public in free communication and competitive markets’<sup>25</sup> or, more broadly, as the ‘public interest in freedom of speech and expressive communication.’<sup>26</sup>

From the perspective of marginalised groups, however, concerns about equality, respect and freedom of speech<sup>27</sup> include not having the public sphere peppered with stigmatising trade marks. Such marks reinforce damaging stereotypical representations, thereby imposing communicative hurdles in democratic societies.<sup>28</sup> The general underappreciation of trade marks’ cultural role is one reason why the registrability of stigmatising trade marks is frequently uncontested. When we underestimate the cultural resource role of trade marks, we are more likely to fail to apply those parts of the *Trade Marks Act 1995* (Cth) oriented towards protecting the public interest, such as the prohibition on registering ‘scandalous’ marks.<sup>29</sup>

Recognising, therefore, that all three distinct interests and roles often play antagonistic parts in delineating the scope of trade mark protection,<sup>30</sup> the

commercial culture, but of popular culture, part of our whole constructed social and visual world’: Patricia Loughlan, *Intellectual Property: Creative and Marketing Rights* (LBC Information Services, 1998) 168 (*‘Intellectual Property’*).

<sup>25</sup> Loughlan, ‘Property Rights and Their Limits’ (n 18) 276.

<sup>26</sup> Loughlan, ‘The Campomar Model’ (n 6) 293.

<sup>27</sup> See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, tr William Rehg (Polity Press, 1996) 125–6.

<sup>28</sup> See generally below Part IV.

<sup>29</sup> *Trade Marks Act 1995* (Cth) s 42. There are, of course, instances where the law should be less regulatory, such as where stigmatised groups challenge their commodified representations through culture jamming. However, some protections are already in place, such as the use of a trade mark defence in s 18(2) of the *Trade Marks Act 1995* (Cth).

<sup>30</sup> See Loughlan, ‘Property Rights and Their Limits’ (n 18) 276: ‘There is a dynamic created among the three separate interests as trade mark jurisprudence develops through international trade directives, legislative change and judicial interpretation. ... The more that one of those interests is protected and enhanced, the more that the other may be weakened or denied’; Loughlan, ‘The Campomar Model’ (n 6) 293: ‘[P]ublic and private interests in trade sign matters do not always converge, and privileging one may in fact harm the other. There are winners and losers in the “varying accommodation” of competing interests’; Loughlan, *Intellectual Property* (n 24) 168: ‘[T]here will be discord over just who is going to benefit from this newly emerging function of trade marks, over who will control the extra or surplus value of trade marks generated by the extra meanings increasingly associated with trade mark use and quite beyond the actual badge of origin meaning’. See also Katyal (n 23) 1617: ‘Today, a trademark can serve commercial, expressive, and communicative functions for more than one party at the same time.’

normative question posed (although not settled) here is how trade mark law ought to regulate these competing interests in the context of stigmatising trade marks. As this article will show, stigmatising and other offensive trade marks can clearly act as trade source signifiers and as personal property, but when thinking about these marks — such as the racist and demeaning trade marks introduced in the next section — their cultural resource role should be of greatest importance in the minds of those granting registered trade mark rights. In other words, of all the competing interests involved, from a public policy perspective, the public interest in the cultural role of trade marks (particularly the interests of the stigmatised group) is clearly most at stake in this space and should therefore be at its regulatory zenith. To borrow the words of Wojciech Sadurski, the trade mark owner's proprietary interests 'must yield to a higher value in the circumstances'.<sup>31</sup> This higher value includes, for instance, a right to equal respect and basic human dignity, including the speech rights of groups referenced in stigmatising trade marks themselves not to be the subject of dehumanising and disparaging representations.

Most commentators focusing on the cultural role of trade marks emphasise the need for third parties to have access to — that is, *reuse* — trade marks in the course of communication. Sadurski's argument, for example, is that even though the law should recognise the (reputational) harms suffered by trade mark owners arising out of trade mark dilution (by 'tarnishment') caused by non-commercial actors, freedom of speech considerations should triumph over these considerations.<sup>32</sup> Similarly, many other commentators have argued that, notwithstanding the adverse effects on private property (trader interests), the promotion of 'public cultural and communicative freedom'<sup>33</sup> requires permitting (especially non-commercial) actors free access to, or use of, trade marks. Emphasising the public interest considerations in favouring liberal access to trade signs in the public sphere, Patricia Loughlan argues that:

The very significance of trade signs in public communicative spheres and in the day-to-day consciousness of those who live and participate in the culture makes the capacity to access those signs and subject them to critical scrutiny so

<sup>31</sup> Wojciech Sadurski, 'Allegro without Vivaldi: Trademark Protection, Freedom of Speech, and Constitutional Balancing' (2012) 8(3) *European Constitutional Law Review* 456, 475.

<sup>32</sup> See generally Sadurski (n 31).

<sup>33</sup> Loughlan, 'Property Rights and Their Limits' (n 18) 286.

important to the maintenance and support of freedom of speech and to the marketplace of ideas in Australia and elsewhere.<sup>34</sup>

Similarly, Rosemary Coombe argues that the promotion of a more inclusive public sphere requires balancing the communicative ledger against stigmatising trade marks. Not only does this mean stronger legal interventions against such signs, but, as she suggests, this may also require generous access to registered stigmatising trade marks by contestatory counterpublic spheres seeking to challenge entrenched state-sanctioned stigmatising commercial signs and personal property.<sup>35</sup> Marginalised groups, Coombe maintains, should be permitted to

*interpret, recode, or rework media signifiers to express their own identities and aspirations. ... [S]igns do not necessarily retain their original meanings when they circulate in social life. The very polysemy of signification — the surfeit of meaning that signifiers always potentially contain — provides the conditions of possibility for social agents to deploy texts, symbols, and images in unforeseen ways in the service of unanticipated agendas.*<sup>36</sup>

However, the pursuit of this ‘communicative balancing’ should mean, at least in most cases (the exact contours of which would need to be worked out), that stigmatising trade marks do not secure registration in the first place and, if registered, they should be struck from the Register in favour of the group(s) illegitimately implicated in the trade mark itself. This is because stigmatising trade marks harm marginalised groups, and such harm includes impinging on a marginalised group’s democratic participation and capacity for effective speech. Decision-makers within the trade mark registration system, then, should adopt a prophylactic approach towards applied-for stigmatising trade marks.

Such an approach can be rationalised when squared against some of the general functions of the Register,<sup>37</sup> especially as they relate to regulating mar-

<sup>34</sup> Patricia Loughlan, ‘Trade Marks: Arguments in a Continuing Contest’ [2005] (3) *Intellectual Property Quarterly* 294, 307.

<sup>35</sup> Coombe (n 23) ch 6.

<sup>36</sup> *Ibid* 271 (emphasis altered).

<sup>37</sup> On the regulatory function of trade mark registration systems generally, see generally Robert Burrell and Michael Handler, ‘The Intersection between Registered and Unregistered Trade Marks’ (2007) 35(3) *Federal Law Review* 375; Robert Burrell, ‘Trade Mark Bureaucracies’ in Graeme B Dinwoodie and Mark D Janis (eds), *Trade Mark Law and Theory: A Handbook of Contemporary Research* (Edward Elgar, 2008) 95.

ket behaviour.<sup>38</sup> These functions, which commentators warn should be treated as conceptually distinct from the rationales for trade mark protection *per se*,<sup>39</sup> generally focus on the Register's communicative and related economic functions. Put another way, the key rationale for trade mark registration is the publicity that Registers offer to the world at large (but principally traders): they indicate to third parties the marks that have been registered *and* that are considered registrable. The main beneficiaries of this publicity are in practicality traders, who are then able to define the scope of their applied-for property rights against the information contained on the Register.<sup>40</sup>

If Registers seek to *publicise* trade marks,<sup>41</sup> this raises difficult questions: What justification is there for publicising stigmatising marks and what are the implications of a government entity offering such publicity for, and possibly granting registration to, such marks? It seems to me that there are good arguments for the state taking an active interest in the kinds of trade marks to which it grants such publicity and especially to which it grants registration. Moreover, there is a strong related argument here that the act of registration confers an actual or, at the very least, a perceived state imprimatur for stigmatising marks. More broadly, Christine Farley has pointed to the 'symbolic effect of the government giving its stamp of approval' to offensive marks and has argued that this 'legal restriction [on trade mark registration] provides governments with an opportunity to refuse to lend the support of the administration to those marks that offend the public.'<sup>42</sup> In light of this broader context, do we really want a Register of Trade Marks strewn with registered stigmatising trade marks?

<sup>38</sup> Burrell and Handler, 'The Intersection between Registered and Unregistered Trade Marks' (n 37) 391. Importantly, these authors reference the debate in European law relating to establishing disincentives for the commercial use of 'immoral marks' that would otherwise be free to be used, notwithstanding rejection/revocation on the grounds of the mark being 'contrary to public policy or morality': at 391 n 75.

<sup>39</sup> Burrell and Handler rightly caution against conflating the rationales for trade mark protection with the underlying rationale for a system of trade mark registration: *ibid* 375. See also Burrell (n 37).

<sup>40</sup> For an excellent discussion and critique of the justifications for trade mark registration systems and the quality of information on Trade Mark Registers, see Burrell (n 37).

<sup>41</sup> See Burrell and Handler, 'The Intersection between Registered and Unregistered Trade Marks' (n 37) 375.

<sup>42</sup> Christine Haight Farley, 'Registering Offense: The Prohibition of Slurs as Trademarks' in Irene Calboli and Srividhya Ragavan (eds), *Diversity in Intellectual Property: Identities, Interests, and Intersections* (Cambridge University Press, 2015) 105, 125.

### III A TRUE(R) HISTORY OF TRADE MARK REGISTERS AS A REFLECTION OF OUR HISTORY

Registered stigmatising trade marks, generally reflective of denigratory attitudes towards non-Whites and women, helped to reaffirm — and perhaps even shape — destructive stereotypes in the Australian public sphere, especially as they related to Indigenous Australians. Their legal protection as property arguably further abetted their proliferation in transatlantic and transpacific public spheres. Before reproducing some of these stigmatising trade marks, it is worthwhile providing some contextual background regarding the colonial, state and Commonwealth Trade Mark Registers.

#### A *The Colonial, State and Commonwealth Trade Mark Registers*

The proposal of a system of trade mark registration in the Australian colonies did not appear to generate the same degree of angst as it did in the United Kingdom ('UK') in the 1860s.<sup>43</sup> In fact, four Australian colonies — South Australia,<sup>44</sup> Queensland,<sup>45</sup> Tasmania<sup>46</sup> and New South Wales<sup>47</sup> — adopted a basic trade mark registration system some 10 years before the first trade mark registration legislation in the UK.<sup>48</sup> (New Zealand had similarly set up a trade

<sup>43</sup> See Lionel Bently, 'The "Extraordinary Multiplicity" of Intellectual Property Laws in the British Colonies in the Nineteenth Century' (2011) 12(1) *Theoretical Inquiries in Law* 161, 169–71. As to the UK experience, see especially House of Commons Select Committee, Parliament of the United Kingdom, *Report from the Select Committee on Trade Marks Bill, and Merchandize Marks Bill* (House of Commons Paper No 212, Session 1862); Frank I Schechter, *The Historical Foundations of the Law Relating to Trade-Marks* (Columbia University Press, 1925) 141; Lionel Bently, 'From Communication to Thing: Historical Aspects of the Conceptualisation of Trade Marks as Property' in Graeme B Dinwoodie and Mark D Janis (eds), *Trademark Law and Theory: A Handbook of Contemporary Research* (Edward Elgar, 2008) 3.

<sup>44</sup> *Trade Marks Act 1863* (SA) (26 & 27 Vict, No 20). The 'scandalous design' prohibition only surfaced in 1892 via s 17 of the *Trade Marks Act 1892* (SA) (55 & 56 Vict, No 551).

<sup>45</sup> *Trade Marks Act 1864* (Qld) (28 Vict, No 5). Curiously, the *Trade Marks Act 1864* (Qld) (28 Vict, No 5) contained registration provisions when first passed, but some of these were later removed by amending legislation: *Trade Marks Act 1864 Amendment Act 1865* (Qld) (29 Vict, No 1) s 1 (repealing ss 2–3 of the *Trade Marks Act 1864* (Qld) (28 Vict, No 5)). Registration provisions were later reintroduced by the *Patents, Designs, and Trade Marks Act 1884* (Qld) (48 Vict, No 13) ss 5, 61.

<sup>46</sup> *Merchandise Marks Act 1864* (Tas) (28 Vict, No 6).

<sup>47</sup> *Trade Marks Act 1865* (NSW) (28 Vict, No 9).

<sup>48</sup> *Trade Marks Registration Act 1875*, 38 & 39 Vict, c 91.

mark registration system well before its colonial masters.<sup>49</sup> Victoria, which at first more or less implemented the *Merchandise Marks Act 1862*, 25 & 26 Vict, c 88,<sup>50</sup> later followed suit,<sup>51</sup> with Western Australia being the last Australian colony to establish a system of trade mark registration.<sup>52</sup>

While astute colonial and international traders quickly registered their marks to take advantage of the benefits of registration, smaller local traders either had little or no knowledge of the functioning Register or perhaps were less convinced of its advantages, preferring instead to rely on existing common law protections. The New South Wales Trade Marks Register documents 10,936 trade mark applications from its commencement up to 30 August 1906,<sup>53</sup> but the first volume reveals only 308 applications for the period 4 August 1865 – 14 June 1879.<sup>54</sup> In Victoria, after the passage of *Trade Marks Registration Act 1876* (Vic) (40 Vict, No 539), the Victorian Trade Marks Register reveals 46 applications in 1876.<sup>55</sup> This number more than doubled in the following year (116), with applications peaking in 1899 (497).<sup>56</sup> But some colonial traders may have considered other colonial markets less viable, and were thus slower to pursue registration there. Consequently, those colonies witnessed far fewer applications for registration. For instance, the Tasmanian Registrar in the first six years of operation accepted one application in 1869, then another in 1872, and one in 1874.<sup>57</sup> In

<sup>49</sup> *Trade Marks Act 1866* (NZ) (30 Vict, No 9).

<sup>50</sup> *Trade Marks Act 1864* (Vic) (27 Vict, No 221).

<sup>51</sup> *Trade Marks Registration Act 1876* (Vic) (40 Vict, No 539).

<sup>52</sup> *Design and Trade Marks Act 1884* (WA) (48 Vict, No 7). Citing original correspondence, Finn notes that Western Australia, on account of its small population and limited trade, chose not to pass trade mark legislation until 1884: Jeremy Finn, 'Particularism versus Uniformity: Factors Shaping the Development of Australasian Intellectual Property Law in the Nineteenth Century' (2000) 6(1–2) *Australian Journal of Legal History* 113, 129. For a comprehensive treatment of the colonial trade mark regime, see especially Amanda Scardamaglia, *Colonial Australian Trade Mark Law: Narratives in Lawmaking, People, Power & Place* (Australian Scholarly Publishing, 2015).

<sup>53</sup> New South Wales, *Trade Marks Register* (1 June 1905 – 30 August 1906) vol 22 (NAA: Series No A1090, Control Symbol 22, Item Barcode 5000347).

<sup>54</sup> New South Wales, *Trade Marks Register* (4 August 1865 – 14 June 1879) vol 1 (NAA: Series No A1090, Control Symbol 1, Item Barcode 198090).

<sup>55</sup> 'Patents and Trade Marks Applied For' (Return to an Order of the House for the Number of Applications for Letters Patent, Provisional Protections and Trade Marks up to the End of 1901, House of Representatives, Parliament of Australia, 23 September 1902) in Parliament of Australia, *Votes and Proceedings of the House of Representatives During the First Session of the First Parliament: 1901–2* (1901–02) vol 1, 841, 842.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid* 844.

Western Australia, there were only two trade mark applications in 1885, then 28 in 1886, before peaking at 300 applications in 1897.<sup>58</sup>

Even though the data is incomplete, almost all colonies demonstrate a pronounced upward trend in applications for trade mark registrations.<sup>59</sup> For the period 1897–1901, there were 9,470 trade mark applications across all of the Australian colonies,<sup>60</sup> broken down as follows: Victoria received the most applications for registration (2,323), followed by New South Wales (2,109), South Australia (1,290), Queensland (1,477), Western Australia (1,345) and, finally, Tasmania (926).<sup>61</sup> This evidence supports the proposition that early ‘colonial laws were quite extensively used by local traders.’<sup>62</sup> However, a check of the historical colonial Trade Mark Registers also confirms that international traders, especially from the UK and the United States (‘US’), regularly sought the benefits of colonial trade mark protection. This often meant that stigmatised groups from other countries, such as Native Americans, Africans, Maoris, Indians and other marginalised groups, entered colonial Registers. Some international traders, such as William Lever of multinational Lever Bros, vigorously enforced their colonial and Commonwealth trade mark rights, and appeared regularly before the courts.<sup>63</sup>

<sup>58</sup> Ibid 843.

<sup>59</sup> Ibid 842–4. But see the New South Wales experience from 1897–1901, which remained consistently around 400 (no information prior to 1897 is noted): at 842.

<sup>60</sup> Ibid 842–4.

<sup>61</sup> Ibid.

<sup>62</sup> Sam Ricketson, Megan Richardson and Mark Davison, *Intellectual Property: Cases, Materials and Commentary* (LexisNexis Butterworths, 5<sup>th</sup> ed, 2013) 1100 [17.9]. Moreover, Australian colonial traders regularly sought trade mark registrations (including of stigmatising trade marks) in the UK: Charles Cameron Forster of Stanwell, Colony of Victoria, applied to register the NEGROLINE device mark in Class 50 (composition for polishing, softening and preserving leather) on 27 April 1883: *Trade Mark No 707* in Victoria, *Register of Trade Marks* (3 September 1881 – 20 November 1883) vol 2, 241 (NAA: Series No A1181, Control Symbol 2, Item Barcode 4286981); *Trade Mark No 707* (Vic) (Application for Registration) (NAA: Series No A11731, Control Symbol 707, Item Barcode 4987877). Charles Cameron Forster also applied to register the device mark in the UK: Patent Office (UK), *The Trade Marks Journal* (1883) vol 8, 446–7 (*Trade Mark No 32780*).

<sup>63</sup> See, eg, *Lever Bros v G Mowling & Son* (1908) 6 CLR 136, on appeal *George Mowling & Son's Application for a Trade Mark* [1908] VLR 123 (Supreme Court of Victoria): Lever Bros, holder of the STARLIGHT trade mark for soaps, objected to Mowling's registration of THREE STARS device mark for soaps pursuant to the *Trade Marks Act 1890* (No 2) (Vic) (54 Vict, No 1183) ss 16(2), 17. See also *Lever Bros Ltd v Abrams* (1909) 8 CLR 609.

The first federal trade mark legislation was the *Trade Marks Act 1905* (Cth).<sup>64</sup> This Act was largely modelled on existing UK legislation,<sup>65</sup> but included some important transitional provisions concerning state trade mark registrations,<sup>66</sup> designed to encourage the migration of trade marks onto the Commonwealth Register.<sup>67</sup>

Traders flocked to the Commonwealth Register, with the first month of operation witnessing almost 1,500 applications.<sup>68</sup> Many of these registrations

<sup>64</sup> The Act received Royal Assent on 21 December 1905 and came into operation on 2 July 1906: Governor-General, 'Proclamation' in Commonwealth, *Commonwealth of Australia Gazette*, No 31, 9 June 1906, 783, 783. It was later amended by: *Patents Trade Marks and Designs Act 1910* (Cth); *Trade Marks Act 1912* (Cth); *Trade Marks Act 1919* (Cth); *Trade Marks Act 1922* (Cth); *Patents, Trade Marks and Designs Act 1932* (Cth); *Statute Law Revision Act 1934* (Cth); *Trade Marks Act 1936* (Cth); and *Trade Marks Act 1948* (Cth), before it was ultimately repealed by the *Trade Marks Act 1955* (Cth). For a fuller treatment of the effect of these amendments (up to 1936), see George Shaw Knowles et al, *Report of the Committee Appointed to Consider What Alterations Are Desirable in the Trade Marks Law of the Commonwealth* (Report, 1939) 4–5 ('Knowles Committee Report').

<sup>65</sup> Even though the *Trade Marks Act 1905* (Cth) was passed before passage of the *Trade Marks Act 1905*, 5 Edw 7, c 15, the various iterations of the latter influenced the former: see Commonwealth, *Parliamentary Debates*, House of Representatives, 22 November 1905, 5579 (Alfred Deakin, Prime Minister of Australia and Minister of External Affairs). Amendments made before the final passage of the *Trade Marks Act 1905*, 5 Edw 7, c 15 were later adopted by the *Trade Marks Act 1912* (Cth): Explanatory Memorandum, Trade Marks Bill 1912 (Cth) 1. Consistent with the resolution adopted by the 1911 Imperial Conference — 'that it is in the best interests of the Empire that there should be more uniformity throughout its centres and dependencies in the law of copyright, patents, trade marks and companies' — Australian trade mark law closely tracked British developments: *Knowles Committee Report* (n 64) 4; Arthur Dean et al, *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider What Alterations Are Desirable in the Trade Marks Law of the Commonwealth* (Report, 1954) 7.

<sup>66</sup> New state trade mark registrations were generally not allowed following the *Trade Marks Act 1905* (Cth), apart from those state registrations that had acquired rights before the commencement of the Commonwealth Act pursuant to an international convention: at s 6(c). Renewals of state registrations were also not permitted: at s 6(a). Existing registrations under state legislation, however, continued for a limited period. For example, registration under a state trade marks Act would cease at the earlier of the following: either 14 years after the commencement of the Commonwealth Act: at s 7(1)(a); or, following commencement, when a trade mark was no longer registrable under a state trade marks Act: at s 7(1)(b).

<sup>67</sup> See *ibid* s 8(6), which stated that '[t]he registration of the trade mark under a State Trade Marks Act shall cease upon its registration under this Act'. Additionally, special dispensation was provided to traders whose state trade marks did not contain 'essential particulars': at s 8(3).

<sup>68</sup> Commonwealth, *Register of Trade Marks* (July 1906 – July 1906) vol 1 (NAA: Series No A6288, Control Symbol 1, Item Barcode 5148001); Commonwealth, *Register of Trade Marks* (July 1906 – September 1906) vol 2, 122 (NAA: Series No A6288, Control Symbol 2, Item

were stigmatising trade marks, notwithstanding the prohibition on registering trade marks that were ‘contrary to law or morality’ or comprising ‘scandalous designs.’<sup>69</sup> Like their colonial counterparts, federal trade mark examiners, oblivious to the damaging effects of these commercial symbols, facilitated their registration. In an environment where parliamentarians had not provided meaningful guidance on the prohibition on registering scandalous and other improper marks, these issues are unsurprising. Not that this would have necessarily mattered, because, as we shall see, many parliamentarians shared racist and sexist views: strong public spheres were not yet sensitised to race and gender concerns. These factors, then, meant that amorphous standards tilted towards protecting dominant societal interests at the expense of marginalised Others, despite the protests of such groups.

The following sections set out several racist and sexist stigmatising trade marks from the colonial and Commonwealth Trade Mark Registers. These trade marks demonstrate how, often in connection with government policy, stigmatising trade marks contributed to, inter alia, institutionalised racism and sexism in Australia. As foreshadowed in the introduction and in the interests of convenience, this article deals seriatim with three stigmatised groups: Indigenous Australians, Chinese and other non-White peoples, and women. In setting out the historical contexts concerning these stigmatised groups, a thematic approach is generally preferred to a chronological approach.

### B *The Racist History*

In colonial Victoria or under Commonwealth legislation, racist trade marks such as the NEGRO’S NECK & HEAD device mark for leather goods (Figure 1) sailed through to registration.<sup>70</sup> This registration, and the GOLD

Barcode 5148002). Colonial traders appeared comfortable with the federal trade mark registration system, and many sought to transfer their existing colonial/state registrations.

<sup>69</sup> *Trade Marks Act 1905* (Cth) s 114 (emphasis added) provided:

*No scandalous design, and no mark the use of which would by reason of its being likely to deceive or otherwise be deemed disentitled to protection in a court of justice, or the use of which would be contrary to law or morality, shall be used or registered as a trade mark or part of a trade mark.*

<sup>70</sup> R Graham & Sons of Ballarat, Victoria, applied to register this trade mark in Class 50 (leather dressing and renovation of leather goods) on 24 October 1896: *Trade Mark No 4832* in Victoria, *Register of Trade Marks* (12 September 1895 – 15 May 1897) vol 11, 218 (NAA: Series No A1181, Control Symbol 11, Item Barcode 4286988); *Trade Mark No 4832* (Vic) (Application for Registration) (NAA: Series No A11731, Control Symbol 4832, Item Barcode 5039141). The application was gazetted on 6 November 1896: Commissioner of Trade Marks,

DUST device mark of so-called ‘twin niggerboys’ spruiking soap products<sup>71</sup> (Figure 2) demonstrates that racist representations faced no obstacles in registration. Likewise, the New South Wales Register reveals objectionable word marks such as NIGGERGAL<sup>72</sup> for tobacco and NIGGERSHINE<sup>73</sup> for stove polishes also secured registration.

‘Trade Marks Act 1890 (No 2)’ in Victoria, *Victoria Government Gazette*, No 112, 6 November 1896, 4522, 4522. It entered into the Register on 24 December 1896: *Trade Mark No 4832* (Vic) (Certificate of Registration) (NAA: Series No A11731, Control Symbol 4832, Item Barcode 5039141). The applicant’s only difficulty, which was easily remedied, was his failure to send in duplicate copies of the mark as required: *Trade Mark No 4832* (Vic) (Correspondence, 27 October 1896) (NAA: Series No A11731, Control Symbol 4832, Item Barcode 5039141).

<sup>71</sup> NK Fairbank Co of Chicago, Illinois, USA, applied to register this trade mark in Class 47 (detergents and washing powders) on 6 September 1897: *Trade Mark No 6226* in New South Wales, *Trade Marks Register* (28 April 1897 – 17 December 1897) vol 13 (NAA: Series No A1090, Control Symbol 13, Item Barcode 5000339). The application was gazetted on 17 September 1897: Registrar General, ‘Trade-Mark (Registered No 6227) under Classification 47’ in New South Wales, *New South Wales Government Gazette*, No 727, 17 September 1897, 6678, 6678. The registration certificate was dated 2 October 1897: *Trade Mark No 6226* in New South Wales, *Trade Marks Register* (28 April 1897 – 17 December 1897) vol 13 (NAA: Series No A1090, Control Symbol 13, Item Barcode 5000339). The mark later entered the Commonwealth Trade Marks Register (Class 47): *Trade Mark No 11609* in Commonwealth, *Register of Trade Marks* (April 1911 – October 1911) vol 12, 153 (NAA: Series No A6288, Control Symbol 12, Item Barcode 5148012).

<sup>72</sup> Cameron Bros & Co of Cooper St, Surry Hills, Sydney, Colony of New South Wales, applied to register this trade mark in Class 45 (tobacco, whether manufactured or unmanufactured) on 30 September 1897: *Trade Mark No 6256* in New South Wales, *Trade Marks Register* (28 April 1897 – 17 December 1897) vol 13 (NAA: Series No A1090, Control Symbol 13, Item Barcode 5000339). The application was gazetted on 8 October 1897: Registrar General, ‘Trade-Mark (Registered No 6256) under Classification 45’ in New South Wales, *New South Wales Government Gazette*, No 786, 8 October 1897, 7279, 7279. The registration certificate was dated 23 October 1897: *Trade Mark No 6256* in New South Wales, *Trade Marks Register* (28 April 1897 – 17 December 1897) vol 13 (NAA: Series No A1090, Control Symbol 13, Item Barcode 5000339). It later entered the Commonwealth Trade Marks Register (Class 45: tobacco, whether manufactured or unmanufactured): *Trade Mark No 1905* in Commonwealth, *Register of Trade Marks* (July 1906 – September 1906) vol 2, 227 (NAA: Series No A6288, Control Symbol 2, Item Barcode 5148002).

<sup>73</sup> Walter Searle and William Wincott of London, England, applied to register this trade mark in Class 50 (stove and all other metal polishes) on 19 May 1899: *Trade Mark No 7016* in New South Wales, *Trade Marks Register* (6 October 1898 – 7 August 1899) vol 15 (NAA: Series No A1090, Control Symbol 15, Item Barcode 5000341). The application was gazetted on 23 May 1899: Registrar of Trade-Marks, ‘Trade-Marks: Applications for the Registration of Trade-Marks’ in New South Wales, *Supplement to the New South Wales Government Gazette*, No 431, 23 May 1899, 4078, 4079. The registration certificate was dated 24 June 1899: *Trade Mark No 7016* in New South Wales, *Trade Marks Register* (6 October 1898 – 7 August 1899) vol 15 (NAA: Series No A1090, Control Symbol 15, Item Barcode 5000341).

Figure 1: NEGRO'S NECK & HEAD Trade Mark (1896)<sup>74</sup>

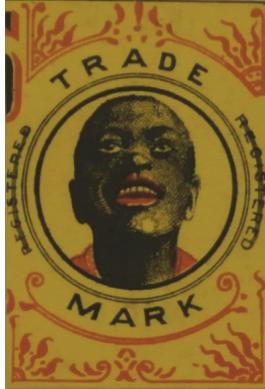


Figure 2: NK Fairbank's (In)Famous GOLD DUST Trade Mark (1897)<sup>75</sup>



In his famous book *Symbols of America*, Hal Morgan describes NK Fairbank's GOLD DUST trade mark as 'among the best known commercial symbols in America.'<sup>76</sup> According to Morgan, a Fairbank company executive was so bemused by a *Punch* cartoon depicting two Black children washing each other in a tub under the caption 'warranted to wash clean and not fade' that he commissioned an artist to draw this as a device mark for the company's washing powder.<sup>77</sup> Through colonial agents, this US registered device mark later secured registration in New South Wales<sup>78</sup> and Victoria.<sup>79</sup> The trade

<sup>74</sup> See above n 70.

<sup>75</sup> See above n 71.

<sup>76</sup> Hal Morgan, *Symbols of America* (Steam Press, 1986) 52.

<sup>77</sup> Ibid.

<sup>78</sup> See above n 71.

mark bureaucrat charged with registering this mark appears to have ticked off each of the following indexing words: 'children', 'negro', and 'niggers'.<sup>80</sup> Such was the popularity of this transpacific stigmatising trade mark that it then migrated onto the Commonwealth Register as *Trade Mark No 11609* where it remained for many years.<sup>81</sup> The device mark had earlier secured trade mark registration in the transatlantic public sphere as British *Trade Mark No 206705*.<sup>82</sup>

In addition to the misappropriation of African and Asian imagery, Australian traders and manufacturers, unlike their British counterparts, also had local Aboriginal and Torres Strait Islander populations to exploit in their commercial insignia. Australian traders and manufacturers (particularly soap, paint, tobacco and alcohol proprietors) repeatedly seized on Indigenous and Black imagery to promote their wares, and strongly defended such marks when their pecuniary interests were threatened.<sup>83</sup> The prohibition against scandalous and immoral marks was never invoked to prevent registration of stigmatising marks which, amongst other things, suggests that decision-makers and/or traders did not see such representations as racist/sexist, or that they did not see racism/sexism as a problem. In this connection, the (often international) stigmatising trade mark registrations lend support to Rosemary Coombe's broad claim that intellectual property laws 'play an important role in the way histories of imperialism and colonialism, territorial annexation, and political disenfranchisement are socially inscribed across national land-

<sup>79</sup> NK Fairbank Co of Chicago, Illinois, USA, applied to register this trade mark in Class 47 (detergents and washing powders) on 6 September 1897: *Trade Mark No 5218* in Victoria, *Register of Trade Marks* (15 May 1897 – 11 February 1899) vol 12, 33 (NAA: Series No A1181, Control Symbol 12, Item Barcode 4286989); *Trade Mark No 5218* (Vic) (Application for Registration) (NAA: Series No A1185, Item Barcode 990080; Series No A11731, Control Symbol 5218, Item Barcode 4996733). The application was gazetted on 10 September 1897: Commissioner of Trade Marks, 'Trade Marks Act (No 2)' in Victoria, *Victoria Government Gazette*, No 89, 10 September 1897, 3472, 3474. It secured registration on 19 October 1899: *Trade Mark No 5218* (Vic) (Application for Registration) (NAA: Series No A1185, Item Barcode 990080; Series No A11731, Control Symbol 5218, Item Barcode 4996733).

<sup>80</sup> *Trade Mark No 6226* in New South Wales, *Trade Marks Register* (28 April 1897 – 17 December 1897) vol 13 (NAA: Series No SP1006/14, Control Symbol REGISTER 13, Item Barcode 10909253).

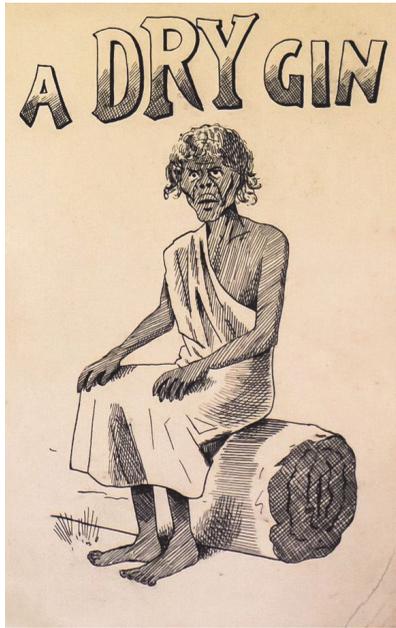
<sup>81</sup> See above n 71.

<sup>82</sup> NK Fairbank Co of Chicago, Illinois, USA, applied to register this trade mark in Class 47 (detergents or washing powders) on 4 August 1897; the mark was advertised on 1 September 1897: Patent Office (UK), *The Trade Marks Journal* (1898) vol 22, 842. Registration of the mark was advertised on 26 January 1898: Patent Office (UK), *The Trade Marks Journal* (1899) vol 23, 102.

<sup>83</sup> See below n 207.

scapes.<sup>84</sup> The political disenfranchisement for Indigenous Australians and women, reinforced through trade mark law, was particularly stark. Effectively discharging their main badge of origin function, and thereby serving commercial interests, damaging representations of women, Indigenous Australians, Blacks and ethnic minorities in colonial and Commonwealth Trade Mark Registers were both prolific and seemingly commonplace.

Figure 3: A DRY GIN Trade Mark (1897)<sup>85</sup>



Consider, for example, the racist stereotypes embodied in the applied-for trade mark, shown above in Figure 3, which is extracted from the colonial New South Wales Trade Marks Register.<sup>86</sup> In the column headed ‘Description

<sup>84</sup> Coombe (n 23) 33.

<sup>85</sup> See below n 86.

<sup>86</sup> James Inglis & Co of Dean’s Place, off George Street, Sydney, applied to register this trade mark in Class 43 (fermented liquors and spirits) on 4 November 1897: *Trade Mark No 6311* in New South Wales, *Trade Marks Register* (28 April 1897 – 17 December 1897) vol 13 (NAA: Series No SP1006/14, Control Symbol REGISTER 13, Item Barcode 10909253). It was gazetted on 10 November 1897: Registrar General, ‘Trade-Mark (Registered No 6311) under Classification 43’ in New South Wales, *New South Wales Government Gazette*, No 890, 10 November 1897, 8116, 8116; but later withdrawn: *Trade Mark No 6311* in New South Wales, *Trade Marks Register* (28 April 1897 – 17 December 1897) vol 13 (NAA: Series No

of Trade Mark' of the pasted Gazzetal Notice, dated 10 November 1897, the trade mark is described as '[t]he figure of a wisened dried up aboriginal [sic] woman, sitting on a log, with a blanket draped over her body, and having her hands placed on her knees, with the words "A Dry Gin" over her head'.<sup>87</sup> The mark references the miserable yearly blanket distributed to Aboriginal Australians.<sup>88</sup> Furthermore, the word 'gin' here has a double entendre well understood by colonial consumers: it obviously refers to the trader's alcoholic products, but it also encapsulates the racist and derogatory reference to an Aboriginal woman.<sup>89</sup> The trader's branding strategy exploits this double meaning by emphasising the 'dryness' of its alcoholic product and trade symbol. The enlargement of the word 'dry' together with the dehumanising representation of an Aboriginal woman achieves this purpose, as well as reinforcing the trade mark's badge of origin in the colonial public sphere.

Demonstrating similar callous indifference to that of American traders towards Native Americans through the application of the CRAZY HORSE trade mark in respect of malt liquor,<sup>90</sup> we see that Australian traders clearly

A1090, Control Symbol 13, Item Barcode 5000339). There are no explanations as to why this application was 'withdrawn'. The historical record merely states 'see papers'. The most likely reason is that the application was abandoned after objections by competing traders. James Inglis & Co registered several other stigmatising trade marks, such as GIPSY: *Trade Mark No 4432* (Vic) (Certificate of Registration) (NAA: Series No A11731, Control Symbol 4432, Item Barcode 5000856); RANEE: *Trade Mark No 1407* (Qld) (Certificate of Registration) (NAA: Series No A11708, Control Symbol 1407, Item Barcode 4993402); and YUM YUM: see Queensland, *Supplement to the Queensland Government Gazette*, No 39, 10 October 1891, 502. These are available upon request.

<sup>87</sup> Registrar General, 'Trade-Mark (Registered No 6311) under Classification 43' in New South Wales, *New South Wales Government Gazette*, No 890, 10 November 1897, 8116, 8116.

<sup>88</sup> The manifest unfairness of the 'exchanges' between authorities and Indigenous Australians did not go unnoticed in colonial Australia. One commentator described the annual distribution of blankets as a 'sorry return for the millions of acres of fertile land of which we have deprived them': 'Distribution of Blankets to the Blacks', *The Illustrated Melbourne Post* (Melbourne, 20 August 1864) 9. Another commentator later criticised the delay in the 'distribution of the one blanket — our only return for all we have taken from them': 'Sydney Aborigines, Past and Present', *The Illustrated Sydney News and New South Wales Agriculturist and Grazier* (Sydney, 15 May 1880) 23 <<http://nla.gov.au/nla.news-page5406070>>. These documents are extracted in Sharman N Stone, *Aborigines in White Australia: A Documentary History of the Attitudes Affecting Official Policy and the Australian Aborigine, 1697-1973* (Heinemann Educational Books, 1974) 84, 94-5.

<sup>89</sup> According to the *Macquarie Dictionary*, the words 'gin' and 'black gin' are taboo, because they are dated racist and derogatory terms: *Macquarie Dictionary* (online at 14 March 2019) 'gin' (n<sup>5</sup>, def 1), 'black gin' (def 2).

<sup>90</sup> See, eg, *Hornell Brewing Co Inc v Brady*, 819 F Supp 1227 (ED NY, 1993); *Estate of Witko v Hornell Brewing Co*, 156 F Supp 2d 1092 (D SD, 2001). Tasunke Witko, aka 'Crazy Horse', was a Native American warrior of the Oglala Lakota who criticised the scourge of alcohol on his

considered Aboriginal imagery (insofar as it applied to alcohol products) valuable;<sup>91</sup> so much so that they often battled over the right to its control.<sup>92</sup> The A DRY GIN mark appears to make light of the devastation that alcohol wrought on Aboriginal peoples, considered by many Aboriginal activists as one of the ‘enemies’ of the Aboriginal people.<sup>93</sup>

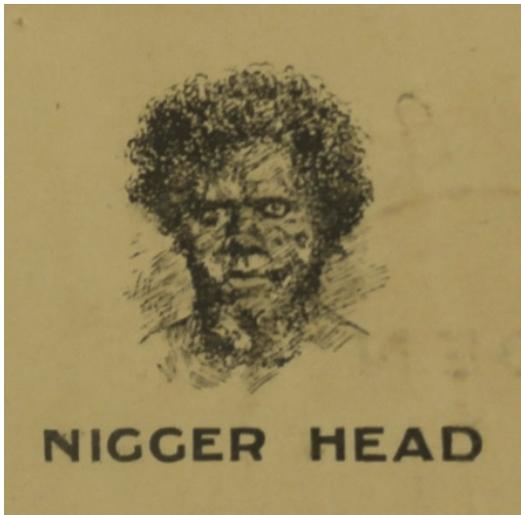
people. He never permitted his image to be captured or represented in any media. This case was one instance where the public sphere mobilised strongly against this objectionable mark, leading to federal legislation, state legislative proposals and administrative actions aimed at prohibiting the use of Crazy Horse’s image on the offending product: see Nell Jessup Newton, ‘Memory and Misrepresentation: Representing Crazy Horse’ (1995) 27(4) *Connecticut Law Review* 1003, 1019; Coombe (n 23) 199–204; Frank Pommersheim, ‘The Crazy Horse Malt Liquor Case: From Tradition to Modernity and Halfway Back’ (2012) 57(1) *South Dakota Law Review* 42. See also the successful application on 17 October 1901 to register, in Class 43 (fermented liquors and spirits), a caricature of a ‘Negro’ with the word ‘Negro’: *Trade Mark No 7152* in Victoria, *Register of Trade Marks* (10 August 1900 – 25 November 1901) vol 14, 238 (NAA: Series No A1181, Control Symbol 14, Item Barcode 4286991); *Trade Mark No 7152* in Victoria, *Applications for Trade Marks* (3 January 1900 – 31 December 1902) vol 4, 151 (NAA: Series No A1185, Control Symbol 4, Item Barcode 990084). See also Commissioner of Trade Marks, ‘Trade Marks: Applications’ in Victoria, *Victoria Government Gazette*, No 133, 23 October 1901, 3979, 3980.

<sup>91</sup> See, eg, the WOMERAH device mark registered by John Augustus O’Shea (trading as The New South Wales Wine & Spirit Co) in Class 43 (spirits, wine, beer, cider, whiskey and liquors): *Trade Mark No 1688* in Commonwealth, *Register of Trade Marks* (July 1906 – September 1906) vol 2, 172 (NAA: Series No A6288, Control Symbol 2, Item Barcode 5148002).

<sup>92</sup> See especially the 1899 *Trade Mark No 6002* (Vic) (Certificate of Registration) (NAA: Series No A11731, Control Symbol 6002, Item Barcode 5002821); *Trade Mark No 6002* (Vic) (Opposition Documents) (NAA: Series No A11731, Control Symbol 6002, Item Barcode 5002821); *Trade Mark No 6002* (Vic) (Correspondence) (NAA: Series No A11731, Control Symbol 6002, Item Barcode 5002821). Because of space constraints, this case study is not explored in this paper, but copies of the relevant trade marks and advertising poster (itself a registered copyright) are available upon request.

<sup>93</sup> See, eg, Tom Foster, who said ‘w[h]ite men brought liquor for us, and it has helped to destroy our people’: ‘Our Historic Day of Mourning & Protest’, *The Australian Abo Call: The Voice of the Aborigines* (Sydney, April 1938) 2 <<http://nla.gov.au/nla.news-page4536066>>. The destructive power of alcohol against Aborigines was long-recognised in colonial print media and by colonists: see, eg, Richard Broome, *Aboriginal Victorians: A History since 1800* (Allen & Unwin, 2005) 24–6. See also a cartoon in *The Bulletin*, where rum was pictured as one of the ‘[t]hree ways of exterminating [or] civilising the noble savage’: ‘Things in General’ (24 May 1890) *The Bulletin* 10 <<http://nla.gov.au/nla.obj-68375465>>, reproduced in Margaret Ann Franklin, *Black and White Australians* (Heinemann Educational, 1976) 95.

Figure 4: NIGGER HEAD Trade Mark (1920)<sup>94</sup>



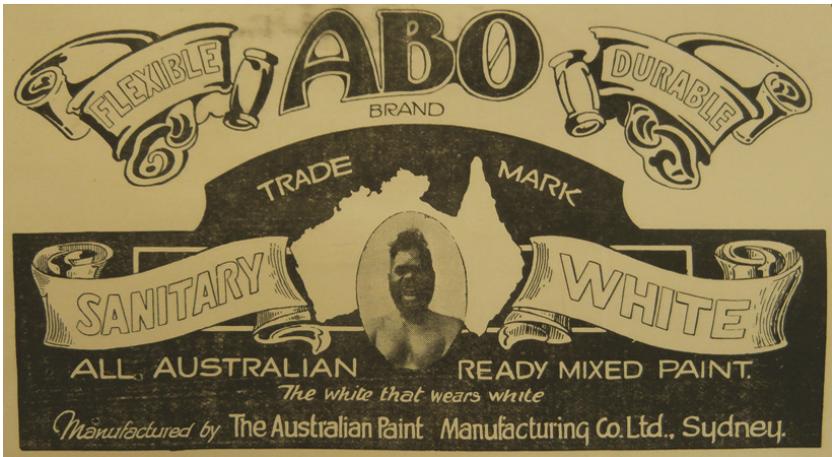
Other stigmatising trade marks adorned consumer goods, such as NIGGER HEAD inks<sup>95</sup> (Figure 4) and ABO BRAND paints<sup>96</sup> (Figure 5 and Figure 6) and featured in advertisements (such as the Velvet Soap advertisement<sup>97</sup> in Figure 7). These representations had lasting consequences.

<sup>94</sup> See below n 95.

<sup>95</sup> William John Quigg, a eucalyptus distiller from New South Wales, applied to register this trade mark in Class 39 (inks for marking, branding, writing, copying, printing and duplicating purposes): *Trade Mark No 28265* in Commonwealth, *Register of Trade Marks* (May 1920 – September 1920) vol 29, 265 (NAA: Series No A6288, Control Symbol 29, Item Barcode 5148029). It was registered on 11 June 1920, but not renewed, and thus was removed from the register 14 years later on 12 June 1934.

<sup>96</sup> Australian Paint Manufacturing Co Ltd of Lilyfield, Sydney, New South Wales, registered this trade mark on 18 July 1921 in Class 1 (paint and enamels): *Trade Mark No 31246* in Commonwealth, *Register of Trade Marks* (June 1921 – November 1921) vol 32, 246 (NAA: Series No A6288, Control Symbol 32, Item Barcode 5148032). It was not renewed, and thus it was removed from the register 14 years later on 30 July 1935. Its associated trade mark, ABO ('Australian Before Others'), was registered 18 May 1925, but was removed 14 years later on 26 May 1939 on account of its non-renewal: *Trade Mark No 41655* in Commonwealth, *Register of Trade Marks* (22 January 1926 – 6 July 1926) vol 40, 329 (NAA: Series No A6288, Control Symbol 40, Item Barcode 5148040). This later appropriation, suggesting 'Whites' had a greater claim to being Australian, may have infuriated Indigenous political activists, like William Cooper. We know that in 1937 Cooper was outraged when White Australians appropriated the term 'native': Broome (n 93) 306.

<sup>97</sup> See below n 101.

Figure 5: ABO BRAND Paints (1921)<sup>98</sup>Figure 6: ABO BRAND Paints (1926)<sup>99</sup>

One firm in particular, J Kitchen & Sons, the proprietors of several well-known trade marks such as VELVET soap,<sup>100</sup> cultivated and promoted many negative stereotypes of Indigenous Australians for many decades. As shown in

<sup>98</sup> See above n 96.

<sup>99</sup> Ibid.

<sup>100</sup> J Kitchen & Sons & Apollo Co Ltd of Melbourne, Colony of Victoria, applied to register this trade mark on 27 July 1896 in Class 48 (perfumed soap): *Trade Mark No 4712* (Vic) (Certificate of Registration) (NAA: Series No A11731, Control Symbol 4712, Item Barcode 4997102); *Trade Mark No 4712* in Victoria, *Register of Trade Marks* (12 September 1895 – 15 May 1897) vol 11, 165 (NAA: Series No A1181, Control Symbol 11, Item Barcode 4286988). The application was gazetted on 7 August 1896: Commissioner of Trade Marks, 'Trade Marks Act 1890 (No 2)' in Victoria, *Victoria Government Gazette*, No 83, 7 August 1896, 3484, 3486; and entry onto the Register was ordered on 11 September 1896: *Trade Mark No 4712* (Vic) (Certificate of Registration) (NAA: Series No A11731, Control Symbol 4712, Item Barcode 4997102). Various VELVET device marks secured registration on the Victorian and Commonwealth Trade Mark Registers and are available upon request.

Figure 7 and Figure 25, their soap products, trade marks and advertisements speak to the efficacy in ‘cleansing’ Aboriginal skin colour. In various advertisements some 20 years earlier from the trade mark depicting a half ‘cleansed’ Indigenous man (Figure 25), J Kitchen & Sons coupled that theme — the juxtaposition of dirt–cleanliness and Blackness–Whiteness — with Australia’s first Prime Minister Edmund Barton’s ‘White Australia’ policy. The image (Figure 7) depicts a ‘half-cleansed’ Aboriginal boy, who is being forcibly washed by an Aboriginal woman, whilst being told that his crying is pointless because all must conform to Barton’s ‘White Australia.’<sup>101</sup> While other children anxiously await their turn to be assimilated, a decolourised/bleached Aboriginal child, seen smiling having benefited from his new found ‘whiteness’, exclaims ‘budgaree [sic] [ie fine] soap dat.’<sup>102</sup>

Figure 7: ‘Velvet Soap’ Advertisement (1901)<sup>103</sup>



<sup>101</sup> *Punch* (Melbourne, 30 May 1901) 646 <<https://trove.nla.gov.au/newspaper/page/20470358>>. This image appeared as part of a special issue of *Punch* on 30 May 1901 commemorating a royal visit.

<sup>102</sup> The advertisers are using the Aboriginal word, ‘budgeree’, which, according to the *Macquarie Dictionary*, means ‘good; fine’: *Macquarie Dictionary* (online at 15 March 2019) ‘budgeree’. The root of this word is the Dharug word ‘bujari’, meaning ‘good, right’.

<sup>103</sup> See above n 101.

The presumed civilising mission that soap performs here has been taken up elsewhere,<sup>104</sup> but is well-demonstrated also in Australia via the ‘Velvet Soap’ advertisement (Figure 7), with many other trade marks considered in this article demonstrating this point. Writing in relation to ‘African cleansing’ and imperialism, Anne McClintock argues that ‘[p]urification rituals ... can also be regimes of violence and constraint’:

People who have the power to invalidate the boundary rituals of another people thereby demonstrate their capacity to violently impose their culture on others. Colonial travel writers, traders, missionaries and bureaucrats carped constantly at the supposed absence in African culture of ‘proper domestic life’, in particular Africans’ purported lack of hygiene. But the inscription of Africans as dirty and undomesticated, far from being an accurate depiction of African cultures, served to legitimize the imperialists’ violent enforcement of their cultural and economic values, with the intent of purifying and thereby subjugating the unclean African body and imposing market and cultural values more useful to the mercantile and imperial economy.<sup>105</sup>

Transposing the word ‘African(s)’<sup>106</sup> above with ‘Aborigines’,<sup>107</sup> Maoris,<sup>108</sup> Native Americans,<sup>109</sup> or ‘coloured’ Others, we see that local and international

<sup>104</sup> See especially Thomas Richards, *The Commodity Culture of Victorian England: Advertising and Spectacle, 1851–1914* (Verso, 1991) ch 3; Anne McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Conquest* (Routledge, 1995) ch 5; Anandi Ramamurthy, *Imperial Persuaders: Images of Africa and Asia in British Advertising* (Manchester University Press, 2003) ch 2.

<sup>105</sup> McClintock (n 104) 226 (citations omitted).

<sup>106</sup> See, eg, the ZULU word mark in Class 47 (laundry soap and candles) applied for by Lever Bros Ltd of Birkenhead, England, and Sydney, Colony of New South Wales, on 5 October 1898: *Trade Mark No 6750* in New South Wales, *Trade Marks Register* (18 December 1897 – 5 October 1898) vol 14 (NAA: Series No A1090, Control Symbol 14, Item Barcode 5000340). The mark later entered the Commonwealth Trade Marks Register: *Trade Mark No 12567* in Commonwealth, *Register of Trade Marks* (October 1911 – May 1912) vol 13, 142 (NAA: Series No A6288, Control Symbol 13, Item Barcode 5148013).

<sup>107</sup> See, eg, Figure 1, Figure 9 and Figure 10. See especially O’Riordan & Sons’ application to register the NULLA NULLA trade mark in Class 47 (soap and detergents): *Trade Mark No 27159* in Commonwealth, *Register of Trade Marks* (January 1920 – May 1920) vol 28, 159 (NAA: Series No A6288, Control Symbol 28, Item Barcode 5148028). The registration date is listed as 7 February 1920.

<sup>108</sup> See, eg, D & J Fowler Ltd’s successful application to register the MAORI BRAND trade mark in Class 42 (oatmeal): *Trade Mark No 572* in Commonwealth, *Register of Trade Marks* (July 1906 – July 1906) vol 1, 143 (NAA: Series No A6288, Control Symbol 1, Item Barcode 5148001). The mark was granted registration in all states, except Victoria; this condition on registration was probably due to prior competing Victorian registrations.

registered trade marks on the colonial and Commonwealth Registers provide some support for Anne McClintock's ideas. These trade marks and accompanying advertisements — supported by an insensitive Trade Marks Office promoting pecuniary interests and a narrow construction of the public interest — helped to denigrate Others and encourage the imposition of 'cultural and economic values' more useful to developing Imperial economies.<sup>110</sup> For instance, the 'cleansed' Aboriginal boy in Figure 7, though retaining some of his Aboriginality through his spoken words and dress, has accepted his subjugated fate: he is now assimilated.

<sup>109</sup> See, eg, the successful application to register a caricature of a Native American shooting an arrow together with the word 'Wyandotte' by Henry Peabody & Co of New York, United States, London, England and Sydney, New South Wales, in Class 47 (detergents, specifically cleansing powder for household and factory, and other purposes): *Trade Mark No 8932* in Victoria, *Register of Trade Marks* (28 April 1904 – 31 August 1905) vol 17, 99 (NAA: Series No A1181, Control Symbol 17, Item Barcode 4286994). In the same volume of the Victorian Trade Mark Register, The JB Ford Co secured registration of re-stylised versions of that device mark in Class 1: *Trade Mark No 9143* and *Trade Mark No 9144* in Victoria, *Register of Trade Marks* (28 April 1904 – 31 August 1905) vol 17, 212 (NAA: Series No A1181, Control Symbol 17, Item Barcode 4286994). The latter device mark contained the words 'Cleaner and Cleanser': *Trade Mark No 9144* (Vic) (Application for Registration) (NAA: Series No A11731, Control Symbol 9144, Item Barcode 5039912); *Trade Mark No 9144* (Vic) (Certificate of Registration) (NAA: Series No A11731, Control Symbol 9144, Item Barcode 5039912).

<sup>110</sup> McClintock (n 104) 226.

Figure 8: Pears' Soap Locksley Hall Advertisement (1899)<sup>111</sup>



Sometimes, stigmatising commercial imagery referred to popular culture circulating in the public sphere, where Indigenous peoples aspire to 'whiteness'. For example, in Figure 8, a line from one of Alfred Lord

<sup>111</sup> The 'Pears' Soap' advertisement appears in what seems to be a serialised version of Fergus Hume's *The Mystery of a Hansom Cab*; it is dated 10 August 1889 (vol 1 no 1). This image can be accessed via *The John Johnson Collection: An Archive of Printed Ephemera* (Website, 2019) <<http://johnjohnson.chadwyck.com>>.

Tennyson's poems is quoted to promote soap products: 'Ev'n the black Australian dying hopes he shall return, a white.'<sup>112</sup>

Stigmatising trade marks and their accompanying advertisements did not end there. Like many colonial cartoons,<sup>113</sup> some registered trade marks operating in the colonial public sphere appeared to have genocidal references. For instance, in the New South Wales Trade Marks Register, the STREET'S WHITE ANT CURE registered device mark, *Trade Mark No 7185*, speaks of applying 'chemical preparations for destroying noxious animals and insects' (Figure 9).<sup>114</sup> The inescapable inference from this device mark is that Indigenous Australians are considered noxious pests requiring extermination.<sup>115</sup>

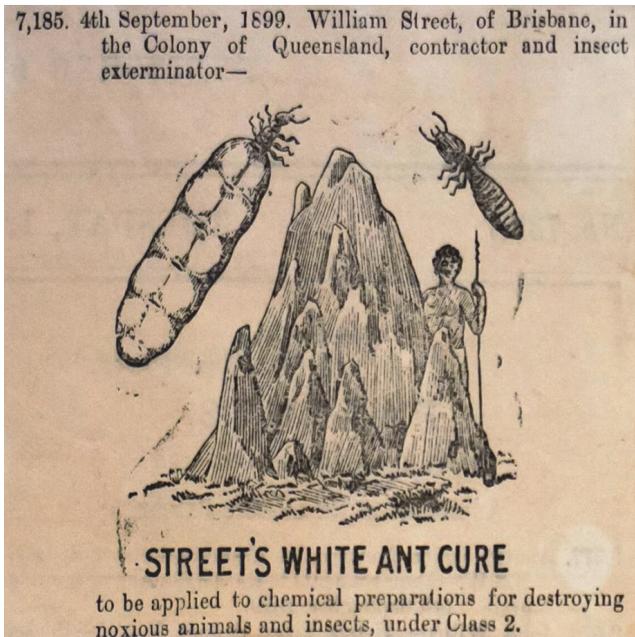
<sup>112</sup> Alfred Lord Tennyson, *Locksley Hall: Sixty Years After* (Macmillan and Co, 1886) 12 (line 70).

<sup>113</sup> See, eg, the genocidal representations in the infamous cartoon in *Queensland Punch*, suggesting various solutions to the Aboriginal 'problem', like 'dispersal', a euphemism for massacre: 'Ginx's Baby' (1 April 1879) *The Queensland Punch* 91 reproduced in Matthew Foley, 'Aborigines and the Police' in Peter Hanks and Bryan Keon-Cohen (eds), *Aborigines and the Law: Essays in Memory of Elizabeth Eggleston* (George Allen & Unwin, 1984) 160, 162. In relation to an Aboriginal woman and child in the foreground, Foley describes the police officer as 'cheerfully consider[ing] the bullet': Foley (n 113) 162.

<sup>114</sup> William Street of Brisbane, Colony of Queensland, applied to register this trade mark on 4 September 1899 (secured registration on 28 September 1899) in Class 2 (chemical preparations for destroying noxious animals and insects): *Trade Mark No 7185* in New South Wales, *Trade Marks Register* (11 August 1899 – 16 May 1900) vol 16 (NAA: Series No A1090, Control Symbol 16, Item Barcode 5000342). The handwritten indexing words include 'nest', 'aboriginal' [sic], 'ant', 'Hill', 'man' and 'Black'. The mark later entered the Commonwealth Trade Marks Register: *Trade Mark No 13328* in Commonwealth, *Register of Trade Marks* (May 1912 – November 1912) vol 14, 82 (NAA: Series No A6288, Control Symbol 14, Item Barcode 5148014).

<sup>115</sup> It is worth noting, however, that such common attitudes were often challenged by humanitarians, who pleaded to newspaper readers and 'all residents in Queensland who think that blacks are human beings and not mere vermin formed (by some unaccountable freak of nature) in the shape of men': Chas G Heydon, Letter to the Editor, 'Black and White in Queensland', *The Sydney Morning Herald* (Sydney, 2 February 1874) 3 <<https://trove.nla.gov.au/newspaper/page/1448643>>.

Figure 9: STREET'S WHITE ANT CURE Trade Mark (1899)<sup>116</sup>



Furthermore, the supposed link between Indigenous Australians and other animals, such as primates, was arguably well entrenched in some parts of Australian culture. The view that Aborigines were ‘sub-human primates’ also ‘deserving’ of extermination certainly existed in the minds of many colonial Australians. According to media reports, one of the jurors in the infamous first Myall Creek massacre trial and subsequent acquittal said:

I look on the blacks ... as a set of monkies, and the earlier they are exterminated from the face of the earth the better. ... I knew well they were guilty of the murder, but I ... would never see a white man suffer for shooting a black.<sup>117</sup>

Following the second Myall Creek massacre trial, which resulted in seven convictions and hangings, colonial newspapers preserved these repulsive views. *The Sydney Herald* editorial lamented the time and expense associated with the trials, rather than the beheadings and immolation of innocent Aboriginal women and children: ‘The whole gang of black animals are not

<sup>116</sup> See above n 114.

<sup>117</sup> Letter to the Editor, *The Australian* (Sydney, 8 December 1838) 2.

worth the money which the Colonists will have to pay for printing the silly documents on which we have already wasted too much time.<sup>118</sup>

Figure 10: LUBRA BOOT POLISH Trade Mark (1906)<sup>119</sup>



As Figure 10 attests, stigmatising trade marks incorporating the theme of the ‘Aboriginal as monkey’ were evident in early 20<sup>th</sup> century Australia. The colonial Victorian Trade Marks Register reveals that, on 23 March 1906, Henry Borrodell Fisher and Frederick William Inch Menhemmett of Fitzroy applied to register this trade mark, *Trade Mark No 9573, LUBRA BOOT POLISH* in respect of Class 50 (pastes and polishes of all description).<sup>120</sup> The

<sup>118</sup> Editorial, ‘The Blacks’, *The Sydney Herald* (Sydney, 5 October 1838) 3 <<https://trove.nla.gov.au/newspaper/page/1525235>>. In another settler-apologist editorial regarding the ‘aboriginal question, complaints were made against the ‘proved inequality of the laws ... [especially] since 1832, though murders have been constantly committed by the blacks, not one black has been brought to justice — [which] will create a spirit of retaliation, will incite an actual war of extermination’: Editorial, *The Sydney Herald* (Sydney, 10 December 1838) 2 (emphasis omitted) <<https://trove.nla.gov.au/newspaper/page/1525350>>. These quotes were referred to in New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 June 2000, 6894–6 (Paul Whelan).

<sup>119</sup> See below n 120.

<sup>120</sup> *Trade Mark No 9573* in Victoria, *Register of Trade Marks* (15 November 1905 – 26 June 1906) vol 18, 76 (NAA: Series No A1181, Control Symbol 18, Item Barcode 4286995); *Trade Mark No 9573* (Vic) (Application for Registration) (NAA: Series No A11731, Control Symbol 9573, Item Barcode 5030858). The application was lodged on 23 March 1906: *Trade Mark No 9573* (Vic) (Application for Registration) (NAA: Series No A11731, Control Symbol 9573, Item Barcode 5030858). The mark was gazetted on 28 March 1906: Commissioner of Trade Marks,

essential particulars were described as the ‘word “Lubra” and device of a lubra.’<sup>121</sup> A handwritten note by the Commissioner of Trade Marks, GH Neighbour, suggests that the trade mark application was gazetted on 26 March 1906 and, being unopposed, secured registration.<sup>122</sup>

Figure 11: ‘Lubra Boot Polish’ Advertising Post Card (1906)<sup>123</sup>



In the spruiking of LUBRA BOOT POLISH, the traders, in the commercial post card in Figure 11,<sup>124</sup> are plainly representing the ‘Lubra’ housemaid as

‘Trade Marks: Applications’ in Victoria, *Victoria Government Gazette*, No 39, 28 March 1906, 1621, 1622. According to the *Macquarie Dictionary*, a ‘lubra’ is a derogatory name for an Aboriginal woman. Ironically, the word is taken from ‘lubara’, which is thought to be the Aboriginal word for penis for south eastern Tasmanian Aborigines: *Macquarie Dictionary* (online at 16 March 2019) ‘lubra’. But see Liz Conon, ‘The “Lubra” Type in Australian Imaginings of the Aboriginal Woman from 1836–1973’ (2013) 25(2) *Gender & History* 230, 235–6.

<sup>121</sup> *Trade Mark No 9573 (Vic) (Application for Registration) (NAA: Series No A11731, Control Symbol 9573, Item Barcode 5030858).*

<sup>122</sup> *Trade Mark No 9573 (Vic) (Certificate of Registration) (NAA: Series No A11731, Control Symbol 9573, Item Barcode 5030858).* But see Commissioner of Trade Marks, ‘Trade Marks: Applications’ in Victoria, *Victoria Government Gazette*, No 39, 28 March 1906, 1621, 1622.

<sup>123</sup> See below n 124.

<sup>124</sup> This image is available from the State Library Victoria (Accession No H35552, Accession No A04729) <<http://handle.slv.vic.gov.au/10381/358378>>. I have chosen not to repeat details of the personal greeting, but the author of the commercial postcard expressed surprise at this commercial imagery.

subhuman and most likely operating in slave-like conditions.<sup>125</sup> The subordinated role of this supposed primate, replete with her contrived stupidity and ‘racialised subject position,’<sup>126</sup> is clear for everyone to see; the caption in Figure 11 reads: ‘Dis LUBRA Polish makes boss’s boots shine good as that big feller sun.’

Figure 12: LEWIS & WHITTYS BLACKING Trade Mark (1883)<sup>127</sup>



These affronts did not only target Indigenous Australians. Traders also used Maoris and Africans alongside various animals such as monkeys (Figure 12)<sup>128</sup> and lizards<sup>129</sup> to differentiate their blacking products and boot polishes from those of their competitors.

<sup>125</sup> For a detailed history of the ruthless exploitation of Indigenous workers and the non-payment of wages in Australia, see Rosalind Kidd, *Trustees on Trial: Recovering the Stolen Wages* (Aboriginal Studies Press, 2006).

<sup>126</sup> Conor (n 120) 236. Conor observes that the use of ‘Lubra’ in settler and Aboriginal communications came to represent ‘racial difference and sexual access,’ and, in this way, ‘began to accrue the sorts of meanings at work in the stereotype.’

<sup>127</sup> See below n 128.

<sup>128</sup> Frederick Albert Lewis & John Benjamin Whitty (trading as Lewis & Whitty’s) applied for this device mark on 1 November 1883 in Class 50: *Trade Mark No 766* in Victoria, *Register of Trade Marks* (3 September 1881 – 20 November 1883) vol 2, 298 (NAA: Series No A1181, Control Symbol 2, Item Barcode 4286981). See also *Trade Mark No 766 (Vic)* (Application for Registration) (NAA: Series No A11731, Control Symbol 766, Item Barcode 5012928). The

Moreover, deleterious racist attitudes in Australia were not limited to Indigenous Australians. Such attitudes and policies also extended to other non-White Australians, particularly Chinese immigrants. Violence against Chinese immigrants was common in early Australian colonial history, particularly on the goldfields.<sup>130</sup> Colonial laws sought to restrict Chinese immigration<sup>131</sup> and unfairly targeted Chinese gold diggers.<sup>132</sup> 'Australian egalitarianism', writes Kercher, 'was based on an equality of white men alone', which meant that Asians (like Indigenous Australians) 'were left out of the embrace of mateship'.<sup>133</sup> As is well known, one of the first accomplishments of the new Commonwealth Parliament was the passage of the *Immigration Restriction Act 1901* (Cth). This was the first federal Act in a series of immigration laws that collectively came to be known as the White Australia policy, which sought to ensure Australia's population was 'white'. Kercher observes that these laws were more of an Australian innovation, with Britain merely suggesting a 'feeble disguise for discriminatory legislation'.<sup>134</sup>

During parliamentary debates over the Immigration Restriction Bill 1901 (Cth), James Ronald warned of the inevitable 'degeneration' to humanity when 'inferior races ... blend with a superior race'<sup>135</sup> and thus pleaded: 'Let us

trade mark was gazetted on 2 November 1883 with an illustration: 'Application for Registration of One Trade-Mark (No 766)' in Victoria, *Victoria Government Gazette*, No 108, 2 November 1883, 2519, 2519.

<sup>129</sup> See, eg, LIZARD BLACK device mark: *Trade Mark No 8290* in New South Wales, *Trade Marks Register* (19 July 1901 – 16 August 1902) vol 18 (NAA: Series No A1090, Control Symbol 18, Item Barcode 5000349).

<sup>130</sup> See Kathryn Cronin, *Colonial Casualties: Chinese in Early Victoria* (Melbourne University Press, 1982) ch 3.

<sup>131</sup> See, eg, *Chinese Immigration Statute 1864* (Vic) (27 Vict, No 200); *Chinese Immigrants Regulation and Restriction Act 1861* (NSW) (25 Vict, No 3). For a useful collection of official reports and documents concerning Chinese immigration, see Ian F McLaren, *The Chinese in Victoria: Official Reports and Documents* (Red Rooster Press, 1985). For newspaper reports on the Victorian anti-Chinese colonial campaign from 1887–88, see D Gibb, *The Making of 'White Australia'* (Victorian Historical Association, 1973) 40–86.

<sup>132</sup> See Manning Clark, *A Short History of Australia* (Tudor, rev ed, 1969) 131–2.

<sup>133</sup> Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1995) 148. Kanakas, indentured Pacific Islander labourers, were also subject to racist laws: at 149–50. For a discussion on the historical development of racist concepts in Australia, see generally Andrew Markus, 'Australian Governments and the Concept of Race: An Historical Perspective' in Marie de Lepervanche and Gillian Bottomley (eds), *The Cultural Construction of Race* (Sydney Association for Studies in Society and Culture, 1988) 46.

<sup>134</sup> Kercher (n 133) 147 (citations omitted). Kercher provides an excellent and accessible summary of colonial and federal anti-Chinese laws and judicial responses: at 147–9.

<sup>135</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 6 September 1901, 4665.

keep before us the noble idea of a white Australia — a snow-white Australia if you will. Let it be pure and spotless.<sup>136</sup> The then Attorney-General, Alfred Deakin, argued that the ‘policy of securing a “white Australia”’ meant prohibiting ‘all alien coloured immigration’ and deporting or reducing the ‘number of aliens now in our midst.’<sup>137</sup> In his earlier life as a parliamentarian before his appointment to the High Court of Australia, Sir Isaac Isaacs expressed his commitment to this policy by declaring that:

Those around us — our constituents of to-day, and our fellow countrymen — and those who come after us, will doubtless scrutinize our acts and our words to see if we have faithfully carried out with unswerving fidelity the principles upon which we have been sent here. Consequently, *I am prepared to do all that is necessary to insure that Australia shall be white, and that we shall be free for all time from the contamination and the degrading influence of inferior races.*<sup>138</sup>

Commonly held xenophobic views were also evident in debates concerning the Customs Bill 1901 (Cth), where the then Minister for Trade and Customs, Charles Kingston, observed that ‘[w]e know that for “ways that are dark and tricks that are vain the heathen Chinese [sic] is peculiar”; but we propose to keep him out of a white Australia.’<sup>139</sup> In advocating the incorporation of Union (White) Labour marks into the Trade Marks Bill 1904 (Cth), Isaac Isaacs again expressed his strong ‘desire to have a White Australia’, and warned of the American cigar manufacturing experience where ‘Chinese operatives’ were employed together with ‘coolies’ operating in ‘small rat tenements.’<sup>140</sup>

These racist views and notably anti-Chinese policies, though present in colonial times, arguably hardened when anxieties over the Other increased. Cartoonists produced racist caricatures of the ‘filth’ associated with the ‘yellow peril’ and the supposed threat to White Australia.<sup>141</sup> These paranoid

<sup>136</sup> Ibid 4666. Ronald later clarified that a ‘white Australia really means a British Australia’: Commonwealth, *Parliamentary Debates*, House of Representatives, 12 September 1901, 4802; and reiterated his yearning ‘to have a white Australia, and to exclude all coloured aliens from our shores’: at 4803.

<sup>137</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 12 September 1901, 4806. Deakin sought this action ‘at the earliest time, by reasonable and just means.’

<sup>138</sup> Ibid 4845 (emphasis added). For a useful collection of extracts on parliamentarians debating the *Immigration Restriction Act 1901* (Cth), see Gibb (n 131) 99–124.

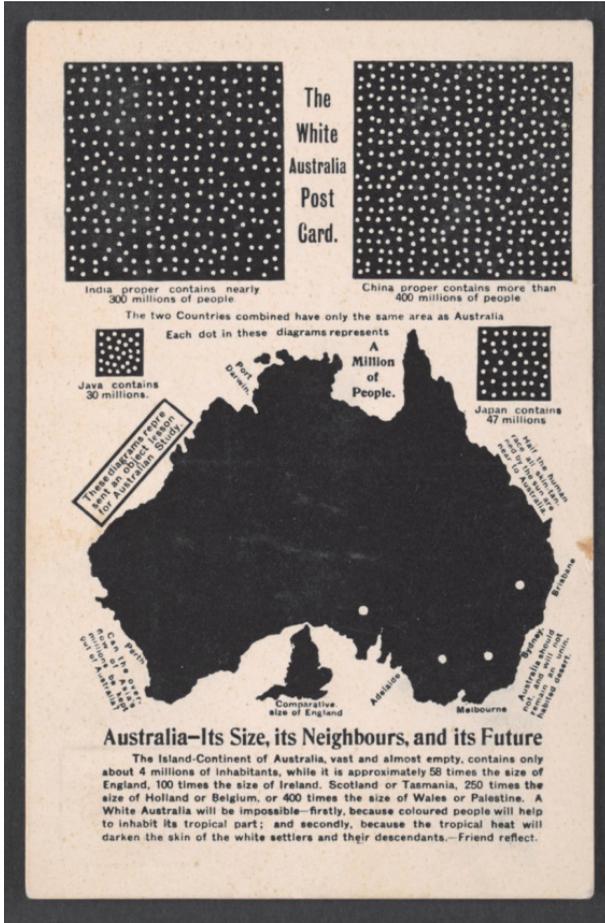
<sup>139</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 11 July 1901, 2458.

<sup>140</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 30 November 1905, 6075.

<sup>141</sup> See, eg, the infamous cartoon depicting the lecherous tentacles of the ‘Mongolian Octopus’: Phil May, ‘Mongolian Octopus — His Grip On Australia’ (21 August 1886) *The Bulletin*

trepidations circulated widely in the Australian public sphere, sometimes as post cards such as that depicted in Figure 13.

Figure 13: 'The White Australia Post Card' (1910)<sup>142</sup>



12–13 <<http://nla.gov.au/nla.obj-507862378>>. See also Livingston Hopkins' illustration: 'The Yellow-Trash Question' (26 August 1895) *The Bulletin* 5 <<http://nla.gov.au/nla.obj-490341508>>. See also Cronin (n 130) ch 4.

<sup>142</sup> This image is available from the State Library Victoria (Accession No H95.48) <<http://handle.slv.vic.gov.au/10381/103255>>.

Many traders, whether deliberately or subconsciously, exploited marginalised Others as a way to differentiate their goods, and thus readily reflected racist sentiments in marked goods, such as *Trade Mark No 2188*, the WELLY GOOD CHINAMAN device mark (Figure 14).<sup>143</sup> This trade mark was created to ensure its versatility: the blank space on the placard in between ‘You Buy’ and ‘Welly Good’ allowed ‘for the reception of the name of the article in respect of which the trade-mark is used.’<sup>144</sup> Racist caricatures of Chinese Australians suggest that ‘welly good’ was commonly used to mock Chinese people.<sup>145</sup> However, the WELLY GOOD CHINAMAN mark did not appear to enjoy commercial success; it soon became ‘defunct’ and was then removed from the Register.<sup>146</sup>

<sup>143</sup> Lange & Thoneman of Melbourne, Colony of Victoria, applied to register this device mark in Class 42 (tea and other substances used as food) on 28 August 1889: *Trade Mark No 2188* in Victoria, *Register of Trade Marks* (16 August 1889 – 28 February 1891) vol 8, 13 (NAA: Series No A1181, Control Symbol 8, Item Barcode 4286983); *Trade Mark No 2188* (Vic) (Application for Registration) (NAA: Series No A11731, Control Symbol 2188, Item Barcode 5000273). The mark was gazetted on 30 August 1889: ‘Application for Registration of One Trade-Mark (No 2188)’ in Victoria, *Victoria Government Gazette*, No 90, 30 August 1889, 2989, 2989; with the mark accepted for registration: *Trade Mark No 2188* in Victoria, *Register of Trade Marks* (16 August 1889 – 28 February 1891) vol 8, 13 (NAA: Series No A1181, Control Symbol 8, Item Barcode 4286983).

<sup>144</sup> ‘Application for Registration of One Trade-Mark (No 2188)’ in Victoria, *Victoria Government Gazette*, No 90, 30 August 1889, 2989, 2989; *Trade Mark No 2188* (Vic) (Application for Registration) (NAA: Series No A11731, Control Symbol 2188, Item Barcode 5000273).

<sup>145</sup> See, eg, ‘Commonwealth Cartoonlets’, *Punch* (Melbourne, 30 May 1901) 642. <<https://trove.nla.gov.au/newspaper/page/20470354>>. The subject of this Chinese Australian caricature, ‘Sin Fat’, exclaims in this cartoon: ‘Welly good, white Australia. Me wantee white Australia too. Me votee for all white Australia. Dam foreigners must go.’

<sup>146</sup> *Trade Mark No 2188* in Victoria, *Register of Trade Marks* (16 August 1889 – 28 February 1891) vol 8, 13 (NAA: Series No A1181, Control Symbol 8, Item Barcode 4286983).

Figure 14: WELLY GOOD CHINAMAN Trade Mark (1889)<sup>147</sup>

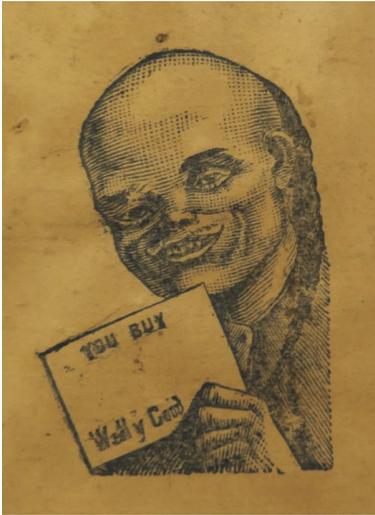


Figure 15: Bedford's WHITE AUSTRALIA Trade Mark (1925)<sup>148</sup>



Some trade mark applicants, like journalist, politician and novelist Randolph Bedford, sought to profit off the White Australia policy by securing registration of a WHITE AUSTRALIA device mark for their goods (Figure 15). Other traders simply conflated the perceived stigmatised characteristics of non-Whites, such as in the NATTAMATTA BLACK BOY device mark shown in Figure 16. For these traders, maltreatment of Others as an amorphous blob of (sub)humanity was presumably uncontroversial.

<sup>147</sup> See above n 143.

<sup>148</sup> (George) Randolph Bedford, of Parliament House of Brisbane, Queensland, secured registration of this device mark in Class 39 (publications) from 23 November 1925: *Trade Mark No 43199* (Certificate of Registration) in Commonwealth, *Register of Trade Marks* (August 1926 – September 1926) vol 43 (NAA: Series No A6288, Control Symbol 43, Item Barcode 5148043). The mark was advertised on 9 April 1926: Department of Patents, *Australian Official Journal of Trade Marks* (1926) vol 21, 253.

Figure 16: NATTAMATTA BLACK BOY Trade Mark (1892)<sup>149</sup>



### C The Sexist History

Women and girls, it appears, did not fare much better. It seems that decision-makers did not consider their continuous objectification particularly problematic. Consistent with the historical record in the UK, the colonial and Commonwealth Trade Mark Registers reveal that Black women, as well as representations of other 'exotic' women, in particular, were hypersexualised. Stigmatising trade marks of Black women and girls went beyond cartoonist caricatures of buxom mythical female beings (Figure 17 and Figure 18) and in fact often included sexually suggestive photographs of actual bare breasted Black women, as shown in the NIRVANA trade mark (Figure 19).<sup>150</sup>

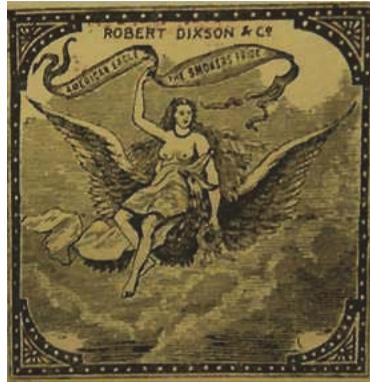
<sup>149</sup> Joseph P Foster of 239 Bourke Street, Melbourne, applied to register this trade mark in Class 42 (tea, coffee and coca) on 18 October 1892: *Trade Mark No 3309* in Victoria, *Register of Trade Marks* (2 March 1891 – 19 April 1893) vol 9, 292 (NAA: Series No A1181, Control Symbol 9, Item Barcode 4286986). The mark was advertised on 21 October 1892: Commissioner of Trade Marks, 'Trade Mark Act 1890 (No 2)' in Victoria, *Victoria Government Gazette*, No 135, 21 October 1892, 4015, 4017. It was later accepted for registration: *Trade Mark No 3309* (Vic) (Certificate of Registration) (NAA: Series No A11731, Control Symbol 3309, Item Barcode 5020880).

<sup>150</sup> See below nn 154–7.

Figure 17: *MIRACULUM*  
Trade Mark (1905)<sup>151</sup>

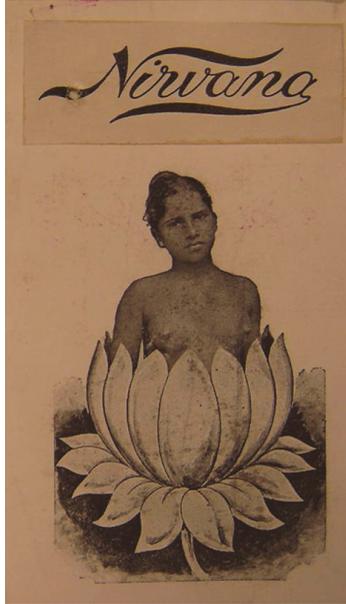


Figure 18: *AMERICAN EAGLE*  
Trade Mark (1906)<sup>152</sup>



- <sup>151</sup> Charleston Puncture Components Pty Ltd, of 395 Collins Street, Melbourne, applied to register this device mark in Class 4 (liquid composition or solution for stopping punctures in motor car and bicycle wheel tyres) on 29 November 1905: *Trade Mark No 9426* in Victoria, *Register of Trade Marks* (15 November 1905 – 26 June 1906) vol 18, 10 (NAA: Series No A1181, Control Symbol 18, Item Barcode 4286995). See also Commissioner of Trade Marks, 'Trade Marks: Applications' in Victoria, *Victoria Government Gazette*, No 139, 6 December 1905, 4585, 4585. This mark later secured Commonwealth registration: *Trade Mark No 602* in Commonwealth, *Register of Trade Marks* (July 1906 – July 1906) vol 1, 151 (NAA: Series No A6288, Control Symbol 1, Item Barcode 5148001). A slightly re-stylised version of this device mark (*Trade Mark No 285096*) also secured British trade mark registration: Patent Office (UK), *The Trade Marks Journal* (1907) vol 31, 1811 (application advertised on 12 December 1906); Patent Office (UK), *The Trade Marks Journal* (1908) vol 32, 213 (registration advertised on 30 January 1907).
- <sup>152</sup> On 20 July 1906, the British Australasian Tobacco Co Pty Ltd applied for Commonwealth registration of this device mark, being the words 'American Eagle' and the 'pictorial device', in Class 45 (tobacco): *Trade Mark No 1267* in Commonwealth, *Register of Trade Marks* (July 1906 – September 1906) vol 2, 67 (NAA: Series No A6288, Control Symbol 2, Item Barcode 5148002). There were earlier registrations and gazettal notices in Victoria Queensland, South Australia, Western Australia and Tasmania. A review of the Registers reveals that tobacco companies were proliferators of soft pornography, especially of Latino and African Others.

Figure 19: NIRVANA Trade Mark (1896)<sup>153</sup>



The NIRVANA trade mark (Figure 19) is troubling both because of its sexism and irreverence to those of the Hindu faith. Yet, this stigmatising mark proved to be a particularly effective trade symbol. Described as a ‘Hindoo [sic] goddess emerging from a lotus flower together with the word “Nirvana”’, Holmes Samuel Chipman, of Margaret Street, Sydney, applied to register this trade mark on 28 December 1896 in Class 42 (long list of foodstuffs).<sup>154</sup> Chipman sought, and was granted, British trade mark registration for the mark in 1898.<sup>155</sup> The value of the NIRVANA trade mark as a species of property recognised and protected by law was self-evident. It was transferred to Kandena Tea Estates (Transfer No 9343) and then again to John Connell &

<sup>153</sup> See below nn 154–7.

<sup>154</sup> *Trade Mark No 5858* in New South Wales, *Trade Marks Register* (1 July 1896 – 27 April 1897) vol 12 (NAA: Series No A1090, Control Symbol 12, Item Barcode 5000338). The application was gazetted on 12 January 1897: Registrar General, ‘Trade-Mark (Registered No 5858) under Classification 42’ in New South Wales, *New South Wales Government Gazette*, No 27, 12 January 1897, 189, 189.

<sup>155</sup> The British trade mark application (*Trade Mark No 201768*) was advertised on 20 April 1898: Patent Office (UK), *The Trade Marks Journal* (1899) vol 23, 439. Its registration was advertised a few months later on 8 June 1898: at 650.

Co Pty Ltd (Transfer No 10061).<sup>156</sup> The mark later migrated onto the Commonwealth Trade Marks Register as *Trade Mark No 26212*, where it was again renewed on 10 October 1933 for another 14 years.<sup>157</sup> Although the mark, as it appeared there, was slightly more stylised and set within a more elaborate frame, the essential particular of the bare-breasted Hindu woman remained. Due to non-renewal, it was finally removed from the Commonwealth Register on 27 October 1947.<sup>158</sup>

For over 50 years, this trade mark adorned various foodstuffs<sup>159</sup> and arguably occupied a continuous visual presence in Australian households and grocers. All the while, as with other examples,<sup>160</sup> the unrelenting stereotype of Aboriginal<sup>161</sup> or other minority women available for the sexual gratification of male consumers was repeated and propagated in the Australian public sphere. Perhaps these trade marks contribute to what Jan Pettman, writing more broadly, conceptualises as structured power relations that put colonised women in colonial and/or racist societies in a ‘terribly vulnerable’ position.<sup>162</sup>

<sup>156</sup> *Trade Mark No 5858* in New South Wales, *Trade Marks Register* (1 July 1896 – 27 April 1897) vol 12 (NAA: Series No A1090, Control Symbol 12, Item Barcode 5000338).

<sup>157</sup> *Trade Mark No 26212* in Commonwealth, *Register of Trade Marks* (September 1919 – January 1920) vol 27, 212 (NAA: Series No A6288, Control Symbol 27, Item Barcode 5148027).

<sup>158</sup> *Ibid.*

<sup>159</sup> As per the original trade mark application, over 100 foodstuffs were listed, ranging from arrowroot, coffee and tea to confectionary, mustard, table oils, flour, peppers, honey, breads and cakes etc.

<sup>160</sup> There are numerous examples, such as the HINDOO, ARAB and TAMARA trade marks. These are all available upon request.

<sup>161</sup> See, eg, the application by Woods & Co of Kangaroo Island, South Australia, lodged on 8 December 1892 to register the LUBRA BRAND device mark depicting a bare-breasted Aboriginal woman carrying a baby on her back in Class 3 (eucalyptus oil and extract): *Trade Mark No 3363* (Vic) (Application for Registration) (NAA: Series No A11731, Control Symbol 3363, Item Barcode 5020934); *Trade Mark No 3363* (Vic) (Certificate of Registration) (NAA: Series No A11731, Control Symbol 3363, Item Barcode 5020934); *Trade Mark No 3363* in Victoria, *Register of Trade Mark* (2 March 1891 – 19 April 1893) vol 9, 316 (NAA: Series No A1181, Control Symbol 9, Item Barcode 4286986). See also Commissioner of Trade Marks, ‘*Trade Marks Act 1890* (No 2)’ in Victoria, *Victoria Government Gazette*, No 155, 16 December 1892, 4805, 4806. The traders also registered this mark in the UK (*Trade Mark No 169952* for the same class): Patent Office (UK), *The Trade Marks Journal* (1893) vol 18, 915 (application advertised on 20 September 1893), 1068 (registration advertised on 1 November 1893).

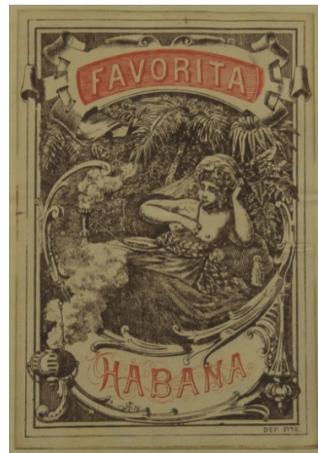
<sup>162</sup> Jan Pettman, *Living in the Margins: Racism, Sexism and Feminism in Australia* (Allen & Unwin, 1992) 27.

In recognising the historical and continued vulnerability of Aboriginal women and girls to sexual exploitation and abuse, she argues that:

Racist and sexist representations of Aboriginal women have tended to label them as immoral and highly sexed, as prostitutes. These representations are compounded by the devaluing of women and the tendency to blame the victim, which is part of rape politics in Australia generally. Here again racism and sexism reinforce each other, and are experienced by Aboriginal women in a brutal interaction.<sup>163</sup>

Those representations are reflected in some of the trade marks considered in this article. Sexism, however, was not confined to Aboriginal or Black women and girls. Stigmatising representations of Latino women (Figure 20), objectified White women (Figure 21 and Figure 22) or the subordination of subservient women in the domestic sphere (Figure 23) were all too common.

Figure 20: OCEANA and FAVORITA Trade Marks (1881)<sup>164</sup>



<sup>163</sup> Ibid (citations omitted). Pettman here was referring to the complex issue of consensual and non-consensual sexual relations in colonial and post-colonial Australia.

<sup>164</sup> Feldheim, Jacobs & Co of 72 Queen Street, Melbourne, Victoria, applied for these trade marks in Class 45 (cigars and manufactured tobacco) which were used for some 18 months before the application: *Trade Mark No 427* (Oceana) and *Trade Mark No 428* (Favorita) in

Figure 21: RHEINGOLD Trade Mark (1882)<sup>165</sup>

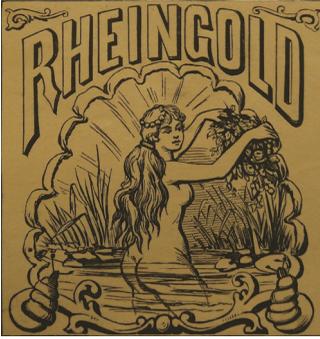
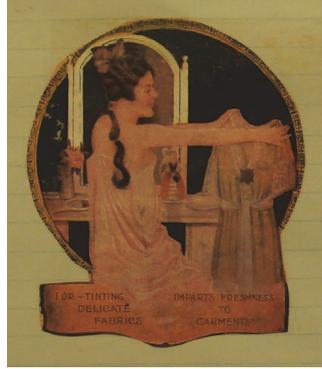


Figure 22: Willis' Trade Mark (1921)<sup>166</sup>



Victoria, *Register of Trade Marks* (3 September 1881 – 20 November 1883) vol 2, 11 (NAA: Series No A1181, Control Symbol 2, Item Barcode 4286981). The 'OCEANA device mark was described as a 'figure of a woman emerging from clouds' and the FAVORITA mark was described as 'the figure of a woman in oriental costume reclining in a leafy bower smoking a hookah'. There was two other device marks applied for at the same time, one of them being the LE NEGRO mark: *Trade Mark No 429* in Victoria, *Register of Trade Marks* (3 September 1881 – 20 November 1883) vol 2, 12 (NAA: Series No A1181, Control Symbol 2, Item Barcode 4286981). The application (with illustrations of all 4 device marks) was gazetted on 11 November 1881: 'Application for the Registration of More Than One Trade-Mark (Nos 427, 428, 429 and 430)' in Victoria, *Victoria Government Gazette*, No 123, 11 November 1881, 3106, 3106. Having met no opposition and nothing 'adverse to the application', the device marks secured registration on 14 February 1882: *Trade Mark Nos 427, 428, 429 and 430* (Vic) (Certificate of Registration) (NAA: Series No A1181, Control Symbol 2, Item Barcode 4286981).

<sup>165</sup> Isaac Jacobs and Alfred Hart secured registration of this mark in Class 45 (manufactured tobacco and cigars): *Trade Mark No 593* in Victoria, *Register of Trade Marks* (3 September 1881 – 20 November 1883) vol 2, 163 (NAA: Series No A1181, Control Symbol 2, Item Barcode 4286981).

<sup>166</sup> Arthur James Willis (Manufacturer) of Wollstonecraft, New South Wales, secured registration of this trade mark on 22 November 1921 in Class 1 (mineral dyes): *Trade Mark No 32050* in Commonwealth, *Register of Trade Marks* (November 1921 – April 1922) vol 33, 50 (NAA: Series No A6288, Control Symbol 33, Item Barcode 5148033). It was not renewed and thus it was removed from the register 14 years later on 3 December 1935.

Figure 23: BALM OF EASE Trade Mark (1920)<sup>167</sup>



Although it is not the present intention to provide a deep account of gender discrimination in historical and modern day Australia,<sup>168</sup> a few points warrant discussion. Feminist activism is often divided into ‘three waves.’ The first wave is concerned with enfranchising women; the second wave generally relates to equality of opportunity, reproductive and other rights; and, depending on the audience, the amorphous third wave either speaks to women securing an

<sup>167</sup> Martha Freeman of New South Wales secured registration of this trade mark on 5 August 1920 in Class 3 (ointment for human use): *Trade Mark No 28794* in Commonwealth, *Register of Trade Marks* (May 1920 – September 1920) vol 29, 794 (NAA: Series No A6288, Control Symbol 29, Item Barcode 5148029). It was not renewed and thus it was removed from the register 14 years later on 6 August 1934.

<sup>168</sup> For discriminatory laws affecting the rights of women, see, eg, Kercher (n 133) 137–44. For an excellent collection of essays, see Kay Saunders and Raymond Evans (eds), *Gender Relations in Australia: Domination and Negotiation* (Harcourt Brace Jovanovich, 1992); Norma Grieve and Ailsa Burns (eds), *Australian Women: Contemporary Feminist Thought* (Oxford University Press, 1994); Patricia Crawford and Philippa Maddern (eds), *Women as Australian Citizens: Underlying Histories* (Melbourne University Press, 2001). For an interesting discussion on the interaction of racism and sexism, see especially Pettman (n 162).

equal share in decision-making power<sup>169</sup> or refers to a critique of the presumptive success of the second wave and deconstructing the concept of universal womanhood through post-colonial lenses, as well emphasising individual autonomy.<sup>170</sup>

Focusing here only on the first wave, Australian women — with the notable exception of Aboriginal and Torres Strait Islander women — were the first in the world to secure the right to vote in federal elections *and* be elected to federal parliament.<sup>171</sup> Australian feminist counterpublic spheres emerged across Australia, with at least one active suffragette movement in every colony from the 1880s.<sup>172</sup> Classic feminist publications, such as *The Dawn: A Journal for Australian Women*, described as the ‘pioneer paper of its kind in Australia ... edited, printed, and published by women, in the interest of women,’<sup>173</sup> played a significant role in promoting women’s rights. Operating within the dominant hegemony, replete with the reality of ‘prescribed sex roles’, many first wave feminists maintained that supposedly ‘female “traits”’ of ‘morality’ and ‘purity’ would enter the public sphere if women were granted the vote, because the ‘righteousness and unselfishness that inspired domestic life’ would inform the political sphere.<sup>174</sup>

<sup>169</sup> See Rosemary Cadden, ‘The Three Waves of Feminism’, *State Library of South Australia* (Web Page, 11 April 2014) <[http://www.slsa.sa.gov.au/women\\_and\\_politics/suffr7.htm](http://www.slsa.sa.gov.au/women_and_politics/suffr7.htm)>, archived at <<https://perma.cc/9KQG-D4XK>>.

<sup>170</sup> See Kate Pritchard Hughes, ‘Feminism for Beginners’ in Kate Pritchard Hughes (ed), *Contemporary Australian Feminism 2* (Longman, 2<sup>nd</sup> ed, 1997) 1. One manifestation is encouraging the sexual assertiveness of women.

<sup>171</sup> See ‘Franchise Act’, *National Museum Australia* (Web Page) <<https://www.nma.gov.au/defining-moments/resources/franchise-act>>, archived at <<https://perma.cc/EM58-8LPJ>>; Rita Farrell, ‘Women and Citizenship in Colonial Australia’ in Patricia Crawford and Philippa Maddern (eds), *Women as Australian Citizens: Underlying Histories* (Melbourne University Press, 2001) 115, 138.

<sup>172</sup> See Farrell (n 171) 136. See especially Katie Spearritt, ‘New Dawns: First Wave Feminism 1880–1914’ in Kay Saunders and Raymond Evans (eds), *Gender Relations in Australia: Domination and Negotiation* (Harcourt Brace Jovanovich, 1992) 325.

<sup>173</sup> ‘Our Anniversary’ (1 May 1889) *The Dawn: A Journal for Australian Women* 3 <<http://nla.gov.au/nla.news-page7541599>>. In addition to focusing on feminist activism, this long-running publication contained pragmatic domestic advice (like stain removal and recipes): see, eg, at 6, 12; as well as gendered representations of women (eg semi-naked goddesses). The modern reader might view those latter elements problematic, notwithstanding their historical context.

<sup>174</sup> Spearritt (n 172) 338–9.

Yet, as was the case in other jurisdictions,<sup>175</sup> when Australian women agitated for fundamental civil rights, entrenched interests ridiculed the suffragette movement in the Australian press. Anti-feminist caricatures were a particularly effective method of stigmatising suffragettes. A popular theme was that enfranchising women would result in a neglect of familial duties.<sup>176</sup> In another theme, the domesticated young and curvaceous mother was supposedly more appealing than the short and aging, beak-nosed, shabbily dressed suffragette clutching a scroll titled ‘Womans [sic] Suffrage’.<sup>177</sup>

Despite important developments like the enfranchisement of White women, notions of White women as ‘maternal citizens’ and the ‘civic duty’ of motherhood remained strong.<sup>178</sup> In other words, whether franchised or disenfranchised, White women in Australia were expected to operate mainly in the domestic sphere and produce White children for the nation. Although conservative principles ‘protecting’ the domestic roles of wives and mothers predominated here,<sup>179</sup> many first wave feminists across the political continuum also openly employed eugenicist ambitions — especially bettering the ‘quality’ of the White Australian race — as a springboard for furthering women’s rights.<sup>180</sup>

<sup>175</sup> See, eg, EW Hoyt & Co’s ‘The New Woman’ advertisement for Rubifoam: ‘The New Woman’ (advertisement) (April 1896) *The Ladies’ Home Journal* 35 (original copy on file and available on request).

<sup>176</sup> See, eg, ‘Woman’s Rights: What We Are Coming to’, *Melbourne Punch* (Melbourne, 14 April 1887) 169 <<http://nla.gov.au/nla.news-page20442715>>. The suggestion there is that granting women civil rights will burden men with ‘womanly domestic duties’ like raising infants.

<sup>177</sup> See, eg, ‘The Mother and the Suffragist’ (1910), reproduced in Joan Eveline, ‘Feminism, Racism and Citizenship in Twentieth-Century Australia’ in Patricia Crawford and Philippa Maddern (eds), *Women as Australian Citizens: Underlying Histories* (Melbourne University Press, 2001) 141, 157.

<sup>178</sup> Farrell (n 171) 135. Farrell demonstrates that this ‘cult of motherhood’, however, excluded non-British women (eg Indigenous, Asian and Melanesian women): at 131–5.

<sup>179</sup> See generally *ibid* 135; Spearritt (n 172); Joy Damousi, ‘Marching to Different Drums: Women’s Mobilisations 1914–1939’ in Kay Saunders and Raymond Evans (eds), *Gender Relations in Australia: Domination and Negotiation* (Harcourt Brace Jovanovich, 1992) 350. Damousi maintains that early Australian feminists were not mere ‘passive recipients of dominant (and largely male) discourses’, but in fact mobilised and challenged dominant structures, thus becoming ‘active agents of social change’: at 350.

<sup>180</sup> On the left side of politics, there were activists like Marion Piddington, Jessie Street, Jean Devanny and Jessie McDonald, whereas on the right, Adela Walsh was an important voice: see Damousi (n 179) 366–71.

Figure 24: PARSON'S STARCH Advertisement (1903)<sup>181</sup>



Anxieties surrounding this 'national duty of [White] motherhood',<sup>182</sup> evident from the 1880s, intensified after World War I with fears of an 'Asian invasion', and remained up to the 1970s.<sup>183</sup> Not only were these anxieties reflected in cartoons of that era,<sup>184</sup> but registered trade marks and accompanying advertisements employed by Australian traders, such as Parsons Brothers & Co<sup>185</sup>

<sup>181</sup> See below n 185.

<sup>182</sup> Eveline (n 177) 156.

<sup>183</sup> Ibid 141–2; see especially at 156–9.

<sup>184</sup> See especially two cartoons reproduced in Damousi (n 179) 363, 367. The first cartoon depicts a White toddler in a classic boxing stance ready to fight 'hordes' of invading Asian and Black children: 'Reinforce Him, or He Will Go Under' (2 March 1920) *The Lone Hand* 18 <<http://nla.gov.au/nla.obj-393171672>>, reproduced in Damousi (n 179) 363. The second cartoon depicts a single White baby sitting under a sign that reads 'WHITE AUSTRALIA KEEP OUT!' in a fenced off area about to be overwhelmed by countless Chinese, Japanese and Indian toddlers clamouring to 'jump the fence': 'We Want Something More than a Sign to Keep Them Out', *Smith's Weekly* (Sydney, 30 April 1921) 1 <<http://nla.gov.au/nla.news-page25315666>>, reproduced in Damousi (n 179) 367.

<sup>185</sup> Timothy Kendall, *Within China's Orbit?: China Through the Eyes of the Australian Parliament* (Commonwealth of Australia, 2008) 27 <<https://www.aph.gov.au/binaries/library/pubs/monographs/kendall/chapterone.pdf>>, archived at <<https://perma.cc/JP9S-FWA9>>. Parsons Brothers & Co registered the royal blue-coloured PARSON'S STARCH device mark — without the advertising tagline 'Makes Laundry Work a Pleasure' — across all the Australian

(Figure 24) had long underpinned the importance of White women to that end, while at the same time reinforcing gendered stereotypes. Those kinds of representations support Joan Eveline's broader contention that the 'Australian politics of motherhood' has, for most of the 20<sup>th</sup> century, 'limited women's participation in the public sphere'.<sup>186</sup> It also supports her argument that the 'notion of the maternal citizen ... produced racial difference amongst Australian women: White women, construed as "mothers of the race", were admonished to "breed up" the supply of White Australian[s]',<sup>187</sup> whereas the opposite was true for Indigenous women.

Thus, further complicating our historical context is the intersectionality of race, gender and class, as these factors inevitably give rise to multiple sites of oppression. Many third wave feminist writers have emphasised that the historical and continued subordination of non-Western women was not simply due to their gender. For instance, Jackie Huggins observes that Aboriginal women were discriminated against and *continue to experience discrimination* more on account of their race than their gender, and that this problem remains unresolved within the Australian feminist movement.<sup>188</sup> Caricatures mocking aspirational Aboriginal women seeking education and transitioning from domestic servility were commonplace.<sup>189</sup> Moreover, the historical relationship between Black and White women suggests that 'sisterhood' could not 'transcend such racial boundaries,' and that 'white

colonies in Class 47 (starch, common soap, blue and other preparations for laundry purposes) and the mark later entered the Commonwealth Trade Marks Register: *Trade Mark No 22184* in Commonwealth, *Register of Trade Marks* (September 1917 – April 1918) vol 23, 46 (NAA: Series No A6288, Control Symbol 23, Item Barcode 5148023).

<sup>186</sup> Eveline (n 177) 162. For a critique of the 'Australian housewife' construct, see Raymond Evans and Kay Saunders, 'No Place Like Home: The Evolution of the Australian Housewife' in Kay Saunders and Raymond Evans (eds), *Gender Relations in Australia: Domination and Negotiation* (Harcourt Brace Jovanovich, 1992) 175.

<sup>187</sup> Eveline (n 177) 163. The PARSONS' STARCH device marks are perhaps another explicit illustration of Whiteness' proprietary value: see especially Cheryl I Harris, 'Whiteness as Property' (1993) 106(8) *Harvard Law Review* 1707.

<sup>188</sup> Jackie Huggins, 'A Contemporary View of Aboriginal Women's Relationship to the White Women's Movement' in Norma Grieve and Ailsa Burns (eds), *Australian Women: Contemporary Feminist Thought* (Oxford University Press, 1994) 70. Huggins notes that a 'cosmetically apparent Aboriginal woman is regularly stereotyped on the basis of being a boong, coon, nigger, gin or abo far in excess' of her womanhood: at 70.

<sup>189</sup> See, eg, BE Minns' cartoon in *The Bulletin*: 'Up to Date' (19 January 1911) *The Bulletin* 13 <<http://nla.gov.au/nla.obj-646604186>>, reproduced in Jackie Huggins and Thom Blake, 'Protection or Persecution?: Gender Relations in the Era of Racial Segregation' in Kay Saunders and Raymond Evans (eds), *Gender Relations in Australia: Domination and Negotiation* (Harcourt Brace Jovanovich, 1992) 42, 51.

women's activities ... [were in fact] part of the colonisation and oppression of Black women.'<sup>190</sup> White women, in particular, oppressed their Indigenous counterparts through domestic servility.<sup>191</sup>

Other scholars adopting a post-colonial framework have argued that the juxtaposition of 'white "civilised" and black "primitive" womanhood were integral to the formulation' of the Australian feminist project in the first half of the 20<sup>th</sup> century, a period when 'nation-builders were self-consciously constructing a White Australia'.<sup>192</sup> There was even a degree of complicity by White Australian women who adopted 'whiteness' as a 'crucial marker of boundaries and status' to advance their cause, thereby differentiating 'themselves from other (coloured) colonised peoples'.<sup>193</sup> Aboriginal scholar Joan Eveline maintains that Australian female suffrage was a 'triumph of racism over sexism and a signal for the further demolition of Aboriginal women's rights'.<sup>194</sup>

While gender discrimination remains a problem in Australia,<sup>195</sup> immigrant women and Indigenous women suffer the 'double structural load' of sexism and racism.<sup>196</sup> As Marie de Lepervanche puts it:

Women, and particularly immigrant women, remain socially and occupationally disadvantaged; sexual harassment of women is not uncommon, and

<sup>190</sup> Huggins (n 188) 72. See also Huggins and Blake (n 189) 42; Aileen Moreton-Robinson, *Talkin' Up to the White Woman: Aboriginal Women and Feminism* (University of Queensland Press, 2000).

<sup>191</sup> Huggins and Blake (n 189) 53–7. See especially Stan Cross's cartoon in *Smith's Weekly: Smith's Weekly* (Sydney, 21 March 1921) 17 <<http://nla.gov.au/nla.news-page25315522>>, reproduced in Huggins and Blake (n 189) 56.

<sup>192</sup> Marilyn Lake, 'Between Old Word "Barbarism" and Stone Age "Primitivism": The Double Difference of the White Australian Feminist' in Norma Grieve and Ailsa Burns (eds), *Australian Women: Contemporary Feminist Thought* (Oxford University Press, 1994) 80, 82.

<sup>193</sup> *Ibid* 82.

<sup>194</sup> Eveline (n 177) 147.

<sup>195</sup> See, eg, Australian Human Rights Commission, *Face the Facts: Gender Equality* (Report, 2018) <[https://www.humanrights.gov.au/sites/default/files/2018\\_Face\\_the\\_Facts\\_Gender\\_Equality.pdf](https://www.humanrights.gov.au/sites/default/files/2018_Face_the_Facts_Gender_Equality.pdf)>, archived at <<https://perma.cc/MFC6-YRXD>>.

<sup>196</sup> Marie de Lepervanche, 'Racism and Sexism in Australian National Life' in Marie de Lepervanche and Gillian Bottomley (eds), *The Cultural Construction of Race* (Sydney Association for Studies in Society and Culture, 1988) 80, 80.

married women who work are still considered *unnatural* in certain quarters ... in conservative thought their place is clearly with the family at home.<sup>197</sup>

These unfortunate attitudes predominate today, even in professional fields.<sup>198</sup> Sexist and misogynistic representations and attitudes abound in commercial advertising<sup>199</sup> and accompanying trade mark registrations,<sup>200</sup> warranting further sensitivity by trade mark examiners towards such marks.

#### IV LET BYGONES BE BYGONES?

For some, it would be tempting to dismiss these stigmatising representations as historical artefacts and not much more. To take that approach, however, would be problematic for several reasons. First, it ignores the harms caused by racism (including racist trade marks and advertising) — harms that are both real and enduring. Second, contending with and acknowledging this history — especially the collective dismissal of those voices that rallied against such (mis)representation — is a condition precedent to true reconciliation, especially when one concedes, for example, that the deeply engrained bigoted tropes animating these unwelcomed ghosts can, and often do, come back to haunt us in contemporary Australia. This latter point is illustrated by considering two recent manifestations of racist abuse where deep-rooted racist tropes were deployed against Indigenous Australian athletes Adam Goodes and Eddie Betts. Finally, disregarding the true history of the Register would be to disregard the cautionary tale it presents to con-

<sup>197</sup> Marie de Lepervanche, ‘The “Naturalness” of Inequality’ in Gill Bottomley and Marie de Lepervanche (eds), *Ethnicity, Class and Gender in Australia* (Allen & Unwin, 1984) 49, 54 (emphasis in original).

<sup>198</sup> On gender discrimination and the attrition of women from the legal profession in Australia, see, eg, Law Council of Australia, *National Attrition and Re-Engagement Study (NARS) Report* (Final Report, February 2014) <<https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/national-report-on-attrition-and-re-engagement>>, archived at <<https://perma.cc/38FK-XSjX>>.

<sup>199</sup> See Evans and Saunders (eds) (n 186); Robyn Wilder, ‘19 Ridiculously Sexist Adverts from the Present Day’, *Buzzfeed* (online, 27 May 2014) <<https://www.buzzfeed.com/robynwilder/ridiculously-sexist-and-racist-adverts-from-the-present-d>>, archived at <<https://perma.cc/73R7-BVYU>>.

<sup>200</sup> See, eg, the registration of the BITCH device mark for Class 25 (clothing, footwear, headgear): *AU Trade Mark 1081576*, filed on 20 October 2005 (Removed on 5 May 2016). And for Class 16 (paper and cardboard and items made of cardboard or paper etc): *AU Trade Mark No 1081573*, filed on 20 October 2005 (Removed on 5 May 2016), both held by Duncan McGufficke. The mark contains a grotesque caricature of an irate hook-nosed woman (replete with warts, hairy legs and untidily braided hair) clutching a fired shotgun.

temporary decision-makers, especially insofar as this might affect minority groups generally.

*A Evidence of Harm Caused by Stigmatising Trade Marks and  
Discrimination Generally*

Racist representations — such as the long-standing trade mark, depicted in Figure 25, employing the metaphor of Black skin in need of cleansing through soap products — are hurtful to referenced groups. Racism, however so suffered, has detrimental consequences for the targeted group, especially in relation to their mental health. We know, for example, that ‘racist experiences have an ongoing deleterious effect on people’s lives and wellbeing even after direct exposure has ended.’<sup>201</sup> Numerous studies<sup>202</sup> and official government statistics<sup>203</sup> have documented these harmful connections in relation to Indigenous Australians. Another study has established, for example, that over half of Indigenous Australians who experience racial discrimination report feelings of psychological distress, which is a recognised risk factor for anxiety and depression, and that greater exposure to racism significantly increases levels of psychological distress.<sup>204</sup>

<sup>201</sup> Angeline Ferdinand, Yin Paradies and Margaret Kelaher, *The Lowitja Institute, Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities: The Localities Embracing and Accepting Diversity (LEAD) Experiences of Racism Survey* (Report, 2013) 21 <<https://www.lowitja.org.au/content/Document/Lowitja-Publishing/LEAD-Report-WEB.pdf>>, archived at <<https://perma.cc/X9XJ-RAHU>>.

<sup>202</sup> See, eg, *ibid* and references cited therein: at 25–9; Winnifred R Louis and Matthew J Hornsey, ‘Psychological Dimensions of Racial Vilification and Harassment’ in ‘Perspectives on the Racial Discrimination Act: Papers from the 40 Years of the *Racial Discrimination Act 1975* (Cth) Conference’ (Conference Papers, Australian Human Rights Commission, August 2015) 82 <<https://www.humanrights.gov.au/our-work/race-discrimination/publications/perspectives-racial-discrimination-act-papers-40-years>>, archived at <<https://perma.cc/Q73F-7VXM>>.

<sup>203</sup> For example, of 755 Aboriginal people surveyed in Victoria in 2010–11, 97% had experienced some form of racism in the previous 12 months, and 66% of those who had experienced 12 or more incidents of racism during that time reported high or very high psychological distress scores: VicHealth, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities: Experiences of Racism Survey* (Report, 2012) 2 <<https://www.vichealth.vic.gov.au/media-and-resources/publications/mental-health-impacts-of-racial-discrimination-in-victorian-aboriginal-communities>>, archived at <<https://perma.cc/J3ZG-F8TX>>; Ferdinand, Paradies and Kelaher (n 201). See also Australian Bureau of Statistics, *The Health and Welfare of Australia’s Aboriginal and Torres Strait Islander Peoples* (Catalogue No 4704.0, 19 December 2012).

<sup>204</sup> Ferdinand, Paradies and Kelaher (n 201). See also the references cited therein: at 25–9.

Figure 25: Kitchen & Sons' Trade Mark (1920)<sup>205</sup>



In this connection, what, then, are the implications of racist trade marks that are spread throughout the public sphere? In addition to the psychological distress suffered by referenced individuals and communities, stigmatising trade marks can create and reinforce pernicious stereotypes, which not only

<sup>205</sup> Variations of this trade mark enjoyed remarkable longevity in the Australian public sphere. Sydney Soap & Candle Co Ltd first applied to register a more elaborate version, THE MAGIC CLEANSER device mark, in colonial New South Wales on 22 February 1892 in Class 47 (soap): *Trade Mark No 3615* in New South Wales, *Trade Marks Register* (24 April 1891 – 26 September 1892) vol 7 (NAA: Series No SP1006/14, Control Symbol REGISTER 7, Item Barcode 10909268). This device mark was gazetted on 26 February 1892: Registrar General, 'Trade-Mark (Registered No 3615) under Classification 47' in New South Wales, *New South Wales Government Gazette*, No 137, 26 February 1892, 1668, 1668. It secured registration on 12 March 1892: *Trade Mark No 3615* in New South Wales, *Trade Marks Register* (24 April 1891 – 26 September 1892) vol 7 (NAA: Series No SP1006/14, Control Symbol REGISTER 7, Item Barcode 10909268). It was later transferred by deed to candle and soap manufacturers, Kitchen & Sons Ltd, 365 Kent Street, Sydney, on 21 August 1914, and the transfer of title onto the New South Wales Trade Marks Register was effected on 5 November 1914. Kitchen & Sons Ltd later obtained Commonwealth registration of the simplified device mark in Figure 25 on 29 June 1920 in Class 47 (candles, common soap and other laundry preparations): *Trade Mark No 28395* in Commonwealth, *Register of Trade Marks* (May 1920 – September 1920) vol 29, 395 (NAA: Series No A6288, Control Symbol 29, Item Barcode 5148029). It was not renewed, and thus it was removed from the register 14 years later on 30 June 1934. Kitchen & Sons Ltd also owned VELVET soap and other notorious racist-themed marks and accompanying advertising: see above nn 100–2 and accompanying text; Figure 7.

harm referenced individuals and communities, but affect broader society by deeply engraining prejudice against targeted groups. Moreover, as very successful trade marks are often ubiquitous, their destructive effects may linger long after their circulation. The trade mark registration system may well have played a role in engraining these prejudices. It must not be forgotten that registered trade marks are not meant to be confined to a sedentary existence on the Register: the registered trade mark system is mainly about fostering investment in and the *use* of registered trade marks.<sup>206</sup> Registered stigmatising trade marks are no different. In fact, the historical records demonstrate that stigmatising trade marks and commercial imagery were used widely on consumer goods and, what is more, such registered trade marks and associated commercial imagery were considered valuable. Indeed, there are many examples of trader disputes over rights to use contested stigmatising trade marks.<sup>207</sup>

In stark contrast to the historical public sphere, a broader spectrum of interest groups in the contemporary Australian public sphere have made concerted efforts in tackling the scourge of racial discrimination and its destructive effects on its victims. The Australian Human Rights Commission's 'Racism. It Stops With Me' campaign has sought to do this, as well as empowering Australians to prevent and respond effectively to racism.<sup>208</sup> Moreover, 'The Invisible Discriminator' advertising campaign by Beyond Blue,<sup>209</sup> with its tagline 'Stop. Think. Respect,' drew attention to the damaging impact on the mental health of Aboriginal and Torres Strait Islander peoples

<sup>206</sup> Cf *Trade Marks Act 1995* (Cth) pt 17.

<sup>207</sup> See, eg, above n 92 and the archival material in *Trade Mark No 9129* (Vic) (Correspondence) (NAA: Series No A11731, Control Symbol 9129, Item Barcode 5030788), which involved two early 20<sup>th</sup> century traders tussling over registered trade mark rights utilising 'Black imagery' for soap products. The extensive correspondence between these traders demonstrates how, within the legal framework constructed by Parliament and the courts, the overtly racist nature of such stigmatising marks was completely overlooked by consumers, traders and decision-makers, and underscores why a more proactive policing of the Trade Marks Register is necessary.

<sup>208</sup> See 'Racism. It Stops With Me', *Australian Human Rights Commission* (Website, 2017) <<https://itstopswithme.humanrights.gov.au/>>.

<sup>209</sup> 'Discrimination Stops With You', *Beyond Blue* (Web Page) <<https://www.beyondblue.org.au/who-does-it-affect/the-invisible-discriminator>>, archived at <<https://perma.cc/9BA3-3LJ5>>. Beyond Blue is an Australian charity that seeks to 'reduce the prevalence and impact of depression and anxiety conditions and suicide in the Australian community': *Constitution*, Beyond Blue (at 17 March 2019) cl 1.6(a)(i); as well as 'increase the capacity of the Australian community ... to deal effectively with depression anxiety conditions and prevent suicide': at cl 1.6(a)(v).

caused by racial discrimination.<sup>210</sup> We learn that racial discrimination (including pernicious stereotypes), for instance, restricts the targeted group's participation in public life, as these groups withdraw from various aspects of 'community life' as a coping mechanism.<sup>211</sup> In other words, exposure to racism leads to social exclusion and shrinks the public sphere for the targeted group. This evidence speaks to a broader argument; specifically, that registered stigmatising trade marks contribute to the inequality faced by marginalised groups in the broader public sphere and provide support for the argument that greater use should be made of the embargo against their registration.

### B *Indigenous Resistance*

As has been well covered elsewhere,<sup>212</sup> Australia's treatment of Aboriginal and Torres Strait Islander peoples has been, and continues to be, abhorrent. At various points in Australia's history, Indigenous peoples have been colonised, subject to frontier violence and massacres, forcibly removed from country and family, subject to 'protectionist' policies, poisoned, raped, abducted, murdered, vanquished, exploited as unpaid and underpaid labourers, and generally treated as subhuman. Mythologised as a 'dying race', Indigenous Australians suffered ongoing oppression and discriminatory policies, such as the widespread forced removal of Aboriginal children from their families into reservations, missions or state care, which, in 2008, drew a parliamentary

<sup>210</sup> Various advertisements emphasise that 'subtle' or 'casual' racism can be just as harmful as more overt forms. This particular initiative encourages Australians to review their own behaviour and check for discriminatory attitudes towards Aboriginal and Torres Strait Islander peoples: see, eg, Beyond Blue Official, 'The Invisible Discriminator' (YouTube, 31 July 2016) <<https://www.youtube.com/watch?v=NVEvKISMx0>>; Beyond Blue Official, 'Stop. Think. Respect. Racial Discrimination and Mental Health' (YouTube, 15 August 2014) <<https://www.youtube.com/watch?v=RFDW9dkLkp4>>.

<sup>211</sup> See, eg, Ferdinand, Paradies and Kelaher (n 201) 1, 20.

<sup>212</sup> For a broad overview of the Aboriginal 'contact history' with non-indigenous Australians, with extracts from leading historians, see Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (Lawbook, 4<sup>th</sup> ed, 2009) ch 1. That chapter explores the history, law and government policies regarding Indigenous Australians and contains a useful discussion on Australia's 'history wars'. For a documentary history, see especially Stone (n 88). On Australian racism generally, see Keith McConnochie, David Hollinsworth and Jan Pettman, *Race & Racism in Australia* (Social Science Press, 1988). For a discussion of some brutal sexual encounters, see, eg, Patricia Grimshaw and Andrew May, "'Inducements to the Strong to be Cruel to the Weak': Authoritative White Colonial Male Voices and the Construction of Gender in Koori Society' in Norma Grieve and Ailsa Burns (eds), *Australian Women: Contemporary Feminist Thought* (Oxford University Press, 1994) 92, 97–9.

National Apology from the then Prime Minister Kevin Rudd.<sup>213</sup> Indigenous Australians were only counted in ‘reckoning the numbers of the people of the Commonwealth’<sup>214</sup> following the 1967 Referendum.

However, and contrary to the widely held misperception of ‘historical Aboriginal silence’, these outrages did not go unchallenged by Indigenous Australians,<sup>215</sup> British parliamentary committees,<sup>216</sup> and various humanitarian and feminist organisations.<sup>217</sup> In the 1920s and 1930s, Aboriginal counter-public spheres, such as the Australian Aboriginal Progressive Association, Australian Aborigines’ League, Australian Aboriginal Association, Native Union and the Aborigines Progressive Association (‘APA’), were formed to promote Indigenous causes and pursue civil rights that, until then, had been denied.<sup>218</sup> The APA, for example, campaigned for equal citizen rights and drew attention to the conditions of Aboriginal slavery and the poor treatment by the much-despised New South Wales Aboriginal Protection Board, as well as equivalent legislation in other state and territory jurisdictions.<sup>219</sup> John

<sup>213</sup> See Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 167–73 (Kevin Rudd, Prime Minister).

<sup>214</sup> *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 127.

<sup>215</sup> Aboriginal resistance was evident from the earliest days of British contact. For violent resistance, see Henry Reynolds, *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia* (Penguin Books, 1982); Broome (n 93); see especially at ch 5. For political resistance, see Franklin (n 93) ch 15; Bain Attwood and Andrew Markus, *The Struggle for Aboriginal Rights: A Documentary History* (Allen & Unwin, 1999); Jack Horner, *Bill Ferguson: Fighter for Aboriginal Freedom* (1994) (‘*Bill Ferguson*’); John Maynard, *Fight for Liberty and Freedom* (Aboriginal Studies Press, 2007).

<sup>216</sup> See, eg, *Report of the Parliamentary Select Committee on Aboriginal Tribes (British Settlements)* (William Ball, Aldine Chambers, Paternoster Row and Hatchard & Son, 1837) (‘*Aboriginal Tribes Report*’). In the preface to the report, the Committee lamented the ‘deep dishonour on the British name’ caused by colonial oppression generally, and sought to advance the ‘cause of justice’: at x. The Committee also warned:

While we are slumbering at our posts, deaf to the call of duty, and indifferent to the claims of mercy, the oppressor and spoiler are abroad, outraging the dearest rights of humanity, and devoting thousands of our race to ruin ... The case is urgent — the danger is imminent — the demand is imperative.

*Aboriginal Tribes Report* (n 216) xi (emphasis in original).

<sup>217</sup> Various Christian missionaries and Christian-based organisations, including representatives of the Methodist Church, Church Missionary Society as well as various feminist counterpublic spheres, such as the Feminist Club, the United Women’s Association and the Younger Feminist, supported the Aboriginal cause: see Horner, *Bill Ferguson* (n 215) 54–5.

<sup>218</sup> See generally Bain Attwood, *Rights for Aborigines* (Allen & Unwin, 2003). For resistance from Aboriginal and non-Aboriginal feminist counterpublic spheres from the 1900s to the 1960s, see Eveline (n 177) 170–5.

<sup>219</sup> Attwood (n 218) ch 2.

Thomas (Jack) Patten, President of the APA, was also the General Editor of *The Australian Abo Call: The Voice of the Aborigines*,<sup>220</sup> possibly the first ‘advancement movement’<sup>221</sup> newspaper with an Aboriginal target audience. Claiming to represent 80,000 Australian Aborigines, its masthead read: ‘We ask for Education, Opportunity, and Full Citizen Rights.’<sup>222</sup>

In its first edition, Patten’s address at the National Day of Mourning on 26 January 1938, being the sesquicentenary of White settlement, was reported,<sup>223</sup> together with a ‘Ten Point Plan’ outlining the APA’s objectives. This was personally delivered to the then Prime Minister Joseph Lyons.<sup>224</sup> In direct response to letters published by *The Sydney Morning Herald*<sup>225</sup> denying ‘Aboriginal were massacred in the early days,’ later publications sought to document the ‘massacres [that] occurred in almost every district of Australia’ and to show that ‘blacks were shot down and poisoned like dingoes.’<sup>226</sup> Similarly, William Ferguson, one of the founders of the APA,<sup>227</sup> expressed indignation at the Parliamentary Select Committee’s ‘slanders against our

<sup>220</sup> Ibid 44.

<sup>221</sup> Marcia Langton and Brownlee Kirkpatrick, ‘A Listing of Aboriginal Periodicals’ (1979) 3(1–2) *Aboriginal History* 120, 120.

<sup>222</sup> *The Australian Abo Call: The Voice of the Aborigines* (Sydney, April 1938) <<http://nla.gov.au/nla.news-page4536065>>. Beginning in April 1938, the publication produced six monthly editions in that year. The publication was closed due to serious financial losses. All copies are available through the National Library of Australia’s Trove service <<http://nla.gov.au/nla.news-title51>>. It is unclear whether the pejorative term ‘Abo’ was ‘reclaimed’ here, or whether the editors simply adopted the derogatory language of the time.

<sup>223</sup> See ‘Our Historic Day of Mourning & Protest’ (n 93).

<sup>224</sup> See ‘Our Ten Points,’ *The Australian Abo Call: The Voice of the Aborigines* (Sydney, April 1938) 1 <<http://nla.gov.au/nla.news-page4536065>>. Some of these demands included a right to the ‘same educational opportunities as white people,’ equal working conditions, to receive payment in cash and not rations, and marriage equality. A two hour meeting between Aboriginal political activists and the Prime Minister was held after the Day of Mourning, on 31 January 1938, where the former petitioned for a new ‘Policy for Aborigines,’ which consisted of the 10 points outlined in the article.

<sup>225</sup> See, eg, John Reidy, Letter to the Editor, ‘Treatment of Aborigines,’ *The Sydney Morning Herald* (Sydney, 5 March 1938) 5 <<http://nla.gov.au/nla.news-page1182509>>.

<sup>226</sup> ‘Massacres,’ *The Australian Abo Call: The Voice of the Aborigines* (Sydney, April 1938) 4 <<http://nla.gov.au/nla.news-page4536068>>. See especially ‘The Massacre at Myall Creek,’ *The Australian Abo Call: The Voice of the Aborigines* (Sydney, May 1938) 3 <<http://nla.gov.au/nla.news-page4536071>>, quoting R Therry, *Reminiscences of Thirty Years’ Residence in New South Wales and Victoria* (Sampson Low, Son & Co, 2<sup>nd</sup> ed, 1863) 271–8. For a useful book collecting details of massacre sites in Western Victoria from 1803–59, see Ian D Clark, *Scars in the Landscape: A Register of Massacre Sites in Western Victoria, 1803–1859* (Aboriginal Studies Press, 1995).

<sup>227</sup> Attwood (n 218) 40.

people, especially our women, and called for 'ordinary citizen rights, not any special rights' as well as a 'right to own land that our fathers and mothers owned from time immemorial'.<sup>228</sup>

Many of the themes discussed in this publication expanded on an earlier pamphlet, entitled 'Aborigines Claim Citizen Rights!,'<sup>229</sup> which was distributed in the lead up to the National Day of Mourning. This 'first political manifesto of Aborigines,'<sup>230</sup> co-authored by Patten and Ferguson, pressed the case for 'Old Australians,' rallied against racial prejudice and insisted on a 'New Deal' for Indigenous Australians:

Your present official attitude is one of prejudice and misunderstanding. ... We ask you to be proud of the Australian Aborigines, and not to be misled any longer by the superstition that we are a naturally backward and low race. This is a scientific lie, which has helped to push our people down and down into the mire.

At worst, we are no more dirty, lazy stupid, criminal, or immoral than yourselves. Also, your slanders against our race are a moral lie, told to throw all the blame for our troubles on to us. You, who originally conquered us by guns

<sup>228</sup> 'Our Historic Day of Mourning & Protest' (n 93). Ferguson is referring to the 1937 Parliamentary Select Committee Inquiry into the New South Wales Aborigines Protection Board, which began in 1937 but was never completed: 'Select Committee, *The Australian Abo Call: The Voice of the Aborigines* (Sydney, April 1938) 1 <<http://nla.gov.au/nla.news-page4536068>>. Ferguson, who later fell out with Patten, unsuccessfully sought to wrest control of the APA: see 'New Hope for Old Australians,' *The Australian Abo Call: The Voice of the Aborigines* (Sydney, May 1938) 1 <<http://nla.gov.au/nla.news-page4536069>>; Attwood (n 218) 49. Ferguson, who drew his support from the Unions, was troubled by the publication's 'right wing' secularist financial backers (especially William Miles): see Horner, *Bill Ferguson* (n 215) 71; Craig Munro, *Wild Man of Letters: The Story of PR Stephensen* (Melbourne University Press, 1984) 185. Although the organisation split, Ferguson and Patten later reconciled in 1940, and called for unity: see Jack Horner, 'Patten, John Thomas (Jack) (1905–1957),' *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/patten-john-thomas-jack-7980>>, archived at <<https://perma.cc/3BFH-MZET>>; Jack Horner, 'Ferguson, William (Bill) (1882–1950),' *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/ferguson-william-bill-6160>>, archived at <<https://perma.cc/74FC-SU8K>>; Chris Cunneen, 'Miles, William John (1871–1942),' *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/miles-william-john-7576>>, archived at <<https://perma.cc/T9ZG-58Z2>>; Attwood and Markus (n 215).

<sup>229</sup> JT Patten and W Ferguson, 'Aborigines Claim Citizen Rights!: A Statement of the Case for the Aborigines Progressive Association' (Pamphlet, 1938) <<http://nla.gov.au/nla.obj-241787110>>.

<sup>230</sup> Horner, *Bill Ferguson* (n 215) 57. Horner dedicates an entire chapter to the Day of Mourning and the politics surrounding this publication: at ch 5.

against our spears, now rely on superiority of numbers to support your false claims of moral and intellectual superiority.<sup>231</sup>

In light of contextual oppression and marginalisation, the fact that Aboriginal leaders like Jack Patten and William Ferguson also demanded an end to the damaging racist stereotypes in print media (and by extension advertising and stigmatising trade marks) is telling. Recognising the importance of the struggle against pernicious Aboriginal stereotypes in his pursuit of Aboriginal democratic rights, Patten declared:

Our huge task is to organise and educate ourselves for full Citizen Rights. We must win the respect and support of the white community by showing how unfairly we have been treated in the past. ...

...

*'Jackey-Jackey' has been a joke for too long — a cruel joke. We have been for too long the victims of missionaries, anthropologists, and comic cartoonists. The white community must be made to realise that we are human beings, the same as themselves.* Persecution of Aborigines here is worse than the persecution of Jews in other countries.

We have been called a 'dying race', but we do not intend to die. We intend to live, and to take our place in the Australian community as citizens with full equality.<sup>232</sup>

The kinds of dehumanising imagery decried by Patten were perpetuated through stigmatising trade marks, like those set out in this article. Circulating freely in colonial Australia and then the Commonwealth of Australia, these stigmatising trade marks helped to stifle Aboriginal communicative equality and equal participation in the broader Australian public sphere. To paraphrase Ferguson and Patten's own words, these injurious representations undermined respect for Aboriginal Australians and prevented the White community from realising that Aborigines are human.<sup>233</sup>

<sup>231</sup> Patten and Ferguson (n 229) 11.

<sup>232</sup> See 'New Hope for Old Australians' (n 228) 1 (emphasis added). This repeated Aboriginal demands in earlier Aboriginal publications: see above nn 230–3 and accompanying text. 'Jackey Jackey' is a derisive 'nickname for an Aboriginal person, especially when seen as being in a supportive role to the dominant white settlers': *Macquarie Dictionary* (7<sup>th</sup> ed, 2017) 'Jackey Jackey' (def 1); 'an Aboriginal person who has adopted a white lifestyle': *Macquarie Dictionary* (7<sup>th</sup> ed, 2017) 'Jackey Jackey' (def 2). It is perhaps the Australian equivalent of the 'Uncle Tom' epithet, used in relation to African Americans: *Macquarie Dictionary* (7<sup>th</sup> ed, 2017) 'Uncle Tom'.

<sup>233</sup> See also Patten and Ferguson (n 229) 10.

In light of these historical records, is it surprising therefore to find those who respond so strongly today to racist taunts of Indigenous Australians that reference primates? Australian journalist and author Peter FitzSimons reminds us that, in Australia, ‘all those with black hair had been dispossessed of all their land ... vilified ... discriminated against, and treated almost like vermin’ (and, as shown above, often depicted as such in trade marks and commercial imagery<sup>234</sup>) and that a ‘frequent insult hurled at those with black hair, for generations, was that the black hair made you look like a monkey, the cruellest kind of taunt of all, claiming that those with black hair aren’t even human.’<sup>235</sup>

These bigoted connections are not remnants of an unenlightened past. For example, on 24 May 2013, in the opening game of the Australian Football League’s (‘AFL’) Indigenous Round — intended to be a celebration of Aboriginal and Torres Strait Islander culture and the contribution by Indigenous Australian athletes to the game — Aboriginal athlete Adam Goodes, dual Brownlow Medalist, and the best on ground that day in Australia’s largest sporting arena, was subject to a racist taunt by a 13-year-old girl.<sup>236</sup> The girl had called him an ‘ape’. Goodes’ immediate post-game comments provide us with further insights regarding the damaging socio-psychological impact of racial epithets:

[T]his week is a celebration of our people, our culture, and I had the absolute privilege of meeting the great man, Nicky Winmar,<sup>237</sup> two days ago now, and what he was able to do for us 20 years ago, and to be able to make a stand myself and say, you know, racism has a face last night, and you know it was a 13-year-old girl, but it’s not her fault.

[The offender, a Collingwood supporter] is 13, she’s still so innocent, I don’t put any blame on her. Unfortunately, it’s what she hears, the environment she’s

<sup>234</sup> See above Part III(B).

<sup>235</sup> Peter FitzSimons, ‘The Greater Goodes: Adam’s Pain will be Australia’s Gain’, *The Sydney Morning Herald* (Sydney, 30 May 2013) 51 (emphasis in original).

<sup>236</sup> Adrian Crawford, ‘Adam Goodes “Gutted” by Racial Slur but Wants AFL Fan Educated’, *ABC News* (online, 27 May 2013) <<https://www.abc.net.au/news/2013-05-25/goodes-gutted-but-places-no-blame/4712772>>, archived at <<https://perma.cc/N294-9LBW>>.

<sup>237</sup> Nicky Winmar is a famous Aboriginal Australian Rules football player who, after being subjected to racist taunts by opposition supporters, famously lifted his shirt and proudly pointed to the colour of his skin: see ‘Nicky Winmar’s Stand’, *National Museum Australia* (Web Page) <<https://www.nma.gov.au/defining-moments/resources/nicky-winmars-stand>>, archived at <<https://perma.cc/JJ8R-STYQ>>. Adam Goodes had replicated this iconic image for the Sydney press earlier in the day he was attacked: Malcolm Conn, ‘Proud Aborigines Made for AFL’, *The Daily Telegraph* (Sydney, 24 May 2013) 121.

grown up in that has made her think that it's okay to call people names. I can guarantee you right now she would have no idea... how it makes anyone feel by calling them an ape. ... It cut me deep and affected me so much that I couldn't even be on the ground last night to celebrate a victory, to celebrate Indigenous round, and I am still shattered — personally, it's tough.<sup>238</sup>

The abuse was compounded the following week when media personality and President of Collingwood Football Club, Eddie McGuire, 'joked' on his radio program that Adam Goodes should be recruited to promote the King Kong stage production.<sup>239</sup> Although devastated by these two racist attacks which 'cut [him to his] core',<sup>240</sup> Goodes, who draws his strength from his mother — a member of the Stolen Generation — continues to speak out against the wickedness of racism.<sup>241</sup>

Goodes' brave stance and educative mission here speaks to the ways in which counterpublic spheres can potentially reorient and rehabilitate the broader public sphere or, at the very least, ensure that the injurious effects of stereotypes and stigmatising imagery do not remain unchallenged. The process of facing up to our past, writes Goodes, requires 'understanding our very dark past, a brutal history of dispossession, theft and slaughter.'<sup>242</sup>

Due to Goodes' indefatigable anti-racism campaign, subsequent epithets by another opposition fan directed at him — 'Fuck off, Magilla the gorilla' —

<sup>238</sup> SwansTV, 'Adam Goodes' Response to the Racism Incident against Collingwood R9 2013' (YouTube, 27 May 2013) 00:00:50–00:02:04 (emphasis added) <<https://www.youtube.com/watch?v=iZkquBdLm0E>>. See also Jon Pierik and Deborah Gough, 'Goodes Accepts Apology for Teen's Slur', *The Sun-Herald* (Sydney, 26 May 2013); 'Adam Goodes Full Press Conference Transcript as He Addresses Racist Taunts' (online, 25 May 2013) <<https://www.heraldsun.com.au/sport/afl/adam-goodes-full-racism-press-conference-transcript/news-story/255a9b49ef91175be4e6d73a8c26a30c>>.

<sup>239</sup> Caroline Wilson, 'Goodes, the Bad and the Ugly: A Week of Heartache', *Sport, The Sydney Morning Herald* (Sydney, 1–2 June 2013) 12–13. McGuire's behaviour here is inexplicable given that McGuire personally apologised to Goodes in the dressing rooms following the May 24 incident: Mark Macgugan, 'Pies Apologise to Goodes after Alleged Racial Slur' (News Release, AFL, 24 May 2013) <<https://www.afl.com.au/news/2013-05-24/pies-apologise-to-goodes>>, archived at <<https://perma.cc/K4YJ-8C7Y?type=image>>. Perhaps Yin Paradies' views that 'middle-class people are better able to disguise their racism' rings true here: see Peter Munro and Damien Murphy, 'Sticks and Stones', *News Review, The Sydney Morning Herald* (Sydney, 1–2 June 2013) 4.

<sup>240</sup> Andrew Webster, 'Continuing Abuse of Goodes Shows We Still Have a Long Way to Go', *The Sydney Morning Herald* (Sydney, 26 August 2014) 38.

<sup>241</sup> Andrew Webster, 'Centre Stage', *The Sydney Morning Herald* (Sydney, 6–7 September 2014) 58.

<sup>242</sup> Adam Goodes, 'White Silence Cannot Dim the Heroes of Utopia', *The Sydney Morning Herald* (Sydney, 3 March 2014) 19.

have been challenged by crowd members, and also resulted in the offender being punished.<sup>243</sup> *The Sydney Morning Herald* clarified to ignorant readers<sup>244</sup> who deny that calling Goodes an ‘ape’ is racist: ‘Any empathetic, respectful adult would know the potential of the term to deeply offend a proud indigenous man.’<sup>245</sup> The troubling episode also prompted a recirculation of anti-racism material in New South Wales schools.<sup>246</sup> Yet, in the ensuing years, Goodes faced ‘unexplained’ relentless booing and jeering whenever he played.<sup>247</sup> While apologists attribute this as a reaction to Goodes’ style of play,<sup>248</sup> others have been more forthright:

Goodes is booed because he is Indigenous. Because in 2013 he called to account a 13-year old girl in the crowd who called him an ape. Because he was made Australian of the Year in 2014. And because he used his honour to challenge Australians about past treatment of indigenous people and the damage of racism.<sup>249</sup>

Most recently, Goodes’ proud expression of Aboriginality, through a celebratory post-goal Aboriginal war cry in the 2015 AFL Indigenous Round, directed towards opposition supporters while wearing an indigenous-themed

<sup>243</sup> See Peter FitzSimons, ‘Goodes, the Bad, the Ugly and the Racists’, *The Sydney Morning Herald* (Sydney, 22 May 2014) 47.

<sup>244</sup> See, eg, John Raftery, of Caringbah, who questions: ‘When did it become “racism” to call a not overly handsome man with a lot of facial hair an “ape”?’: John Raftery, Letter to the Editor, *The Sydney Morning Herald* (Sydney, 27 May 2013) 22. Raftery suggests the incident reflects a ‘blot on our society’, because it is “political correctness” having gone mad’.

<sup>245</sup> Editorial, ‘Discussing Race with Children Crucial to Building Empathy’, *The Sydney Morning Herald* (Sydney, 27 May 2013) 22. However, note the earlier position 175 years ago: see above n 118 and accompanying text.

<sup>246</sup> Peter Munro, ‘Schools to Recirculate Anti-Racism Material’, *The Sydney Morning Herald* (Sydney, 27 May 2013) 9.

<sup>247</sup> See Jake Niall, ‘Players Look at Ways to Stop Epidemic of Goodes Booing’, *The Age* (Melbourne, 29 July 2015) 54.

<sup>248</sup> Andrew Bolt, “‘Victim’ Goodes Crying Wolf”, *Herald Sun* (Melbourne, 1 June 2015) 13. Bolt views Goodes’ Australian of the Year accolade as a reward for Goodes’ ‘disproportionate reaction’ in calling out racist epithets. Interestingly, in *Eatoock v Bolt* (2011) 197 FCR 261, the Federal Court held that Bolt’s comments elsewhere regarding Aboriginal Australians breached racial vilification laws. Miranda Devine also claims that Goodes is booed because ‘[n]o one has forgotten how he singled out a 13-year-old girl ... and sicced security on to her’ and was ‘rewarded for outing this powerless little girl with the honour of Australian of the Year which he then turned into a grievance pulpit to bag Australia as a racist nation’: Miranda Devine, ‘Adam Goodes Might be a Damn Goose But He’s Goode for a Show’, *The Daily Telegraph* (Sydney, 17 June 2015) 13.

<sup>249</sup> Patrick Smith, ‘Silence is Far From Golden for Mick’, *The Australian* (Sydney, 26 May 2015) 34.

guernsey designed by his mother, attracted faux outrage and sensationalist media coverage in some quarters.<sup>250</sup> Worse still, Goodes' Wikipedia entry was subsequently defaced with monkey images.<sup>251</sup> The matter flared up again in July and August 2015, but public opinion was by then mostly in Goodes' favour. Content with his remarkable achievements on the sporting field, and though wounded by his experience, Goodes has since retired from AFL football. Nevertheless, he has communicated his contentment in the educative function he played in drawing to attention the enduring harm caused by racist epithets in the public sphere.<sup>252</sup>

In yet another reverberation of the racist trope of 'Indigenous person as ape', another AFL Indigenous player, Eddie Betts, has had to contend with two separate instances of racial vilification: the first, a female Port Adelaide supporter who threw banana at him during his 250<sup>th</sup> match in 2016,<sup>253</sup> and then, in 2017, another supporter of the same team, on social media, referred to Betts as an 'ape' and called for him and his family to 'go back to the zoo' where they 'belong'.<sup>254</sup> Like Goodes, Betts has responded magnanimously to these slurs by championing an educative mission tackling the scourge of deep-seated racism: 'This is all about education, it's never too late to learn'; 'No one is born racist ... it's ingrained in them somewhere down the track'.<sup>255</sup>

<sup>250</sup> See, eg, Bolt (n 248).

<sup>251</sup> Tom Cowie, "'On Ya Brother": Players Support Adam Goodes' Post-Goal War Dance', *The Sydney Morning Herald* (online, 30 May 2015) <<http://www.theage.com.au/afl/on-ya-brother-players-support-adam-goodes-postgoal-war-dance-20150530-ghd1bh>>.

<sup>252</sup> See, eg, Goodes' Valedictory Speech as 2014 Australian of the Year: 'Australian of the Year: Adam Goodes Lauds Progress against Racism, but Says More Work to be Done', *ABC News* (online, 25 January 2015) <<http://www.abc.net.au/news/2015-01-25/australian-of-the-year-goodes-more-work-to-be-done-on-racism/6045170>>, archived at <<https://perma.cc/XA7U-ZBL3>>. See especially the documentary *The Final Quarter* (Shark Island Productions, 2019).

<sup>253</sup> Timna Jacks, 'Fan "Sorry" after Betts Banana Insult', *The Age* (Melbourne, 23 August 2016) 2.

<sup>254</sup> Bhakthi Puvanenthiran, 'Fan Denies "Ape" Comment about Adelaide Crows Player Eddie Betts is Racist', *The Age* (online, 11 April 2017) <<https://www.theage.com.au/sport/afl/fan-denies-ape-comment-about-adelaide-crows-player-eddie-betts-is-racist-20170411-gvj0di.html>>.

<sup>255</sup> Jade Gailberger and Paul Starick, 'Let Banned Fan Watch Footy Again, Says Betts', *The Advertiser* (Adelaide, 25 August 2016) 4.

## V CONCLUSION

This article offers a provocative exploration of Australian Trade Mark Registers with a view to challenging a widely-held view that such registers contain bland trade marks of interest only to traders and trade mark practitioners. In this regard, this article has argued that trade marks are not limited to 'badge of origin' or 'private property' roles: there is also a 'public discourse' or 'cultural' role recognised by commentators, and present since the inception of trade mark registration systems in public interest oriented provisions restricting the registration of scandalous marks. If we accept this point, then trade mark registration systems ought to regulate the interests of traders and the general public interest.

From the vantage point of minority and marginalised groups, however, those systems failed in colonial and Commonwealth Australia. An examination of colonial and Commonwealth Trade Mark Registers demonstrates clearly that Indigenous Australians, Africans, Maoris, Native Americans, Chinese, and women (Black or White) were the subject of stigmatising registered trade marks. The historical record demonstrates that the protests and concerns of Aboriginal and other minority counterpublic spheres were largely ignored. Dominant commercial and other interests in the broader Australian public sphere appear to have drowned out these concerns.

While it might be contended that there is little benefit in commenting on the historical record through contemporary sensibilities, that approach, as convenient as it might be, is simply dangerous. Reviewing the history of trade mark registrations in Australia, at the very least, offers some important lessons. First, stigmatising registrations reveal the dangers of bureaucratic insensitivity to minority concerns and the potential for professional embarrassment. Second, shunning this history would be to once more ignore historical grass-roots protests against such representations and discount significantly the important role that historical Trade Mark Registers had in propagating and disseminating damaging stereotypes. As the Adam Goodes and Eddie Betts case studies above illustrate, racist tropes that manifest in the Register are not confined to their historical milieu, but rather remain an indelible part of the present-day lived experience for many marginalised communities, replete with their attendant injurious consequences. Finally, shining a light on the colonial and Commonwealth Registers' dark history underscores that the state should avoid setting its imprimatur on stigmatising trade marks, by at the very least, denying trade mark registration to such marks.

The contemporary Register of Trade Marks is no doubt vastly improved, insofar as it relates to racist registrations<sup>256</sup> and official practice,<sup>257</sup> but problems, which cannot be explored here, nonetheless remain. For instance, the Register reveals that misogynistic stigmatising marks often secure registration.<sup>258</sup> In a trade mark registration system unsensitised to these concerns, one which prioritises the property interests in trade mark law and not the dignity of people by failing to appreciate fully a trade mark's cultural role, these outcomes are predictable, though not inevitable.

<sup>256</sup> But see the FROGGY'S AND WOGGY'S device mark in Class 42: *AU Trade Mark No 847154*, filed on 22 August 2000 (Removed on 8 March 2011) and W.O.G SPRAY device mark in Class 3: *AU Trade Mark No 1988695*, filed on 16 February 2019 (Registered on 24 September 2019).

<sup>257</sup> 'Trade Marks Office Manual of Practice & Procedure', *IP Australia* (Online Manual, 1 March 2019) <[http://manuals.ipaustralia.gov.au/trademarks/trade\\_marks\\_examiners\\_manual.htm](http://manuals.ipaustralia.gov.au/trademarks/trade_marks_examiners_manual.htm)>; see especially at pt 30 [2.9], [2.11].

<sup>258</sup> See, eg, Peter Gifford's registration of the word mark SILLY BITCH in Class 25: *Trade Mark No 890132*, filed on 25 September 2001 (Registered on 3 May 2002).