Balfe wanted the enquiry to judge the advantages and disadvantages of a wholly municipal system and a centralised system. He favoured centralisation, pointing out that if "a properly-organised police system" had existed during the Chiniquy disturbances, they would not have needed to call out the Volunteers.[157] Giblin reiterated his support but was under no illusion that change would be easily achieved. Municipal control of policing had "created a mass of vested interests which it would be very difficult to uproot".[158] Before introducing change, Giblin wanted to educate the public on the advantages of centralisation and thought the select committee would help by collecting information.

The status quo was defended by Adye Douglas. He damned the "centralising despotism" of recent years, prophesising that it would corrupt the government, the institutions, and the people of Tasmania.[159] He preferred "anarchy" to the old days when a centralised police abused their powers and harassed innocent people. Douglas believed that the municipal police were generally better managed than the territorial police, with the Launceston force being pre-eminent. Nonetheless, he saw advantages in strengthening central powers of supervision as in England to ensure greater uniformity in policing standards and working conditions.[160] Balfe's motion was passed and he was appointed chairman of the committee.

It made little headway. Eleven meetings were held, nine witnesses were interviewed, and a brief, anodyne progress report was produced.[161] Some witnesses supported a centralised system, others argued for the status quo, although most seemed to favour amalgamating small forces. The strength of the municipal forces was 44 in Hobart Town and 22 in Launceston but one force had three policemen, seven had five policemen, one had six policemen, seven had seven policemen, two had eight policemen, and one had nine policemen, making a total of 184 and a further 100 men in the territorial force.[162] The committee found that the duties of Inspector of

157 As above.

158 As above.

159 *Mercury,* 3 September 1880. In 1885, when Premier, Douglas changed tack and supported a Central Board of Health to force local government to pay attention to sanitation: see Petrow, *Sanatorium of the South?* p23.

160 For the "creeping centralisation" of England, see Emsley, *The English Police: A Political and Social History* (Harvester, Hemel Hempstead 1991) pp86-87.

161 Tas, Parl, *Journals*, HA (1880) Vol 39, Paper 132, *Police Committee: Progress Report and Evidence* at 3ff.

162 Tas, Parl, *Journals*, HA (1880) Vol 39, Paper 131, *Twenty-Second Annual Report of Inspector of Police* at 3, 12.

Police were curiously undefined and that his inspection of municipal forces was deficient, but seemed to lose interest in their brief after Balfe died in December 1880. The *Police Regulation Act* 1881 did little more than provide a superannuation scheme for the territorial police.[163]

The riots of 1874 and 1879 prompted a major review of who should control the police in Tasmania. In Launceston Superintendent Coulter was respected for upholding the law and for forging an honest body of men. Despite being numerically overwhelmed, facing intimidation from the rioters, and knowing the railway rate was widely detested, Coulter continued to enforce the law and retained aldermanic confidence. In Hobart Town Superintendent Propsting had long been criticised for his partial and 'weak-kneed' enforcement of the law and for not providing upright leadership for his men, who fell into corrupt ways. The Chiniquy riots demonstrated clearly what Propsting's critics could only allege - that he was incapable of discharging his duties and organising his men. After Propsting resigned, he was replaced by Frederick Pedder, who had an unsullied reputation, and the force was weeded of dishonest and physically incapable men. The government hoped to make capital out of the riots by fundamentally changing the dual system of policing. It failed because of the deep-seated resistance of municipal councils to centralisation, and subsequently no further crises occurred to create a climate for change. The debate on centralisation therefore continued for nearly two decades and, despite municipal opposition, centralisation finally became a reality in 1899.[164]

163 *Mercury,* 5 October 1881.

164 Jackman, *Development of Police Administration in Tasmania, 1804-1960* pp 90-101.

*Shirley V Scott**

THE JAPANESE LUGGER CASE EPISODE: THE TRIUMPH OF THE RULE OF LAW?

THIS paper traces Australia's attempts to use legal means to meet the economic and security threat posed by the operations of the Japanese pearling industry off the coast of the Northern Territory in the 1930s. Finding no means in existing law by which to curb Japanese operations, the Australian Government in 1937 amended s19 of the *Aboriginals Ordinance* 1918-1936 (NT). But the move was blatantly unsuccessful: the first Japanese against which the law was brought to bear won their cases against the Commonwealth and the remaining cases were settled out of court. Efforts to further amend the Ordinance were abandoned when it proved impossible to draft provisions which were likely to be effective but which would not be obviously discriminatory. There is, however, an ironic twist to the tale. By the time the failure of Commonwealth efforts became fully apparent, the Australian policy of appeasement towards Japan meant that officials were almost relieved at the outcome. What follows is a fascinating story of the apparent triumph of the rule of law.

THE AUSTRALIAN PEARLING INDUSTRY

The Australian pearlshell industry was an important one for Australia's sparsely populated North from its beginnings in the 1860s to the 1950s. The centre of the industry moved, from Queensland in the late nineteenth century, to Broome in the early twentieth century and then to Darwin in the 1930s. Darwin pearlers earned some £76 000 per annum from the sale of pearl shell in 1936,[1] the total annual value of the pearl and pearlshell industry to Australia at that time being approximately £210 000.[2] Australia was the major influence on the American market between 1914 and 1936,

---

* B Mus, B A (Hons), Ph D (Qld); Lecturer of Political Science, University College, UNSW, Australian Defence Force Academy.

1 Weddell to the Secretary, Department of the Interior, 5 September 1936: Australian Archives (AA) A1/1 I36/7994.

2 Memo No 36/7994 on "Japanese Sampans operating in the vicinity of Australia", 2 November 1936: AA A1/1 I36/7994.

shell from Western Australia and the Northern Territory representing an average of 47.9% of the quantities handled.[3]

A recurrent problem for the industry was a lack of skilled workers. While whites provided the capital the industry was always basically Asiatic. Following the amendment of the Bakufu edict in 1866 under which the Japanese had been forbidden to leave Japan, permission was granted for the first Japanese labourers to work overseas, as divers and crewmen in the Australian pearling industry. The Japanese, quickly establishing a reputation as the most efficient divers, were always in demand and, by about 1885, dominated the industry.

It was not only as divers and crewmen that the Japanese contributed to the Australian industry. Skilled Japanese tradesmen undertook the ongoing task of repairing gear and equipment. Although the tradesmen, by the terms of their admission, were limited to the *repair* of vessels, pearlers found that some boats required such extensive repairs that they virtually resembled new boats when completed.[4] While the law also prevented the Japanese from owning luggers, some white Australians known as 'dummies' were persuaded to act as front men for the Japanese. Master pearlers feared that the Japanese, having proved themselves efficient captains, tenders and businessmen, would one day take over the industry altogether.[5]

The pearlers' fears began to be realised during the 1930s. The industry had shown little signs of recovering from the Depression when the Japanese began to send their own modern fleets to the Arafura Sea. By mid 1934 the amount of pearling carried out by foreign pearlers in extra-territorial waters was reaching significant proportions, ten Japanese boats having reportedly taken two hundred tons from 'Australian' waters during 1934.[6] An accusation commonly brought against the Japanese was that of poaching, but there was little that the Portmaster could do to follow up possible sightings, since the Japanese boats were faster than any in commission in the Torres Strait. The Queensland Government took the

---

3 Australian Trade Commissioner (USA), *Report on the Market for Ocean Pearl Shell in the United States*, January 1940, p1: Queensland Premiers Department (QPD), Batch 329.

4 Jennison, "Labour in the Australian Pearl-shell Fisheries" (1946) 5 *Fisheries Newsletter* 4.

5 Edwards, *Port of Pearls: A History of Broome* (Rigby, Adelaide 1983) p92.

6 Bach, *The Pearling Industry of Australia Report* prepared for the Commonwealth Government p219: AA A8985/1 I1.

attitude that it was a matter which primarily concerned the Commonwealth.[7]

But there was little that the Commonwealth Government could do unless the Japanese were actually caught in the act of poaching shell in territorial waters. Merely having a quantity of shell on board was an insufficient basis on which to take action, as shell could easily have been gathered outside of territorial waters. At a conference on constitutional matters attended by state and Commonwealth Ministers in February 1934, it became apparent that there was a gap between the Commonwealth's constitutional rights and international precedent. Despite s51(X) of the Constitution giving the Commonwealth power to legislate on fisheries matters in Australian waters beyond territorial limits, the generally accepted limit of territorial waters was three miles. There was no grounds in international law for action to be taken regarding activities in waters beyond this limit.[8]

As early as 1933 the Commonwealth, faced with an increasing number of reports of poaching and accusation of theft and other malpractices, considered making a complaint to the Japanese government.[9] This course was not followed, however, since it was considered that to appeal to the Japanese Government would be to admit an Australian inability to police its own territorial waters.

The Commonwealth Government met with much domestic criticism in 1936 for having granted port facilities to the Japanese at Darwin.[10] The extension of port facilities the following year to include the sale of crude oil from the Railway Department's storage tanks at less than half the price charged by the Australian oil companies to Broome pearlers only increased the anger and sense of betrayal felt by the pearlers.[11] The Japanese could now operate in direct competition with the Australian fleet, using Australian ports, but taking out no licences and paying no primage.

---

7 "Re Operation of Sampans": Queensland State Archives (QSA), HAR/69.

8 Bach, *The Pearling Industry of Australia* p221.

9 At p220.

10 For an example of a press report, see "Japanese Pearling Boats may make Regular Visits to Darwin", *Northern Standard* 10 July 1936. For the response of Darwin pearlers, see Darwin Pearlers' Committee to the Secretary, Interior, 28 October 1936: AA A1/1 I36/7994.

11 "Memo to the Secretary" 15 June 1937, in AA A1/1 I36/7994 and Bach, *The Pearling Industry of Australia* p229.

Japanese operations became increasingly organized. The formation of the Japan South Seas Association in 1937 was the beginning of the process of amalgamation, which the following year brought Japanese operations almost entirely under government control.[12] Operating from the mandated island of Palau and sub-bases off Dutch New Guinea, fleets of up to sixty vessels, each accompanied by a mother-ship and sometimes a supply ship, worked the centre of the beds several miles off Darwin. The smaller Australian boats, forced to remain around the inshore fringes, carried only two divers, one of whom had also to navigate the boat, while the Japanese luggers carried five divers, whose work was organized in shifts such that there were always three men on the ocean bed. In the United States, the New York house of the Mitsui Company handled the importation of the Japanese shell, about three quarters of which was then placed through the Otto Gerdau Company. Individual Australian lugger owners, operating without a comparable system of marketing, had little chance of offering effective competition.

In the two years following the first appearance of Japanese shell in New York in 1936, the tonnage of shell doubled.[13] The sudden influx of shell in quantities far above the annual world consumption of about 4 300 tons flooded the markets, leading to a drop in the world price. The scale of Japanese operations also had a severe impact on the beds in the Arafura Sea. The Japanese catch, which had increased from 750 tons in 1935 to 3 840 in 1937, fell during the 1939 season, to only 893 tons. Partly due to the low world price, this appears to have also been caused by the depletion of known beds.

AUSTRALIAN REACTION TO JAPANESE COMPETITION

Various suggestions were put forward as to how Japanese activities might be constrained. All boats could be required to have a licence (unfeasible since the beds were in international waters) or to carry one or more persons competent to interpret in English.[14] Alternatively, foreign ships could be required to take out a licence in order to enter an Australian port.[15] Although more practical, this course was still of limited use, since

12 Bach, *The Pearling Industry of Australia* p232.

13 "Report on the Market for Ocean Pearl Shell in the United States" p1: QPD Batch 329.

14 Garrett to The Secretary of the Department of the Interior, 27 October 1936: AA A461 I345-1-3 Annexure 6.

15 East, Marine Branch, to Minister for External Affairs, 4 March 1938: AA, A461 I.345-1-3 Annexure 5.

pearling vessels could avoid entering ports if necessary. None of the suggestions were pursued because none would have gone far towards removing the source of the Japanese threat: extensive operations carried out in international waters beyond Australian control.

Meanwhile, public feeling had been aroused by press reports of pearlers trespassing on Aboriginal reserves and bartering tobacco and clothes for Aboriginal women. Officials in Darwin were under pressure to "protect" the "poor blacks ... against themselves".[16] Captain Haultain, of the Northern Territory Patrol Service, established in May 1936,[17] was instructed to "eliminate the 'lubra trade'".[18] He assumed, as was a widespread public assumption, that this involved the crew of both Australian and Japanese vessels.[19] In fact it seems that this was not the case. While crews of Japanese vessels often landed on the coast for fresh water and wood and employed local aborigines as pilots[20] the "trade" was carried out by the (mainly Japanese and Malay) crews of the Australian-owned luggers.

In April 1937 the *Larrakia* of the Northern Territory Patrol Service encountered 51 Japanese pearling boats close to the shore of Korowa Island.[21] Captain Haultain detained a number of the vessels but, when he radioed Darwin for further instructions, was advised that he could only draw on s185 of the *Customs Act* 1901 (Cth) by which vessels found in territorial waters without proper reason were to be given twelve hours in which to leave or risk arrest. Shocked at the weakness of the law at his disposal, Haultain released the luggers with a warning; 35 other approaching members of the Japanese fleet were warned away to avoid further embarrassment.[22]

Since the probability of the patrol again finding Japanese luggers close to the shore was high Haultain felt it was important that he be able to follow

16 Bishop-Elect of Darwin to Lyons, Prime Minister, 29 April 1938, A659/1, I40/1/7282. There were many written complaints from missionaries such as those at the Roman Catholic Mission on Bathurst Island: Haultain, *Watch off Arnhem Land* (Roebuck, ACT 1971) p13.

17 The patrol boat was intended both to be in readiness to assist aeroplanes engaged in the Overseas Air Mail Service and to carry out patrol duties for the Northern Territory administration.

18 Haultain, *Watch off Arnhem Land* p26.

19 At pp13, 26.

20 At p118.

21 Statement prepared for Sir John Latham: AA A659/1 I40/1/7282.

22 Haultain, *Watch off Arnhem Land* pp115ff.

up the warning previously issued with a definite course of action. At a conference subsequently held in Darwin between the (Acting) Administrator of the Northern Territory, the Sub-Collector of Customs, the Quarantine Officer and Chief Protector of Aborigines Giles,[23] Government Secretary and currently Acting Administrator of the Northern Territory, it was suggested that the best way of dealing with the situation was to amend the *Aboriginals Ordinance* declaring the three-mile prohibition limit for waters off an Aboriginal Reserve.[24] The Department of the Interior took up the idea of amending the *Aboriginal Ordinance* "in some way to create an offence for which the Japanese could be prosecuted".[25] On 21 April 1937, only seventeen days after the *Larrakia* incident, s19AA of the *Aboriginals Ordinance* (1918-1936) was gazetted, rendering it illegal to enter in a vessel, without authority or unless necessary for the protection of life, the territorial waters adjacent to a reserve for aboriginals. If caught, a vessel would be arrested and brought to Darwin, the owner then having to sue in order to regain possession of the ship.[26]

ENFORCING THE ORDINANCE

Australian officials hoped that this provision would handicap Japanese pearling operations by making it more expensive and difficult for them to

---

23 Statement prepared for Sir John Latham: Ser A659/1 I40/1/7282.

24 Haultain, *Watch off Arnhem Land* p127.

25 Clausen, Deputy Crown Solicitor, to the Secretary, Attorney-General's Department, 13 April 1937: AA A432/81, I1938/146 Pt 1.

26 Section 19AA read:

(1) Any person (not being the Administrator, the Chief Protector, a Protector, a Police Officer, an authorized officer or an aboriginal) who enters in a vessel the territorial waters adjacent to a reserve for aboriginals or is found in a vessel within such territorial waters shall be guilty of an offence against this Ordinance, unless he was authorized by a Protector or Police Officer to enter or be therein, or he satisfies a Protector or Police Officer that his entry or being therein was necessary for the protection of life.

(2) Any vessel in which any such person enters the territorial waters adjacent to a reserve for aboriginals or is found within such territorial waters and any goods found on such vessel shall be forfeited to the King unless that person was authorized by a Protector or Police Officer to enter or be therein or he satisfies a Protector or Police Officer that his entry or being therein was necessary for the protection of life.

Commonwealth of Australia Gazette No 18, 21 April 1937, pp693-694.

obtain water, fuel, and other supplies.[27] At the same time, the fact that the provision was to apply to vessels of all nationalities meant that it would "not ... give offence to the Japanese".[28] It could be publicly justified as a response to missionary calls to "protect" aborigines although many of the key figures in the episode were well aware that the Japanese fleet was not involved in the "lubra trade".[29]

Darwin pearlers were irate at this restriction on the conduct of their operations, claiming that their inability to land on such a vast percentage of the coastline meant that they may as well abandon the Darwin grounds to the Japanese and move to Broome.[30] Australian authorities attempted to placate Australian pearling interests, apparently giving some sort of informal undertaking that Australian luggers would not be prosecuted.[31]

---

27 "Japanese Encroachment in Australian Waters", Memo by Carrodus, Secretary, Interior, 16 December 1938: AA A461 I1345/1/3:

> It seems to me that all we can do is to make the operations of the Japanese fleets as expensive as possible by maintaining regular patrols of the coast and preventing the crews from landing on the coast for careening and other purposes.

28 At p3.

29 In his memo on "Japanese Encroachment in Australian Waters" Carrodus, Secretary of the Department of the Interior, juxtaposed information on the need to prevent crews from interfering with Aboriginal women with evidence of the Japanese entering territorial waters and landing on Aboriginal reserves. He stopped short of stating that Japanese crews were involved in the trade: as above. Some of the key figures in the episode stated this quite openly. See comments of CLA Abbott, Administrator to the Secretary, Interior, 10 May 1938: AA A659/1 I39/1/864 and 12 February 1940, in F1 I1939/408; J McEwen to the Prime Minister, 28 November 1938: AA A659/1 I39/1/86; Wells J to Administrator, 8 February 1940: F1 I1939/408; and Mr White, Minister for Customs, Aust, Parl, *Debates* [HRep] (1936) Vol 151 at 137. Cook, Chief Protector of the Aboriginals, wrote:

> [T]he Japanese merely exploits the existing social organization of the aboriginal and does not destroy it. The mission, on the other hand, sets itself out utterly to destroy the native social organization and does not succeed in replacing it. Viewed from this aspect, the Japanese is less a menace than is the mission.

Cook to the Administrator, 30 March 1938: AA A659/1 I40/1/7282.

30 "Pearlers may leave Darwin", *Argus*, 12 June 1937; "Pearlers' Threat to Move from Darwin", *Sydney Morning Herald*, 12 June 1937.

31 Master Pearlers claimed that Mr Paterson had made such a promise to them: "For Press", 4 April 1938: AA A659/1 I39/1/864. See also Cecil Cook, Chief Protector of Aboriginals to The Administrator, 8 September 1937: AA A659/1 I39/1/864. One newspaper article referred to an understanding that Australian-owned luggers could go within 3 miles for navigational purposes - provided that there was no interference with natives: "Lugger Trespass Alleged", *Melbourne*

Special watering bases were established at Elcho Island and King River for Australian luggers so that they should not be disadvantaged by not being able to land on the shores of Aboriginal reserves.[32]

The new Administrator of the Northern Territory, Charles Abbott, issued written instructions for Captain Haultain, which, by omitting reference to Australian vessels, made Japanese luggers the object of the enforcement of s19AA:

> I have been informed that there are nine vessels in the vicinity of Haul Round Island, but do not know their nationality. You should proceed there with despatch, date and time of arrival being left to your judgement. *If these vessels are of foreign origin*, and are in territorial waters, you will conform to the conditions laid down in the Ordinance recently promulgated, the contents of which you are aware.[33]

Captain Haultain followed his orders. Although encountering Australian vessels anchored in the King River, with the "'trade' in full swing", Haultain simply warned the pearlers and continued on his way.[34] Similarly, Jack Stokes, the policeman stationed at the Elcho Island control base, was told that "his job was to ensure that the crews of Japanese luggers did not interfere with the Aborigines".[35] It is not surprising that Stokes was not kept very busy; Japanese mother ships monitored his wireless conversations and the lugger crews did not even come ashore for water until it had been ascertained that Jack was elsewhere.[36] Stokes reported that the Japanese were obtaining water further up the coast and suggested that they be permitted to use bases so that they could water under supervision.[37] Cabinet refused the suggestion.

Herald, 2 April 1938. That the Ordinance was enforced against the Japanese owners but not against the Australian industry was said to be "common knowledge" in Darwin: "Bathurst Island Mission Faces Disaster", *The Advocate*, 10 November 1938, p13.

32 Senator Payne quoted the Melbourne *Herald* as reporting that when Darwin pearlers asked for the bases they gave an assurance that there would be no interference with the Aborigines: Aust, Parl, *Debates* [HRep] (1937) Vol 153 at 718.

33 Haultain, *Watch off Arnhem Land* p138. Emphasis added.

34 At p140.

35 Clarke, *The Long Arm: A Biography of a Northern Territory Policeman* (Roebuck, Canberra 1974) p19.

36 At p24.

37 Telegram, Giles to Interior, Canberra, 12 July 1938: AA A659 I1940/1/7282.

Many incidents during the enforcement of the Ordinance against the Japanese luggers were to prove almost comic. On 10 June 1937 the *Larrakia* came across the *Takachiko Maru No 3* and a mother-ship named the *New Guinea Maru* within, so Captain Haultain believed, three miles of the shore. When it was found that the draught of the *New Guinea Maru* was such that they would have to return to Darwin via the open sea, the worry of what would then take place if the troublesome engines of the *Larrakia* were to fail prompted Captain Haultain to release the *New Guinea Maru* on condition that another vessel be placed inside territorial waters as a replacement. The Japanese swapped the mother-ship for the *Seicho Maru No 10*, "the dirtiest and most disreputable craft [Captain Haultain] had seen for many a day"[38] and offered the Australians two hundred pounds for its release. But what sparked the imagination and mirth of the public were reports that on the way back to Darwin the *Larrakia* broke down completely and was obliged to request the *Takachiko Maru* to tow it to Darwin, a task for which the captain of the confiscated lugger then claimed salvage.[39] Once in Darwin, the crew of the *Takachiko Maru* refused to leave their ship until threatened with forcible ejection. They were then told to board the *Seicho Maru* which, owing to the (illegal) circumstances of its arrest, was ordered to leave Darwin. Speaking in the Senate, Mr Paterson, Minister for the Interior, tried to play down the whole incident:

> While it is true that at one stage, owing to flat batteries, Captain Haultain had to compel one of his prisoners to tow him for 22 miles, the fact is, that the rest of the journey of over 700 miles was done under the launch's own power.[40]

Further arrests followed. The *Dai Nippon No 5* and *Palau Maru* were surprised by the *Larrakia* near Elcho Island in August 1937. Having received a formal request for return of the *Dai Nippon* on the grounds that the captain and members of the crew had been ill, water had been "rather low", and the vessel knocked about, Abbott recommended its release.[41] Cabinet refused but the condition of the boat for which the Government was then responsible pending legal proceedings was such that it had to be

38 Haultain, *Watch off Arnhem Land* p153.

39 "Australian Patrol Boat Being Towed by Arrested Japanese Pearling Craft", *Japan Times*, 16 June 1937. An amusing account of the incident is told by Clyde Fenton who was sent to do an aerial search for the *Larrakia* when it failed to make radio contact, in his *Flying Doctor* (Georgian House, Melbourne, 3rd ed 1949) pp170-175.

40 Mr Paterson, Aust, Parl *Debates* [HRep] (1937) Vol 153 at 349.

41 Decoded telegram from Administrator to Interior: AA A1 I37/13441.

pumped every two hours to keep it afloat.[42] On 19 September 1937 the *Tokio Maru No 1* was found off Bremer Island; once escape had proved useless its engineer disabled the motor. Although some repairs were carried out the confiscated lugger was taken most of the way back to Darwin under sail.[43]

THE LUGGER CASES

The lugger owners decided to appeal and the first of five 'lugger cases' was scheduled to begin in the Supreme Court of the Northern Territory on 20 June 1938.[44] On 16 June, Cabinet considered a submission from the Acting Attorney-General, which explained that evidence of the Crown regarding the place of arrest of two of the luggers, the *New Guinea Maru* and the *Seicho Maru,* was "not very satisfactory". It was asked whether the Government would be prepared to settle these two cases if the plaintiffs were prepared to do so for reasonable amounts or whether Cabinet would prefer to fight the cases in Court.[45] Cabinet decided to wait and see how the first three cases went.

The Japanese retained Mr JW Lyons, a local solicitor, who then briefed Mr GJ O'Sullivan, an experienced Sydney barrister. Mr JD Holmes, another Sydney barrister, was to appear for the Commonwealth. To the amazement of many Australian observers[46] the Commonwealth lost the first case as Justice Wells was not convinced that the Japanese vessels had in fact been within three miles of the shore.[47] Justice Wells raised the question as to whether the Ordinance was applicable to foreign vessels but left the point open. He ordered the return of the vessel to the plaintiffs,

---

42 Abbott to Secretary, Interior, 23 November 1937: AA A1 I1938/13036.

43 Haultain, *Watch off Arnhem Land* pp189ff.

44 See Edeson, "Foreign Fishermen in the Territorial Waters of the Northern Territory, 1937" (1976) 7 *FL Rev* 202.

45 Cabinet Submission by McLachlan, A/g Attorney General, 16 June 1938: AA A432/85 I38/146.

46 Haultain was clearly amazed - to the extent that he hinted at the possibility that the loss was a strategic one on the part of the Commonwealth. For example, he cited examples of the Crown having failed to use evidence that would have strongly supported its position, asserting that the oversight "was either ineptitude on the part of those responsible for gathering witnesses, or something deeper": Haultain, *Watch Off Arnhem Land* p237. There does not appear to be any evidence that the Crown did not do its best to win. See AA A432/85 Parts 1-3 on the preparation and conduct of the defence.

47 *Haruo Kitaoka v The Commonwealth, Abbott & Haultain* (Unreported, NT Sup Ct, Case No 14 of 1937): AA A1 I1938/20322.

return of the shell that had been removed from the vessel and £2000 damages.[48]

In the second case,[49] the master of the *Tokio Maru* did not deny having been within territorial waters but said that he had experienced engine trouble. Justice Wells accepted this explanation and found that the presence of the lugger in territorial waters was therefore accidental and the seizure unlawful. Justice Wells added that, even if this had not been the case, the right of innocent passage could have applied, which would have made s19AA inapplicable to foreign-owned vessels.[50] "Wells ordered the return of the vessel and pearl shell."[51] EW Mitchell advised the Attorney-General that an appeal would probably fail because "the High Court must either hold that the denial of right of passage does not apply to foreign vessels or that if it does apply the Ordinance is not valid".[52]

The third of the cases, regarding the *Dai Nippon Maru* was then settled before judgment could be delivered, Justice Wells' comments in the previous cases making it appear likely to go against the Commonwealth.[53] With some embarrassment, the remaining cases pertaining to the *New Guinea Maru* and the *Seicho Maru* were settled out of court.[54] The settlement consisted of the return of the five vessels detained, their pearl shell cargoes, and £3 592.[55]

The Administrator of the Northern Territory concluded that it did not appear desirable to take further legal proceedings under s19AA in respect of foreign vessels until the question of the right of innocent passage had been decided or until the provisions of the section had been replaced by

48 Statement prepared for Sir John Latham: AA A659/1 I 40/1/7282.

49 *Fukutaoo Tange v The Commonwealth, Abbott & Haultain* (Unreported, NT Sup Ct, Case No 21 of 1937).

50 Abbott to Secretary, Interior, 13 December 1938: AA A432/81 I38/502.

51 "Wells, Thomas Alexander" in Carment & James (eds), *Northern Territory Dictionary of Biography* Vol 2 (Northern Territory University Press, Casuarina 1992) p229.

52 *Tange v Commonwealth. Advice on Appeal. Opinion of Mr EW Mitchell, Commonwealth Crown Solicitor:* AA A432/81 I1938/146 Pt 4 .

53 *Yamani v Commonwealth, Abbott & Parnell* (Unreported, NT Sup Ct, No 22 of 1937): AA A432/85 I1938/146 Attachment 7.

54 Lieut Com McKenzie (the Technical Adviser to the Plaintiffs), "Arrest of Japanese Pearlers" *Sydney Morning Herald*, 7 & 8 December 1938.

55 "Wells, Thomas Alexander" in Carment & James (eds), *Northern Territory Dictionary of Biography*, Vol 2, p229.

more effective legislation.[56] Nor did it seem possible to apply s19AA to Australian registered vessels, both because the right of innocent passage applied only to foreign vessels which meant that any case brought against an Australian vessel would likely lead to charges of inequality[57] and because of a possible conflict of laws between ss19AA and 30 of the *Pearling Ordinance* 1930-1937 (NT) which conferred rights of pearling in all territorial waters of the Northern Territory not closed by an order under s35 of the *Pearling Ordinance*.[58]

Even before the cases were finished, moves were underway to amend the Ordinance further so as to be effective but not conflict with "recognized principles of the rule of law".[59] Wells was invited to comment on the Minister of the Interior took up Abbott's suggestion of November 1940 that the question be deferred due to there being "hardly any" activity by Japanese-owned pearling vessels in the Arafura Sea.[60] Following the lugger cases no further arrests for trespass were made of either local or foreign boats before pearling ceased in 1941 due to the War. The two patrol vessels were taken over by the Navy.

CONCLUSIONS: THE TRIUMPH OF THE RULE OF LAW?

The critical school of legal studies has emphasised the way that, contrary to the notion of the rule of law as treating everyone as equal regardless of class, gender, or race; law has in fact been used by the state in Australia, and elsewhere, as an instrument of domination and discrimination. The story of the Japanese lugger episode is such an attempt at discrimination via law. The entry of the modern and efficient Japanese fleet to the pearling industry in the Arafura Sea in the 1930s posed an immediate threat to the Australian industry. The Commonwealth Government sought a legal basis on which to respond to pressures arising from the demise of

56 CLA Abbott, Administrator to The Secretary, Department of the Interior, 17 September 1938: AA A659/1 I39/1/864.

57 CLA Abbott, Administrator to The Secretary, Interior, 13 December 1938.

58 An Order was therefore made by the Governor-General in pursuance of s35 of the *Pearling Ordinance* 1930-1937 (NT) to close all such portions of the present pearl-shell area as are adjacent to any reserve for Aboriginals. See Secretary, Attorney-General's Department to the Secretary, Interior, 23 August 1938: AA A659/1 I39/1/864 and Memo No 37/13444, 12 September 1938, Department of the Interior: AA A659/1 I39/1/864. The Order appeared in the *Commonwealth of AustraliaGazette* No 59, 13 October 1938, p2351.

59 See AA F1 I1939/408, F1, I1949/135, and A431/1 I50/778 Pt 4.

60 Carrodus, Interior to Secretary, Attorney-General's Department, 24 April 1941: AA F1 I1949/135.

the Australian industry, widespread concern at the "lubra trade" on the coast of the Northern Territory and the Japanese "southward advance". Yet, upon examination it appeared that the estimated ninety five per cent of pearling operations which were carried out in extra-territorial waters were entirely legal within established international law. Being unable to find any means in existing law, the Government amended the *Aboriginals' Ordinance* to establish a legal basis on which to attempt to curb Japanese pearling. Although the Amendment was phrased in such a way as to uphold the notion of the rule of law, it was enforced so as to support the struggle of the Australian pearlers against Japanese competition. During the case substantial evidence was produced to show that the Amendment had also been enforced in such a way that Australian vessels regularly encroached on waters adjacent to Aboriginal reserves without any action having been taken.

The purported goal of s19AA was to stop interference with Aborigines, especially women, along the Northern Territory coast. But several of the key players in the episode, including Justice Wells and the Administrator of the Northern Territory, readily admitted that such interference was carried out by the crews of the Australian rather than the Japanese vessels. Hence it was not surprising that the amendment did not achieve its purported goal. The 1938 report of the Bathurst Island Mission described prostitution at nearby Luxmoor Head as "rife";[61] the "trade" was also in progress at Melville Island which was not an Aboriginal Reserve and so not covered by s19AA[62] and the King River, one of the authorized control bases for Australian luggers.[63] Nor did the amendment achieve its underlying goal of reducing competition from Japanese operations. It is true that an increased number of luggers called at Darwin for supplies rather than entering territorial waters[64] but by the late 1930s the Japanese were operating with large mother ships in such a way that they no longer needed to land for water and wood.

The Australian pearling industry only survived the 1930s with government assistance. The 1935 report of a Tariff Board enquiry rejected the

61 Report, Bathurst Island Mission, 31 December 1938: AA A659/1 I39/1/864.

62 CLA Abbott, Administrator to The Secretary, Interior, 13 December 1938.

63 Rev Webb to the Minister for the Interior, 22 June 1938; and CLA Abbott, Administrator to the Secretary, Interior, 18 June 1938: AA A659/1 I39/1/864. The other two watering bases were not used: CLA Abbott, Administrator to The Secretary, Department of the Interior, 13 December 1938: AA A659/1 I39/1/864.

64 CLA Abbott, Administrator to The Secretary, Interior, 21 September 1938: AA A659/1 I39/1/864.

payment of a bounty but recommended that relief be granted in the form of non-payment of primage and customs duty.[65] Following an investigation into the industry by the Department of Commerce in 1938, sixty-four thousand pounds of repayable advances were made by the Commonwealth and State governments to meet the difference between production costs and overseas prices, to pay off crews for 1938, and to prepare luggers for 1939.[66]

Was this, then, a story of the victory of the rule of law, of the "triumph of British justice"?[67] Justice Wells can certainly be viewed as having endeavoured to uphold the rule of law. During the 'lugger cases', Justice Wells made comments from the Bench such as "the 'poor old aboriginal' was being used as a 'stalking-horse'",[68] and after the proceedings he defended his views in correspondence with Robert Menzies, then Attorney-General:[69]

> Probably the most serious aspect of this matter is that the facts disclosed during the hearing of these cases show most clearly that no attempt has been made to administer S.19AA of the Aboriginals Ordinance ... for the purpose for which it was [purportedly] enacted - that is, for the protection of the natives, particularly native women, from interference by the crews of such vessels - but that, on the other hand, it was attempted to use the section in a futile endeavour to harass overseas pearling vessels lawfully engaged in fishing pearlshell outside territorial waters.[70]

---

65 Aust, *Year Book of the Commonwealth of Australia* No 32 (Commonwealth Government Printer, Canberra 1939) p699.

66 Aust, *The Pearl Shell, Beche-de-mer and Trochus Industry of Northern Australia* (Report of the Northern Australia Development Committee 1946) p9: AA A52 1338/372.

67 This was the thrust of much press reaction to the cases. See, for example, "A Darwin Tragi-Comedy", *Sydney Morning Herald,* 8 December 1938.

68 Lieut Com McKenzie (the Technical Adviser to the Plaintiffs), "Arrest of Japanese Pearlers" *Sydney Morning Herald,* 7 & 8 December 1938.

69 See correspondence: AA A2124/1 I2.

70 JA Wells to the Hon RG Menzies, 14 March 1939: AA A2124/1 I2. Abbott wrote of the first case that "it seemed ... that [Captain Haultain] had to withstand two hostile cross-examinations, one from Mr O'Sullivan, Counsel for the Japanese, and the other from His Honour the Judge": CLA Abbott, Administrator to The Secretary, Interior, 21 September 1938: AA A659/1 I39/1/864.