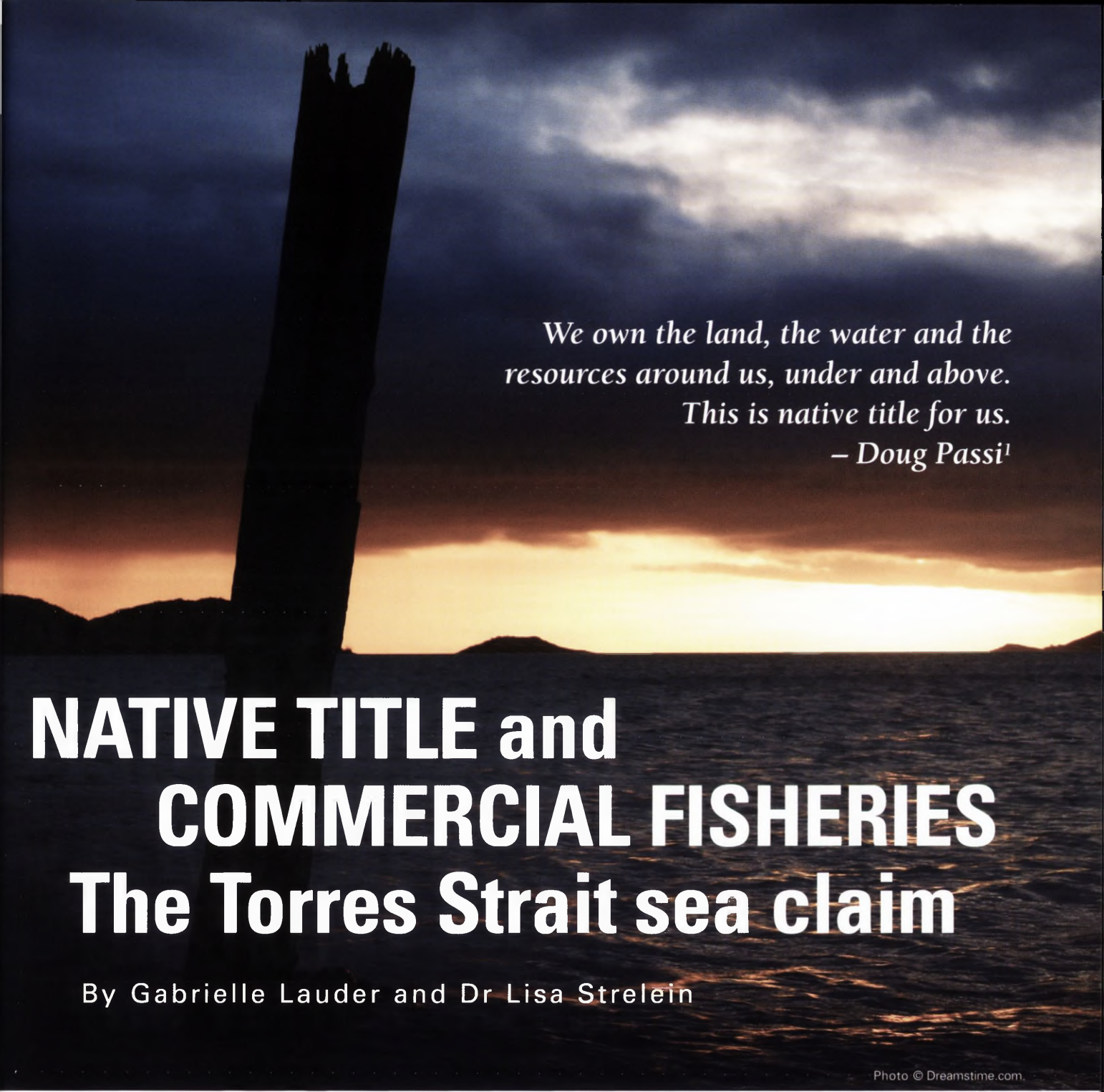

We own the land, the water and the resources around us, under and above. This is native title for us.
– Doug Passi[1]

NATIVE TITLE and COMMERCIAL FISHERIES
The Torres Strait sea claim

By Gabrielle Lauder and Dr Lisa Strelein

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For native title holders, the ability to exercise native title rights for commercial purposes is crucial to full and meaningful participation in the social, cultural and economic life of Australia. This article examines the extent to which native title gives its holders the power to manage resources, govern their use and exploit them commercially.

On 7 August 2013, the High Court of Australia unanimously held that the native title right of the Torres Strait Regional Seas Claim Group (the Seas Claim Group) to take fish and other aquatic life for any purpose, including trade or sale, had not been extinguished by fisheries legislation.[2]

Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia and Ors ('Akiba') was the first native title case to come before the High Court for some years.[3] This article examines the issues brought to the High Court in this case against the backdrop of 20 years of native title.[4] Native title is described as *sui generis* because the rights and interests that comprise the title are drawn from the traditional law and custom observed by the original inhabitants of that territory.[5] The *Akiba* case is significant in that the primary judge recognised that Torres Strait Islanders have traditionally exploited marine resources for commercial purposes. The recent High Court appeal tested to what extent those rights had been extinguished by fisheries legislation. >>

20 YEARS OF NATIVE TITLE

The Torres Strait is the birthplace of native title. In 1992 the High Court recognised native title for the first time in the case of *Mabo v Queensland (No. 2)*, brought by the Meriam People.[6] This case dispelled the myth that the land was legally uninhabited, or *terra nullius*, and challenged what has been called the Australian 'cult of disremembering'[7] the history of forced settlement. Native title belatedly recognises that Indigenous people have rights and interests in their ancestral lands and waters under their own laws and customs.[8] Native title enjoyed a brief period of development under the common law, before it became a creature of statute in the form of the *Native Title Act* 1993 (Cth) ('the Act'). While the Act and subsequent amendments significantly curtailed the right to make decisions about the use and management of resources under native title, it was the High Court that allowed for the piecemeal erosion of native title over time.[9] Twenty years on there are still critical issues and ambiguities that are open to interpretation. It remains to be seen whether a new generation of law makers can contemplate a native title system that returns to Indigenous Australians a measure of control over the land and resources which, 'but for colonisation, would have been indisputably theirs'.[10]

THE *AKIBA* LITIGATION

The *Akiba* determination at first instance was handed down in the Federal Court of Australia on 2 July 2010.[11] Justice Finn, the primary judge, found that the Seas Claim Group had established their claim to approximately 37,800 square kilometres of sea between the Cape York Peninsula and Papua New Guinea. The Seas Claim Group included the descendants of the native title holders of 13 island communities within the determination area. The primary judge recognised the non-exclusive right to access and take for any purpose resources from the determination area, which by natural extension includes commercial purposes. On appeal, the Full Court of the Federal Court varied the native title determination to exclude the right to take fish and other aquatic life for sale or trade on the basis that these rights had been extinguished by applicable Queensland and Commonwealth fisheries legislation.[12] On 7 August 2013, the High Court delivered its judgment on the appeal from the Full Court's decision. The High Court unanimously held that the right to take fish and other aquatic life for trade or sale, supported by the native title right to take for any purpose, had not been extinguished by fisheries legislation.[13]

THE RECOGNITION OF COMMERCIAL RIGHTS

Since *Mabo*, there have been 22 determinations of native title over all of the inhabited areas and most of the uninhabited islands within the Seas Claim area.[14] The *Yarmirr* determination in 2001 in relation to the Croker Island region of the Northern Territory clarified that native title rights may exist over sea country.[15] However, owing to inconsistency with the public right to fish and navigate and the international right of innocent passage, there could be no exclusive claim to sea country.[16] By direct application of the Croker Island decision, the High Court clarified in *Western Australia v Ward on behalf of the Miriuwung Gajerrong* that public fishing rights negate any claim to 'exclusive fishery'.[17] This precedent nonetheless allows for non-exclusive fishing rights (save for any extinguishment). Indeed, the Act contemplates that native title would include non-exclusive fishing rights and interests[18] and the right to fish for personal, domestic and communal use is commonly recognised in native title determinations.

Section 223(1) of the Act defines 'native title rights and interests' and establishes the requirements of proof. The section is interpreted as requiring native title claimants to demonstrate an ongoing connection with the claim area through the acknowledgement and observance of traditional law and custom since a time prior to the assertion of sovereignty. This is an onerous standard of proof, particularly in areas subject to rapid European settlement where local Indigenous populations were depleted by conflict and disease, driven out of the area by force or restricted access to traditional resources, or forcibly removed to designated reserves and institutions. The idea that native title claimants must establish traditions and customs that are 'untouched' by colonisation, or to provide an unbroken chain of continuity, should be recognised not only as racist romanticism but as a fundamentally unjust reward for the colonisers' refusal to recognise the rights of Indigenous peoples.[19]

A member of the Seas Claim group, Alick Tipoti, gave evidence that song, dance and storytelling 'are like our documents to prove that it belongs to us'.[20] The faith that many claimants have in being able to explain their claim to country in court is often met with a misguided and restrictive preoccupation with the forensic examination of specific activities – such as hunting or fishing a particular species – to discern law and custom. For example, the way Justice Olney in the *Yarmirr* case approached the requirements of proof was more concerned with the activities undertaken than the normative structure of the laws and customs.[21] To this end, his Honour found that the activity of exchange in marine resources did not constitute a broader right to trade.

The primary judge in *Akiba* determined the relevant laws and customs at a higher level of abstraction. Justice Finn found that the laws and customs governing the use of marine resources in fact allowed members to take resources for any purpose and the taking of such marine resources for a commercial purpose was no more than a particular mode of enjoying this right. The decision recognised that Torres Strait Islanders are a maritime people, evidenced by their possession of sea craft for more than one and a half millennia which enabled them 'to exploit the region's marine resources and allowed them to be part of a wide network of communities and to participate in trading and cultural relationships across the Strait'.[22] His Honour observed that 'the laws and customs of present concern are informed by considerations of utility and practicality' and are not reliant on any overarching spiritual connection.[23]

A PEOPLE FROZEN IN TIME?

Extrajudicially, Justice Finn has criticised the reductionist approach of identifying incidents of native title based on activities carried out before the assertion of sovereignty.[24] The Torres Strait Islanders were traders for centuries and so succeeded in establishing a pre-sovereignty right to take marine resources for trading or commercial use. But why should it matter if fishing had been undertaken only for subsistence because there was no need or no opportunity for commercial exploitation at the time? Counsel for the Seas Claim Group stated: 'Some [fish] might be for sale. Some might be for eating';[25] it's neither here nor there.

Native title holders should not be precluded from engaging in a commercial opportunity that arose after the assertion of sovereignty. As Tom Jack Baira, a member of the Seas Claim Group, put it: 'Selling things for money is new because money is new; but we always exchanged and traded things for what we needed. In that way, selling things for money is no different.'[26] In *Yanner v Eaton*,[27] it was held that there is no prescription on the ways in which native title is exercised. The exercise of fishing, the methods employed in fishing and the underlying purpose of fishing will necessarily change and evolve as the society does. The manner of exercising a right should not be bound up in an arcane notion of 'traditional', so long as the connection between the Indigenous people and the land and water remains.

The paradox of the legal construction of Indigenous tradition as a static entity, as Marcia Langton has pointed out, is that it forgets that Indigenous Australians have survived a brutal invasion and lived through the transformation of their landscapes and the displacement of an ancient economy through radical adaptation.[28] To suggest that Indigenous tradition is frozen in time is manifestly absurd. Although the *Mabo* decision 'appeared to leave open the notion that the evolution of land use would include forms of contemporary sustenance and resource development',[29] this has been significantly curtailed in native title determinations, leaving Indigenous Australians 'land rich, but dirt poor'.[30] Native title groups have been denied the commercial rights to the resources they require for economic empowerment, to build necessary social capital, to ensure their cultural survival, and to achieve self-determination.

CARVING UP THE BUNDLE OF RIGHTS

Once commercial rights have been recognised in a native title determination, the next stage of enquiry concerns the extent to which any acts by the sovereign may have extinguished those rights. Extinguishment means that the native title rights and interests cease to be recognised by the common law and thereupon cease to be native title rights and interests within the meaning of s223 of the Act.[31] According to former Federal Court Justice Gray, 'The concept of native title has been reduced to something of little practical significance by judges who have been unable to understand, and legislators who have been consciously averse to, the vital relationship between people and land in Aboriginal traditions.'[32] There is no greater testament to this than the way in which the courts have 'exacerbated the harshness'[33] of the principle of extinguishment.

The High Court in *Mabo* established the principle that up until the passing of the *Racial Discrimination Act* 1975 (Cth), the Crown had the power to extinguish native title unilaterally by legislation or an executive act, without consent or compensation. *Wik Peoples v State of Queensland* confirmed that native title rights and interests can coexist with other non-exclusive interests, in this case pastoral leases, but native title will yield to the extent of any inconsistency.[34] The decision in *Ward* confirmed that partial extinguishment of native title is possible, such that native title may be seen as a bundle of rights, the components of which may be extinguished separately.[35] Against the tide, the recent decision in *Brown (on behalf of the Ngarla People) v State of Western Australia* suggests that native title may survive exclusive possession acts that have a 'temporal element', as long as there is no clear and plain intent to extinguish all native title rights in the area.[36]

The right at issue in *Akiba* was the right to access resources and to take for any purpose resources in the native title areas. The majority judgment stated: 'These are the rights and interests which are at stake. Have these rights and interests been partially extinguished?'[37] More particularly, >>

did the statutory fishing regimes in Queensland extinguish commercial fishing rights or merely regulate the exercise of these rights. On the extinguishment issue, Justice Finn said: 'The native title right I have found is a right to access and take marine resources as such – a right not circumscribed by the use to be made of the resources taken.'[38] The Full Court in *Akiba* held that although the statutory fishing regimes do not explicitly extinguish native title, they manifest a clear intention to extinguish all common law rights.[39] The majority decided that the prohibition is directed at all commercial fishing and an explicit reference to native title is not necessary to include native title holders within a general prohibition.[40]

THE *YANNER* PRECEDENT

The decision of the Full Court stands in contrast to the precedent in *Yanner v Eaton*.[41] The High Court in *Yanner* held that a requirement for an Indigenous person to obtain a permit under the *Fauna Conservation Act* 1974 (Qld) ('the Fauna Act') to hunt did not extinguish the native title right to hunt.[42] The Fauna Act went no further than regulating the way in which rights and interests could be exercised. By operation of s211 of the Act, the Fauna Act did not prohibit or restrict the appellant as a native title holder from taking two young crocodiles for the purpose of satisfying personal, domestic or non-commercial communal needs. The 'native title defence' in s211 of the Act, however, does not apply to the exercise of native title rights and interests for *commercial* purposes.

Taking a different approach to *Yanner*, the High Court in *Ward* held that the Crown had extinguished any native claim to ownership of mineral resources. The Court distinguished the Crown's assertion of property in minerals and petroleum under the Western Australian legislation from the fauna legislation considered in *Yanner*.[43] Rather than creating a legal fiction to regulate scarce natural resources, as was the case in *Yanner*, it was said that the minerals legislation created and vested a right of ownership in minerals.[44] The matter in *Akiba* was more akin to the question in *Yanner*. The High Court was asked to consider at what point on the continuum of regulation a prohibition on the exercise of a right shades into extinguishment of the right itself.

INCONSISTENCY OF RIGHTS

Ultimately the High Court accepted the primary judge's articulation of the right, such that the regulation of commercial fisheries is logically acceptable as mere regulation of the right to take for any purpose. Chief Justice French and Justice Crennan held that neither logic nor construction required a conclusion that a conditional prohibition on taking fish for commercial purposes was directed to the existence of native title rights. Their Honours cited various provisions of the Act, including s227, s238 and s211, which necessarily assume that native title rights can be affected, restricted or prohibited by legislation without that right itself being extinguished.[45] The joint judgment of Justices Hayne, Kiefel and Bell also emphasised that the Act lies at the core of this litigation. Section 211 acknowledges that regulating particular aspects of the usufructuary relationship with traditional waters does not sever the connection of the Torres Strait Islanders with those waters, nor is it inconsistent with the continued existence of that right.[46]

The joint judgment of Chief Justice French and Justice Crennan considered the difficulty in ascertaining a clear and plain legislative intention to extinguish native title, when the applicable statutes were enacted prior to the common law recognition of native title in *Mabo*.[47] That is, how can you inquire as to the subjective processes of law makers who perceived the state of the law to be different to what we now know it to be?[48] Both judgments turned to inconsistency of rights as the pre-eminent criterion for extinguishment.[49] Put simply, native title is extinguished by the creation of rights that are inconsistent with the native title holders continuing to hold their rights and interests.[50] The question was therefore whether the regulation was inconsistent with the continued existence of that right.

The State of Queensland and the Commonwealth asserted that the inconsistency turned on the general application of the statutory prohibitions against commercial fishing without

a licence. The respondents relied on *Harper v Minister for Sea Fisheries*[51] in which the effect of the licensing regime was held to convert a public right to take abalone into the exclusive preserve of those who hold licences.[52] Equating native title with other common law rights in this instance is problematic as native title is fundamentally of a different character; it is a burden on the sovereignty of the Crown.[53] The High Court clarified that *Harper* is not authority for the proposition that native title rights are as freely amenable to extinguishment as public rights derived from common law.[54] The judgment of Justices Hayne, Kiefel and Bell distinguished *Harper* from *Akiba*, saying: 'This case concerns the relationship between legislation prohibiting commercial fishing without a licence and rights and interests which are rooted, not in the common law, but in the traditional laws and customs observed by Torres Strait Islanders.'[55]

The answer may have been somewhat different, though not necessarily, if the Court approached commercial fishing as a distinct and severable right in itself. But no distinct native title right to take fish for sale or trade was found; rather, the relevant right was a right to take resources for *any* purpose.[56] Chief Justice French and Justice Crennan rejected the submission that the exercise of a general native title right for a particular purpose is a differentiated right that can be characterised as a lesser right by reference to that purpose.[57] Likewise, Justices Hayne, Kiefel and Bell stated: 'It was wrong to single out taking those resources for sale or trade as an "incident" of the right that has been identified.'[58] Focusing on the activity rather than focusing on the relevant native title right was apt to lead to error.[59]

PYRRHIC VICTORY OR REAL GAIN?

One may ask then, beyond recognition, what does the Seas Claim Group stand to gain? There is no right to negotiate in relation to offshore areas.[60] Nor does the Act give the native title holders the right to refuse the creation of rights and interests in their territories. Despite this apparent victory for the Seas Claim Group, commercial fishing rights are still regulated by the statutory fishing regimes in place in Queensland.

However, as Counsel for the Seas Claim Group stated, if native title had been partially extinguished, 'then nothing by way of future change, radical or otherwise, repeal or otherwise of statutory fishing regimes can lead to its revival'.[61] In Canada, the court in *R v Sparrow* agreed that the right of the Musqueem to fish could be exercised according to their discretion, including for commercial purposes (although not in issue in that case).[62] Moreover, even if a government can regulate the exercise of that right, government policy does not determine the scope of the underlying right, as a regulatory regime does not affect the underlying right. Therefore, the Indigenous right survives and may be reinvigorated, to be enjoyed to the fullest extent possible under the >>

prevailing regime. But as Nick Duff observes, the 'revival' or 'reinvigoration' of the right in circumstances where the legislation no longer requires a licence for commercial fishing would not confer any benefit on the native title party different to that of the public.[63] That is, everyone equally enjoys the freedom to do what is not prohibited by law.

The native title party may, at best, use the recognition of native title rights to leverage concessions from governments; for example, to ease the cost and administrative burden of licences or to buy back licences from commercial fisheries for redistribution to native title holders.[64] In New Zealand a series of legal claims to historic rights to fish under the 1840 *Treaty of Waitangi* resulted in legislative action in 1992. As a result, the Maori were allotted ownership of 20 per cent of New Zealand's commercial fishing quotas and a controlling interest in New Zealand's largest commercial fishing company. To give effect to common law developments in Canada, programs were developed to enable Indigenous participation in commercial fisheries through the transfer of licences. By 2007, in Canada some 900 commercial licences had been issued to Indigenous groups, while in New Zealand Maori controlled an estimated 40 per cent of the New Zealand seafood industry.[65]

The High Court's decision in *Akiba* accords with a British Columbia Court of Appeal decision handed down on 2 July 2013.[66] The primary judge in this case found that the Vancouver Island First Nation, the Nuu-chah-nulth, had established the right to fish within their territories and to sell fish. The trial judge went further and found a *prima facie* infringement of such rights by the existing regulatory regime of Canada concerning the West Coast Fishery in the area occupied by the Nuu-chah-nulth. Both the majority of the Court and, on rehearing, the British Columbia Court of Appeal upheld the decision of the primary judge. Assembly of First Nations Chief Shawn Atleo said the decision should spur the Federal Government to negotiate a commercial harvest for the Nuu-chah-nulth: 'Governments must finally get to the negotiating table as instructed by the courts to recognize and reconcile our rights.'[67]

In the Torres Strait, the most lucrative commercial fisheries today are the prawn and tropical rock lobster fisheries. While participation by traditional owners in the latter is significant, there are no Indigenous-held licences for prawn fisheries. The recognition of native title commercial fishing rights in the Torres Strait may be the gateway to securing greater Aboriginal and Torres Strait Islander benefit from commercial fisheries. Outside of participation in the commercial fisheries, there may be alternative forms of economic engagement and productive possibilities including payment for the provision of environmental services, wildlife harvesting, border control, and carbon abatement activities. Such projects 'recognise and enhance the value of Indigenous knowledge and capacity deriving from relationships to the land [and waters], and have the potential for development outcomes in terms of generation of economic resources'.[68]

For example, Islanders have been centrally involved in the community-based management of dugong and turtle fisheries with a view to safeguarding marine resources for future generations. The Seas Claim Group gave evidence in the Federal Court that reveals instances of members of Island communities taking steps to protect their community's interest in its marine resources. Kris Billy said in his affidavit, 'I sometimes see European crayfishermen using hookahs [diving apparatus] and I ask them to go. We want to free dive, just like our ancestors did.'[69]

CONCLUSION

The argument for 'unlocking the economic benefits'[70] of native title is made in the context of a 20-year diminution of the native title right to the commercial use of resources. The Act is an impediment to adaptation and evolution in the way native title groups exercise their native title rights and interests over time. Native title jurisprudence has further stymied the evolution and development of Indigenous relationships with their lands and water. This case law ignores the fortitude and resilience with which Indigenous Australia radically adapted to a changing landscape following the European assertion of sovereignty. Against this background, the primary judge was satisfied on the evidence that the Seas Claim Group have long exercised commercial fishing rights under Islander law and custom. The High Court has upheld this decision, allowing the Seas Claim Group to imagine how they might exercise commercial fishing rights in a highly regulated environment without compromising their cultural identity. ■

Notes: **1** Doug Passi is Chair of the Prescribed Body Corporate (PBC) that holds and manages native title on behalf of the Meriam People, and the nephew of David Passi, Eddie Mabo's fellow plaintiff. **2** *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia and Ors* [2013] HCA 33. **3** The last significant decision was *Griffiths v Minister for Lands, Planning and Environment* (2008) 167 FCR 84. Note that special leave was also granted in 2012 to appeal *Dietman v Karpany & Anor* [2012] SASCFC 53. **4** *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia and Ors* [2013] HCA 33. **5** *Mabo v Queensland [No. 2]* (1992) 175 CLR 1 per Brennan J (with Mason CJ and McHugh J in agreement) at [58] per Deane and Gaudron J at [110] and Toohey J at [187]. **6** *Mabo v Queensland [No. 2]* (1992) 175 CLR 1. **7** W Stanner, 'After the Dreaming', the 1968 Boyer lecture, Sydney, 1974. **8** *Mabo v Queensland [No. 2]* (1992) 175 CLR 1. **9** L Strelein, 'Western Australia v Ward on Behalf of Miriuwung Gajerrong: Summary of Judgment', (2002) 2(17) *Land Rights Laws: Issues of Native Title* 1, p2. **10** Jane Lee, 'Mabo's native title victory squandered, says judge', *The Sydney Morning Herald*, 1 June 2013 (online). www.smh.com.au/national/mabos-native-title-victory-squandered-says-judge-20130531-2nheg.html **11** *Akiba v Queensland [No. 2]* (2010) FCA 64. **12** *Commonwealth of Australia v Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group* [2012] FCAFC 25. **13** *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia and Ors* [2013] HCA 33. **14** *Akiba v Queensland [No. 2]* (2010) FCA 643 at [10]. **15** *Commonwealth v Yarmirr* [2001] 208 CLR 1. **16** *Ibid.* **17** *State of Western Australia v Ward* [2002] 191 ALR 1 at [387]-[388]. **18** *Native Tile Act* 1993 (Cth), s223(2). **19** *Delgamuukw v British Columbia*, per Lamer CJ at [153]; See also *R v Cote* [1996] 3SCR 139 at [53]. **20** *Akiba v Queensland [No. 2]* (2010) FCA 643 at [608]. **21** *Commonwealth of Australia v Yarmirr* [1999] FCA 1668. **22** *Akiba v Queensland [No. 2]* (2010) FCA 643 at [553]. **23** *Akiba v Queensland [No. 2]* [2010] FCA 643 at [6]. **24** P Finn, 'Mabo into the future: Native title jurisprudence', (2012) 8(2) *Indigenous Law Bulletin*, pp5-9. **25** *Leo Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia and Ors* [2013] HCATrans 15 per per Walker Mr BW Walker SC. **26** *Akiba v Queensland [No. 2]* (2010) FCA 643 at [527]. **27** *Yanner v Eaton* [1999] HCA 53. **28** M Langton, 'The Aboriginal balancing act' (2013) *Australian Geographic* 39. **29** L Strelein, *Compromised*

jurisprudence, 2nd ed, Aboriginal Studies Press, 2009, p15, citing *Mabo v Queensland (No 2)* [1992] HCA 23 at [61] per Brennan J and [110] per Deane and Gaudron JJ. **30** M Langton, above n25. **31** *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia and Ors* [2013] HCA 33 at [10]. **32** J Lee, 'Mabo's native title victory squandered, says judge', *The Age*, 1 June 2013 (online). www.theage.com.au/national/mabos-native-title-victory-squandered-says-judge-20130531-2nheg.html. **33** S Brennan, 'Commercial Native Title Fishing Rights in the Torres Strait and the Question of Regulation Versus Extinguishment' (2012) 8(2) *Indigenous Law Bulletin* 17, p19. **34** *Wik Peoples v Queensland* (1996) 187 CLR 1. **35** *Western Australia v Ward on behalf of Miriuwung Gajerrong* [2002] HCA 28 at [76]. **36** *Brown (on behalf of the Ngarla People) v State of Western Australia* [2012] 294 ALR 223 at [426]. **37** *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia and Ors* [2013] HCA 33 at [60]. **38** *Akiba v Queensland [No 2]* [2010] FCA 643 at [22]. **39** *Commonwealth of Australia v Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group* [2012] FCAFC 25. **40** *Commonwealth of Australia v Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group* [2012] FCAFC 25 at [73]. **41** *Yanner v Eaton* [1999] HCA 53. **42** *Ibid*, at [51]. **43** L Strelein, 'Western Australia v Ward on Behalf of Miriuwung Gajerrong: Summary of Judgment', (2002) 2(17) *Land Rights Laws: Issues of Native Title* 1, p7. **44** *Western Australia v Ward on behalf of Miriuwung Gajerrong* [2002] HCA 28 at [384]. **45** *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia and Ors* [2013] HCA 33 at [24]-[28]. **46** *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia and Ors* [2013] HCA 33 at [54], [63]-[64]. **47** *Wik Peoples v Queensland* (1996) 187 CLR 1 at [184]; At [31]. **48** *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia and Ors* [2013] HCA 33 at [31]. **49** *Western Australia v Ward on behalf of Miriuwung Gajerrong* [2002] HCA 28; At [35], [62]. **50** *Yanner v Eaton* [1999] HCA 53 at [35]; at [32]. **51** [1989] HCA 47. **52** *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia and Ors* [2013] HCA 33 at [37]. **53** *Yarmirr v Northern Territory* [2001] HCA 56 (2001) 208 CLR 1. **54** *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia and Ors* [2013] HCA 33 at [38]. **55** *Ibid* at [74]. **56** *Ibid* at [67]. **57** *Ibid* at [39]. **58** *Ibid* at [66]. **59** *Ibid* at [67]. **60** S Brennan, 'Unlocking native title', *Inside Story*, 14 June 2012 (online) http://inside.org.au/unlocking-native-title/. **61** *Leo Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia and Ors* [2013] HCATrans 15, per Walker Mr. BW Walker SC. **62** [1990] 1 SCR 1075. **63** N Duff, 'Using native title for freshwater outcomes', *Issues Paper AIATSIS* (forthcoming). **64** *Ibid*. **65** M Durette, 'Indigenous property rights in commercial fisheries' (2007) CAEPR Working Paper 37, pp6, 14. **66** *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2013 BCCA 300. **67** 'First Nation wins commercial fishing rights', *West Coast Native News*, 4 July 2013, (online) http://westcoastnativenews.com/first-nation-wins-commercial-fishing-rights/. **68** B Scambary, *My Country, Mine Country*, ANU E Press, 2013, p239. **69** *Akiba v Queensland [No. 2]* (2010) FCA 643 at [284]. **70** S Brennan 'Unlocking Native Title', *Inside Story*, 14 June 2012, (online) http://inside.org.au/unlocking-native-title/.

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