Mabo: The Decision and the Debate

Professor Michael Crommelin

The Decision

Eddie Mabo was a member of the Meriam people, the traditional inhabitants of the Murray Islands in Torres Strait. In 1982, Mabo and four other members of the Meriam people commenced proceedings in the High Court seeking declarations of entitlement to the Murray Islands in a number of capacities: as owners, as possessors, as occupiers and as persons entitled to the use and enjoyment of those islands.

A decade later, on 3 June 1992, the High Court handed down judgment in the case: *Mabo v Queensland [No.2]*.[1] It included declarations that the Meriam people were entitled to possession, occupation, use and enjoyment of one of those islands, the island of Mer.

Matters of Principle

In doing so, the High Court rejected the concept adopted in the eighteenth and nineteenth centuries in Australia, and applied as recently as 1971 in the Gove land rights case, *Milirrpum v Nabalco Pty Ltd*,[2] that at the time of European occupation Australia was *terra nullius*, or land belonging to nobody.

At the same time, the High Court held that the common law of Australia did recognise a concept of native title to land. That decision did not disturb the position of the Crown as sovereign, or the sovereignty of Australian governments in relation to land. Included in that sovereignty was "radical title" to all land in Australia. Radical title is a somewhat ephemeral concept, with feudal origins, acknowledging the status of the Crown as ultimate land holder, but not necessarily carrying within it any beneficial rights in relation to the land.

The High Court was then confronted with the question: How is native title to be established? The answer lay in the relationship of the indigenous inhabitants with the land at the time of assertion of Crown sovereignty. The relevant date for the Murray Islands was 1879, when those islands were annexed to the colony of Queensland. However, for the eastern part of the continent of Australia, the relevant date was much earlier: 1788.

1. (1992) 175 CLR 1.

2. (1971) 17 FLR 141.

Attributes of Native Title

Australian law, by virtue of its English inheritance, recognises a variety of interests in land rather than a single concept of absolute ownership. Many of those interests are familiar. They include the freehold estate or interest in land (estate in fee simple), the leasehold, the less familiar profit à prendre, and the easement. In *Mabo*, the High Court appears to have added native title to the list of interests in land.

Unlike other interests in land, however, native title does not have a fixed content. The rights and obligations conferred by native title depend on the customs and traditions of the holders of that native title. Since it may be anticipated that those customs and traditions will vary considerably from one part of the country to another, so too will the content of native title. In relation to the island of Mer, the plaintiffs were able to establish — but only after very lengthy evidence given in proceedings in the Supreme Court of Queensland — that according to their customs and traditions they were entitled to rights of possession, occupation, use and enjoyment of the land. They were not able, however, to establish ownership in any larger sense.

A peculiar feature of native title is its liability to extinguishment. Native title may be extinguished in various ways: by a loss of connection with the land at any time since European occupation; by surrender of the native title to the relevant government; by appropriation of the land by the relevant government for its own use; and by grant of another title which is inconsistent with the native title.

Problems

Since *Mabo*, debate has raged on the issue of validity of land and resource titles granted by States since 31 October 1975, when the *Racial Discrimination Act 1975* (Cth) came into effect. That Act was passed by the Commonwealth Parliament to implement Australia's international obligations as a party to the International Convention on the Elimination of All Forms of Racial Discrimination.

Section 9 of the *Racial Discrimination Act* makes it unlawful for a person to do an act involving racial discrimination which has the purpose or effect of impairing the enjoyment of any human right or fundamental freedom. Section 10 provides that if any law denies persons of a particular race the enjoyment of a right that is enjoyed by others, then that denial itself is abrogated by the *Racial Discrimination Act*.

In an earlier *Mabo* decision, *Mabo v Queensland [No.1]*,[3] the High Court held that a Queensland Act, the *Queensland Coast Islands Declaratory Act 1985*, was inconsistent with section 10 of the Racial Discrimination Act and thus invalid. That legislation purported to declare that the land in the Murray Islands — and, indeed, other islands off the coast of Queensland — was vested in the Queensland government free from all competing interests. The effect of the Act, if valid, would have been to defeat the claim which was then before the High Court in what became *Mabo [No.2]*.

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3. (1988) 166 CLR 186.

The concern has been widely expressed that land and resource titles granted since 31 October 1975 may infringe section 9 or section 10 of the Racial Discrimination Act; particularly where such titles, if valid, would extinguish native title. I do not share this concern. My own view is that extinguishment of native title is an attribute of that title rather than the consequence of any racial discrimination. It is true that the *Racial Discrimination Act* precludes a State from wholesale extinguishment of native title without compensation; but, to my mind, extinguishment by virtue of inconsistent grant of a land or resource title is another matter.

Since *Mabo*, questions have also been raised about the validity of land and resource titles granted prior to 31 October 1975. The issue here is whether State governments are bound by a duty to act in the interests of Aboriginal people in dealing with land subject to native title, particularly where that dealing would, if valid, extinguish the native title. In 1984, in *Guerin v The Queen*,[4] the Supreme Court of Canada held that the government of Canada owed a fiduciary duty to native people to act in their interests in dealings with land involving extinguishment of native title. This issue of fiduciary duty was raised but not resolved in the *Mabo* case.

Again, I think that the concerns are exaggerated. I do not rule out the possibility that the High Court will impose a fiduciary duty on State governments in dealing with land subject to native title. However, I do think that the consequence of breach of that fiduciary duty will usually be damages rather than invalidity of the land or the resource title which caused the extinguishment. Indeed, that was the result in the *Guerin* case.

One consequence of the *Mabo* decision is that the task of establishing native title through litigation is difficult, time consuming and expensive. Another Canadian example makes the point. *Delgamuuk v. British Columbia*[5] is a consolidation of some 133 separate claims of native title in respect of 58,000 square kilometres of land in the interior of the province of British Colombia. That case commenced in the Supreme Court of British Colombia in 1987. The trial ended in 1990, after 318 days of evidence and 56 days of argument. The judgment was delivered on 8 March 1991. It was, not surprisingly, the subject of immediate appeal. Argument in the British Columbia Court of Appeal occupied a further 34 days. Judgment of the Court of Appeal was delivered on 25 June 1993, and leave has been sought to appeal from that judgment to the Supreme Court of Canada.

Another consequence of the Mabo decision, as previously noted, is the vulnerability of native title to extinguishment.

Solutions

In the face of these problems, it is no surprise that the objects of the Native Title Bill proposed by the Commonwealth Government on 2 September 1993 were threefold: firstly, the establishment of a mechanism other than the ordinary court procedures for determining claims to native title; secondly, the validation of past grants of land and resource titles and Acts of government in relation to those titles; and thirdly, the

4. (1984) 13 DLR (4th) 321.

5. Court of Appeal for British Columbia CA 013770, 25 June 1993.

recognition and protection of native title in relation to future dealings of land which may cause the extinguishment of that native title.

The statement issued by the Prime Minister earlier this week indicates in more detail how these objects will be met. The establishment of claims to native title will be possible through either one of two mechanisms: a special Commonwealth tribunal established for the purpose, comprising both a judicial and an administrative arm; or State tribunals. State tribunals will be required to conform with requirements specified in Commonwealth legislation if they are to perform this task. Exactly what those requirements will be remains to be seen. States will be authorised to validate land and resource titles granted at any time in the past and up until 31 December 1993.

However, the integrity of the *Racial Discrimination Act* will be maintained to the greatest possible extent. I think this has been one of the more difficult aspects in the negotiations leading up to the present package of arrangements. The Commonwealth legislation will apparently be cast as a special measure under section 8 of the *Racial Discrimination Act*, rather than as an amendment of section 9 or section 10. Exactly how that will be done, and to what extent it will be possible to achieve all the objects of this package without any amendment of the existing provisions of the *Racial Discrimination Act*, are important matters.

Pastoral leases will extinguish native title: pastoral leases validated pursuant to the authority given to States, and presumably pastoral leases granted in future. Where Aboriginal people acquire a pastoral lease, they will be given the opportunity by the Commonwealth legislation to convert that lease, not into native title — because the grant of the pastoral lease will have extinguished that native title — but presumably into a statutory form of native title. The exact content of that statutory form of native title remains to be seen. Mineral leases will not extinguish native title.

Native title will be afforded some protection by giving the holders of that title an opportunity to negotiate in the future with applicants for land and resource titles over that land. Time limits will be prescribed for those negotiations. This too is a highly contentious aspect of the set of proposals; because under present arrangements in this country, land and resource management is generally a function performed by the States.

The Commonwealth has extensive powers capable of use in this area, but generally the Commonwealth has chosen to exercise those powers rather sparingly. The day-to-day reality is that land and resource management questions are normally resolved by the State level of government. The extent to which the Commonwealth legislation will inhibit the States in performing those tasks is an important feature of the legislation which will require close examination.

Comments

I shall comment on some of the features of the settlement as I see it. I do so, of course, at the risk of not knowing very much about what these proposals will turn out to be when they are fully drafted.

First, there is the distinction between pastoral leases and mineral leases. Pastoral leases will extinguish native title, whereas mineral leases will not. Mineral leases will coexist

with native title. It will be necessary for the holders of the different interests in the land — the mineral leases and the native title — to work out their relationships, including matters of compensation.

I find this distinction between pastoral leases and mineral leases intriguing. The idea of coexistence of interests in land is not at all surprising. One of the more imaginative features of the common law in this country is that it not only presupposes a variety of interests in land, but it also provides extensive opportunities for the coexistence of different interests in the same land. The result that will be achieved in relation to mineral leases and native title, whilst possibly awkward in practice, is not, in any sense, unusual in our legal system. What seems unusual to my mind, given the High Court's decision in the *Mabo* case, is the decision to accord different status to pastoral leases and mineral leases in the terms of the settlement.

So far as extinguishment by inconsistent grant is concerned, the High Court's decision was that extinguishment depended on inconsistency. The basic principle of extinguishment is inconsistency. The High Court went on to say that a freehold grant will extinguish native title because the rights of the holder of a freehold estate in land are so extensive that they leave no room whatsoever for native title, regardless of its content.

There are also suggestions — probably in a majority of the judgments — that a lease, in the strict sense of an interest in land entitling the holder to exclusive possession of that land, will extinguish native title. That position is not as clear as the position in relation to freehold title, but there are strong indicators of that result. What is important about that result is that only the lease in the strict sense of conferring entitlement to exclusive possession necessarily brings about extinguishment. Many things that are called leases are not leases in that strict sense. There is, and has been for many years, a debate about whether mineral leases are leases in that strict sense. Do mineral leases confer a right to exclusive possession of the land?

One cannot resolve that debate by a simple answer, because there are different statutory regimes for mineral leases in each of the Australian jurisdictions. Whatever the answer may be in the Northern Territory or Western Australia, there is no reason why the answer should be the same in South Australia or Victoria. One has to look at each case on its merits. Not all mineral production titles are called 'leases'; but even if that label is employed, one has to look at each case and decide whether it confers a right of exclusive possession on the holder. If it does confer that right, then its grant probably extinguishes native title.

It would appear from the Prime Minister's statement that even in the case of a mineral lease which is genuinely a lease by conferral of exclusive possession on the holder, native title will not be extinguished. One of the things that we will need to know is whether that result is purely prospective or whether that result may have some retrospective force in determining whether or not past grants of mineral leases have extinguished native title.

The other side of the coin is that a pastoral lease need not necessarily be a lease in the strict sense, either. It all depends on what rights are conferred on the holder of that pastoral lease. In some cases it may well be that the holder of a pastoral lease is entitled to exclusive possession of the land, although it is not uncommon for pastoral leases to

include reservations for the benefit of Aboriginal people that allow them access to the land for various purposes. It is by no means clear that all pastoral leases are leases in the sense required to extinguish native title.

The Commonwealth proposal seems to suggest that regardless of whether pastoral leases do satisfy that criterion or not — that is, regardless of whether they do confer a right of exclusive possession on the holder of the pastoral lease — past and future grants of such pastoral leases will have the effect of extinguishing native title. That too is a remarkable feature of the settlement package.

The other point on which I would like to make some comment is the validation of past grants, and the thorny issue of achieving that result without derogating from the integrity of the *Racial Discrimination Act*. Given my view that validation is not as large a problem as many others believe, the task of achieving that result without doing violence to the *Racial Discrimination Act* is less of a challenge for me than it is for others. Those who feel that the extent of invalidity of past grants of land and resource titles is more substantial, require a much more sweeping Commonwealth measure in order to authorise the validation of those grants.

The more lively issue at the moment is whether the total package of measures which are to be included in the Commonwealth legislation will meet the description of special measures under the *Racial Discrimination Act*. The *Racial Discrimination Act* does provide for measures to be implemented which would otherwise infringe its terms, if such measures are special measures designed to deal with a problem of past racial discrimination or deprivation. 'Catch-up' measures — if I can use a colloquial term — are permitted as special measures.

The trouble with the Commonwealth package — as with any package, at least for this purpose — is that it has plus and minus factors so far as Aboriginal people are concerned. If it is looked at as a whole, it is highly likely that it will be regarded *in toto* as a special measure for the benefit of Aboriginal people. If, however, the different parts of it are disentangled and treated separately, some parts may be more difficult than others to sustain as special measures.

Conclusion

Let me conclude by drawing attention to what I see as the most significant feature of the High Court's decision in the *Mabo* case. In my view, the most important aspect of that case is the recognition by the Court of native title to land. It is the recognition that our legal system provides a place for native title to land: a place carved out by the laws and customs of Aboriginal peoples themselves. This is the first occasion in which our legal system has provided a place for some part of customary Aboriginal law.

It immediately gives rise to the question: will that place be extended? Will the High Court be prepared to accord recognition to any other components of customary Aboriginal law? If so, we may see a basis for what I would hope to be very healthy negotiations not only for reconciliation but also for the development of a system of self-determination. It would be a system which does not threaten in any way the established sovereignty of governments in this country, but provides a diversity and flexibility under which different peoples may live under some different rules.

After all, given that we live in a federal system in this country, we are not unfamiliar with diversity. A great virtue of our federal system is that it allows a measure of diversity in defined areas of governmental action. It may well be that the *Mabo* decision leads the way to another avenue for diversity of particular significance to the indigenous peoples of this country.

Questioner — Professor, I will preface my question by saying that I agree with everything you have said. My question is this: do you think it was necessarily good law to extend the Mabo decision to the other parts of Australia when, in fact, it is not absolutely necessary to do so in order to find that the Meriam people had native title?

Professor Crommelin — Yes. That aspect of the decision has been subject to some criticism. My view on that is that it was essential for the High Court to make some statement of principle. The court could not decide the Mabo case, in relation even to the tiny island of Mer, without dealing with what seems to me to be the fundamental issue. The fundamental issue was whether the *terra nullius* doctrine would continue to be recognised and applied in this country or, alternatively, whether our legal system would acknowledge a concept of native title to land.

In dealing with that fundamental issue one way or another, the Court had to deal with an issue of generality. That issue has no special application to the island of Mer. Whichever way the Court was going to decide that issue, it had to produce ramifications for the entire land territory of this country.

I do not share the views that some have put that the High Court went beyond what was appropriate in the circumstances of the case. Indeed, I think the High Court tried very hard, in dealing with an issue of immense complexity — as our politicians are now discovering as they try to grapple with it — to set out with some clarity matters of basic principle which would guide the resolution of this issue in the future.

The Court could never tie up all the loose ends. That would be impossible. But the Court did, I think, provide important guidance on such issues as the concept of native title, content, method of establishment and vulnerability to extinguishment.

Questioner — Thank you for so aptly addressing this topical subject. I will ask two questions, basically of fact. Firstly, in your preamble you mentioned that it is not only possible for native title to be extinguished but also for it to be surrendered. Could you tell us if it is possible for such a surrender to be revoked at a later date? One could envisage an inducement being offered and subsequent generations then wishing to revoke that surrender. Secondly, have you been made aware of any attempt to redetermine that which defines an Aboriginal person? There are individuals who may or may not be perceived by the community as being Aboriginal persons.

Professor Crommelin — So long as the surrender is valid in the first place, I see no scope whatsoever for revoking it. There may well be an issue as to the validity of a surrender. Indeed, that was the issue in the *Guerin* case in Canada, to which I referred. There the plaintiffs, the previous holders of the native title, claimed that they had been induced to surrender on terms which were not then reflected in the lease that the

government entered into with the golf club. That is an issue that has been canvassed in the Supreme Court of Canada, but if the surrender is valid in the first place then I do not think it can be revoked.

As far as the second question is concerned, deciding who is and who is not Aboriginal for the purposes of claiming native title to land and for other purposes is a problem that has been around for some time. In the *Mabo* case, Justice Brennan did indicate some support for the approach that the Commonwealth has taken in its legislative definition of 'Aboriginal' in various Commonwealth Acts. That approach involves two components. The first is biological descent, and the second is mutual acceptance. The person must both assert membership of the Aboriginal group and be accepted as a member of that group by the elders or whosoever according to the traditions of that group is authorised to make those decisions. It was not necessary for the court in *Mabo* to explore that issue in any detail, but I do recall that degree of support in Justice Brennan's judgment for that approach.

Questioner — Granting what you have said about the need for the Court to consider the generality of the application of the *Mabo* decision to the mainland of Australia, would you care to express a view as to whether it was justified in pursuing that line in the absence of any representation from either Aboriginals or non-Aboriginals from the mainland of Australia? It appears to me that the Court made that decision and that application in the total absence of any representation from persons greatly affected.

Professor Crommelin — In the *Mabo* decision, the High Court did not purport to decide any particular claim of native title in respect of any land other than the Murray Islands. What it did was declare certain principles; and that is a time-honoured function of the courts in our constitutional system. It is a function that the English courts have been performing for at least four centuries, probably longer, and it is a function which our courts have been performing ever since European occupation of this country and the inheritance of English law.

In the *Mabo* case, I would certainly object if the High Court purported to decide that, in any part of the mainland territory of Australia, a particular claim to native title would or would not succeed. But, of course, it did not do that. Nobody has been affected on the mainland in any way other than by the recognition of the principle. The application of the principle to specific facts, circumstances and particular areas of land is the occasion when those who may or may not be affected by that application will have the opportunity to participate in the proceedings.

Questioner — Of the six or so claims that have been made since the *Mabo* decision and prior to this legislation, perhaps the most interesting is that of the Wik people in the Weipa area on the Cape York Peninsula. Many people have suggested that that particular claim has been framed to get a decision from the High Court on many of the things that were left open in its original decision.

Without asking you to predict what the High Court would say, do you see any possible problems in the way of fiduciary duty and so forth that would come out of the issues that are addressed and that may well be contrary to the current legislation or plans for the

present legislation, or could create further complications to the legislation as it has been planned?

Professor Crommelin — The *Wik* proceedings, as you say, are very interesting proceedings, because they raise a number of matters not resolved by the High Court, including the fiduciary obligation question, in the *Mabo* case. Strategic development of the law through cases is, again, a time-honoured practice, so there is nothing surprising in taking these things in stages.

I understand that following the failure of the claimants in the Gove land rights case in 1971 in the Federal Court, a deliberate decision was made not to proceed on appeal because at that time the prospects were not seen to be good and, conversely, the political prospects for a statutory solution were assessed to be better. These sorts of decisions are constantly being made — and not just here in Australia. What is quite remarkable is how precisely the same issues have occurred in the Province of British Colombia at similar times. When the Gove land rights case was being argued here, *Calder v. the Attorney-General of British Columbia* — which became the leading Canadian case — was in the courts in Vancouver.

But I do not necessarily see a clash between the proposed legislative package and what the High Court may do in the *Wik* case or in any other case. What the High Court did in the *Mabo* case — and what it will do in the *Wik* case, if it proceeds — will be to determine questions of common law and to interpret any relevant statutory provisions. To the extent that any component of the Commonwealth legislative package is inconsistent with the common law as declared by the High Court in the *Mabo* case, provided that the Commonwealth legislation is valid in the constitutional sense, the common law will yield to it. Nothing in the *Mabo* decision is immutable. It is within the capacity of two levels of government, Commonwealth and State, with the relevant constitutional powers distributed between them, to deal with the issue of native title to land howsoever they think fit.

That is complicated a bit by certain international obligations we have but, nevertheless, the legislative branch of government in this country can decide to alter the common law in any respect it thinks appropriate. So, if any part of the package is not consistent with what the High Court might otherwise decide in the *Wik* case, the High Court will have to change its mind and go with the legislation.

Questioner — I would like to make a statement rather than ask a question. A gentleman asked a question earlier about identification and how one determines who is an Aboriginal person. I think that in 1993, the International Year of the World's Indigenous People, it is offensive for non-indigenous Australians to tell us who is an Aboriginal person. I am not saying that you are doing that; I am simply saying that that is something we are quite capable of determining for ourselves.

There are three separate components to identification as an Aboriginal person. The first is being of Aboriginal descent, the second is identification as an Aboriginal person — determining for yourself that you are an Aboriginal person — and the third component is acceptance by the community in which you live. That is a very strong component in this case; it is not just a case of people deciding that they might benefit and therefore coming up and saying that they are Aboriginal.

The last point I would like to make is that native title is not about individuals benefiting, it is about benefits to the community.

Questioner — As I understand it, the *Mabo* decision establishes that where people under native title have a variety of interests in land, if a subsequent grant is inconsistent with a single one of those interests then native title is extinguished in its entirety, thus destroying certain valuable interests without transferring them to any other person. It does this at a time when this is not inconsistent with any other person's rights, and it is therefore unnecessary. It would be conceivably possible, if the decision had been different, that the extinguishing grant could extinguish part of the rights under native title and leave others intact. Is that the case? Ought it to be the case? And, if it ought not to be the case but it is, what can be done about it?

Professor Crommelin — That is not my understanding. My understanding is that inconsistency involves an element of degree, and that there can be situations where one has, to use a shorthand term, partial inconsistency that does not cause extinguishment. I should say that this aspect of the decision has not been explored in any detail by the Court yet, but that is my understanding of what a majority of the Court — particularly Justice Brennan — indicated by inconsistency. I do not think that only the slightest degree of inconsistency necessarily causes extinguishment. How much inconsistency is required to cause extinguishment is a far more difficult question to answer.

Questioner — What about partial extinguishment?

Professor Crommelin — There can be loss of what previously was one of the rights comprised in the native title. To that extent, there can be partial extinguishment; but not extinguishment of the title as a whole, just the loss of some component of it. Again, that is an approach which is not unfamiliar to us with our feudal background of land law.

For example, take the situation between farmers and miners. We have long recognised under our legal system that you can split rights to land into two different titles: the surface title and the mineral or sub-surface title. You can have one person holding the surface title with the farming and grazing rights and another person holding the mineral title. Inevitably, if they both choose to exercise them then at some point there may be some conflict. The common law has to reconcile that conflict and it has developed rules for doing so.

Similarly, you can have a person with the rights to cut timber — and that is an interest in land — another person with the rights to take minerals, and a third person with the grazing rights; and you can have the prospect of some incompatibility or inconsistency amongst them. The common law has, for centuries, sorted out those sorts of problems. My assumption is that unless a legislative regime requires otherwise, the courts will continue to sort those out, with native title as one of the elements involved.

Questioner — If I understood you correctly, native title is not peculiar to *Mabo*, and it is not something that has been introduced by *Mabo*. It has been recognised in Canada, for instance. There is no argument which says that the native title to the Canadian

Indians is going to be the same as the native title to the Australians; nor, indeed, that the native title in Cape York will be the same as the native title in Cape Leeuwin. If there is a spatial difference in native title, is there conceivably a temporal difference as well? Is it likely that native title, as given today, will recognise the effect of 200 years of invasion on the culture of the Aborigines?

The second question is again related to native title. If current freehold title in Australia, for instance, is sometimes subject to mineral leases, and is subject to local government planning controls, is it likely that native title will also be subject to the same sorts of things? Or is it likely to be a title that stands above all the common law things that the millennia have built up in the Westminster system? The third one is almost a trivial one: is it pronounced 'May-bo' or 'Mah-bo'?

Professor Crommelin — I did not meet the named plaintiff. My understanding is that the pronunciation is 'Mah-bo', but I certainly have no sound basis for that understanding. That was perhaps the easiest of the three questions to answer.

So far as the question of content is concerned, I agree with you that content varies from country to country and place to place within Australia; and that is because content is determined by customary law, rather than any fixed common law prescription. Given that, I think it is possible — although this is a matter on which the Court has not provided much guidance so far — that there may be some changes of content with changes of customary law. It seems to me to be a distinct possibility, but it remains to be seen whether or not that will be recognised. I have forgotten the second question, I am sorry.

Questioner — Is it likely that native title will be subject to the same conditions as freehold title?

Professor Crommelin — Native title has to fit within the system. Part of the deal involving recognition made it part of the wider system of law. It has some special features, but those special features do not place it above and beyond other interests. On the contrary, it seems to me that native title is a peculiarly vulnerable form of interest in land because of its liability to extinguishment. The general answer to the second question is that it is part of the wider scheme of things with no special status or overriding effect.

Questioner — Professor, can you clarify some of the negative aspects of distinguishing between a mineral lease and a pastoral lease in extinguishing native title?

Professor Crommelin — I am not sure that there necessarily are negative aspects. I commented on it because it represented an interesting departure from the approach laid down by the High Court on extinguishment. There may be very good, pragmatic reasons for making that distinction. The consequences of that differential treatment are quite important because the area of land under pastoral lease is vastly greater than the area of land under mineral lease. I do not know what the factor of difference is, but I would not be surprised if it were something like 100.

In this country the area of land under mineral lease is tiny and the area of land under pastoral lease is extensive. I have seen the figure of thirty-five per cent used to describe

the area in Western Australia that is under pastoral lease, but I cannot verify that. Despite the fact that Western Australia is known as a mining state, I would be surprised if more than three per cent of the land mass were under mining lease. It is a decision of great practical consequence which raises some interesting legal issues. We will have to wait and see how they are worked out.