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NATIVE TITLE: DEAD CAPITAL?

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This article explores whether restrictions on alienations of native title land, such as the inability to grant a mortgage to secure finance, will adversely affect the owners of native title land. The objections to inalienability are explored and some of the premises that such objections rest upon are also questioned. Arguments in favour of inalienability are also explored and reasons why restrictions on alienation will not be detrimental are canvassed. Finally, some practical considerations are overviewed, leading to a conclusion that the restrictions in themselves will not be detrimental.

I. INTRODUCTION

In the year 2000 Hernando de Soto published to popular acclaim his book *The Mystery of Capital (Why Capitalism Triumphs in the West and Fails Everywhere Else).*[1] Hernando de Soto's thesis is that capitalism does not work in the Third World because the assets of the poor, particularly their homes and the land they stand on, are not legally recognised by the legal systems in these countries. This is particularly true of the indigenous people of South America.

De Soto estimates that the poor in Latin America, Africa and Asia have legally unrecognised assets that are worth US$9.3 trillion. This is what he calls dead capital. The poor have control or occupy these assets, typically land, but since they have no legal title to them they do not have access to loans. Effective property laws enable people to use land as collateral to borrow. This in turn generates economic activity and creates employment.

It is not that many of these Third World countries do not have laws but the laws are not effective in terms of either recognising or enforcing rights; for example, there are many squatters' houses in Lima but 728 bureaucratic steps are required by the Lima municipality in Peru to obtain legal title to a home in a validated housing settlement.[2] According to de Soto, these

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1 Hernando de Soto, *The Mystery of Capital (Why Capitalism Triumphs in the West and Fails Everywhere Else)*, (New York: Bantam Press, 2000) [de Soto].

2 *Ibid.* at 174.

barriers to utilisation of land explain why substantial sections of the Third World population can never lift themselves out of the poverty trap.

Many indigenous people in Australia are also in a poverty trap. Their levels of education, health and life expectancies are below those of most Australians. Life expectancy for males is between 16 and 18 years lower than the Australian average (slightly higher for females) and indigenous people have twice the rate of heart and circulatory problems and seven times the rate of respiratory problems.[3] This is despite the fact the Commonwealth Government spends considerable sums on Aboriginal and Torres Strait Islander programmes plus social welfare payments.[4] There are complex reasons for these statistics, including racial discrimination, the latter now being illegal in Australia under Commonwealth legislation.[5] However, the economic plight of the indigenous peoples undoubtedly plays a significant role in contributing to the poor state of health and short life spans of indigenous people in Australia.

Does the restriction on alienation inherent in native title as established by the *Mabo* decision,[6] mean that native title will be dead capital for indigenous people in Australia? This is not an uncommon view of the Australian position. Warby puts it like this:

> The major failure of native title is that, as communal, inalienable and partial title, it does not represent a sound basis for significantly improving the conditions and prospects of Aboriginal and Torres Strait Islanders.[7]

The same author describes the failure of communal land even more vividly in these terms:

> The failure of the command economies, particularly in agriculture, provide a stark example of the deleterious effects of communal, inalienable title. Contemplating the apparent starvation of North Korea, it is lunacy to then advocate similar policies as the path to advancement for indigenous Australia.[8]

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3 K. Bhatia and P. Anderson, "An Overview of Aboriginal and Torres Strait Islander Health: Present Status and Future Trends", Australian Institute of Health and Welfare, AGPS, Canberra, 1995.

4 For example, from 1984 to 1994–95, more than A$11 billion were spent on Aboriginal and Torres Strait Islanders programmes: Michael Warby, *Past Wrongs, Future Rights (Anti-Discrimination, Native Title and Aboriginal and Torres Strait Islander Policy, 1975–1997)*, (Melbourne: Tasman Institute, 1997) at 95 [Warby].

5 *Racial Discrimination Act 1975* (Cth.).

6 *Mabo v. Queensland* (1992) 175 C.L.R. 1, 107 A.L.R. 1, online: High Court of Australia <http://www.austlii.edu.au/au/cases/cth/high_ct/175clr1.html> [*Mabo*]. All subsequent references to paragraphs will be from Brennan J.'s judgement from the preceding site.

7 Warby, *supra* note 4 at iii.

8 *Ibid.* at 109.

In a similar vein Nagy wrote: "There is concern that the *Mabo* decision and the subsequent native title legislation will make it more difficult to raise finance, especially development funding."[9]

Such observations have also been made in relation to the poverty trap in which indigenous peoples find themselves in the Americas. Holle, referring to the plight of the Canadian Indians, writes:

> This analysis [De Soto's] offers a compelling explanation for the entrenched poverty of Canada's native people. A growing number of their opinion leaders. . ..are coming to the same conclusion. The sections of the Indian Act—29, 87, 89 and 90—that effectively forbid commercial credit create 'a real reluctance to put a business on a reserve', one native leader recently stated.[10]

II. Property Systems

It is worthwhile looking at the advantages stemming from an efficient system before exploring whether or not the inalienability aspect of native title is an impediment to the development of the welfare of indigenous Australians.

Most lawyers in Western countries rarely stop to consider the effects of a an efficient legal system with regards to land since most Western countries have efficient property systems, although many of them are not all that old.[11]

An efficient property system should, amongst other things, in a capitalist system:

(i) allow land to be utilised as an asset so that it can be freely sold or used as an asset to raise money. It should therefore not create any barriers to alienation unless these are justifiable on a public benefit basis that outweighs the detriment constituted by the prohibition on alienation. Such prohibitions on alienation do occur, of course, in efficient property systems: for example, planning uses, covenants restricting certain buildings;

(ii) allow all land to be covered by the system. If the system does not recognise "popular ownership" (that is, long-term occupation) because of the cost, then it will be ineffective as citizens will simply ignore it. This is the case in many Third World countries;

(iii) in keeping with the idea of prospective purchasers being able to hunt around to find the best deal, an idea central to a free market

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9 J. Nagy, "Raising Finance in Native Title and Other Aboriginal Land" (1996) Issue Paper No. 11, Australian Institute of Aboriginal and Torres Strait Islander Studies [Nagy].

10 Peter Holle, "Archaic Indian Act is behind Native Poverty" *National Post* (19 July 2001), online: The Frontier Centre for Public Policy <http://www.fcpp.org/publications/fcpp-media/archaic-indian.html>.

11 de Soto, *supra* note 1 at 95.

system, enable comparisons to be made. An efficient system of land registration does this. Land size, easements, restrictive covenants and the like are noted on the title, so that the prospective purchaser knows what he or she is buying. Computerisation holds out the prospect of other relevant information such as water rates and charges also being integrated. This facilitates comparisons. Although land is not fungible like, say, papers clips, standardisation does facilitate the comparison process;

(iv) be accompanied by an efficient contract system that facilitates property transfers and where legal rights and obligations can be quickly and cheaply enforced;

(v) identify the owners and other parties who have an interest in the property. This too facilitates exchanges. It will also prove invaluable in assessing taxes and making people part of the capitalist system;

(vi) allow creditors to enforce legal rights properly. It is a logical corollary of an efficient land system that allows property rights to be utilised as an asset that the system should allow the same assets to be legally lost to creditors. A market system will not function unless there are winners and losers; and

(vii) be up to date. An efficient property system should record transfers of ownership quickly and accurately.

Registered land is in effect a disembodiment of the actual land. Such a disembodiment process over many centuries is graphically illustrated by money: first, there was barter, then token money, then coins, then notes and now electronic money. The transfer of currency notes money confers good title since it is a negotiable instrument: the innocent taker takes free from defects in title. Although the disembodiment idea with registered land has not gone this far, it is possible with Torrens title land in Australia to create equitable rights merely by handing over the duplicate certificate of title as in, for example, an equitable mortgage or an equitable transfer. However, under the Torrens scheme of registration, legal title can only be gained by registration.

Bearing in mind the desirable features of a property system and acknowledging that Australia's property laws are by and large efficient, we can now review the *Mabo* decision.[12]

III. THE *MABO* DECISION

In 1982, Mabo and four other Murray Islanders brought a legal action in the High Court of Australia with regards to the Queensland (Aboriginal and

[12] *Mabo*, *supra* note 6.

Island Land Grants) Amendment Act 1982 which set up a system of land grants on trust for Aboriginal and Torres Strait Islanders. Mabo and the other litigants opposed this legislation since they claimed that they, being members of the Meriam people, owned the Murray Islands.[13]

(The Queensland Government in 1985 had tried to stop the legal proceedings by passing the Queensland Coast Islands Declaratory Act which declared that when the Murray Islands were annexed to Queensland in 1879, the land vested in Queensland was free from all other rights, interests and claims. However, the High Court found that this offended the provisions of the Commonwealth Racial Discrimination Act 1975.)[14]

The plaintiffs accepted the proposition that the Imperial Crown acquired sovereignty over the Murray Islands in 1979 and that the laws of Queensland including the common law became the laws of the Murray Islands[15] but they did not accept that the Crown had acquired absolute beneficial ownership of the land.

The defendant argued that the Crown had absolute beneficial ownership of the land stemming from annexation based on three arguments:[16]

(i) The prerogative argument
(ii) The patrimony argument
(iii) The feudal doctrine of tenure argument

A. *The Prerogative Argument*

This argument is that absolute ownership is a royal proprietary prerogative. But the High Court rejected this notion.[17]

B. *The Patrimony Argument*

This argument in favour of absolute Crown ownership is the idea that Crown grants in the colonies were a great source of revenue for the benefit of all.

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[13] These are the most easterly islands in the Torres Straits and consist of three islands: Mer (also called Murray Island), Dauar, and Weir. Their land area is about nine square kilometres.

[14] *Mabo*, *supra* note 6 at para. 92.

[15] The sovereignty over the islands was established by *The Queensland Coast Islands Act* of 1879 and was in turn the colonial legislative expression of Letters Patent passed by Queen Victoria. Brennan J. noted with interest that there was no apparent intent in the legislation for the annexation of the islands to result in beneficial ownership in the land being acquired either by the Queensland or the Imperial Government (para. 11). There were some doubts about the legality of the legislation following Queensland's separation from New South Wales and the Imperial Government passed the *Colonial Boundaries Act 1895* (Imp.)(5) 58 and 59 Vic. c 34 to remove these doubts.

[16] *Mabo*, *supra* note 6 at para. 31.

[17] *Ibid*. at para. 56.

Moreover, it was argued the reservation and dedication of public lands was a benefit to all. This buttressed the idea that the Crown upon settlement had absolute ownership.[18] However, the High Court ruled that the patrimony argument did not necessarily imply absolute ownership. Indeed, it represented political acts. Given that the High Court accepted the idea of radical title and the corollary that native title could be extinguished by Crown grants or reservations, the fact that there was a patrimony to the nation did not mean that the Crown had absolute ownership which necessarily extinguished native rights and interests.

C. *The Feudal Doctrine of Tenure Argument*

This was the most serious argument used to back the defendant's claim that the Crown had absolute ownership of Australian land. If the Crown had absolute ownership of the land, native rights and interests could not exist independently of it.

Prior to *Mabo* the clearest expression of the medieval doctrine of tenure applicable in Australia was to be found in *Attorney-General v. Brown* where Sir Alfred Stephen C.J. ruled:

> The territory of New South Wales, and eventually the whole island of which it forms part, have been taken possession of by British subjects, in the name of the Sovereign. They belong, therefore to the British Crown.[19]

In short, absolute beneficial ownership in the lands of Australia was, so the defendant argued, vested in the Crown. The importance of the tenure argument is that all rights and proprietary interests stem from this absolute ownership.

According to the High Court in *Mabo*, the medieval concept of tenure does form part of the common law that Australia inherited.[20] Under this concept, some time after the Norman Conquest of 1066 all land was owned absolutely by the Crown. There was no allodial land, that is, land owned outright by persons other than the king.[21] Land could only be held by anyone below the Crown as an estate in the land of and under his feudal superior (*tenere terra de X*) in return for services or payments. The conquered Anglo-Saxons Kings forfeited or surrendered their lands to William the Conqueror

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18 *Ibid*. at para. 55.

19 (1847) 1 Legge 312, (1847) 2 S.C.R. (N.S.W.) App. 30 at 33, 38.

20 *Mabo*, *supra* note 6 at para. 49.

21 This is perhaps historically dubious. If ownership rights of the Anglo-Saxon kings were dissolved, why was the Doomsday Book needed? By implication this points to a parallel form of ownership that may have continued for some time.

but they were regranted to them as feuds.[22] The Crown was deemed to have absolute beneficial ownership.

Did the tenure concept also apply to Australian lands? The High Court ruled that the Crown's acquisition of sovereignty could not be challenged in an Australian municipal court but the consequences could.[23] According to Blackstone, English law became the law of a place upon first settlement by English colonists of a "desert uninhabited".[24] This is to be contrasted with a conquered country where local laws continue after the conquest until altered by the conqueror.[25] It was accepted that Australia was annexed by settlement rather than by conquest. The idea of "*terra nullius*" was thus inherent in the idea of the Crown's absolute ownership to the exclusion of indigenous property rights. Indeed, the idea of "*terra nullius*" was enlarged to cover situations where the land was not deserted but inhabited by "barbarous" peoples who were not considered to have any laws.[26] If there were no settled inhabitants and no settled law, it could, according to this notion, be considered "*terra nullius*".

The High Court found that this theory was wrong because it did not accord with the facts as now understood. Since the theory was wrong, the common law could be changed. As Brennan J. pointed out:

> It would be a curious doctrine to propound today that, when the benefit of the common law was first extended to Her Majesty's indigenous subjects in the Antipodes, its first fruits were to strip them of their right to occupy their ancestral lands.[27]

The rejection of the concept that the Crown did not have absolute ownership of all the lands of Australia upon settlement did not "fracture a skeletal system of our legal system".[28] Having rejected the doctrine of *terra nullius*, the way lay clear for the High Court to rule upon the nature of the Crown's "ownership". The High Court found that the crown had a "radical or ultimate title".[29] This radical title was consistent with the feudal theory of estates, which still applied to Australian land. But—and it is a big but—it does not mean that the Crown had absolute ownership of all the lands of Australia upon European settlement. This could only be true of uninhabited desert, true "*terra nullius*", of which there was little.[30] The Crown could not

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22 *Mabo*, *supra* note 6 at para. 49.
23 *Ibid*. at para. 32.
24 *Ibid*. at para. 35.
25 *Ibid*. at para. 35.
26 *Ibid*. at para. 36.
27 *Ibid*. at para. 38.
28 *Ibid*. at para. 43.
29 *Ibid*. at para. 50.
30 *Ibid*. at para. 51.

become the absolute owner of inhabited lands. It had at the most a radical title. This radical title did not mean extinguishment of the rights and interests of indigenous inhabitants. Their rights and interest could co-exist with the radical title of the Crown but they did not stem from the radical title of the Crown. They are "rights and interests which do not owe their existence to a Crown Grant".[31] In short, native title is a separate parallel form of ownership not created by the common law but recognised and enforceable by the common law.

Brennan J. summarised his rulings on the common law of Australia with reference to land titles as follows:

1. The Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court.
2. On acquisition of sovereignty over a particular part of Australia, the Crown acquired a radical title to the land in that part.
3. Native title to land survived the Crown's acquisition of sovereignty and radical title. The rights and privileges conferred by native title were unaffected by the Crown's acquisition of radical title but the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title.
4. Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests (for example, authorities to prospect for minerals).
5. Where the Crown has validly and effectively appropriated land to itself and the appropriation is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished to parcels of the waste lands of the Crown that have been validly appropriated for use (whether by dedication, setting aside, reservation or other valid means) and used for roads, railways, post offices and other permanent public works (which preclude the continuing concurrent enjoyment of native title). Native title continues where the waste lands of the Crown have not been so appropriated or used or where the appropriation and use is consistent with the continuing concurrent enjoyment of native title over the land (for example, land set aside as a national park).

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[31] *Ibid.* at para. 51.

6. Native title to particular land (whether classified by the common law as proprietary, usufructuary or otherwise), its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land. It is immaterial that the laws and customs have undergone some change since the Crown acquired sovereignty provided the general nature of the connection between the indigenous people and the land remains. Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people.
7. Native title to an area of land which a clan or group is entitled to enjoy under the laws and customs of an indigenous people is extinguished if the clan or group, by ceasing to acknowledge those laws, and (so far as practicable) observe those customs, loses its connection with the land or on the death of the last of the members of the group or clan.
8. Native title over any parcel of land can be surrendered to the Crown voluntarily by all those clans or groups who, by the traditional laws and customs of the indigenous people, have a relevant connection with the land but the rights and privileges conferred by native title are otherwise inalienable to persons who are not members of the indigenous people to whom alienation is permitted by the traditional laws and customs.
9. If native title to any parcel of the waste lands of the Crown is extinguished, the Crown becomes the absolute beneficial owner.[32]

This is a masterly summary and demonstrates that the decision steers a delicate course between the land rights of indigenous people, recognised by the common law but not stemming from it, and the land rights of non-indigenous people that derive from the Crown. Native title is thus a unique form of interest in relation to land that is given its content by indigenous customs and laws. But it can be extinguished. It is thus more fragile than normal land rights. Moreover, the Crown remains triumphant and cannot be questioned.

D. *Restrictions on Alienation of Native Title Land*

One of the most noteworthy characteristics of native title land is that it is inalienable by the common law. Brennan J. put it thus:

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[32] *Ibid.* at para. 83.

> Native title, though recognised by the common law, is not an institution of the common law and is not alienable by the common law. Its alienability is dependent on the laws from which it is derived. If alienation of a right or interest in land is a mere matter of the custom observed by the indigenous inhabitants, not provided for by law enforced by a sovereign power, there is no machinery which can enforce the rights of the alienee. The common law cannot enforce as a proprietary interest the rights of a putative alienee whose title is not created either under a law which was enforceable against the putative alienor at the time of the alienation and thereafter until the change of sovereignty or under the common law.[33]

Any alienation of native title land to members of the indigenous group must be in accordance with the laws and customs of that group.[34] An acquisition of a right or interest in native title land cannot be acquired by someone outside the indigenous group unless there is acknowledgment of these laws and customs.[35] The latter would seem to mean that the customs and laws of the indigenous group would have to acknowledge alienation to someone outside the group. Any alienation beyond the "native law" will be ineffective unless it is to the Crown.[36]

Native title rights and interests can be possessed as a group or as an individual and may be proprietary, personal or usufructuary.[37] Individual or subgroup rights and interests would seem to be more amenable to alienation if allowed by the particular native law. An alienation of the whole group's interest would not seem possible.

In short:

(i) Native title land can only be held by natives subject to stringent conditions.

(ii) Alienation rights can only stem from customary native law. They do not depend on the common law. The only alienation recognised by the common law is surrender to the Crown.[38]

(iii) Native title can be recognised by the common law and enforced by it. Brennan J. ruled that:

> . . . native title, being recognised by the common law (though not as a common law tenure), may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence, whether proprietary

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33 *Ibid*. at para. 65.
34 *Ibid*. at para. 67.
35 *Ibid*. at para. 67.
36 *Ibid*. at para. 67.
37 *Ibid*. at para. 68.
38 *Ibid*. at para. 67.

> or personal and usufructuary in nature and whether possessed by a community, a group or an individual.[39]

E. *Changes to Prohibitions on Alienations?*

Recent High Court cases demonstrate that alienation rights according to customary native law are perhaps more extensive than commonly thought. This closely relates to the issue of ownership.

Although *Wik Peoples v. State of Queensland*[40] was a major case on native title regarding the effect of native title on pastoral leases, the decision merely established that the granting of a pastoral lease, whether or not current, does not necessarily extinguish native title and rights that might exist. The decision does not add anything in terms of alienability of native title land as established by the *Mabo* decision but does illustrate that native title does not always include a right of exclusive possession.

In *Mabo*, Brennan J. made observations that are capable on being interpreted as saying that native title is as valuable as fee simple; for example, he observed that

> as native title is not a title created by grant nor is it a common law tenure, it may be confusing to describe the title of the Meriam people as conferring 'ownership', a term which connotes an estate in fee simple or at least an estate of freehold. Nevertheless, it is right to say that their native title is effective as against the State of Queensland and as against the whole world unless the State, in valid exercise of its legislative or executive power, extinguishes the title.[41]

The High Court case of *Western Australia v. Ward*[42] throws some interesting light on concepts of ownership (essential with regards to alienation) and native title.

The majority (Gleeson C.J., Gaudron, Gummow and Hayne J.J.) referred to the spiritual relationship between the Aboriginal peoples and the land, and that this right was sometimes referred to as a "right to speak for country".[43] They lamented, however, that the spiritual must be translated into the legal and "this requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them."[44]

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39 *Ibid.* at para. 68.
40 (1996) 187 C.L.R. 1 at 255–6.
41 *Mabo*, *supra* note 6 at para 96.
42 (2002) 76 A.L.J.R. 1098, (2002) 191 A.L.R. 1 [Ward].
43 *Ibid.* at para. 14.
44 *Ibid.* at para. 14.

The majority pointed out that that the expression "a right to speak for country" means more than a right of occupation (this not being in itself sufficient to form the basis of native title). The expression encompasses rights of control over the land that extend beyond the mere right of occupation.[45] The majority thought it would be wrong to use such a blanket expression like a right to speak for country "to translate those rights and interests (possession, occupation, use and enjoyment . . . to the exclusion of all others)" and then to break up these elements as a "description of some common law title to land."[46] The majority endorsed the metaphor of a "bundle of rights" as a useful way to describe native title rights and interests. Here we seem to be coming close to speaking of ownership rights. Indeed, the majority acknowledged this:

> . . . native title is more than the right to be asked for permission to use or have access (important though that right undoubtedly is) there are other rights and interests which must be considered, including rights and interests in the use of the land.[47]

The case is interesting in how it deals with these rights. At first instance, Lee J. held that the native title claimants enjoyed the right to use, enjoy and trade in the *resources* of the area.[48] There was evidence led that ochre had been used and traded; however, the word "resources" could be interpreted to cover more than this. The majority of the Full Court of the Federal Court held, however, that Lee J.'s determination should be confined to ochre, and that petroleum and other minerals should be excluded on the basis that minerals that required modern methods of extraction could not form part of native title rights. Such a view reveals native law and custom as static. North J., in dissent, took the view that the historical record of native custom and law was elastic enough to cover modern adaptations and therefore other minerals apart from ochre could be covered. On appeal to the High Court, Kirby J., in dissent, agreed with the approach that Aboriginal customs are not static.[49] In his view, therefore, "resources" could cover petroleum and other minerals (he acknowledged that legislation had, however, extinguished these rights). But the majority of the High Court agreed with the approach of the majority in the Full Court of the Federal Court, namely, that there was no evidence of any traditional Aboriginal law, custom or use relating to petroleum and other minerals. No native right or title had been established to them; so, therefore, there was no issue of extinguishment.

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45 *Ibid*. at para. 93.
46 *Ibid*. at para. 94.
47 *Ibid*. at para. 91. See also para. 88.
48 *Ward v. Western Australia* (1998) 159 A.L.R. 483 at 639.
49 *Ward*, *supra* note 42 at para. 574.

Some critics of the *Ward* decision argue that the majority decision is based on a fundamental misunderstanding of *Mabo*.[50] The importance of traditional laws and customs, so the criticism goes, relates to the internal dimensions of communal native title (the *inter se* rights of the members of the community), but are not relevant to the external dimension, that is, the rights of the community vis–à–vis the world. The latter depends on occupation. This explains, so it is argued, the nature of the order in *Mabo*, namely, that the Meriam people are entitled to possession against the whole world. If traditional laws and customs provided the nature of the Meriam people's title against the Crown, then the order makes no sense. The true basis of their right to possession was the Meriam people's occupation. If this is the case, so it is argued, then native peoples have beneficial title and therefore the right to sub-surface petroleum and minerals on native title land.

In the *Ward* case, Kirby J. was willing to extend native title rights to even cultural knowledge and matters.[51] The majority described such claims as being "akin to a new species of intellectual property".[52] The majority denied the claim, pointing out that intellectual property laws might provide a measure of protection to the applicants.

The interesting aspect of the *Ward* case is that it reinforces the recognition that proprietary or ownership rights might exist under native title and that they can be traded. The right to trade was admitted at first instance and there seems to be no demurrer on this point by the High Court. Again, this underscores that alienations, albeit of a limited nature, under native custom and law are possible.

The recent High Court case of *Yorta Yorta Aboriginal Community v. Victoria*[53] demonstrates there can be adaptations and changes, including alienation rights within the framework of native law and custom. Although native title and rights find their origins in pre-sovereignty law and this normative system must be able to show to have continued, this does not mean it is frozen in time. Both the applicants and the respondents in *Yorta Yorta* conceded this.[54] The majority judgement made this point:

> What is clear, however, is that demonstrating some change to, or adaptation of, traditional law or custom or some interruption of enjoyment or exercise of native title rights or interests in the period between the Crown

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50 Kent McNeil, *Emerging justice?: essays on indigenous rights in Canada and Australia* (Saskatoon: Native Law Centre, University of Saskatchewan, 2001) at 420. See also Noel Pearson, "Native title's days in the sun are finished", The Age (28 August 2002) at 15.

51 *Ward*, *supra* note 42 at para. 580.

52 *Ibid*. at para. 59.

53 *Yorta Yorta Aboriginal Community v. Victoria* (2002) 77 A.L.J.R. 356.

54 *Ibid*. at para. 44.

> asserting sovereignty and the present will not *necessarily* be fatal to a native title claim.[55]

The concept of native title is therefore flexible enough to take into account significant adaptations "at least of a kind contemplated by traditional law and custom".[56] Alienations are therefore not completely incompatible with native title, if the native law permits them.

The recent case of *Mary Yarmirr & ors v. Northern Territory of Australia & ors*[57] and subsequent appeals explored the issue of commercial limitations on the exploitation of sea resources and this will be dealt with later on with regards to hunting and gathering, communality and inalienability.

In the final analysis at common law, it would seem that alienation depends on the traditional laws and customs. It would seem that even an alienation of land to another Aboriginal or Torres Strait Islander group is possible if traditional native law allows this.[58] Even succession to another group may be recognised as long as it is in accordance with traditional laws and customs.[59]

At the very least some limited forms of alienation of land may be permitted and there is at least the possibility that there may be alienations of objects and materials deriving from native land.

F. *The Native Title Act 1993 (Cth.)*

The ramifications of the *Mabo* decision were such that it was inevitable that legislation would have to be passed to give effect to the decision. The decision did not, for example, present a clear road map as to how to establish and protect native title. The Native Title Act 1993 (Cth.) amongst other things establishes a Native Title Tribunal for determination of native title claims and a Native Title Register to record native title rights.

The main objects of the Act as set out in s. 3 are:

(a) to provide for the recognition and protection of native title; and
(b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and

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55 *Ibid.* at para. 83 [emphasis original].

56 *Ibid.* at para. 44.

57 *Mary Yarmirr & ors v. Northern Territory of Australia & ors* [1999] A.L.J.R. 23; 156 A.L.R. 370 [Mary Yarmirr].

58 *Mabo v. Queensland (No. 2)* (1992) 175 C.L.R. 1 at 59, 110, 194; 107 A.L.R. 1 at 43, 83, 151–2; 66 A.L.J.R. 408 *per* Brennan J., Deane and Gaudron J.J. and Toohey J. respectively; *North Ganalanja Aboriginal Corp v. Queensland* (1995) 61 F.C.R. 1; 132 A.L.R. 565 at 593 (reversed on other grounds *North Ganalanja Aboriginal Corp v. Queensland* (1996) 185 C.L.R. 595; 135 A.L.R. 225; 70 A.L.J.R. 344).

59 *Re Waanyi People's Native Title Application* (1995) 129 A.L.R. 118 at 125–30; 124 F.L.R. 1.

(c) to establish a mechanism for determining claims to native title; and
(d) to provide for, or permit, the validation of past acts invalidated because of the existence of native title.

In some respects the legislation goes further than the *Mabo* decision. It provides that native title can exist with regards to waters.[60] This part of the *Mabo* claim was not pursued and so there was no decision on this point. Although the rights and interests of native title are not exhaustively defined (nor were they in *Mabo*) the Act provides that they include hunting, gathering and fishing rights.[61] The Act does, however, echo *Mabo's* apparent prohibition on alienation in terms of prohibiting charges on the land.[62]

We shall return to the provisions of the Native Title Act under VI dealing with practical considerations on restrictions on alienations.

IV. Objections to Inalienability

Traditionally, economists from early times have been opposed to restrictions on alienability as being incompatible with private ownership and freedom of contract. The restriction on alienation which most stuck in their craw was the practice of entailment. Broadly speaking, this meant that the property could only descend to members of the family. Thus a grant "to A and his heirs" was a general entail while a grant "to A and the heirs of his body by his wife" was a special entail. Typically the entails were male, that is, the property descended exclusively to males. John Stuart Mill remarked:

> In an economical point of view, the best system of landed property is that in which land is most completely an object of commerce; passing readily from hand to hand when a buyer can be found to whom it is worthwhile to offer a greater sum for the land than the value of the income drawn from it by its existing possessor. . . Whatever facilitates the sale of land, tends to make it more productive instrument of the community at large; whatever prevents or restricts its sale, subtracts from its usefulness.[63]

Having the dead hand of the patriarch fetter the freedom of disposition of the land was clearly inimicable to this idea. Thomas Jefferson as early as the end of the eighteenth century in America abolished entailing, thus making property more easily transferable. The practice has now been abolished in most jurisdictions.

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60 *Native Title Act 1993* (Cth.), s. 223.
61 *Ibid*. at s. 223 (2).
62 *Ibid*. at s. 56 (5).
63 John Stuart Mill, *Principles of Political Economy*, 9th ed. (London: Longmans, 1909) at 896.

But it should be pointed out that the right to alienate as being one of the key rights of ownership is not always true. Restrictions on alienations of fee simple have historically existed.[64] The Crown did grant land in fee with conditions prohibiting alienation.[65] However, generally speaking, it is probably reasonable accurate that the right of alienation is normally one of the rights of ownership of non-native title.

A. *Objections to Communal Nature of Native Title*

Free market economists also have trouble with the idea of communally owned land.

Decisions that are made communally tend by and large to take longer. On the other hand, decisions that are made individually and for the benefit of the owner will not only be made more quickly but the benefits and the decision making will be vested in one person. It behoves the owner to make the best decision for her own benefit and if she does not then she will bear the penalty of her poor decision. Moreover, land that is owned communally tends not be used efficiently. Everyone owns it but no one has responsibility for it. Since everyone owns it there is a tendency to abuse it.

This is the so-called tragedy of the commons. Evidence suggests that the commons in England were overgrazed and abused precisely because they were collectively owned by everyone and individual responsibility was therefore diminished.[66]

Posner puts it like this:

> Imagine that a number of farmers own a pasture in common; that is, none has the right to exclude any of the others. We can abstract from the dynamic aspects of the property rights problem by assuming that the pasture is a natural (uncultivated) one. Even so, pasturing additional cows will impose a cost on all of the farmers: the cows will have to graze more in order to eat the same amount of grass, and this will reduce their weight. However, because none of the farmers pay for the use of the pasture, none will take account of this cost in deciding how many additional cows to pasture, with the result that more cows will be pastured than would be optimal.[67]

Posner therefore argues that exclusive rights, that is, exclusive individual rights is necessary to overcome the problem.

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64 Edwards Jenks, "An alienable fee simple?" (1917) 33 L.Q.R. 11.

65 Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 233 [McNeil].

66 Garett Hardin, "The Tragedy of the Commons" (1968) 162 Science 1243.

67 R. Posner, *Economic Analysis of Law*, 2nd ed. (Boston: Little Brown, 1977) at 27.

> The problem would disappear if someone owned the pasture and charged each farmer for its use. . .. The charge to each farmer would include the cost imposed on the other farmers by his pasturing additional cows, because that cost reduces the value of the pasture to the other farmers and hence the price they are willing to pay the owner for the use of the pasture.[68]

Moreover these rights should be transferable so that an inefficient farmer would have an incentive to sell out to the efficient farmer: both would be winners.

B. *Objections to Inalienability on the Basis of Paternalism*

One of the problems that plagues the area of indigenous lands rights is the problem of paternalism; that is to say, well-meant laws passed by governments that limit the freedom of indigenous people. Paternalism is objectionable to neo-classic economics since it detracts from people's freedom to choose and act. It is this freedom that underpins the objections to inalienability of native title.

The problem of paternalism with regards to indigenous people is a worldwide phenomenon. de Soto gives a graphic example from Peru:

> To defuse this new threat (the sudden emergence of strong and well-organised leftist movements), the Peruvian government, like those of many Third World countries, instituted agrarian reform programs that massive tracts of land from large farms and ranches (haciendas) to create over six hundred government run agrarian co-operatives for farmers. Again the aim was noble: to make sure that the natives had access to real estate. What turned these efforts into failures was that many of the indigenous people disliked working inside imposed bureaucracies.[69]

One of the reasons why the common law held that alienations of native land were illegal was ostensibly to protect indigenous people from exploitation. John Batman, considered to be the founder of the city of Melbourne in Australia, attempted to buy large tracts from the local Aboriginals for a paltry sum.[70] The Governor of the colony issued a Proclamation that such purchases were void as against the Crown. The Proclamation was approved by the Colonial secretary who said that the welfare of the Aboriginals would not be advanced by "recognising in them any right to alienate

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[68] *Ibid*.

[69] de Soto, *supra* note 1 at 152.

[70] Manning Clark (Charles Manning Hope), *Select Documents in Australian History, 1788–1850* (Sydney: Angus & Robertson, 1950) at 90–2.

to private adventurers the Land of the Colony".[71] It could be argued that this was somewhat paternalistic: why should Aboriginals not be able to sell their lands subject to it being an informed decision? Apart from apparent concern with the welfare of the Aboriginals, there was also at play, the power and authority of the Crown. It would diminish the authority of the Crown if private transactions without Crown permission were allowed.

Now, of course, we see paternalism at work in many areas of the law; for example, the law in many jurisdictions prohibiting the smoking of marijuana could be described as paternalistic. The law does not ban the smoking of tobacco, so why should it limit the freedom of people to smoke marijuana? Underlying the free market system is the idea that people should be able to make free choices. The problem is whether and when the law should be allowed to substitute its judgment for that of the individual.

There are no clear-cut answers here. Obviously, a common answer to the charge of the law being paternalistic is that the person should not be free to choose if her choice is harmful to her. This helps explain laws against suicide. Another answer might be that interference with the freedom is so obnoxious in itself, since freedom is the keystone of our political and economic construct, that the law should not be entitled to substitute its judgment for that of the individual. The idea that government can decide for others is particularly worrying for liberals; yet, even Milton Friedman, one of the most outspoken advocates of neo-classic economics, wrote:

> There is no avoiding the need for some measure of paternalism. As Dicey wrote in 1914 about an Act for the protection of mental defectives, 'The Mental Deficiency Act is the first step along a path on which no sane man can decline to enter, but which, if too far pursued, will bring statesmen across difficulties hard to meet without considerable interference with individual liberty.' There is no formula that can tell us where to stop. We must rely on our fallible judgment and, having reached a judgment, on our ability to persuade out fellow men that it is a correct judgment, or their ability to persuade our fellow men that it is a correct judgment, or their ability to persuade us to modify our views. We must put our faith, here as elsewhere, in a consensus reached by imperfect and biased men through free discussion and trial and error.[72]

Is *Mabo* paternalistic then? Some of the basic objections to the inalienability of native title would seem to suggest so: unlike other Australians indigenous people cannot sell native title land and cannot mortgage it. Moreover, because it is communal land it will mean that decisions will be made

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[71] Gleneg to Bourke, 13 April 1896 in 18 *Historical Records of Australia* (ser. 1), 379.

[72] Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962) at 33 [Friedman].

through some sort of communal body like a land council with the possibility of majority abuse of power. Unlike other Australians individual decisions by indigenous people about native title land cannot be made on an individual basis. Here it could be suggested that this implies that Australian indigenous people cannot be trusted to have rights that are accorded to other Australians with regards to land.

It has even been argued that judicial native title is nothing more than a post-colonial construct and that it is a cunningly contrived concept to admit aboriginal rights but then to assure that in reality real rights and compensation are in fact denied.[73] Native law and custom are assimilated in such a way that it is acceptable to the dominant law.[74]

If the criticism of the inalienability of native title on the basis of paternalism is that indigenous people are being treated differently, is it not equally paternalistic to argue that freehold system used by non-indigenous Australians, based as it is on individual rights as opposed to group rights, is best for indigenous people? The counter argument to this is that indigenous people should not be treated any differently to other Australians with regards to property rights (as happens with non-native title) and that therefore an argument in favour of alienability is not paternalistic. However, the fact remains that *Mabo* is just as much a legal invention as *terra nullius*: it seeks to accommodate a new form of land ownership within the existing legal framework. It only recognises native customary "law". In one sense, this recognition does not seem to be at all paternalistic. Indeed, it is the reverse since Wik, where it was pointed out, consistently with *Mabo*, that native title does not depend upon the common law for its legitimacy or content. This is not white man's law for the natives; it is the law of the indigenous peoples. But this generosity is withdrawn in almost the same breath as it is given since common law recognition is only given if native laws and customs are not repugnant to "natural justice, equity and good conscience".[75]

It could be argued that the *Mabo* decision by its very nature is somewhat paternalistic: the recognition by the current owner of the house of a long-forgotten lodger in the attic, but a lodger whose rights depend upon and are subordinate to those of the current owner of the house. The fact that the lodger regards the house as belonging to her is not relevant.[76] The occupation of the house by the current owner is never in doubt: the

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[73] Povinelli Elizabeth A., "Cunning of recognition: real being and Aboriginal recognition in settler Australia" (1998) 11 Australian Feminist Law Journal 3.

[74] Margaret Davies (Margaret Jane), "Race and Colonialism: Legal Theory As White Mythology" in *Asking the Law Question: The Dissolution of Legal Theory*, 2nd ed., (Pyrmont, N.S.W, Lawbook Co., 2002), at 257.

[75] *Mabo*, *supra* note 6 at 44.

[76] Irene Watson, "Indigenous Peoples' Law-ways: Survival Against the Colonial State" (1997) 8 Australian Feminist Law Journal 39 at 47–8.

taking possession of Australia was an act of state that was beyond the authority of the court to even question.[77] Moreover, the *Mabo* decision clearly recognised that native title could be extinguished and without any compensation.[78]

So native title is both at once free from paternalism in its origins but arguably somewhat paternalistic in so far as the common law can set limits on the extent of the recognition.

V. Arguments in Favour of Inalienability

Objections to inalienability fundamentally rest on the idea that they are contrary to the concept of private exchanges by way of legally enforceable contracts. Adam Smith put the matter thus:

> It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest. . ..
>
> He is in this . . . led by an invisible hand to promote an end, which was no part of his intention. Nor is it always the worse for society that it was no part of his intention. Nor is it always the worse for society that it was no part of it. By pursuing his own interest, he frequently promotes that of society more effectively than what he really intends to promote it.[79]

Thus private transactions are what make the capitalist system go around.[80] If two people enter into a contract, there is a presumption that they are both getting something out of it. Indeed, the Pareto test for efficiency rests on this: will the transaction make somebody better off while making no one worse off? However, even advocates of neo-classical economics realise that the idea of myriads of private contracts resulting in benefits to the parties and therefore to society is subject to certain assumptions. Milton Friedman put it thus:

> The possibility of coordination through voluntary cooperation rests on the elementary-yet frequently denied-proposition that both parties to an economic transaction benefit for it, provided the transaction is *bilaterally voluntary and informed*.[81]

The above provisos merit further comment.

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77 *Mabo*, *supra* note 6 at para. 31.

78 *Ibid.* at para. 33–6 *per* Brennan J.

79 Adam Smith, *The Wealth of Nations* (New York: Random House Inc., 1937) at 14.

80 There is, of course, the issue of choice of capitalism itself. Can it be really argued that capitalist institutions are the result of the individual choices of citizens? Or are they just as much a result of history and collective decisions? See Thomas Scanlon, "Liberty, Contract, and Contribution" in *Markets and Morals* (Washington: Hemisphere Pub Corp., 1977) at 43.

81 Friedman, *supra* note 72 at 13 [emphasis added].

A. *Bilaterally Voluntary*

This means both parties to the transaction must enter it voluntarily. The law does, of course, recognise situations where contracts will not be enforced: for example, duress, and unconscionability. However, there are many cases that will not fall within these categories and could be seen as undermining the free choice premise that private contract law rests on: for example, an unemployed mother of a sick child sells her one precious asset to obtain medicine for her sick child. Is the contract entered into voluntarily? Or take the case of the privately owned natural monopoly that extracts a monopoly price is the buyer acting voluntarily? Some theorists suggest that threats are coercive and therefore detract from free will while offers do not detract from free volition.[82] Others argue that taking advantage of another should be allowed unless it detracts from the freedom or liberty of the other, but this assumes that we know what the latter is.[83] In short there are many situations where it is doubtful whether one of the parties truly entered into it voluntarily.

B. *Informed Transactions*

Another assumption underlying the contract keystone of neo-classic economics (and therefore the suspicion of restrictions on alienations) is that the parties entering into the contract are informed. This lies at the heart of free choice, something crucial to the functioning of the free market system. But how much information is needed for a free choice to be made? In a sense no contracts are entered into with both parties having all the relevant information. And this also depends on that point in time is taken: for example, I thought the film was going to be good at the time I bought the ticket but after seeing it I'm disappointed. If we look at the matter after the contract has been entered into then we might say there was not enough information on the side of the buyer and that therefore it was not a contract that was entered into freely. However, this would allow disappointment to set aside contracts. It makes more sense to look at the state of knowledge at the time of entering into the contract. According to the Pareto test for efficiency, if both parties think they are going to be better off at the time of entering into the contract, then the contract should stand even though there was imperfect knowledge at the time of entering into the contract. Of course the law does allow the most egregious forms of behaviour that destroy or distort information to be used as a basis for not being bound by the contract, for example,

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82 Charles Fried, "Contract as Promise" in Alan Wertheimer, *Coercion* (Princeton: Princeton University Press, 1987) at 450.

83 Anthony Kronman, "Contract Law and Distributive Justice" (1980) 89 Yale Law Journal 472.

fraud, negligent misrepresentation. However, there are some grey areas that sometimes result in contracts being set aside but not at other times, for example, non-disclosure of material facts. Even more problematic are situations where one of the parties may not be in a position to assess the ramifications of the contract they enter, for example, a guarantee. The law's efforts to protect guarantors can be seen as an attempt to protect the free choice of the contracting party by reference to fairness and unconscionability. However, these concepts imply that X would not have signed the guarantee had she known the true picture. This involves a fair degree of conjecture as to what the person would have really consented to. Again it demonstrates that free choice is something of a myth. Solving mutual mistake problems and frustration also involve resort to principles outside the contract, for example, shared values, and fairness. The idea that the contract is a reflection of the free will of the parties is therefore somewhat dubious.[84] Time and time again we see the law substituting its own views based on perceived community standards for those of the parties, for example, competence of the contracting parties, whether the party's consent is real. In many cases it could be argued that this is paternalistic, for example, minors should not be bound by loan contracts because it is not good for them to borrow. People's freedom to contract should only be upheld if they exercise it for their own benefit. But this runs counter to the very idea of freedom to contract. Thus John Stuart Mill wrote:

> His own good, either physical or moral, is not sufficient warrant (for interfering with his liberty). He cannot be rightfully compelled to do or forebear because it will be better for him to do so, because it will make him happier, because in the opinion of others, to do so would be wise . . .[85]

It can be seen that the very idea of contracts freely entered into by the parties is not without its problems. Yet this idea is at the very core of the free market system that engenders antipathy towards restrictions on alienations.

C. *Why Not All Prohibitions on Alienations Are Bad*

We are all familiar with prohibitions or restrictions on alienations that we readily accept, for example, in bankruptcy laws prohibitions on dispositions designed to hide assets or that prefer some creditors to others or zoning laws. This raises the question whether these are justifiable or not and why

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[84] Joel Feinberg, *The Moral Limits of the Law: Harm to Self*, Vol. 3 (Oxford: Oxford University Press, 1989) at 113.

[85] John Stuart Mill, *On Liberty* (New York: Liberal Arts Press, 1956) at 13.

we accept them even though they apparently seem contrary to the idea of freedom of property transfers.[86]

The prohibition on fraudulent dispositions in bankruptcy law is not an absolute prohibition on alienation. The person facing bankruptcy can dispose of her or his assets as long as they are sold at market value. The aim of the fraudulent disposition prohibition is to protect creditors so, as they will have access to the bankrupt's assets. At the time of the fraudulent disposition the creditors' claims are not yet recognised; so the law adopts a rather blunt tool to protect their prospective rights, a prohibition. This is consistent with efficiency. If the law did not provide for this prohibition pending bankrupts would be able to dispose of their assets and creditors would receive nothing and the result would be likely to be an increase in interest rates and less dealings in the market place. The rationale for prohibition on preferences is that all unsecured creditors should be treated equally. This seems to be an equity consideration although there may be efficiency considerations at play too.

Some economists take the view that some prohibitions on activities can be economically justified on the basis of externalities. These are costs to third parties. If, for example, A asks B, the owner of a dye factory, to dye some clothes for him and this causes pollution to the nearby river and damages farmer C's land, A and B are better off but C has "paid" the price.[87] Most of us might accept that a prohibition or limitation on this sort of activity might be justified because of the harm caused. Or another way to tackle the problem might be through taxes that discourage the activity. The latter seeks to modify behaviour in the market place while prohibition is a drastic way to solve the problem.

Some prohibitions on alienations relate to public health. In Australia, sale of blood is banned partly on the basis that it might encourage people with dangerous infections and viruses to sell their blood whereas donors would be more likely to have "good" blood.[88] This partly reflects the view that the market suffers from imperfect information.[89]

We can therefore see that there are prohibitions on alienation that can be justified on efficiency grounds (economics) as well as equity and cultural grounds.

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[86] One of the most interesting seminal works on these issues is by S. Rose-Ackerman, "Inalienability and the Theory of Property Rights" (1985) 85 Columbia Law Review 931.

[87] Using the Pareto test one could say that this is not Pareto superior since although A and B are better off, C is worse off. If one uses the Kaldor-Hicks efficiency test then a cost benefit analysis would also lead to the conclusion that it is not justifiable.

[88] For arguments for and against the sale of blood see: Richard Titmuss, *The Gift Relationship: From Human Blood to Social Policy* (London: Allen & Unwin, 1970); Kenneth Arrow, "Gifts and Exchanges" (1972) 1 Philosophy and Public Affairs 342.

[89] It is probable that the donor knows more about his health than the hospital, at least in regard to things like hepatitis. Payment would encourage donors to hide these things.

D. *Hunting and Gathering, Communality and Inalienability*

In Australia, there are laws protecting endangered species from being hunted and sold.[90] From an economic point of view, native animals are often in short supply and therefore commercial exploitation might very well destroy the source of supply. The prohibition or restrictions are arguably justified on efficiency grounds apart from anything else. But this raises the delicate question as to whether there should be an exception in favour of indigenous peoples who hunt such animals?

The issue of indigenous hunting rights versus conservation law is well illustrated by the case of *Yanner v. Eaton*.[91] Yanner was a member of the Gunnamulla clan of the Gangalidda tribe who had speared two young estuarine crocodiles in the Gulf of Carpentaria area in the state of Queensland. He was charged with taking fauna without a licence contrary to the provisions of the Fauna Conservation Act 1974 (Q.) which amongst other things prohibited the taking of fauna without a licence.[92] This clashed with s. 211 of the Native Title Act 1993 (Cth.), the Federal legislative attempt to give effect to the *Mabo* decision, which allowed the hunting of fauna. The effect of this was summarised as follows:

> Section 211 of the Native Title Act 1993 (Cth.) provided that where a State law would otherwise prohibit or restrict the exercise or enjoyment of native title rights and interests by way of hunting, fishing, gathering, a cultural or spiritual activity or any other prescribed activity, the law did not prohibit or restrict the native title holders from carrying on such activities where they did so (a) for the purpose of satisfying their personal, domestic or non-commercial communal needs; and (b) in exercise or enjoyment of their native title rights and interests.[93]

At first instance the Magistrate found that the Native Title Act 1993 (Cth.) prevailed over the Fauna Conservation Act (Q.) and that the defendant had

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90 For example, *Fauna Conservation Act 1974* (Q.).

91 (1999) 201 C.L.R. 351

92 Section 7(1) of the Fauna Conservation Act 1974 (Q.) provided: "All fauna, save fauna taken or kept otherwise than in contravention of this Act during an open season with respect to that fauna, is the property of the Crown and under the control of the Fauna Authority." Section 54(1)(a) of that Act prohibited a person taking, keeping or attempting to take or keep fauna of any kind unless that person held a licence, permit, certificate or other authority granted and issued under the Act. For the purposes of the Act, fauna included animals, wild by nature, or those which were declared by Order in Council to be fauna. Estuarine crocodiles were declared to be fauna by Order in Council in 1974.

93 McNeil, *supra* note 65 at 351.

satisfied s. 223(1)(a) and (b) of the Native Title Act.[94] On appeal to the Queensland Court of Appeal this decision was set aside on the basis that s. 211 was not relevant since native title right or incident to hunt crocodile had been taken away by s. 7(1) of the Fauna Conservation Act (Q). This was in turn reversed on appeal to the High Court of Australia. Much of the debate in the High Court was about what vested in the Crown under the Fauna Conservation Act (Q). The majority held that s. 7 (1) did not extinguish the native right to hunt crocodiles. According to Gleeson C.J., Gaudron, Kirby and Hayne JJ. what vested in the Crown were the rights to limit the taking of fauna, the possession of it and receiving royalties. The crown did not receive absolute ownership of the fauna. Gummow J. thought the Crown received royalty rights as well as rights to penalties arising from transgressions of the law. The Fauna Conservation Act (Q) did not extinguish native rights title and interests. However, it is clear that s. 211 of Native Title Act 1993 (Cth.) does not allow fishing and hunting on a commercial basis.[95] There is therefore a partial prohibition on alienation but not an absolute one: native peoples are allowed to hunt in the traditional manner but are not allowed to commercially exploit the catch.

The upshot of the case would seem to be to preserve traditional indigenous ways of life without endangering the native animals that commercial exploitation might entail. The restriction on alienation is justifiable on economic grounds as well as on indigenous cultural grounds.

The same clash—traditional rights to fish versus endangered species laws—was echoed in the case of *Wilkes v. Johnsen*.[96] Here an Aboriginal person was found in possession of a number of undersized marrons (a type

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[94] Section 223(1) of the Native Title Act 1993 (Cth.) is important since it defines "native title" and other key concepts:

> (1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.

[95] Section 211(2) of the Native Title Act 1993 (Cth.) provides:

> If this subsection applies, the law does not prohibit or restrict the native title holders from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity, where they do so:
>
> (a) for the purpose of satisfying their personal, domestic or *non-commercial communal needs*; and
>
> (b) in exercise or enjoyment of their native title rights and interests [emphasis added].

[96] (1999) 21 W.A.R. 269; 151 F.L.R. 89.

of crustacean that is endangered) contrary to s. 46(b) of the Fish Resources Management Act 1994 (W.A.). The appellant sought to lead evidence that he was exercising his native title rights right. At trial this was excluded on the basis that it was not relevant to the charge under the Fish Resources Management Act. The appeal to the Full Court of the Supreme Court of Western Australia allowed the appeal and the matter was sent back to the magistrate to be further dealt with according to the law. A majority of the appeal judges ruled that s. 46 of the Fish Resources Management Act 1994 (W.A.) extended to Aboriginal people exercising their native title fishing rights and that s. 211 of the Native Title Act 1993 (Cth.) has the effect of permitting fishing by native title holders, contrary to the prohibitions expressed in s. 46 of the Fish Resources Management Act, provided that the native title holders carry out their fishing activities for personal, domestic or non-commercial communal purposes and in the exercise or enjoyment of their native title rights and interests, as required by s. 211(2) of the Native Title Act. To the extent that s. 46(b) of the Fish Resources Management Act purports to prohibit possession of fish caught pursuant to s. 211 of the Native Title Act, it was the view of the Court that the former provision would give rise to an inconsistency within s. 109 of the Constitution of the Commonwealth and would be to that extent inoperative.

This case is therefore consistent with the *Yanner* case: the partial prohibition in s. 211 of the Native Title Act (not allowing commercial fishing) sits well with a law designed to protect endangered species.

The recent case of *Mary Yarmirr & ors v. Northern Territory of Australia & ors*[97] and subsequent appeals explored the issue of commercial limitations on the exploitation of sea resources. Here it was not a clash between protecting endangered species and the right to commercial exploitation but rather whether there was right to trade in resources of the sea.

Here the Mandilarri-Ildugij, the Mangalara, the Murran, the Gadura-Minaga and the Ngaynjaharr clans applied under the Native Title Act 1993 (Cth.) for a determination of native title relating to the areas of sea and sea beds-beds adjoining Croker Island. At first instance, Olney J. held that native title existed in regard to the sea and sea beds, but that native title was not exclusive and was limited to personal, domestic and non-commercial commercial activities, such as subsistence fishing and other cultural activities. In particular he found that native title did not include a right to trade in resources of the sea. The right to trade in the resources of the waters and land was advanced as a separate right to the right to fish.[98]

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[97] *Mary Yarmirr & ors v. Northern Territory of Australia & ors* [1999] A.L.J.R. 23; 156 A.L.R. 370.

[98] *Ibid.* at para. 119.

The applicants led evidence that traditionally there was trade in the resources of the sea, including evidence of trading with the Macassars (the port of Macassar is now in Indonesia) and that this trade predated English colonisation. It was being put in effect that there could be alienation to peoples (the Macassars) that were outside the native group. But Olney J. found that the turbulent relationships between the Macassars and the indigenous people made it unlikely that there was trade with them. Another matter pertaining to rights of alienation was the claim by senior members to a major portion of catches. Olney J. held that none of the foregoing were rights and interests in relation to waters that came within the statutory definition of rights and interests, even though the objects were resources of the water and land.[99] There was also evidence led that some clans had sold turtle meat, dugong and fish to nearby missions. However, Olney J. held that there was no evidence prior to European contact of trade by members of the Croker Island community.

The case went on appeal to the Full Court of the Federal Court on the basis, amongst other things, that native title on the evidence includes a right to trade in resources.[100] The majority of the Federal Court found that Olney J. was correct in rejecting the claim that the right to trade in resources of the area was not compatible with the factual finding that the claimants had no exclusive entitlement to possession of the area.[101] However, the majority did concede that "[i]t may well be right, as the argument runs, and as it seems logical to view the right to trade as 'an integral part', or integral aspect, of right to exclusive possession".[102] Moreover, the majority opined that if exclusive possession was established it might be viewed as a proprietary interest in the resources,[103] citing Brennan J. from *Mabo (2)* where it was said:

> If it be necessary to categorise an interest in land as proprietary in order that it survive a change in sovereignty, the interest possessed by a community that is in exclusive possession of land falls into that category. Whether or not land is owned by individual members of a community, a community which asserts and asserts effectively that none but its members has any right to occupy or use the land has an interest in the land *that must be proprietary in nature*: there is no other proprietor.[104]

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99 *Mary Yarmirr, supra* note 57 at para. 118.
100 *Commonwealth v. Yarmirr* (2000) 101 F.C.R. 171; 168 A.L.R. 426.
101 *Ibid*. at paras. 246–51.
102 *Ibid*. at para. 250.
103 *Ibid*. at para. 252.
104 *Mabo*, *supra* note 11 at para. 51 [emphasis added].

The majority of the Full Court was of the view that such an approach could in principle apply and give rise to a proprietary interest in resources. But all of these observations were strictly *obiter dicta* given that the right to trade was not compatible with the factual finding of the first instance judge that there was non-exclusive occupation by the claimants. In particular, the Full Court of the Federal Court did not overturn Olney J.'s ruling that the right to trade in objects from the sea and land did not come within the statutory definition of rights and interests, nor did they comment on it.

The claimants appealed to the High Court of Australia on the basis that their native title rights and interests conferred occupation, possession, enjoyment and use to the exclusion of others. This was rejected. The majority took the opportunity to warn against the dangers of conceptualising native title rights and interests in the language of the common lawyer, saying:

> It is, of course, important to notice that the native title rights and interests with which the Act deals are rights and interests in relation to land or water. Those rights and interests may have some or all of the features which a common lawyer might recognise as a species of property. Neither the use of the word 'title' nor the fact that the rights and interests include some rights and interests in relation to land should, however, be seen as necessarily requiring identification of the rights and interests as what the common law traditionally recognised as items of 'real property'. Still less do those facts necessarily require analysis of the content of those rights and interests according to those features which the common law would traditionally identify as necessary or sufficient to constitute 'property'.[105]

However, the majority did admit that native title rights and interests may have characteristics that the common law would classify as rights property or interests in property.[106]

The significance of the *Mary Yarmirr* case would seem to be, had the evidence at first instance of exclusive occupation been accepted, the right to trade in sea resources may have been accepted as a right stemming from native title. However, the High Court was silent on the issue of the existence of a right to trade and whether it came within the definition of a right or interest under the Native Title Act 1993 (the statutory analogue of *Mabo*). This is not surprising given that the trial judge's finding that there was not exclusive possession was not disturbed. Although the High Court said that the inquiry about the existence of native title rights and interests should not begin with common law proprietary concepts, this did not mean that such rights and interests might not have such proprietary characteristics. The way

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[105] *Commonwealth v. Yarmirr* (2001) 75 A.L.J.R. 1583; 184 A.L.R. 133 at para. 12.
[106] *Ibid.* at para. 14.

therefore still seems open to argue that native title does allow some forms of alienations.

On the issue of fishing, the first instance judge found a right to subsistence fishing consistent with the non-exclusive native title that he found existed. This was ultimately upheld on appeal. But what would the position be, however, if there were a finding of exclusive native title and it were shown that according to native law and custom there was trade or exchanges of fish with other peoples (commercial fishing)? It is clear that s. 211 of Native Title Act 1993 (Cth.) does not allow fishing and hunting on a commercial basis. The wording of s. 211 seems fairly clear that it would be illegal.[107] This perhaps casts doubt on the sagacity of such a provision. One could not necessarily justify this provision on the basis of protecting endangered species.

E. *The Objection to Communality Stemming from the Private Ordering Perspective*

In a free market society, common ownership is by its very nature anathema. However, in terms of hunting and gathering, common ownership makes good sense. Indeed, it is difficult to envisage hunting of native wild animals and gathering of native plants on a subsistence level if private ownership were allowed. The two are not compatible. Indeed, this was the essential clash between the indigenous nomadic way of life and the settled European way of life based on grazing and cultivation. It is noteworthy that the Torres Strait Islanders traditional way of life depended largely on the cultivation of land that was not owned communally. Brennan J. in the *Mabo* case was alert to the possibility that it would be argued that Australian indigenous mainlanders usually had a nomadic way of life and did not own property communally and that this therefore distinguished them from the Murray Islanders; but he said:

> Nor can the circumstances which might be thought to differentiate the Murray Islands from other parts of Australia be invoked as an acceptable ground for distinguishing the entitlement of the Meriam people from the entitlement of other indigenous inhabitants to the use and enjoyment of their traditional lands. As we shall see, such a ground of distinction discriminates on the basis of race or ethnic origin for it denies the capacity of some categories of indigenous inhabitants to have any rights or interests in land.[108]

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[107] For a contrary view see Peter Kilduff and Neil Lofgren, "Native Title Fishing Rights in Coastal Waters and Territorial Seas" (June 1996) Aboriginal Law Bulletin Vol. 3 No. 81.

[108] *Mabo*, *supra* note 6 at para. 24.

The *Mabo* decision is therefore an attempt to bridge two apparent conflicting cultures: the Western idea of property as a commodity versus the indigenous idea of land being part of their culture and of themselves. The triumph of *Mabo* is that indigenous law and culture were able to form the basis of the Meriam people's claim. This is not to underestimate the difficulties faced by indigenous peoples in establishing their claims since they must satisfy Western rules and must clothe their claims in ill-fitting garments.[109] Oral traditions and indigenous concepts of law, land and being do not sit easily with Western concepts; yet, *Mabo*, within the limits of our law and Western culture, carves out a place for native title and all that this implies.[110]

One of the main objections to the inalienability of native title is that it will keep indigenous people in a time warp if it results in a return to a hunter-gatherer life style. But apart from the cultural value of the hunter-gatherer life style, bush foods can make a valuable contribution to the diet of indigenous people.[111] In one study it was found that subsistence production made up for "sixty-four per cent of total cash and imputed income, remaining the mainstay of the economy".[112]

Since inalienability means that traditional life styles are easier to maintain, this has led to a stimulating of indigenous arts and crafts. In the Northern Territory of Australia the estimated value of this is more than A$100 million.[113]

Another positive spin off from native title land with its concomitant features of inalienability and communality is so-called cultural tourism. National parks like Uluru and Kakadu in the Northern Territory that are under Aboriginal ownership and control generate considerable income as well

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[109] See N. Sharp, *No Ordinary Judgement: Mabo, the Murray Islanders Land Case* (Canberra: Aboriginal Studies Press, 1996) at 166.

[110] *Contra*, Dr. Dodson argues that even at the High Court level, hunting and gathering were viewed through an economic prism without due regard for their spiritual significance: "Aboriginal and Torres Strait Islander Social Justice Commissioner" (1993) First Report Canberra GPS at 29.

[111] Altman found that "[b]ush foods accounted for 46 per cent of kilocalories and 81 per cent of protein intake of people in the outstation over the period of the study. Altman's data indicate that hunting and gathering activities make a crucial contribution to this above average diet": C. Blanchard (Chair), *Return to Country: The Aboriginal Homelands Movement in Australia* (Canberra: Australian Government Publishing Service, 1987) at 132.

[112] J.C. Altman and L. Taylor, "The economic viability of Aboriginal outstations and homelands" in *A Report to the Australian Council for Employment and Training* (Canberra: Australian Government Publishing Service, 1987).

[113] J. D. Finlayson, "Northern Territory land rights: purpose and effectiveness", Discussion Paper 180/1999, Centre for Aboriginal Economic Policy Research, The Australian National University.

as valuable co-operation between the Aboriginal owners and government management.[114]

Another objection to native title is that it is communal and that this will lead to stifling bureaucratic land councils. Judging from the operations of the land councils set up under the Northern Territory land rights legislation, such fears seem unjustified. Land councils play an important role in negotiating with private enterprise and government. Moreover, private enterprise often prefers to negotiate though centralised Aboriginal bodies rather than with numerous smaller bodies.[115]

VI. Practical Considerations On Restrictions On Alienations

One of the main objections to restrictions on alienation is that it will prevent native title being used as collateral to raise finance.

Before exploring any practical considerations, it would be helpful to touch upon some aspects of the Native Title Act 1993 (Cth.) and how native title is held.

Before a court decides whether or not native title exists, it must request a representative of the claimants to be included in the decision as to who native title holders are[116] and to indicate, within a specified period, whether the title is to be held in trust.[117] They must name in writing a prescribed body corporate to be trustee of the title[118] and provide the court with the written consent of the body corporate nominated. The body corporate therefore has the job of managing the native title rights and interests and must:

(a) manage the native title rights and interests of the common law holders;
(b) hold money (including compensation money) in trust;
(c) invest or otherwise apply money held in trust as directed by the common law holders;
(d) consult with the common law holders; and
(e) perform any other function relating to native title rights and interests as directed by the common law holders.[119]

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[114] R. Blowes, "From terra nullius to every person's land-a perspective from legal history", in J. Birckhead, T. de Lacy and L. Smith (eds.) *Aboriginal Involvement in Parks and Protected Areas* (Canberra: Aboriginal Studies Press, 1992).

[115] G. Parker (Chair), *Review of Native Title Representative Bodies* (Canberra: ATSIC, 1995).

[116] *Native Title Act 1993* (Cth.), s. 56.

[117] *Ibid*. s. 56(2)(a).

[118] *Ibid*. s. 56(2)(a)(i).

[119] *Native Title (Prescribed Bodies Corporate)* Regulations 1999 (Cth.), reg. 6(1).

The Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth.) set out how the prescribed body corporate must exercise its function to consult with the common law holders and the evidence required to establish that there has been adequate consultation in accordance with the regulations.[120]

The Native Title Act 1993 (Cth.) provides some explicit prohibitions on charging land. At first sight this might be viewed as a considerable impediment to raising finance. Native title is protected from debt recovery processes and cannot be assigned, restrained, garnisheed, seized or sold,[121] or made the subject of a charge or interest[122] as a result of incurring any debt or liability of,[123] or any act done by,[124] the body corporate holding the native title.[125]

The protection is extended to the land itself making it free from liabilities of native titleholders themselves and the prescribed body corporate. But this protection does not cover other assets of the native titleholders or the prescribed body corporate.[126] It is thus possible for security to be taken over these other assets. Moreover, the protection does not apply to debts or liability incurred in connection with dealings with the native title authorised by the regulations in relation to the transfer, surrender or other dealings with the native title.[127]

At this juncture we need to briefly review the role security plays before determining whether the prohibition on alienation does have a detrimental effect in practice. Security for a loan fulfils a number of functions. First, it acts to concentrate the mind of the borrower on the consequences of failure to repay the loan; this is an important psychological factor.[128] Second, it bestows upon the lender a number of extra judicial remedies against the borrower, for example, the right to take possession and the right to sell (these processes being under the control of the lender are quicker and more certain than litigation). Third, it gives the lender a right against the assets themselves, a right *in rem*. Fourth, it allows the debt to survive the bankruptcy or insolvency of the borrower,[129] since the lender relies on his security and

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120 *Ibid*. at regs. 8, 9.

121 *Native Title Act 1993* (Cth.), at s. 56(5)(a).

122 *Ibid*. at s. 56(5)(b).

123 *Ibid*. at s. 56(5)(d).

124 *Ibid*. at s. 56(5)(e).

125 *Ibid*. at ss. 55(6), 56(5).

126 *Ibid*. at ss. 56(5), 56(6).

127 *Ibid*. at s. 56(6).

128 The threat of enforcing security and its effects are discussed by Adrian Bridge in "The Quistclose Trust in a World of Secured Transactions" (1992) 12 Oxford Journal of Legal Studies 333 at 338–9.

129 When a person becomes bankrupt the bankrupt's assets vest in the trustee in bankruptcy: *Bankruptcy Act 1966* (Cth.), s. 58(1) and are distributed on a *pari passu* basis (all unsecured creditors are treated equally). When a company goes into liquidation, control passes to a

does not take part in the insolvency proceedings; or, if the lender does take part it may only be to the extent that the security does not cover the debt.[130] Fifth, the fact that the borrower has borrowed from lender number and given security will probably mean that it is less likely that borrower will borrow elsewhere since the giving of the security involves time and money to the borrower and the lender may have the right to "tack" further loans onto the original security. In addition, usually the security will be registered on a public register and this will make it more difficult for the borrower to obtain loans from elsewhere.[131]

In addition to the traditional securities (the mortgage, charge, pledge and lien) there are so-called quasi-securities that many lenders regard on a practical level as being as important as traditional securities. The distinguishing feature of quasi-securities is that they do not confer on the lender any proprietary interest in the asset but only contractual remedies. Quasi-securities include guarantees, indemnities, rights of combination and set-off, negative pledges, and standby letters of credit.

The essence of these is that they give the lender contractual rights against a particular person. Quite often a quasi-security like standby letter of credit issued by a bank to cover a default of a loan will be easier to access than, say, exercising rights of sale over a marginal rural property in outback Australia.

All lenders regard security, be it a traditional security or quasi-security, as insurance: realising the security is a last resort and not always an effective one. Lawyers are often slow to point out the problems with securities despite myriads of cases bearing testimony to this fact. Quite often, the security will be defective in terms of the initial agreement, for example, the loan may be *ultra vires* or it may involve an abuse of power. Alternatively, the security may not be perfected, that is, it may be open to challenge by third parties for a number of reasons: it may be invalid because it is not registered as the law requires; it may amount to disposition of property that offends insolvency law; it may be subject to claims to after-acquired property and tacking of future advances; it may be subject to the claims of *bona fide* purchasers of value. Moreover the value of a security may not realise much even if it is sold. In addition there may be claims made against the secured creditor by the purchaser for various reasons, for example, it may be an environmental hazard. Add to this the opprobrium that often accompanies the exercise of the secured creditor's rights and we can appreciate that taking security is fraught with difficulties. However from the lender's point of view the taking of security is only one element of the decision as to whether to lend.

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liquidator: *Corporations Act* (Cth.), s. 474(1) and, here again, the *pari passu* principle applies.

[130] Section 58(5) of the *Bankruptcy Act 1966* (Cth.) provides that nothing affects the rights of a secured creditor to realise or otherwise deal with his or her security.

[131] The obvious anti-competitive tying effect of securities is beyond the scope of this article.

A moment's reflection make one realise that loans are made everyday to persons or entities who often only not do not offer any security but are also problematic in terms of even contractual recovery, for example, unincorporated associations, no-liability mining companies, schools.

And it is not always small loans that are unsecured. In Australia, negative pledge lending to large public companies is not uncommon. Lenders in such circumstances seek to protect themselves by various covenants in the loan agreement. Pledge in this context is not referring to the traditional possessory security but rather to a promise. The borrower undertakes not to give any other lender any security (the so-called negative pledge) that would make another lender rank ahead as a secured creditor. There may also be a covenant on dividend restraint, for example, to maintain a minimum net worth or that the dividend be only a certain percentage of the year's earnings (the aim here is to stop the company being deprived of cash). There might be restrictions on disposing of certain key assets and ratio covenants. The most frequent cause of company failure is failure of cash flow and the aim of the liquidity ratio covenant is to guard against this. In short, lenders attempt to "secure" themselves by attempting to have an intimate knowledge of the borrower's business and by contractually binding him to the straight and narrow. The absence of property securities in Australia does not therefore hinder lending to large public companies.

We have seen from the above that the emphasis on taking security is often stressed by lawyers but ignored by bankers in practice.

In the first place, lenders typically look to the ability of the borrower to repay rather than to the security. Indeed, lenders are in many instances implicitly forbidden to lend on the basis of only the security, for example, clause 25.1 of the Code of Banking Practice (due to start on the 1 August 2003) provides:

> Before we offer to give you a credit facility (or increase an existing credit facility), we will exercise the care and skill of a diligent and prudent banker in selecting and applying our credit assessment methods and in forming our opinion about your ability to repay it.

The Code of Banking Practice will apply not only to consumer customers but also to small businesses.[132] The above clause was inserted partially in response to concerns about credit levels.[133]

The inalienability of native title should not cause insurmountable problems for financing although it may pose challenges for banks and other

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[132] See clause 40 of the Code of Banking Practice.

[133] Final Report on the Review of the Code of Banking Practice: "Asset based lending (where no investigation is made of the customer's ability to repay and the only consideration is the adequacy of the security) is not unknown in this country", at 51.

financiers. One author has noted that overseas experience indicates that in itself, inalienability has not been an obstacle to commercial finance:[134]

> In the United States and Canada, for example, title to reservation land is commonly held in trust for a particular Native American community and, under federal law, usually it may not be sold, taxed or encumbered. Yet this has not stopped banks, like the Bank of Montreal and other successful financiers, which have formed special units responsible for extending commercial credit to Native American communities.

The emphasis has been on the banker's old friends, cash flow and knowing the borrower. In addition the failure rate of such loans is half that of other commercial loans.[135]

Another practical matter to take into consideration is that the Native Title Act 1993 allows for one sort of alienation, namely, sales to the Crown. Section 20 allows native title land to be sold to the government.

This sometimes results in a surrender of native title in a three-way exchange: native title is surrendered to the Crown (because native title cannot be alienated), the Crown makes a new grant to a commercial party, and the commercial party pays compensation and other consideration to the native title holders in terms of involvement in the commercial project.

However, if the native title land is established over vacant Crown land then this poses the problem that there will not really be an established market for this. And it has been argued that this might limit its value for compensation.[136]

VII. Conclusions

Australian law is not the only national law to impose restrictions on alienation. Canadian law also has restrictions on alienations of native land.[137] Chilean law, too, provides that indigenous lands cannot be alienated, encumbered, mortgaged or seised by way of execution.[138] However, Australian law in theory recognises the existence of non-state law, that is, the law and

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134 Nagy, *supra* note 9 at 3.

135 *Ibid*.

136 Warby, *supra* note 4 at 2.

137 McNeil, *supra* note 65 at 221.

138 *Indigenous Law 1993* (ley no. 19, 253) Article 13 provides: "Las tierras a que se refiere el artículo precedente, por exigirlo el interés nacional, gozarán de la protección de esta ley y no podrán ser enajenadas, embargadas, gravadas, ni adquiridas por prescripción, salvo entre comunidades o personas indígenas de una misma etnia."
It does, however, provide that the restriction on alienations does not apply to the family house and surrounding land. Moreover, the prohibition on creating encumbrances can be dispensed with by obtaining authorisation from the Corporacion.

customs of Australian indigenous people. By way of contrast, Chilean law in regard to indigenous land rights consists of only Chilean law despite the fact that it purports to promote indigenous self-development.

Like it or not, *Mabo* recognises native title, even though Australia is basically a non-indigenous state. It represents a fundamental change that even the cost and time involved in the case cannot outweigh.

Behind the neo-classic economic objection to restraints on alienation stands the mythical figure of the individual ready to use his property to borrow money to start a small business. This, however, is a cultural mind set that is at odds with the traditional hunter-gatherer outlook, based on the land being part of the hunter-gatherer, the land being sacred and communal. To make the land truly alienable by individuals would be completely at odds with this view.

The objections on efficiency grounds to inalienable native title also rest to a certain extent upon the idea that the land is precious. Most land that has any great agricultural worth (in the European sense) has already been granted to non-indigenous Australians and native title at common law has been extinguished. Native title will be thus over vacant Crown land and land that may already be held under legislation established prior to the Native Title Act 1993.[139]

The *Mabo* decision with its prohibitions on alienations is perhaps a mixed blessing, but, overall, it represents something of a triumph of *homo indigenous* over *homo economicus* since the law of the conqueror recognises, within limits, the legitimacy of native law. On balance, it is suggested that prohibitions on alienations will not in themselves prevent economic development. Moreover, *Mabo* makes it clear that alienations in keeping with native law are permissible. The fact that native law seems to be against alienations in the European sense is perfectly compatible with their view of the land. *Mabo* accommodates this view and makes it part of the broader fabric of Australian law.

Inalienability of native title is partly protective and partly spiritual: protective, since the common law held that settlers in colonies had to derive their title from a Crown Grant and not through purchases from indigenous people who could be subject to exploitation; spiritual, since the land has a special value that transcends economic aspects. To allow unfettered alienation of land would be to end indigenous people's special relationship with it. As the Canadian Chief Justice said in one famous Canadian case: "What the inalienability of lands held pursuant to aboriginal title suggests is that these lands are more than just a fungible commodity."[140]

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[139] See, for example, *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth.), *Pitjantjatjara Land Rights Act 1981* (S.A.), *Aboriginal Land Rights Act 1983* (N.S.W.).

[140] *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 at 1090.