6

The Inalienability of Native Title in Australia: A Conclusion in Search of a Rationale

David Yarrow

Introduction

Conventional jurisprudence in Australia has it that the common law disfavours restraints upon the alienability of real property. So in *Hall v Busst*,[1] a majority of the High Court concluded that a contractual term precluding a purchaser from selling or letting a property, once the purchase was completed, without obtaining the consent of the vendor was void as a restraint upon alienation and therefore contrary to public policy.[2] Dixon CJ observed that '[t]he ground for denying the validity of a contractual restriction upon alienation is that it is a principle of the law that private property should be fully alienable'.[3] Notwithstanding a number of exceptions being recognised by the courts since *Hall v Busst* was decided, this principle is still applied, most recently by the New South Wales Court of Appeal in *Gora v Bondi Beach Astra Retirement Villages Pty Ltd*.[4]

Furthermore, at least for property in land, alienability is accepted as a defining characteristic of the legal category of property itself. In *National Provincial Bank Ltd v Ainsworth* (*National Provincial Bank*),[5] when considering the nature of the interest of a person occupying real property entirely owned by their spouse and the entitlement of a mortgagee of the property to possession, Lord Wilberforce considered the distinction between proprietary and personal rights. He summarised his conception of property as follows:

> Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.[6]

1 (1960) 104 CLR 206.
2 Ibid, 215-218 (Dixon CJ), 223-225 (Fullagar J) (with both of whom Menzies J agreed at 236).
3 Ibid, 218.
4 (2011) 82 NSWLR 665. The restriction on alienation in this case was upheld on the grounds of public policy, namely insofar as it assisted the establishment and financial viability of retirement villages for an ageing population. See also *Elton v Cavill (No 2)* (1994) 34 NSWLR 289.
5 [1965] AC 1175.
6 Ibid, 1247-1248 (Lord Wilberforce), cited with approval by Mason J in *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 342, with whom Gibbs CJ and Brennan J agreed at 332 and 364 respectively.