1. Introduction

> The native title of a community of indigenous peoples is comprised of the collective rights, powers and other interests of that community, which may be exercised by particular sub-groups or individuals in accordance with that community's traditional laws and customs. Each collective right, power or other interest is an "incident" of that indigenous community's native title.[1]

Aboriginal title to land has been described as *sui generis* interest in land, arising from occupation of lands prior to colonisation. Aboriginal title has many unique features which distinguish it from other common law interests; including its inalienability, its important non-economic component, and its status as a collective right.

2. Explain why aboriginal title is described as *sui generis* interest in land.

The term *sui generis* encompasses the unique nature of aboriginal rights to land. Translated literally from Latin, it means "a type of its own". Aboriginal title to land is *sui generis* because it arises from aboriginal people's occupation of the land prior to colonisation and the assertion of British sovereignty over the land. This is contrasted with other common law rights to land which come about upon a grant from the Crown after the assertion of Crown sovereignty.[2]

Meyers has asserted that the judicial treatment of indigenous rights in North America and New Zealand serves to illuminate three fundamental principles of common law native title which illustrate it as *sui generis* interest.[3] First, indigenous communities were considered to be sovereigns in their own right at the time of colonisation, thus the source of aboriginal land rights in the newly acquired territory is the pre-existing, communal occupancy of and sovereignty over the land by aboriginal people at the time of assertion of paramount

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[1] per Gummow J. in *Yanner v Eaton* (1999), 166 A.L.R. 258.
[2] Pape and Salter, "Delgamuukw – A Summary of the Supreme Court of Canada Decision", 17 February 2003, www.cstc.bc.ca/pages/Treaty_delgmkwmry.htm
[3] G. Meyers, 'Native Title Rights in Natural Resources: A Comparative Perspective', [2002] Environment and Planning Law Journal, p. 251

sovereignty to that territory by the colonising state.[4] Secondly, prior occupation /prior sovereignty gives rise to the powers to control resources on reserve/retained land, as well as diminished self-government rights for indigenous peoples. And finally, the acknowledgement of indigenous prior occupancy by the new sovereign and the assumption of ultimate sovereignty gives rise to a fiduciary duty to protect the remaining rights of the aboriginal occupants of the land, including their lesser sovereignty rights.[5]

3. Discuss the origins of the concept of aboriginal title.

In the landmark case *Mabo v Queensland (Mabo No. 2)*[6] Brennan J. remarked on the source and nature of native title generally:

> "Native title has its origin in and is given its content by the traditional laws acknowledged by the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs"[7]

While the content of native title is developed from traditional laws and customs, the title itself originates from the aboriginal community's pre-existing occupation of the land; or from an aboriginal group's established entitlement to occupy the land; or[8] from meaningful presence on the land "amounting to occupancy".[9]

The test for occupancy includes three criteria:[10]

1. The land must have been occupied by the aboriginal people prior to the date which the Crown asserted its sovereignty over the territory.
2. If present occupation is relied on a proof of occupation at the date the Crown asserted its sovereignty over the territory, there must be a continuity between present occupation and the aboriginal people's occupation at that time.

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[4] ibid.
[5] ibid.
[6] [No. 2] (1992) 175 CLR 1
[7] *Mabo No. 2,* supra at nt 6, p. 58
[8] per Deane and Gaudron JJ in *Mabo No. 2.*
[9] per Toohey J in *Mabo No. 2*
[10] Pape and Salter, supra at nt 2.

3. At the date the Crown asserted its sovereignty over the territory, the occupation by the aboriginal people must have been exclusive.

The approach to native title endorsed by the Australian Courts in *Mabo No. 2, Wik Peoples*[11], and *Yanner*[12] encompasses two scenarios in which native title claims may be established. First, native title can be established by proving that an Indigenous group was in exclusive occupation of land at the time the Crown acquired sovereignty. In that situation, it may also be necessary to prove the existence of some system of traditional laws or customs in relation to land. where their exclusive occupation has been proven, they have rights of possession, occupation, use and enjoyment as against the whole world.[13] The second scenario deals with native title rights that do not include rights of exclusive possession, occupation, use and enjoyment of land, and are established by proof that an Indigenous group had a connection with lands in accordance with their traditional laws and customs when the Crown acquired sovereignty. Traditional laws and customs would continue to regulate the exercise of that activity among the members of the Indigenous group, but would not define their native title right as against the whole world.[14]

Mabo No. 2 established that native title rights akin to ownership arises where an Indigenous people as a community was in exclusive occupation of their territory at the time of acquisition of sovereignty by the Crown regardless of the specific content of their traditional laws and customs. An indigenous people could nonetheless have a less extensive title if, for example, they used land for a specific purpose such as ceremonial rites, but lacked exclusive occupation because the land was also used by another Indigenous people. In that situation, it appears that their practices and traditions, which could include their laws and customs, may be relevant for determining both the existence and content of their title.[15]

4. What characteristics distinguish aboriginal title from other common law interests in land?

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[11] (1996), 141 A.L.R. 129
[12] supra nt. 1.
[13] K. NcNeil, 'The Relevance of Traditional Laws and Customs to the Existence and Content of Native Title at Common Law' in *Emerging Justice,* 2001, p. 461
[14] ibid., p.462
[15] ibid.

Aboriginal title has many features which distinguish it from other common law interests in land, not the least of which holds that aboriginal title is a collective right to land held by all members of an aboriginal nation, and cannot be held by individual people. Unlike other common law interests in land which may be transferred upon the will of the owner, providing there is conformity with relevant legislative provisions,[16] aboriginal title is inalienable and cannot be transferred, sold or surrendered except to the Crown.

In addition to these factors, aboriginal title has different purposes to those of other common law interests in land. These purposes include the protection of aboriginal people's relationship with their land. Aboriginal title cannot be put to uses which are irreconcilable with the aboriginal people's attachment to the land. Aboriginal title lands have an important non-economic component including an inherent and unique value. The aboriginal community cannot put the land to uses which would destroy this value. If aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then they must surrender their aboriginal title to those lands, and convert them into non-aboriginal title lands to do so.[17] Thus while aboriginal title is a legal interest in land and a right to the land itself, it is not an absolute right.[18]

Erueti has drawn an insightful contrast between a claim to Maori customary title based on the Maori Land Act 1993 and one based on native title.[19] In the former case, upon proof by the claimants of ownership of the land according to custom, the Maori Land Court may grant a Maori freehold title to the claimants. This title is akin to a fee simple interest at common law, although a Maori freehold title is subject to provisions of the Maori Land Act 1993. In contrast, while a native title claim is not limited to land, the content of native title is by nature, very uncertain, and its content is dependant upon how a Judge construes the claimants' evidence of traditional use. Erueti asserts that there has been a tendency for common law Courts to read down the content of native title to include only non-exclusive traditional hunting and fishing subsistence activities. An example of such interpretation of

[16] For example transfer of land transfer land under the Land Transfer Act 1952.
[17] Pape and Salter, supra nt 2.
[18] ibid.
[19] Andrew Erueti, 'Native Title Claims to Sea Country', [2001] NZLJ 415, ISSN 0028 8373, p. 417

aboriginal title by the Courts was seen in the Australian decision of *Yamirr*[20] (discussed below). However, the Court's decisions in *Mabo No. 2* and *Delgamuukw* provide important exceptions.[21]

In addition to these distinctions, Meyers has suggested that native title rights might be also distinguished from other common law interests in land by some unique forms of legal protection which may be available to assure these collective rights.[22] For example, some courts in the US, Canada and New Zealand have acknowledged that established native title rights in natural resources may impose a duty on the government to protect the resource subject to those off-native title lands rights.[23]

5. What are some limits on the concept of aboriginal title?

The Australian case *Yamirr*, involving a claim to the sea-bed and its resources, is a pertinent example of the limits which the Courts have placed on the concept of aboriginal title. In *Yamirr* Beaumont and von Doussa JJ. upheld Olney J.'s decision at trial that native title to the claimed area had been established, but held that the rights and interests were not exclusive and did not include ownership of the resources in the sea or on and under the sea. In the course of the judgment, the Courts dicta in *Mabo No 2* was approved of and the Court explicitly stated that aboriginal title will be limited primarily by the lapse in the real observance of traditional customs:

> "…when the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition."[24]

McNeil has criticised the approach of the Australian Courts in their interpretation of *Mabo No. 2* asserting that the level of proof required to attain a native title exceed the requirements

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[20] (1999), 168 A.L.R. 426
[21] *Mabo No. 2* supra at nt. 6, for discussion of *Delgamuukw* supra nt 2.
[22] Meyers, supra n 3, p. 255
[23] ibid.
[24] *Mabo No. 2,* supra n 6, p. *59-60,* quoted in *Yamirr,* supra n. 20, p. 435

of common law actions in relation to land.[25] Thus, in *Western Australia v Ward*[26] Beaumont and von Doussa JJ. conclude that abstract notions of an intangible spiritual connection with the land count for nothing on their own, while physical connections without abstract conceptions of entitlement under traditional laws or customs also appear to be inadequate. On this conception of native title, the evidentiary burden requires both rights and interests arising from traditional laws and customs and a physical connection with the land have to be shown.[27]

6. Conclusion.

Aboriginal title is a legal burden on the Crown's title, both the aboriginal title holders and the Crown are subject to, and qualified by, each other's interests in the land which is encompassed by aboriginal title.[28] Aboriginal title is *sui generis* interest in land because it is a unique right arising from the prior occupancy of Indigenous peoples of their lands before colonisation. Native title has its origin in and is given its content by the traditional laws acknowledged by the traditional customs observed by Indigenous inhabitants of a territory. However, a native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.[29]

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[25] McNeil, supra n 13, p. 444
[26] (2000), 170 A.L.R. 159
[27] McNeil, supra n. 13, p. 445
[28] Pape and Salter, supra n 2.
[29] *Mabo No. 2,* supra n 6, p. 59-60.