

Aboriginal & Torres Strait Islander Studies 2019 v1.1

IA2 high-level annotated sample response

March 2020

Investigation — inquiry response (25%)

Assessment objectives

This assessment instrument is used to determine student achievement in the following objectives:

1. define and use terminology within the context of responses and contributions related to the land rights of Aboriginal peoples and Torres Strait Islander peoples
2. demonstrate an understanding of maintaining culture and identity within Aboriginal societies and Torres Strait Islander societies through explaining responses and contributions related to land rights
3. analyse worldviews of Aboriginal peoples and Torres Strait Islander peoples within a historical, social and cultural context, and examine influences on the recognition of land rights
4. consider and organise information from sources related to land rights for Aboriginal peoples and Torres Strait Islander peoples within a historical, economic, social and cultural context
5. evaluate the significance of the responses and contributions that have influenced the land rights of Aboriginal peoples and Torres Strait Islander peoples within a historical, economic, social and cultural context
6. create an analytical essay that communicates ideas related to responses and contributions to the land rights of Aboriginal peoples and Torres Strait Islander peoples within a historical, economic, social and cultural context.

Instrument-specific marking guide (ISMG)

Criterion: Defining, using and demonstrating understanding

Assessment objectives

1. define and use terminology within the context of responses and contributions related to the land rights of Aboriginal peoples and Torres Strait Islander peoples
2. demonstrate an understanding of maintaining culture and identity within Aboriginal societies and Torres Strait Islander societies through explaining responses and contributions related to land rights

The student work has the following characteristics:	Marks
<ul style="list-style-type: none"> • thorough and accurate use of terminology related to the land rights of Aboriginal peoples and Torres Strait Islander peoples, with the meaning of words, phrases and concepts correct in all key aspects • comprehensive and appropriate identification of responses and contributions related to the land rights of Aboriginal peoples and Torres Strait Islander peoples • detailed explanations of relevant responses and contributions, with inaccuracies or omissions not being significant to the response. 	5–6
<ul style="list-style-type: none"> • use of appropriate terminology related to the land rights of Aboriginal peoples and Torres Strait Islander peoples, but the meaning of some words, phrases and/or concepts characterised by inaccuracies or omissions • some identification of responses and contributions related to the land rights of Aboriginal peoples and Torres Strait Islander peoples • explanations of responses and contributions are evident, but with some errors or omissions. 	3–4
<ul style="list-style-type: none"> • use of terminology related to the land rights of Aboriginal peoples and Torres Strait Islander peoples, but the meaning of words, phrases and/or concepts is characterised by inaccuracies and/or omissions throughout the response • one or more statements on responses and contributions related to the land rights of Aboriginal peoples and Torres Strait Islander peoples • significant errors and/or omissions within statements are evident throughout the response. 	1–2
<ul style="list-style-type: none"> • does not satisfy any of the descriptors above. 	0

Criterion: Analysing

Assessment objective

3. analyse worldviews of Aboriginal peoples and Torres Strait Islander peoples within a historical, social and cultural context, and examine influences on the recognition of land rights

The student work has the following characteristics:	Marks
<ul style="list-style-type: none"> • well-reasoned analysis of worldviews of Aboriginal peoples and Torres Strait Islander peoples that have formed and informed the recognition of land rights within a historical, social and cultural context • thorough and detailed examination of influences on the recognition of land rights for Aboriginal peoples and Torres Strait Islander peoples within a historical, social and cultural context • an in-depth understanding of influences on the recognition of land rights clearly supports the analysis. 	6–7

The student work has the following characteristics:	Marks
<ul style="list-style-type: none"> considered analysis of worldviews of Aboriginal peoples and Torres Strait Islander peoples that have formed and informed the recognition of land rights within a historical, social and cultural context substantial examination of influences on the recognition of land rights for Aboriginal peoples and Torres Strait Islander peoples within a historical, social and cultural context an understanding of influences on the recognition of land rights generally supports the analysis. 	4–5
<ul style="list-style-type: none"> partial analysis of worldviews of Aboriginal peoples and Torres Strait Islander peoples that have formed and informed the recognition of land rights within a historical, social and cultural context some consideration of influences on the recognition of land rights for Aboriginal peoples and Torres Strait Islander peoples within a historical, social and cultural context a basic understanding of influences on the recognition of land rights affects the analysis. 	2–3
<ul style="list-style-type: none"> one or more statements on worldviews of Aboriginal peoples and Torres Strait Islander peoples that have formed and/or informed the recognition of land rights statements based on a simplistic and/or erroneous understanding of influences on the recognition of land rights for Aboriginal peoples and Torres Strait Islander peoples within a historical, social and/or cultural context significant inaccuracies and/or use of irrelevant information affects the analysis. 	1
<ul style="list-style-type: none"> does not satisfy any of the descriptors above. 	0

Criterion: Evaluating

Assessment objective

5. evaluate the significance of the responses and contributions that have influenced the land rights of Aboriginal peoples and Torres Strait Islander peoples within a historical, economic, social and cultural context

The student work has the following characteristics:	Marks
<ul style="list-style-type: none"> <u>insightful and well-justified evaluation of the extent to which responses and contributions have influenced the land rights of Aboriginal peoples and Torres Strait Islander peoples within a historical, economic, social and cultural context</u> justification supported by assessing and examining influences on land rights using discerning and thorough reasoning <u>reasoning is consistently accurate within the evaluation in relationship to the hypothesis established.</u> 	6–7
<ul style="list-style-type: none"> justified evaluation of the extent to which responses and contributions have influenced the land rights of Aboriginal peoples and Torres Strait Islander peoples within a historical, economic, social and cultural context <u>justification supported by assessing and examining influences on land rights using considered reasoning</u> reasoning is generally accurate within the evaluation in relationship to the hypothesis established. 	4–5
<ul style="list-style-type: none"> evaluation of the extent to which responses and contributions have influenced the land rights of Aboriginal peoples and Torres Strait Islander peoples within a historical, economic, social and cultural context evaluation supported by assessing and examining influences on land rights using basic and appropriate reasoning inaccuracies within the reasoning affect the evaluation in the response. 	2–3

The student work has the following characteristics:	Marks
<ul style="list-style-type: none"> • superficial evaluation of the extent to which responses and contributions have influenced the land rights of Aboriginal peoples and Torres Strait Islander peoples within a historical, economic, social and/or cultural context • statements related to land rights based on a simplistic understanding of influences on these and/or are unclear • significant inaccuracies and/or irrelevant information throughout the response affect the evaluation. 	1
<ul style="list-style-type: none"> • does not satisfy any of the descriptors above. 	0

Criterion: Considering, organising and creating

Assessment objectives

4. consider and organise information from sources related to land rights for Aboriginal peoples and Torres Strait Islander peoples within a historical, economic, social and cultural context
6. create an analytical essay that communicates ideas related to responses and contributions to the land rights of Aboriginal peoples and Torres Strait Islander peoples within a historical, economic, social and cultural context

The student work has the following characteristics:	Marks
<ul style="list-style-type: none"> • <u>a variety of primary and secondary sources is used effectively in response to the hypothesis</u> • <u>succinct, with ideas conveyed logically in relation to the hypothesis devised</u> • <u>genre, language (spelling, grammar, punctuation) and recognised referencing conventions are adhered to, with minimal errors throughout the response.</u> 	4–5
<ul style="list-style-type: none"> • relevant primary and secondary sources used in response to the hypothesis • conveys ideas that are related to the hypothesis devised • genre, language (spelling, grammar, punctuation) and recognised referencing conventions generally adhered to, but with some errors evident throughout the response. 	2–3
<ul style="list-style-type: none"> • some use of primary and/or secondary sources is evident • conveys ideas not related to the hypothesis devised • frequent and/or significant errors in genre, language (spelling, grammar, punctuation) and/or referencing conventions impede communication of ideas. 	1
<ul style="list-style-type: none"> • does not satisfy any of the descriptors above. 	0

Task

Context
<p>When considering responses and contributions to land rights, Dr Nicole Watson* argues that following the Mabo High Court decision (1992):</p> <p>The doctrine of 'terra nullius' has lost its currency. The acceptance of the Mabo decision by the Commonwealth in 1992 established the foundation for some Aboriginal Peoples and Torres Strait Islander Peoples, in parts of Australia, to claim recognition of their native title rights in the Federal Court through processes established by the <i>Native Title Act 1993</i> (Cwlth).</p> <p>*Note:</p> <ul style="list-style-type: none">• Dr Nicole Watson (Birri Gubba and Yugambah) is a solicitor and an academic who has worked for the National Native Title Tribunal and the Queensland Environmental Protection Agency (quotation provided in personal communication, 1 Nov 2019. Licensed under CC BY 4.0).
Task
<p>With reference to the context statement above, investigate and evaluate the significance of the Mabo High Court decision (1992) in responding to and contributing to recognition of the native title rights of Aboriginal peoples and Torres Strait Islander peoples.</p> <p>Present your response in an analytical essay.</p>

Sample response

Criterion	Allocated marks	Marks awarded
Defining, using and demonstrating understanding Assessment objectives 1 and 2	6	6
Analysing Assessment objective 3	7	7
Evaluating Assessment objective 5	7	6
Considering, organising and creating Assessment objectives 4 and 6	5	5
Total	25	24

The annotations show the match to the instrument-specific marking guide (ISMG) performance-level descriptors.

Considering, organising and creating [4–5]

succinct, with ideas conveyed logically in relation to the hypothesis devised

The response poses a logical hypothesis in relation to the task quotation.

Defining, using and demonstrating understanding [5–6]

thorough and accurate use of terminology

The response accurately references land rights and *terra nullius*.

detailed explanations of relevant responses and contributions

The response establishes a hypothesis that explains the responses to native title recognition and associated rights that were later diminished, as reflected in the task quotation.

The response explains the notion of co-existence in relation to the stimulus and hypothesis.

Analysing [6–7]

well-reasoned analysis of worldviews of Aboriginal peoples and Torres Strait Islander peoples

The response identifies two opposing perspectives that gave rise to the need for land rights recognition — European Christian and holistic Aboriginal worldviews.

The response provides substantiated reasons for the different perspectives (using evidence).

Defining, using and demonstrating understanding [5–6]

thorough and accurate use of terminology

The response appropriately uses terms such as dominion and worldview.

Hypothesis: *The Mabo Court decision has been the most significant step in the attainment of self-determination for Aboriginal and Torres Strait Islander people to date as this case marked a shift in the legal foundation of native title rights in Australia.*

The Mabo Case is one of the most frequently mentioned events in the history of Indigenous native title rights. Not only did the decision nullify the doctrine of terra nullius as it was applied to Australia – land belonging to no-one –, it laid the legal foundation for a change in the way land rights were regarded in Australia. The outcome of his case has meant that the Australian government could no longer consider only their own interests when it comes to determining rights to land, but had to also recognize the rights and claims of Indigenous people, as acknowledged by Nicole Watson when she states that “The doctrine of ‘terra nullius’ has lost its currency” (N Watson, 2019, pers. comm., 1 Nov). However, she also notes that “The acceptance of the Mabo decision by the Commonwealth in 1992 established the foundation for some Aboriginal Peoples and Torres Strait Islander Peoples, in parts of Australia, to claim recognition of their native title rights in the Federal Court through processes established by the Native Title Act 1993 (Cth)” (Watson, 2019). This highlights the fact that in the years following the Mabo decision, the Australian government and judicial system worked to curtail the extent of the rights they had initially promised.

The root of the conflict between the Europeans and the Indigenous peoples of Australia stems from two opposing perspectives on land rights and ownership. The Europeans believed that land was something to be owned and subdued. This perspective came in part from religious motivations – they believed God had given European Christians the right to own the earth (“And God said unto them...replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth” Genesis 1:28 KJV). They saw the land as an asset to be bought and sold, a place upon which to live and develop, something which exists only in its relationship to the people who owned it. Therefore, upon arrival in Australia and seeing no evidence of “dominion” no houses, fences, or agriculture – the Europeans immediately made the assumption that no one owned the land, and that the Indigenous people they saw there were “primitive savages” incapable of recognizing land ownership. The Indigenous worldview was, unsurprisingly, very different. They saw the land as an entity of itself, and one that in a sense “owned” them. As Palyku woman Amberlin Kwaymullina (2005) puts it “Country is much more than a place. Rock, tree, river, hill, animal, human – all were formed of the same substance by the Ancestors who continue to live in land, water and sky. Country is loved, needed and cared for...country is self”. When Indigenous people look at land they see not only country, but also the Dreaming history and the Ancestors, the sacred sites and the bush tucker that sustains them. Therefore, they let country lead them, forming trails and paths in places

Analysing [6–7]

thorough and detailed examination of influences on the recognition of land rights for Aboriginal peoples and Torres Strait Islander peoples

an in-depth understanding of influences on the recognition of land rights clearly supports the analysis

The response supports the misconceived notion of land ownership resulting in the claim of the Crown.

Defining, using and demonstrating understanding [5–6]

thorough and accurate use of terminology

The response interprets *terra nullius*.

The response uses 'diametrically opposed' to convey the vast differences between worldviews.

Analysing [6–7]

thorough and detailed examination of influences on the recognition of land rights for Aboriginal peoples and Torres Strait Islander peoples within a historical, social and cultural context

an in-depth understanding of influences on the recognition of land rights clearly supports the analysis

The response analyses the impact of the notion of *terra nullius* on Indigenous peoples' culture, traditions, law and family.

Defining, using and demonstrating understanding [5–6]

comprehensive and appropriate identification of responses and contributions

detailed explanations of relevant responses and contributions

The response identifies and explains the roles of important cases that preceded and influenced the Mabo decision.

where it would not damage existing vegetation, camping in clearings, and following bush tucker with the changing seasons. This close relationship to the land meant that they had no need of visible fencing. Each clan group knew where their boundaries were and cultural protocols meant that these boundaries were strictly observed. These differing perspectives led to what would become the most damaging misconception by the Europeans.

Upon arrival in Australia, the land was declared *terra nullius*, which means "land belonging to no one". This doctrine had been used throughout the 17th century to enable the British, under European law, to claim and colonise land that no other European power had first claimed. Of course, almost all of these lands had occupants on them already, so the term expanded to mean something like "lands without a civilized society" and European common law at the time enabled the settlement of "uninhabited or barbarous lands" (Terra Nullius 2018). Because of the absence of fencing, houses and agriculture Indigenous people were widely seen as being "barbarous" as the absence of visible evidence showing that they had subdued or "dominated" the land meant that their worldview was diametrically opposed to the European Christian worldview at the time. Therefore, the entirety of the eastern seaboard of Australia was claimed for the Crown by Captain James Cook upon his arrival in 1770 under the doctrine of *terra nullius*. Under this law, once the Crown had laid claim to an area it became the absolute owner of that land, leaving no room for the recognition of any other type of landholding. The colonies were initially used as a penal colony, with free settlers starting to arrive in the 1790's. They were granted land by the governor of each colony, and the Indigenous people already living this land were dispossessed, usually by violence (Australians Together 2018). This practice expanded across Australia, culminating in the establishment of 'reserves' into which Aboriginal clan groups were driven in the 1800's and then into Church operated missions (Australian Institute of Aboriginal and Torres Strait Islander Studies 2018). This dispossession shattered Aboriginal family bonds, traditional lore and law, and cultural protocols.

The emergence of native title recognition in 1992 was preceded by a long history of protests and legal cases brought by Indigenous people desperate to reclaim what had been taken from them. Among the most prominent were the Gove land rights case (*Milirrpum v Nabalco Pty Ltd, 1971*) and the Wave Hill Walk Off. In the Wave Hill Walk Off (1966 – 1975), over 200 stockmen walked off the station upon which they had been working. Initially this was a protest for better working conditions, but it became a claim for land rights when the stockmen and their families moved to land near the station and began negotiations with the government for the return of their land, including drawing up maps showing the area of land they wanted returned and going on speaking tours across Australia to raise awareness of their cause (National Museum Australia, 2018). In the Gove case, which occurred in the middle of the 10 year walk off, Justice Blackburn categorically rejected the doctrine of native title. He held that while the Yolgnu plaintiffs may have had a system of law, existing legal precedents meant that he had no

Analysing [6–7]

thorough and detailed examination of influences on the recognition of land rights for Aboriginal peoples and Torres Strait Islander peoples within a historical, social and cultural context

an in-depth understanding of influences on the recognition of land rights clearly supports the analysis

The response analyses relevant cases other than the Mabo case to establish a history of land rights claims that culminated in the Mabo decision.

Evaluating [6–7]

insightful and well-justified evaluation of the extent to which responses and contributions have influenced the land rights of Aboriginal peoples and Torres Strait Islander peoples

The response demonstrates understanding of the importance of various legislation in changing the legal landscape and balance of power in land rights negotiations and claims.

justification supported by assessing and examining influences on land rights using considered reasoning

reasoning is consistently accurate within the evaluation in relationship to the hypothesis established

The response maintains a consistent argument and uses relevant evidence.

Defining, using and demonstrating understanding [5–6]

comprehensive and appropriate identification of responses and contributions

Evaluating [6–7]

justification supported by assessing and examining influences on land rights using considered reasoning

choice but to rule that “native title does not form... and has never formed... part of the law of Australia” (Milirrpum v Nabalco Pty Ltd 1971) He stated that since New South Wales (and by extension the rest of Australia) had become legally part of Crown land, that no land rights could exist without a grant from the Crown which naturally the Yolgnu people did not possess (Milirrpum v Nabalco Pty Ltd 1971) This case was followed by others, all which came to the same conclusion. The Gove case, together with the ongoing Gurindji strike, highlighted the need for legal land reforms across Australia and brought the issue to national and international attention.

It was not until the Mabo case that Indigenous people were able to procure a legal basis for native title and self-determination. Prior to this, all claims were rejected as the courts were unable to rule against the Crown’s existing legal right to hold the land (and each case that did not succeed only strengthened the precedents). However, in 1975 the federal government passed a piece of legislation that would change the legal landscape of native title – the Racial Discrimination Act, which specifically prohibited discrimination based on race. This meant that the Queensland government had no legal basis upon which to claim the Torres Strait Islands, as they had hastily passed an Act of Parliament extinguishing any native title claims the Torres Strait Islanders may have had (Australian Institute of Aboriginal and Torres Strait Islander Studies 2017). In Mabo v Queensland (no.1) the High Court found this Act to be invalid as it conflicted with the Racial Discrimination Act. Had this not been the case, every government in Australia could have passed similar legislation, potentially extinguishing the doctrine of native title permanently.

Mabo v Queensland (no.2) became a turning point in Australia’s history when six out of seven judges in the High Court ruled that the lands of Australia were not terra nullius but did in fact belong to the Indigenous peoples who had lived here for thousands of years ‘according to their own laws and customs’. This was, in the main, due to the evidence of the Mer Islander witnesses, including elders, who provided statements explaining their customs in regard to their land and showed the judges their clan lands and the adjacent seas and the laws that governed this possession. This case successfully proved that the Mer Islanders’ laws and culture were entirely dependent upon their land and the rights and obligations to the land that they had possessed for many thousands of years.

There were five facets of the decision that impacted native title and continue to impact it today. These were that the impacts of settlement were not fixed, that the principle of non-discrimination (as laid out in the *Racial Discrimination Act 1975*) needed to be applied to property rights, that the Crown’s claim to land was not totalitarian, that native title and Indigenous laws and customs should be recognized in law, and that the state had the power to extinguish native title rights (Australian Institute of Aboriginal and Torres Strait Islander Studies 2017). This decision prompted a wave of uncertainty around the nation, as legally a door had been thrown open to a wide variety of judicial responses. This

Analysing [6–7]

an in-depth understanding of influences on the recognition of land rights clearly supports the analysis

Evaluating [6–7]

insightful and well-justified evaluation of the extent to which responses and contributions have influenced the land rights of Aboriginal peoples and Torres Strait Islander peoples within a historical, economic, social and cultural context

justification supported by assessing and examining influences on land rights using considered reasoning

reasoning is consistently accurate within the evaluation in relationship to the hypothesis established

The response uses the details of the decision in Mabo, including the five facets, to evaluate the decision’s impact at the time it was handed down as well as ongoing impacts of the decision for stakeholders.

The response evaluates stakeholder perspectives — individuals, non-Indigenous people, governments, mining companies and Indigenous Peoples.

The response considers the impact on Australian law.

The response makes a logical and considered judgment about the impact of lessening the ‘promise of Mabo’ on self-determination and justice as well as the reduced capacity of Indigenous Peoples to seek or acquire native title over their lands.

Evaluating [6–7]

insightful and well-justified evaluation of the extent to which responses and contributions have influenced the land rights of Aboriginal peoples and Torres Strait Islander peoples within a historical, economic, social and cultural context

led the federal government to pass the *Native Title Act 1993* (Cth) which aimed to provide for the recognition and protection of native title as well as establish guidelines for determining native title claims.

European law now “officially recognize(d) the prior existence of Indigenous people” (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2018 – Land Rights) and future governments now had a pathway to acknowledging the injustices and dispossessions suffered by Indigenous people. However, the decision caused widespread panic among non-Indigenous Australians, who were worried that “large swathes of the Australian continent would be transferred into Aboriginal hands” (Williams, 2017) and the Coalition government under John Howard moved swiftly to pass legislation which would severely limit any claims of native title. The ‘ten-point plan’ led to the amendment of the Native Title Act. This gave state and federal governments more power to extinguish native title rights, made Aboriginal (and Torres Strait Islander) rights secondary to those of non-Indigenous land owners and removed any right of native title over urban areas. (Cromb, 2018). This meant that for many Aboriginal peoples and Torres Strait Islander peoples, the hope of self-determination and justice that the Mabo decision had given them would never be fulfilled.

Therefore, today the fight for land rights is far from over. As Nicole Watson (2019) acknowledges, the Mabo decision has only provided a pathway to self-determination for “some Aboriginal peoples and Torres Strait Islander peoples, in parts of Australia”. One of the major reasons for this is that the judicial system holds the ultimate power to determine whether or not a claim for native title exists, and claimants must “show a continuous observance of traditional law and customs since the British arrived”. (Williams, 2017). Subsequently, the courts and Parliament have ignored the fact that Aboriginal and Torres Strait Islander culture has changed over the past 200 years and instead base their decisions and legislation on “what non-Aboriginal people think Aboriginal laws and cultures should look like...no other culture in the world is expected to exist in a vacuum”. (Behrendt, 2006). In the case of the Yorta Yorta people, for example, Justice Olney found that “the tide of history has indeed washed away...any real observance of their traditional customs” and denied their native title claim. (National Native Title Tribunal, 2017). This hurdle means that many Aboriginal peoples and Torres Strait Islander peoples cannot legally achieve recognition of their native title claims as due to dispossession, dispersal and death across the centuries they cannot prove continuous observance to a court’s satisfaction.

The Mabo case marked a shift in the way native title was viewed in Australia - the Australian government no longer had the sole claim to the land, and were forced to recognise the Indigenous peoples’ competing claims and rights to the land they had possessed for thousands of years. Although the obstacles and hurdles imposed on Aboriginal Peoples and Torres Strait Islander Peoples mean that only some Peoples will successful claim their native title, the notion of *terra nullius* has “lost it’s

justification supported by assessing and examining influences on land rights using considered reasoning

reasoning is consistently accurate within the evaluation in relationship to the hypothesis established

The response considers the implications of contemporary land rights claims and the restrictions imposed by legal interpretation and responses by the Native Title Tribunal.

The response returns to the hypothesis and impact of the Mabo decision.

currency” (Watson, 2019) and without the Mabo case native title would likely not exist in the form that it does today.

Considering, organising and creating [4–5]

a variety of primary and secondary sources is used effectively in response to the hypothesis

succinct, with ideas conveyed logically in relation to the hypothesis devised

genre, language (spelling, grammar, punctuation) and recognised referencing conventions are adhered to, with minimal errors throughout the response

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