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:  

<table>
<thead>
<tr>
<th>Marks</th>
<th>The student work has the following characteristics:</th>
</tr>
</thead>
</table>
| 5–6   | • 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. |
| 3–4   | • 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. |
| 1–2   | • 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. |
| 0     | • does not satisfy any of the descriptors above. |

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:  

<table>
<thead>
<tr>
<th>Marks</th>
<th>The student work has the following characteristics:</th>
</tr>
</thead>
</table>
| 6–7   | • 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. |
| 0     | • does not satisfy any of the descriptors above. |
### The student work has the following characteristics:

<table>
<thead>
<tr>
<th>Marks</th>
<th>Description</th>
</tr>
</thead>
</table>
| 4–5     | • 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.                                                                                                                                                                                                                                                                                     |
| 2–3     | • 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.                                                                                                                                                                                                                                                                                |
| 1       | • 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.                                                                                                                                                                                                                                                                                 |
| 0       | • does not satisfy any of the descriptors above.                                                                                                                                                                                                                                                                                                                                                                                                                                                 |

### 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:

<table>
<thead>
<tr>
<th>Marks</th>
<th>Description</th>
</tr>
</thead>
</table>
| 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 discerning and thorough reasoning  
         | • reasoning is consistently accurate within the evaluation in relationship to the hypothesis established.                                                                                                                                                                                                                                                                                     |
| 4–5     | • 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 generally accurate within the evaluation in relationship to the hypothesis established.                                                                                                                                                                                                                                                                                     |
| 2–3     | • 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.                                                                                                                                                                                                                                                                                                                                                             |
The student work has the following characteristics: | Marks
---|---
• 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 | 1
• statements related to land rights based on a simplistic understanding of influences on these and/or are unclear | 1
• significant inaccuracies and/or irrelevant information throughout the response affect the evaluation. | 1
• 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
---|---
• a variety of primary and secondary sources is used effectively in response to the hypothesis | 4–5
• succinct, with ideas conveyed logically in relation to the hypothesis devised | 4–5
• genre, language (spelling, grammar, punctuation) and recognised referencing conventions are adhered to, with minimal errors throughout the response. | 4–5

• relevant primary and secondary sources used in response to the hypothesis | 2–3
• conveys ideas that are related to the hypothesis devised | 2–3
• genre, language (spelling, grammar, punctuation) and recognised referencing conventions generally adhered to, but with some errors evident throughout the response. | 2–3

• some use of primary and/or secondary sources is evident | 1
• conveys ideas not related to the hypothesis devised | 1
• frequent and/or significant errors in genre, language (spelling, grammar, punctuation) and/or referencing conventions impede communication of ideas. | 1

• does not satisfy any of the descriptors above. | 0
Task

Context

When considering responses and contributions to land rights, Nicole Watson* argues that following the Mabo High Court decision (1992):

The doctrine of ‘terra nullius’ has lost its currency and most jurisdictions now have a legislative mechanism for Aboriginal people to claim ownership of their lands … The emergence of native title in 1992, and the Commonwealth’s acceptance of the Mabo decision, created a foundation for the maturing of relationships between Australian parliaments and Aboriginal and Torres Strait Islander communities.

*Note:
- Nicole Watson (Birri Gubba and Yugambeh) is a solicitor who has worked for the National Native Title Tribunal and the Queensland Environmental Protection Agency.

Task

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 land rights of Aboriginal peoples and Torres Strait Islander peoples. Present your response in an analytical essay.

Sample response

<table>
<thead>
<tr>
<th>Criterion</th>
<th>Allocated marks</th>
<th>Marks awarded</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defining, using and demonstrating understanding Assessment objectives 1 and 2</td>
<td>6</td>
<td>6</td>
</tr>
<tr>
<td>Analysing</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assessment objective 3</td>
<td>7</td>
<td>7</td>
</tr>
<tr>
<td>Evaluating</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assessment objective 5</td>
<td>7</td>
<td>6</td>
</tr>
<tr>
<td>Considering, organising and creating</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assessment objectives 4 and 6</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Total</td>
<td>25</td>
<td>24</td>
</tr>
</tbody>
</table>

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

The Mabo Case is one of the most frequently mentioned events in the history of Indigenous land rights. Whilst it is usually discussed in the context of Indigenous people gaining self-determination, the true importance of this case goes much deeper. Not only did the decision nullify the doctrine of terra nullius as it was applied to Australia, it laid the foundation for a change in the legal way land rights were regarded in Australia and thus meant that the Australian government can no longer merely consider their own interests when it comes to determining land usage, but must also recognize the rights and claims of Indigenous people, as recognized by Nicole Watson when she states that “the doctrine of terra nullius has lost its currency...The emergence of native title in 1992 and the Commonwealth’s acceptance of the Mabo decision created a foundation for the maturing of relationships between Australian parliaments and Aboriginal and Torres Strait Islander communities” (Cadzow et al, 2011). The shift in the legal foundation of land rights meant that the power imbalance between Indigenous people and the Australian government also shifted somewhat, allowing for both Crown sovereignty and native title to co-exist – a change that would not have been possible were it not for the Mabo case.

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...
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 1790s. 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 1800s 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

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<table>
<thead>
<tr>
<th>Framework</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Criterion: Defining, using and demonstrating understanding [5–6]</strong></td>
<td>thorough and accurate use of terminology</td>
</tr>
<tr>
<td></td>
<td>The response interprets <em>terra nullius</em>.</td>
</tr>
<tr>
<td></td>
<td>The response uses terms such as diametrically opposed to convey the vast differences between worldviews.</td>
</tr>
<tr>
<td><strong>Criterion: Analysing [6–7]</strong></td>
<td>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</td>
</tr>
<tr>
<td></td>
<td>An in-depth understanding of influences on the recognition of land rights clearly supports the analysis.</td>
</tr>
<tr>
<td></td>
<td>The response supports the notion of land ownership resulting in the claim of the Crown.</td>
</tr>
<tr>
<td><strong>Criterion: Defining, using and demonstrating understanding [5–6]</strong></td>
<td>comprehensive and appropriate identification of responses and contributions</td>
</tr>
<tr>
<td></td>
<td>Detailed explanations of relevant responses and contributions</td>
</tr>
<tr>
<td></td>
<td>The response identifies and explains the roles of important cases that preceded and influenced the Mabo decision.</td>
</tr>
<tr>
<td><strong>Criterion: Analysing [6–7]</strong></td>
<td>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</td>
</tr>
<tr>
<td></td>
<td>An in-depth understanding of influences on the recognition of land rights clearly supports the analysis.</td>
</tr>
</tbody>
</table>
| | The response analyses relevant
cases other than the Mabo case to establish a history of land rights claims that culminated in the Mabo decision.

Criterion: Evaluating [6–7]

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

The response maintains a consistent argument and uses relevant evidence.

Criterion: Defining, using and demonstrating understanding [5–6]

comprehensive and appropriate identification of responses and contributions

Criterion: Evaluating [6–7]

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

Criterion: Analysing [6–7]

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

Criterion: 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

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
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.

The implications of this were far-reaching, affecting almost every sphere of governance in Australia. For example, it forced the government and the mining industry to recognise that the rights of the Indigenous occupants could no longer be ignored. That they would now have to consider concessions and compromises with Indigenous people, and recognise the implications of policy and practice on the occupants. While the Native Title Act does not grant full rights to the Indigenous occupants and places a number of hurdles in their path to native title claims (including the divisive statement that to claim native title a person must prove they have retained unbroken ties with that land since the occupation – a burden that the Stolen Generation and the ensuing chaos makes difficult [Creative Spirits 2018]) it is important because European law now “officially recognizes the prior existence of Indigenous people” (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2018 – Land Rights) Without said recognition, further legal reforms giving even more rights and justice to Indigenous people would be impossible to achieve. Paul Keating exemplifies this in the historical Redfern Speech when he says, “Mabo is a historic decision... we can make it...the basis of a new relationship between Indigenous and non-Aboriginal Australians” (Galloway, K 2018). It gave future governments a pathway to acknowledging the injustices and dispossessions suffered by Indigenous people.

The fight for land rights is far from over. Today, land rights campaigners are working towards gaining sovereign land rights over their country. These rights would include the right to claim the full value of minerals and resources on their lands, genuine autonomy and long-term planning and development. The government has so far been reluctant to give traditional owners these types of rights due to pressures from the powerful resource industry and from the non-Indigenous voter base (Australian Human Rights Commission 2018). Tony McEvoy, the first Indigenous Australian Queen’s Counsel, says that the current native title system “embeds racism” because if Indigenous people and mining companies cannot come to an agreement about land usage it goes before the Native Title Tribunal. This tribunal almost never rejects mining leases, therefore putting Indigenous people under pressure to concede their land or risk losing any compensation they might otherwise have received (The Guardian 2018). Sovereign land rights would grant Indigenous people the power to determine if mining companies can use their land or not, and continue the legacy of the Mabo case by achieving true independence and self-determination.

While the fight for land rights may not be over, the Mabo case marked an extraordinary shift in the way native title was viewed in Australia. With the legal status of native title now firmly enshrined in law, “the maturing of the relationship between the
Australian government and Aboriginal and Torres Strait Islander people" was inevitable. 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. Without the Mabo case, native title today would likely not exist in the form that it does now.

Note:

Criterion: Considering, organising and creating [4–5]

Throughout the response the following characteristics are evident:

• 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.

Bibliography


Native Title Act 1993 (Cth)


Mabo v Queensland (No 2) [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992)

Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141 (27 April 1971) Supreme Court (NT)

Racial Discrimination Act 1975 (Cth)