Dissecting the commercialisation of Indigenous land

Author and former native title lawyer David Ritter explored the difficulties involved in the Australian native title system in his public lecture given at the Castan Centre in September. Ritter, who recently released the book *The Native Title Market*, sought to paint a realistic portrayal of the agreement and negotiation process.

Ritter marvelled at how quickly things changed in the 1990s. Before then, the concept of native title often seemed naïve and unimaginable. For today's generation, it is difficult to conceive of a time before Mabo, the landmark native title case run by Ron Castan AM QC, after whom the Castan Centre is named. Ritter suggested that Indigenous issues relating to native title were at their most prominent in Australian politics during the mid-1990s. However, since this time such issues have taken a back seat as native title has now settled into a system of negotiation and agreement making. The objectives of this process are to allow for successful agreements to be entered into by all involved parties.

The *Native Title Act*, which was passed in 1993, monetised the relationship between Indigenous people and resource companies seeking to use the land, according to Ritter. This meant that Indigenous groups had the right to negotiate how their land was used. Ritter describes this process as a "virtual shopping centre in which miners, explorers and energy companies purchase their permissions to go on native title land from Indigenous groups acting as vendors".

Ritter argues that, contrary to popular belief, agreement making under the right to negotiate is not particularly alternative; is unconcerned with principles of compensation or interest satisfaction in a broader sense; does not necessarily address Indigenous disadvantage, is disconnected from reconciliation; and rather than necessarily promoting community or solidarity, may actually encourage greater atomization and individualism within Aboriginal communities. However, despite this Ritter maintained that his central objective is not to condemn the native title system, but to steer understanding and debate to the actual *process* by which native title land is traded.

Six questions for: Tania Penovic

What were you doing prior to coming to Monash University?

I worked as a solicitor and yearned all the while to devote myself to something I cared about more profoundly than the outcomes of the commercial disputes I worked on.

What area of human rights law are you most passionate about?

The conferral of hard rights on members of marginalised groups.

You teach torts law… do you find a significant cross-over between torts and human rights law?

Yes. Human rights and tort law share some key objectives and in the absence of a federal bill of rights, a number of victims of human rights violations have addressed the wrongs done to them through torts such as negligence and false imprisonment. Of course, these victories are hard won and can only be enjoyed by those who have ridden the rollercoaster of civil litigation (and usually the appeal process as well). As human rights gain wider acceptance, hopefully with the boost offered by a federal bill of rights, it is likely that tort law and the developing jurisprudence of human rights will be mutually influential. Another important point that we can take from the torts arena is that longstanding common law actions such as negligence are built on notions such as 'reasonable foreseeability' and 'harm' which are no less vague than human rights norms which are regularly mis-characterised as non-justiciable.

You have worked on a number of submissions to government inquiries for the Castan Centre, which has been the most rewarding for you to work on?

The *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* sought to phase out the onshore component of Australia's humanitarian programme. All asylum seekers who reached (or tried to reach) Australia by boat would have been processed in offshore centres such as Nauru. Australia would have ceased to process boat arrivals irrespective of circumstances like the danger they fled, their age or medical condition. After providing a written submission to the Senate committee reviewing the Bill, I appeared before the committee with my colleague Azadeh Dastyari. We were thrilled when the committee recommended that the Bill should not proceed and even more thrilled when it foundered in the face of imminent defeat in the Senate.

What inspired your interest in human rights?

My maternal grandfather was disappeared as a young man in the former Yugoslavia in the kind of circumstances that have occurred repeatedly across the world and still occur today. When my grandmother's life ended 14 years ago on the other side of the world, she died in ignorance as to his fate and with the unrealistic hope that he might still be alive. My cousins in Croatia tell similar stories about events which played out much more recently. International human rights law and the related area of international criminal law have offered a vocabulary for articulating why this kind of situation is intolerable. The need to refine this vocabulary and concomitant legal remedies continues to inspire me.

If you could give students one piece of advice, what would that be?

Don't forget that while following your dreams, you are more likely to succeed with a solid grounding in the kinds of subjects that you might not associate with human rights; constitutional and administrative law, torts and even equity! It may sound dull but it will give you the most solid grounding from which to develop your thinking about human rights!