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<b>Previous Fragment</b>	<p><b>Legal and Constitutional Affairs Legislation Committee - 28/05/2014 - Estimates - ATTORNEY-GENERAL PORTFOLIO - Attorney-General's Department</b></p> <p style="text-align: center;"><b>Attorney-General's Department</b></p> <p><b>CHAIR:</b> I call the hearing of the Senate Legal and Constitutional Affairs Legislation Committee back to order. We have a program—and it is just one program, for those who are confused by it being repeated throughout the day—and it is group 1, group 2 and group 3. We have about eight hours of questioning. As a rough rule of thumb, we will look at about 2½ hours per program. That is not certain, but we will start getting anxious at those times, because people who have questions on group 2 and group 3 would not want to miss out.</p> <p>We have a number of senators who have indicated they want to ask questions on all groups. Bearing in mind that each one is approximately 2½ hours, I thought we might do it in 15-minute segments and then keep rolling around trying to be fair in giving everyone a chance, recognising, with respect to the Greens, that the coalition and the official opposition have perhaps a slightly increased entitlement to questions. Mr Wilkins, once we have finished with a group, the relevant officers can go home. I am sorry we cannot tell the group 3 people that they will not be needed until X, but obviously it will be mid-afternoon at the very earliest.</p> <p>Mr Wilkins : May I say thank you, Mr Chairman. I think that makes life a lot simpler from the department's point of view. I appreciate it.</p>
<p><b>Legal and Constitutional Affairs Legislation Committee (Senate-Wednesday, 28 May 2014)</b></p> <p><b>ATTORNEY-GENERAL PORTFOLIO</b></p> <p><b>Ministry for the Arts</b></p> <p><b>Ms Basser</b></p> <p><b>Senator EDWARDS</b></p> <p><b>Mr Wilkins</b></p> <p><b>CHAIR</b></p> <p><b>Senator WRIGHT</b></p> <p><b>Senator SINGH</b></p> <p><b>Senator MARSHALL</b></p> <p><b>Senator BRANDIS</b></p> <p><b>Mr Lovelock</b></p> <p><b>Australia Council</b></p> <p><b>Senator WRIGHT</b></p> <p><b>Ms Basser</b></p> <p><b>CHAIR</b></p> <p><b>Senator Brandis</b></p> <p><b>Mr Grybowski</b></p> <p><b>Senator SINGH</b></p> <p><b>Senator KROGER</b></p> <p><b>Screen Australia</b></p> <p><b>Senator WRIGHT</b></p> <p><b>CHAIR</b></p> <p><b>Mr Cameron</b></p> <p><b>Senator EDWARDS</b></p> <p><b>Mr Mason</b></p> <p><b>Senator Brandis</b></p> <p><b>Mr Grybowski</b></p> <p><b>Senator SINGH</b></p> <p><b>National Film and Sound Archive</b></p> <p><b>National Gallery</b></p> <p><b>National Museum</b></p> <p><b>National Portrait Gallery</b></p> <p><b>Old Parliament House</b></p> <p><b>Mr Wilkins</b></p> <p><b>CHAIR</b></p> <p><b>Mr Elliot</b></p>	

**Senator KIM CARR:** Minister, I draw your attention to a press release that you issued on 3 December, concerning execution of some warrants by ASIO. I do not want to comment on the merits of the legal matters, which are currently the subject of arbitration proceedings in The Hague and I do not want to comment on the allegations of spying that have been made by the government of East Timor. I do that in the context of a longstanding convention about these security questions. And I am not inquiring into the reasons the warrants were issued against East Timor's lawyers operating here in Canberra, because I understand you did state at the time that there were matters of national security involved. But I do note that Australia has been brought before the International Court of Justice, accused of breaching East Timorese sovereignty and related principles of international law—and the ICJ has made significant interim orders against Australia. The Prime Minister of Timor-Leste described the actions taken by the Australian government as—

**CHAIR:** Do you have a question?

**Senator KIM CARR:** Yes, the question is coming, do not worry. He said:

The actions taken by the Australian government are counterproductive and uncooperative. Raiding the premises of a legal representative of Timor-Leste and taking such aggressive action against a key witness is unconscionable and unacceptable conduct. It is behaviour that is not worthy of a close friend and neighbour or of a great nation like Australia.

Minister, given what has occurred in The Hague and given the statements by the Prime Minister of Timor-Leste, have you or the government since apologised for your actions against the government of East Timor?

**Senator Brandis:** Let me say three things in response to your question. The answer to your ultimate question is no. Secondly, I should say that matters concerning Australia's relations with a foreign state are matters for the Minister for Foreign Affairs and, ultimately, the Prime Minister—not for me to comment on. Although, perhaps, if you want to ask that question next week in foreign affairs estimates, where I will be representing the foreign minister, I will feel able to respond with any additional observations she would wish to make through me. Thirdly, in relation to the operation conducted by ASIO, as you would be aware, I made a full statement to the Senate the day after that was conducted. That statement attracted no criticism or comment from the opposition.

Lastly, may I say that you used the phrase, 'Orders were made against Australia.' That is a little misleading. These were provisional measures or what, in the Australian system, we would call interlocutory orders. They largely, although not entirely, reflected undertakings that I had given to the ICJ in relation to the handling of material taken in those raids. You may not be aware of this, Senator, but it is not at all uncommon—in fact it is very normal—when interim undertakings are given for those undertakings to be converted into orders of the court. These were undertakings freely offered by me on behalf of Australia and they were embodied in orders of the court. To the extent to which the orders of the court reflected the undertakings I had voluntarily given to the court, it is something of a mischaracterisation to say that they were orders made against Australia. They were, effectively, orders Australia consented to. That is not the case in relation to all of the orders, I am at pains to point out, but it is the case in relation to most of it.

**Senator KIM CARR:** You made a couple of points that I want to take up, Minister. First, in

regard to the jurisdictional issue about whether it is this committee or another committee, I will ask you: since the International Court of Justice was established in 1945, how many times has Australia appeared as a respondent in a substantive hearing before the court in The Hague—that is, to answer an allegation of breaches of international law? That is surely a matter for this department.

**Senator Brandis:** I will take that question on notice.

**Senator KIM CARR:** I do not have your legal training, but I am a student of history—and I do not recall us having to appear in the manner in which we had to appear this year.

**Senator Brandis:** As I said, I will take that question on notice. I want to make sure that the answer to the question you have asked is carefully considered.

**Senator KIM CARR:** I put it to you that this is the first time that Australia has been named as a respondent.

**Senator Brandis:** I have taken the question on notice.

**Senator KIM CARR:** My understanding is that this is the first time Australia has appeared concerning allegations of this type.

**Senator Brandis:** This case raises issues which, I am advised, have not been raised in other proceedings before the International Court of Justice or other international tribunals. Assuming that advice to be correct, what you say is correct—but it is also correct to say that, because this is the first case that has ever raised some of these issues, it is the first time any country has appeared to respond to those issues.

**Senator KIM CARR:** It is quite an achievement, isn't it, and an historic precedent—the embarrassment for this nation you have been able to achieve in the first few months of your term in office?

**Senator Brandis:** By the way, I can respond to your earlier question that I said I would take on notice. The answer to your question is no. This is a matter in which Australia is defending a suit brought by a foreign state. Australia is defending this suit, as you would expect, to protect Australia's national interests. No doubt the government of Timor-Leste is bringing this suit in the prosecution of what it believes to be its national interests. I do not think that it is appropriate for me to comment on the merits of a dispute in which Australia is involved, nor do I think, if I may say so, it is wise for you to do so.

**Senator KIM CARR:** I am just making the point about precedent here. Australia, it is my understanding, has actually been named as a respondent in earlier cases—the Nauru case in 1989, which was settled prior to substantive hearings, and the East Timor case brought by Portugal, which did not proceed because Indonesia chose not to appear. This is the first time that this has occurred under these circumstances. Therefore, I am saying to you that it is quite an achievement for you, Minister. It is quite an achievement, indeed.

**Senator Brandis:** In your question you identified two previous matters in which proceedings were commenced against Australia. They did not proceed to an ultimate determination. This case has not proceeded to a final hearing either. Occasionally, under international law, nations have disputes. That is why the international legal system exists. Any government of the day, regardless of its political complexion, will respond appropriately to protect Australia's national interests.

**Senator KIM CARR:** You mentioned the interim orders. My understanding is that there were quite substantial margins in the interim orders of the court of 12-to-four and 15-to-one majorities. Specifically—and you would agree with this, wouldn't you?—it was determined that:

By twelve votes to four,

Australia shall ensure that the content of the seized material is not in any way or at any time used by any person or persons to the disadvantage of Timor-Leste until the present case has been concluded ...

Also:

By twelve votes to four,

Australia shall keep under seal the seized documents and electronic data and any copies thereof until further decision of the Court ...

And:

By fifteen votes to one,

Australia shall not interfere in any way in communications between Timor-Leste and its legal advisers in connection with the pending *Arbitration under the Timor Sea Treaty of 20 May 2002* between Timor-Leste and Australia, with any future bilateral negotiations concerning maritime delimitation, or with any other related procedure between the two States, including the present case before the Court.

In a press release of 14 March this year you described this as a good outcome for Australia. How could you possibly regard that as a good outcome for Australia?

**Senator Brandis:** Because, as I went on to say in that press release, Senator Carr—I do not have a copy of it before me, but I remember it well—the first two of the three orders to which

you have referred are orders that Australia in effect invited the court to make. You see, documents were taken under warrant by ASIO for reasons with which you do not quibble; but of course an issue then arises as to the handling of those documents in a way that is fair to parties to international litigation. So, in the course of the provisional measures hearing, I offered a suggestion to the court, through counsel, by way of undertakings as to the handling of those documents, and that is how the court accepted those undertakings. Other orders were sought against Australia in those proceedings which were not made. I have spent most of my adult life involved in litigation. Where there is a miscellany of issues in a complex case I know what a win looks like and I know that you do not necessarily win on every point. Just because you do not win on every point does not mean you do not regard the outcome as a successful outcome.

**Senator KIM CARR:** I see. If these undertakings that you made during your course of the mediation were such a great victory for Australia—

**Senator Brandis:** I think it is a satisfactory outcome. Other orders were sought which, in view of the undertakings offered, were not made.

**Senator KIM CARR:** Why did you make those undertakings at the time the raids were initiated on 3 December? Why did you have to wait for the proceedings before the court?

**Senator Brandis:** Senator, you give undertakings to a court in proceedings. The issue did not arise.

**Senator KIM CARR:** I see. Given you have said that you know what a win looks like and that you do not win every point, a person of your experience, any competent Attorney-General, would have anticipated the response of East Timor and the international community to the public rage that you authorised. An inevitable diplomatic row would follow from such rage. I wonder whether or not you would now agree that your reaction was, in fact, inept.

**Senator Brandis:** The answer to your question is no. You may not be familiar with the relevant provisions of the ASIO Act, Senator. I have become very familiar with them since I have been the Attorney-General. The Attorney-General is the repository of a statutory obligation to exercise a power, and that power is exercised according to certain specified criteria. In my judgment, on the particular occasion when authorisation was sought of me by ASIO I was satisfied that the grounds for the exercise of that power were clearly made out. It was not a borderline case. They were clearly made out for the purpose of protecting Australia's national security. So I exercised my statutory power, as I ought to have done, on the basis of the material that was presented to me. You say that there was a reaction from the international community. There has been a reaction from the East Timorese government. Senator Carr, you should not conflate the judgment of a majority of the International Court of Justice with the reaction of the international community. The judges of the International Court of Justice, like judges at any other court, do not speak for executive governments; they do not represent the opinion of the international community.

**Senator KIM CARR:** Minister, I cannot comment on what nature of the national security issue was.

**CHAIR:** Do you have a question?

**Senator KIM CARR:** My question is this: how do you respond to the charge that your actions have not only damaged our relationship with East Timor but also seriously embarrassed Australia internationally?

**Senator Brandis:** My response to that is that it is arrant nonsense. For an Attorney-General to appropriately exercise powers invested in him under the ASIO Act, on the application of ASIO, in a clear case of protecting Australia's national interest, is not only what the Attorney-General should do but what any competent Attorney-General invariably would do.

**CHAIR:** Has Mr Collaery taken some action? Is he a plaintiff or a respondent in any action?

**Senator Brandis:** I do not want to be a commentator on the case, but Mr Collaery is an agent, or a lawyer, for East Timor and I understand that he also represents himself to be the legal representative of an individual person who is known in these proceedings as witness K. There are issues which I do not want to go into at the moment about the various capacities in which Mr Collaery is an actor in these proceedings.

**CHAIR:** I was wanting to know if there are any legal proceedings afoot and, if so, where are they at?

**Senator Brandis:** I see. There are two legal proceedings afoot. There are the proceedings about which Senator Carr has asked me some questions, before the International Court of Justice. They are governed at the moment by the interim orders, as you and I would know them, or what the ICJ calls provisional measures, which Senator Carr read though apparently did not understand. Then there are related proceedings without reference to which the context of the ICJ proceedings cannot properly be understood. Those are proceedings in an arbitration between Australia and East Timor. The issues are complex but essentially the arbitration concerns the treaty between our two nations which governs rights of exploration in an oil and gas field in the Timor Sea, and in particular the delimitation of the maritime boundary, which is the big question in issue.

**CHAIR:** But there are no cases in Australian courts about ancillary matters involving this issue?

**Senator Brandis:** No.

**CHAIR:** This has nothing to do with anything and it is meaningless, but there was a Mr Collaery who was a Labor minister in the ACT government—is this the same Mr Collaery?

**Senator Brandis:** I know that Mr Collaery was at one time some years ago the Attorney-General of the ACT; whether he was a Labor Party politician or an Independent I am not sure. I suspect we are thinking of the same person.