

THE SATURDAY PAPER

NEWS

The government's use of harsh national security laws to pursue Bernard Collaery and Witness K is the latest cynical act in its dealings over Timor Sea mining rights. By *Mike Seccombe*.

The dark politics of the Timor spy case

Then foreign minister Alexander Downer's "birth of a nation" media statement of May 15, 2002 was an extraordinary exercise in hyperbole.

It ran to 2640 words, comprising in roughly equal measure fulsome congratulations to the people of Timor-Leste on the occasion of their independence from Indonesia, and smug self-congratulations for the role Australia, and he in particular, played in the process.

There was nary a hint of his past disdain for struggling developing nations, or "busted-arse countries", as Downer had previously called them.

Instead he laid on the celebratory rhetoric with a trowel, saying how "gratifying personally" it was to have helped steer Timor-Leste to nationhood. Downer addressed concern that "the progress we have made is not compromised by lack of resources or commitment" and promised that Australia would continue to work closely with Timor-Leste, the United Nations and other donors "to ensure the people of East Timor can build for themselves a peaceful and prosperous future".

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Those words have rung ever more hollow down the years, as we've learnt more about the faux altruism that motivated the Howard government's support for Timorese independence from Indonesia. The government's preferred position was that Timor-Leste remain part of Indonesia, and it was only a matter of circumstance – specifically the overwhelming vote of the Timorese in favour of independence in a referendum and the brutal response of the Indonesian security forces – that pushed Australia and the broader world community towards doing the right thing.

More damningly, we know that even as Downer promised Australian support towards that prosperous future, his government was engaged in what former New South Wales director of public prosecutions Nicholas Cowdery, QC, has described as a “conspiracy to defraud” the impoverished new nation of its most prospective source of revenue – the oil and gas reserves beneath the Timor Sea. To that end we know that our government subsequently ordered an act of espionage against the new Timorese government by Australia’s spy agency, the Australian Secret Intelligence Service (ASIS).

Even now, 16 years on from Timor-Leste’s independence and Downer’s statement, and 14 years since the government ordered ASIS to install listening devices in Timor-Leste’s ministerial offices, the ruthless expediency continues under another conservative government.

Last week it was revealed, under cover of parliamentary privilege by independent MP Andrew Wilkie, that the Commonwealth director of public prosecutions had filed charges on national security grounds against two people for having exposed the fact of the bugging.

They are a former head of technical operations for ASIS – identified only as Witness K – and his lawyer, Bernard Collaery, a former deputy chief minister and attorney-general of the ACT.

Specifically, it is alleged that during a five-year period, between about May 1, 2008 and May 31, 2013, the pair conspired to commit an offence against section 39 of the *Intelligence Services Act 2001*, which prohibits the unauthorised disclosure of information about ASIS activities. It is further charged that, by subsequent actions in December that year and March 2014, they breached Section 39.

The first directions hearing is due to be held in the ACT Magistrates Court on July 25, where the government will push for the case to be decided in secret. Collaery and Witness K face up to two years’ jail time.

“Basically, what the government is trying to do is prosecute people for revealing its own crimes,” says Clinton Fernandes, a professor of international and political studies at the University of NSW, and a former intelligence agent himself. He is just one of many with deep knowledge of the whole saga who is outraged by the decision to pursue prosecutions in this case.

But to understand the government’s recent actions – peculiar and worrying as they are – it’s necessary to look at Australia’s history of duplicitous dealings with Timor-Leste.

The signs were there in Downer’s “birth of a nation” statement that he and the Howard government might not be entirely motivated by altruism in their support of the new state, though they were disingenuously phrased and buried halfway through the speech.

“Australia and East Timor have reaffirmed their commitment to the joint development of Timor Sea petroleum resources, recognising in particular the crucial importance of these resources in promoting East Timor’s economic development,” said Downer.

In truth, his greater concern was with Australia’s economic interest, and with grabbing as big a slice of the revenues from the oil and gas as possible. This was apparent in a couple of actions.

One, acknowledged in the Downer statement, was the fact that the week before formal independence he, along with the prime minister, the treasurer and industry minister, had met with the incoming Timorese chief minister, Mari Alkatiri, to discuss a new Timor Sea treaty. They were pressing for it to be signed within days.

The other thing, not mentioned in Downer’s statement, was that a few months before Timorese independence Australia withdrew from the maritime boundary jurisdiction of the International Court of Justice and the International Tribunal for the Law of the Sea.

This was done for a simple reason – the government was concerned about what an international umpire might decide if asked to adjudicate on the competing claims of Australia and Timor-Leste to those undersea oil and gas resources.

The problem was that the 200 nautical mile economic zones of Timor-Leste and Australia overlap. Even before Timorese independence, it was a matter of dispute where the boundary should be drawn.

Precedents set under those international agreements from which we withdrew would dictate the matter be simply resolved by drawing the line at the midpoint between the two claimant states. But that would have left the vast fossil fuel reserves on the Timorese side. And the Australian government wasn’t having that.

In a reversion to bullying form, Downer made it clear at a meeting in November 2002 that either the deal would be on his terms or there would be no deal.

As quoted by Paul Cleary, an adviser to the Timorese during negotiations and author of the book *Shakedown: Australia’s Grab for Timor Oil*, Downer thundered: “We don’t have to exploit the resources. They can stay there for 20, 40, 50 years. We don’t like brinkmanship. We are very tough. Let me give you a tutorial in politics – not a chance.”

And so Timor-Leste was strongarmed into signing up to a 50–50 split, under the January 2006 Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS). This was a welcome development for corporate interests eager to tap the resources and notably the major consortium led by Woodside Petroleum.

But if the government and the oil companies were happy, the ASIS officers were not. This has been confirmed by various sources, including Fernandes – who previously worked in Timor-Leste, and maintains good sources to this day.

The Bali bombings had happened in 2002, followed by a bombing at the Australian embassy in Jakarta in 2004. Howard and Downer were vigorously reassuring the Australian people that our intelligence resources were focused on the threat posed by Jemaah Islamiyah terrorists.

Except the ASIS agents in Dili knew they weren't, which left them "nonplussed", as Fernandes puts it.

"These ASIS guys were taken out of the war on terror and deployed to Timor for purposes of corporate counterespionage. This caused bewilderment inside ASIS," he says.

"But what turned bewilderment to anger, what made K come out, was when they learned about Downer and Calvert's work with Woodside."

He is referring to the late Ashton Calvert, former head of the Department of Foreign Affairs and Trade, who jumped from that role straight into a directorship of mining giant Rio Tinto in January 2005, and then in August that year to the board of Woodside.

In 2011 and 2012, Downer also worked advising Woodside.

In his speech to parliament last week, Wilkie decried as "scandalous" those relationships between the public servants and "the main financial beneficiary of the ASIS operation".

The Saturday Paper is not suggesting Downer acted inappropriately.

The suggestion that it was anger over the nexus of politics and business that motivated Witness K is not new. Four years ago, in March 2014, in a piece for *The Saturday Paper*, Jonathan Pearlman asked Downer about it, and duly recorded the former minister's denial that his position at Woodside was in any way a conflict.

"HE'S TRYING TO MAKE HIMSELF OUT TO BE A RUBBER STAMP. THAT'S BULLSHIT."

"This was years later," Downer said. "They [Woodside] wanted advice on East Timor's position. There was no conflict of interest. I knew about the issue because I was a minister. Did Woodside say to me during the negotiations, 'If you get this treaty up, we will give you a job in the future?' Of course they didn't."

Downer also denied knowledge of the ASIS operative now known as Witness K.

"I don't know who he is. I don't know what his issues are. I don't care what he thinks," he said. "You didn't have to spy on East Timor to find out what their position is. This is all complete hogwash."

On December 3, 2013, officers with Australia's domestic intelligence agency, the Australian Security Intelligence Organisation (ASIO), conducted raids on the home and office of Collaery and seized documents and data. They also swooped on Witness K, and took his passport.

The irony is that by the time ASIO acted, Australia's espionage in Timor-Leste was no secret. Far from covering up Australia's spying, the raids only served to make it bigger news.

"ASIO officers have allegedly detained a man and raided the office of a lawyer who claims that Australian spies bugged the cabinet room of East Timor's government during negotiations over oil and gas deposits," began the story in *The Sydney Morning Herald* that day.

It went on to note: "The current director general of ASIO, David Irvine, was head of ASIS when the alleged bugging operation against East Timor took place."

All the major media explained the context: that the Timorese were angry about having been spied upon, that they had gone to the Permanent Court of Arbitration in The Hague claiming the espionage should render the treaty unlawful, and that the raids were an attempt to impede the arbitration process.

After a great deal of international legal to-ing and fro-ing, the government eventually gave back the seized material, and this March Australia and Timor-Leste reached agreement on a new deal over the maritime border and the sharing of revenue from oil and gas, substantially more favourable to Timor-Leste.

Given all of this was known, the events of the past week raise a number of questions: first, why on earth would the government proceed with the case against Collaery and Witness K now, after a five-year hiatus? Why not simply put this embarrassment behind it?

Attorney-General Christian Porter has said only that the decision was taken by the Commonwealth director of public prosecutions, Sarah McNaughton, SC – who was appointed in May 2016, having previously worked for the government as senior counsel assisting the Royal Commission into Trade Union Governance and Corruption.

And that, says Greg Barns, barrister and president of the Australian Lawyers Alliance, is really no explanation.

“The prosecution required Porter’s consent. He has a discretion. If the attorney-general, as the first law officer of the nation, thinks the DPP has worked outside guidelines or not and acted in the public interest, then he or she can say, ‘I’m not going to sign off on this.’

“He’s trying to make himself out to be a rubber stamp. That’s bullshit.”

In his speech to parliament, Wilkie suggested that the government had held off until it had reached its new agreement with Timor-Leste and that “with the diplomacy out of the way, it’s time to bury the bodies”.

Dr Keiran Hardy, of Griffith University, notes that this prosecution coincided closely with the passage of new, tougher espionage laws, and the conjunction of events signals the government’s preparedness to go in even harder in future.

“The new espionage offences contain a really broad definition of ‘dealing with’ information, whereas in the past we were talking about ‘communicating’ information, perhaps through an article or something. That’s much tougher.

“The second concern is a very broad definition of national security. In the past espionage law has been more about security and defence. Now the definition encompasses economic matters. That suggests trade negotiations or negotiations over treaties could fall within the new definition.”

Professor David Dixon, of the University of NSW Law School, picks up on that point, and notes also that the government appears to have been selective in the way it has laid the charges in this case.

“It’s notable the people named in the charges [as having communicated with Collaery] are ABC journalists. But the reporter for *The Australian* who first ran with a story quoting Collaery is not,” he says.

A number of others, including the ABC’s *Media Watch* and Greens senator Nick McKim, have made the same observation. McKim questioned whether the prosecution was constructed to “protect certain media organisations that might be sympathetic to the government”.

Dixon points out that those named reporters might be vulnerable under the new laws.

“If they are in possession of material ... if Emma Alberici, for example, still had information in her filing cabinet, she could theoretically be charged under the new legislation.”

Dixon says: “It’s like a warning.”

And that is perhaps the best summation of the government’s action. It’s a warning that the government will not be crossed, even when it has acted outrageously and illegally. It remains determined that no act of decency will go unpunished.

It reminds Dixon of a 1984 case in Britain in which a senior civil servant in the Ministry of Defence, Clive Ponting, sent damaging documents relating to Britain’s sinking of the Argentine warship *General Belgrano* to a Labour MP. Ponting was subsequently charged with having breached the *Official Secrets Act*.

His defence at trial was that he had acted in the public interest, but the judge in the case directed the jury to ignore that, saying “the public interest is what the government of the day says it is”.

The jury acquitted Ponting anyway.

“What we want,” says Dixon, “is a jury that does what the jury did in the Ponting case.”

Fond hope.

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