

## "Be honest for once": cost of secret trials rises as Government covers-up Timor spying fiasco

*Rex Patrick in Michael West Media, 17 Sept. 2022*

The Timor-Leste secret spy trials are not over, with costs already \$5m and rising, **Rex Patrick** writes the Government will be back in court spending more public money trying to censor one of the former Chief Justice's decisions to keep secret the finding of the Court that the spying operation took place.

Court proceedings relating to Bernard Collaery blowing the whistle on a conspiracy to defraud Timor-Leste of its oil and gas by spying on the Timorese sea boundary negotiating team are over. Yes?

No!

\$5,421,115 of taxpayers' money has been spent, but there's more cost to come. Secret trials have occurred, but they're not over yet.

On 23 September the Government will be back in the ACT Supreme Court spending taxpayers' money trying to censor one of the former Chief Justice's decisions to keep secret the finding of the Court that the spying operation took place.

Everyone in Australia, Timor and the International community knows happened, did take place. Yet the Department of Foreign Affairs and Trade, the Department joined at the hip to the Australian Secret Intelligence Service, still want to maintain that they can neither confirm or deny it.

This is despite the new Timorese President, Jose Ramos-Horta, and influential leader, Xanana Gusmao, having given sworn testimony in Australian proceedings that the continued secrecy about the whole sordid affair continues to cause harm.

*"Continued secrecy creates a sense of suspicion and impropriety can cannot remain a feature of our good neighbourly relations,"* deposed Gusmao.

Apart from the fact that we don't prosecute people in Australia for revealing fictitious operations, evidence in various proceedings in courts and tribunals confirm that the spying took place.

For a first time, the case is laid out.

According to the [Memorial of Timor-Leste](#) filed in the International Court of Justice:

*"The substantive terms of the 2006 Treaty were negotiated during formal rounds of talks between Australia and Timor-Leste, between April and October 2004 ... (Memorial Paragraph 2.30).*

*During the negotiations Australia covertly spied on the Timor-Leste negotiating team by means of listening devices surreptitiously and unlawfully placed by Australian Government personnel in the Timor-Leste government offices. This enabled the Australian negotiating team to become aware of the private discussions of the Timor-Leste negotiating team and of its position in relation to various issues arising in connection with the 2002 Treaty and the attempt to amend it by the drafting of the 2006 Treaty (Memorial Paragraph 3.4 – 1.3)*

The 2006 Treaty was signed by both States on 23 February 2007.

At some point Timor-Leste became aware of the spying.

On 23 April 2013, after unsuccessfully approaching the Australian Government in response to the spying, Timor-Leste served an Arbitration Notice on Australia. They were taking Australia to the Permanent Court of Arbitration (PCA).

On 3 May 2013, in response to the legal proceeding being commenced, the then Foreign Minister, the Hon Bob Carr, and the then Attorney General, Mark Dreyfus, issued a [joint media release](#) that stated:

*The arbitration relates to the validity of the CMATS treaty. Timor-Leste argues that CMATS is invalid because it alleges Australia did not conduct the CMATS negotiations in 2004 in good faith by engaging in espionage.*

*These allegations are not new and it has been the position of successive Australian Governments not to confirm or deny such allegations.*

## **Bernard Collaery trial**

On 3 December 2013, as the PCA proceedings were progressing, the Australian Security Intelligence Organisation (ASIO), executed a search warrant on the offices of Timor's legal representative, Bernard Collaery, and the home of Witness K, and wrongfully seized legal documents related to the arbitration.

*The documents seized included earlier versions of an affidavit made by Witness 'K', a former officer of the Australian Secret Intelligence Service, and a client of Collaery Lawyers. The affidavit describes the covert bugging in 2004 of the Timor-Leste Cabinet room on the instructions of the Australian authorities. This affidavit was the key evidence in the Timor Sea Treaty Arbitration. (Memorial Paragraph 4.12)*

The improper seizing action by the Australian Government gave rise to a second set of legal proceeding in the International Court of Justice (ICJ).

The Australia Government's [Counter Memorial](#) confirmed in those ICJ proceedings confirmed it was all about a spying operation:

*The facts on which the current dispute turns clearly show that the acts of Mr Collaery and one of his clients, known as 'K', constituted an unauthorised disclosure of Australian national security information, which posed serious threats to Australian lives and national security (Counter-Memorial Paragraph 3.3).*

*As set out above, items LPP012 and LPP014 have each been described by Timor-Leste as 'the draft of a statement of a third party taken for legal proceedings involving Timor-Leste'. Based on this information, and the titles of the items, it is reasonable to conclude that these items are drafts or final versions of the affidavit of 'K' submitted by Timor-Leste in the Arbitration. It follows that those items are each documents which purport to contain national security information unlawfully disclosed by 'K', and are therefore the product of a criminal offence (Counter-Memorial Paragraph 4.54).*

Australia's line of defence in the ICJ centred about its rights as a State, and argued that the seizing of the documents involved an exercise of territorial sovereignty over an Australian national to protect Australia's national security. Australia claimed that they were pursuing criminal offences established under Australian law, including sections 39 of the Intelligence Services Act 2001.

During these ICJ proceedings the Australian Government did not dispute that the spying took place.

As a result of the ICJ proceedings the seized documents were returned to Timor-Leste and unprecedented orders were made to the Australian Government:

*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.*

The original proceedings in the PCA were eventually discontinued, and the two countries reached agreement on a new treaty.

Subsequent to the new Maritime Boundary Treaty being signed, charges were brought against Witness K and Mr Collaery.

The charges against Witness K are described in the summary of facts in the Magistrates Court of the ACT.

*Witness K has pleaded guilty to the offence of conspiracy to communicate ASIS information between about 1 February 2013 and 20 November 2013 in the Australian Capital Territory and/or elsewhere contrary to section 11.5 of the Criminal Code (Cth) and section 89 of the Intelligence Services Act 2001 (Cth) ... (Summary of Facts Paragraph 1).*

The charges relate to the spying operation that took place in Dili, Timor-Leste between April and October 2004. The statement of facts confirms:

*On 23 April 2013 the Republic of Timor-Leste instituted arbitral proceedings in the Permanent Court of Arbitration against the Commonwealth of Australia, alleging the negotiated Treaty on Certain Maritime (sic) Arrangements in the Timor Sea (CMATS) was invalid because Australia failed to conduct the treaty in good faith by engaging in espionage. Collaery was involved as a legal advisor to Timor-Leste and the evidence of Witness K was central to the Timor-Leste case.*

*... Also at Witness K's premises in a camera tripod bag in the hallway linen cupboard, a signed copy of an affidavit was found and seized. The affidavit was dated as having been signed on 7 May 2013, and the header read "In the matter of an arbitration between the Democratic Republic of Timor-Leste and the Commonwealth of Australia" ('the May 2013 Affidavit').*

*Witness K used his name in the May 2013 affidavit, identifying himself as a former staff member of ASIS, and the affidavit included information which relates to the performance by ASIS of its functions. The affidavit is generally consistent with the statements later made to the media by Collaery. Witness K made two handwritten amendments to the Affidavit, being an alteration to the date, which was changed from the 6th of May 2013 to the 7th of May 2013, and an alteration to his address on page 1. Witness K signed the affidavit on 7 May 2013. Collaery signed the Affidavit as a witness to Witness K signing the document..*

*On 20 November 2013 Witness K signed a further affidavit ('the November 2013 affidavit'). This affidavit was a further version of the May 2013 affidavit. Collaery signed the affidavit as a Witness to Witness K signing the document.*

*It is alleged that Collaery and Witness K conspired to communicate information which relates to the performance by ASIS of its functions to the government of Timor-Leste (Count 1.).*

Through the statements of Governments across multiple legal proceedings, the dots are joined. It's beyond reasonable doubt that the spying operation occurred.

Yet the Australian Government is happy to spend more of our money to trying to censor a Court of Appeal Judgement that went against the Government. It is likely that it reasonably finds the spying took place.

The Government had taken the censorship issue to the High Court, but the High Court wasn't having a bar of it.

Having withdrawn its application to the High Court the new attorney is allowing a further application before a new ACT Chief Justice to go ahead to redact passages in the judgement. The Government has now turned back to the ACT Courts; a court which seem to be a paid arm of Government when it comes to burying its dirty little secrets.

I don't say that lightly – I've read all of Justice Mossop's judgement in the Collaery persecution. I've also read the Independent National Security Legislation Monitor's report into the secret charging, arraignment, conviction, sentencing and serving of a jail term of Alan Johns. Whilst Grant Donaldson SC is careful not to criticise the courts, what you read between the lines is absolutely scathing of the judicial institution.

Most Australians are highly embarrassed about our conduct towards Timor-Leste. Many Australians are rightly concerned with the increasing propensity of the closing of our courts.

Attorney-General Mark Dreyfus, whose signature authorises the ongoing court action, needs to rise above all the desire of officials to keep past dirty laundry secret. He should end the proceedings and allow the truth out. How about, for once, the Australian Government just be honest about this?