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Citing fear of upsetting Indonesia, the government has unsuccessfully attempted to suppress reasons for sealing documents related to Timor Gap negotiations. By *Karen Middleton*

Exclusive: Government tried to suppress Timor ruling

Former senator Rex Patrick with Grata Fund executive director Isabelle Reinecke.

The whistleblower lawyer at the heart of the Witness K case has accused government lawyers of abandoning professional and ethical standards, after they obtained an advance copy of an unpublished legal decision and tried to have it withheld and sections suppressed for fear it would damage relations with Indonesia.

Bernard Collaery is accusing lawyers in the office of the Australian Government Solicitor (AGS) of not upholding the same standards that are required in private legal practice.

His comments come after the Commonwealth's legal advisers persuaded the Administrative Appeals Tribunal (AAT) to let them vet an information-access ruling involving the National Archives of Australia before it was released to the applicant, former independent senator Rex Patrick.

The government sought to have the decision withheld from Patrick while it argued for redactions, based on fears some parts could harm ties with Indonesia. The material related to historical negotiations with Timor-Leste over oil and gas resources in the Timor Gap.

"This cloud has swept over our rule of law and democratic processes," says Collaery, who faced prosecution, later abandoned, for his role in revealing the alleged bugging of those negotiations by Australian spy agencies. "It's highly unusual for a tribunal to give its reasons in advance to one party and not the other. The perception of independence is as vital as actual independence. It can give a very poor perception for litigants to find that a Commonwealth litigant gets to hear issues and results before others."

Patrick had been seeking access to cabinet documents dated in the year 2000 on Australia's negotiations with Timor-Leste. There has been past controversy over whether the territorial boundaries agreed with Timor-Leste were more generous than those with Indonesia. The ruling, including sections the government wanted suppressed, highlights the risk that tensions could " resurface".

In the AAT case, Patrick sought to challenge the National Archives' decision to refuse him access to any of the documents he sought. Under the Archives Act, cabinet documents become publicly accessible after 20 years unless publication could damage Australia's national security, defence or international relations.

As the case reached the tribunal, the National Archives relented and allowed partial access. But it still withheld most documents, arguing publication could damage Australia's international relations.

Patrick says it was clear the original decision was "unsustainable", suggesting the initial process was "flawed".

The sensitivity lies in the subject matter and ongoing Australian government fears – some say unfounded – about how Indonesia might react to any renewed focus on uncomfortable historical events.

In making his original arguments, Patrick's affidavit witnesses included Timorese president José Ramos-Horta, former president Xanana Gusmão and Professor Andrew Serdy, who served in the Sea Law and Ocean Policy section of the Department of Foreign Affairs and Trade (DFAT) through the period of the Timor Gap negotiations.

All three testified that past sensitivities around the negotiations had been resolved. As the case began, the government changed the basis for the refusal, switching its reason from international relations to national security and then back again. Its case relied on expert testimony given in secret by two DFAT officials.

The attorney-general issued a protective certificate under section 36 of the AAT Act, meaning Patrick and his lawyers were not allowed to know the DFAT evidence being presented.

Patrick's request for the secrecy certificate to be revoked was rejected first by Michaelia Cash when she was attorney-general, and then by her Labor successor, Mark Dreyfus.

"Both attorneys had a say in this, and both attorneys declined to allow this matter to be heard in an open tribunal," Patrick says.

"The whole issue of transparency, obligation to truth, and public confidence in the integrity of our courts and tribunals is bound up in this issue."

After two days of hearings, AAT deputy president Peter Britten-Jones rejected Patrick's application.

Ahead of providing his decision and reasons, an AAT officer contacted the AGS with an administrative query. During the exchange, the lawyer asked if the AGS was going to be given an advance copy, to check there was nothing in it that should remain protected.

The officer sent a copy, prompting the AGS to apply immediately for four sentences to be suppressed before it could be sent to Patrick and for the ruling to be withheld from him until the redactions issue was resolved.

Britten-Jones agreed to hear their further submissions and Patrick was notified in the meantime. He objected and asked to make his own submissions and to at least be given a copy of the redaction decision.

Having represented himself during the main hearings, Patrick engaged a barrister and argued that the tribunal had breached its own legislation by not providing the ruling to both parties simultaneously. During a special extra hearing, the barrister argued that without simultaneous release, there is no clear time at which it takes effect.

He also argued that deliberations on such redaction should only occur in proceedings before the tribunal's security division, where there are special legal provisions – rather than the general division, where this was heard.

Britten-Jones indicated he was not inclined to support the government's redaction application. The AGS then withdrew it. Patrick says this proves it was unjustified. He says sometimes names or other details may be removed from a public version of a ruling, by agreement. "But in those instances, both parties were fully availed of the decision reasoning."

The AGS then requested that Patrick be subject to a seven-day gag order on publishing the four redacted sentences, so DFAT could brief foreign counterparts to mitigate "the potential harm of disclosure". It is unclear what, if any, briefings have occurred.

The tribunal agreed and Patrick was sent a complete version.

Having already received the redacted version, he was able to see exactly what DFAT had been so worried about.

The seven-day gag ended on Wednesday this week. The sentences – and the fact DFAT wanted them suppressed – reveal the level of sensitivity around ties with Indonesia and revisiting the fairness of the agreed maritime boundaries and how Australia behaved.

In two of the sentences, Britten-Jones simply notes that the confidential DFAT evidence supports his belief that there is an ongoing risk in publishing details of the historical negotiating strategy.

The second of those is preceded by a sentence that the government did not seek to redact. "In my view, there are reasonable grounds for concluding that disclosure … could cause damage to the international relations of Australia with Indonesia," it reads.

"There is an inherent sensitivity with respect to international relations with Indonesia in circumstances where the maritime boundary fixed between Australia and Timor-Leste is more favourable to Timor-Leste when compared to the maritime boundary between Australia and Indonesia," the contentious section says. "Disclosure of the negotiating positions of Australia vis a vis Timor-Leste would cause those inherent sensitivities to come to the surface with potentially damaging consequences for Australia's international relationship with Indonesia."

In a statement to The Saturday Paper, the AGS said it was "not unusual" for the Commonwealth to receive an advance copy of an AAT decision involving matters of national security where a secrecy certificate had been issued.

"An AGS lawyer has a duty to the [AAT]," the statement said. "That duty extends to assisting the Tribunal to comply with its governing legislation." The statement said it was consistent with that duty to raise the concerns.

Patrick notes that the AGS was unable to provide examples demonstrating that the circumstances were not unusual. "It is very unusual," Patrick says. "And the tribunal conceded that that was unusual."

He says the events raise questions about the tribunal itself. "It is purported to be an independent body," Patrick says. "And the tribunal providing decisions to the government prior to the applicant would create a tremendous apprehension of bias as to the tribunal's independence. Noting there are already concerns about the stacking of the AAT with political appointees, it would create the impression that the tribunal was simply a lapdog of the government."

In a statement to The Saturday Paper, the AAT said that once concerns were raised it was obliged to withhold the decision from Patrick until the redactions issue was resolved "to ensure information was not disclosed to any person other than the Deputy President".

“The AAT’s usual practice when issuing a decision is to send the decision to the parties at the same time,” a spokesperson said. “This did not occur on this occasion due to the officer responsible for sending the decision being called away from their desk prior to the decision being provided to the applicant … The Tribunal considers its actions in addressing the issues that arose in this case to be consistent with the Tribunal’s obligations under the AAT Act, including the requirement to afford both parties a reasonable opportunity to be heard.”

Collaery, who is a former attorney-general of the Australian Capital Territory, says one litigant should never communicate with the decision-maker without the other’s knowledge. “The whole issue of transparency, obligation to truth, and public confidence in the integrity of our courts and tribunals is bound up in this issue.”

He also rejects the concerns about Indonesia. “The issues about Indonesian sensitivity requiring redaction are simply trite and absurd,” he says, insisting the issues are openly debated in Indonesia. “They’re talked about amicably with our Indonesian diplomatic colleagues, and they’re talked about openly among international lawyers, including the good team that Indonesia has.”

He says it illustrates “the continuing propensity of bureaucrats and ministers to use these golden words ‘foreign relations’, to refuse [information] requests, to decline and demand redactions, when it has absolutely no truth in it ... Now we’ve read those lines. How possibly could they have raised a new sensitivity with our neighbour Indonesia?”

Patrick also remains concerned about Britten-Jones’s overall decision that publishing could cause ongoing diplomatic harm – effectively, that the records should never be released.

“I think the history of Australia’s relationship with Timor-Leste needs to be properly told,” Patrick says. “That means that we need to get access to these sorts of documents so that we can understand exactly what went on and particularly in relation to the big contention, the big controversy, and that is the sea boundary negotiations.”

In his ruling, Britten-Jones says that “whilst transparency and openness between countries is at a general level potentially positive in terms of improving relations” he does not consider this would extend to “a country divulging its confidential and sensitive negotiating strategy recorded in official documentation at the highest level of government”.

He writes that while time passing may have reduced those sensitivities, the secret documents remain “potentially damaging” because details of the negotiating strategy and of how cabinet dealt with those issues have never been disclosed.

“Those sensitivities, which existed at the time of the confidential negotiations, would undoubtedly resurface and could cause damage to international relations if the negotiating strategies and legal advice before Cabinet were disclosed.”

Britten-Jones says the risk of damaging Australia’s relationships “applies even where the negotiations have concluded”.

Rex Patrick says that means Australians can never know what was done in their name. “It condemns this part of Australian history to a locked file in the archives forever,” he says. “The effect of the decision is that the history – this part of our history – with Timor-Leste will never see the light of day.”