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CORRECTIONS

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Facsimile: Senate	(02) 6277 2977
House of Representatives	(02) 6277 2944
Federation Chamber	(02) 6277 2944

BY AUTHORITY OF THE SENATE

PROOF

Senator PATRICK (South Australia) (18:43): I rise to respond to the Governor-General's opening speech during this address-in-reply, and I do so with a view to discussing a situation that we have before us that should be of great concern. As we all know, Australia's national interests are best served by a rules based international order. The *2016 Defence white paper* mentioned a rules based order 53 times. The *Foreign policy white paper* put out by DFAT in 2017 mentioned a rules based order 15 times. We need to practise what we preach, otherwise DFAT will become a rather expensive department that has no credibility, and that's not in the national interests. This overriding national interest is the context of my following remarks.

In March 2002, three months before East Timor became an independent state, Australia's then foreign minister, Mr Alexander Downer, withdrew Australia from the maritime boundary jurisdiction of the International Court of Justice and the International Tribunal for the Law of the Sea. That meant East Timor couldn't claim its right under international law to a maritime boundary halfway between the two countries' coastlines. How's that for a rules based international order?

Meanwhile, on 20 September 2002, the Howard government awarded an exploration contract for an area partly on East Timor's side of the median line. East Timor protested but couldn't go to the independent umpire. The government awarded similar contracts in April 2003 and February 2004, also protested by East Timor. Then, in November 2002, Mr Downer warned East Timor's Prime Minister that Australia could hold up the flow of gas from the Timor Sea for decades. He said, according to a transcript of the negotiating records, 'We don't have to exploit the resources. We can stay for here 20, 40, 50 years. We are very tough. We will not care if you give information to the media. Let me give you a tutorial in politics—not a chance.'

In December 2002, the Sunrise project partners, Woodside, ConocoPhillips, Shell and Osaka Gas, announced the indefinite delay of the project, an obvious tactic to pressure East Timor to accept Mr Downer's demands. The bottom line here is that Mr Downer and Woodside wanted to force East Timor, one of the poorest countries in the world, to surrender most of the revenue from the Greater Sunrise project—revenue that it could have used to do much with, including dealing with its infant mortality rate. Currently, 45 out of 1,000 children in East Timor don't live past the age of one. Yet our plan was to deprive them of oil revenue.

It's prudent at this time to mention that one of Mr Downer's senior advisers at the time was a man named Mr Josh Frydenberg. It's relevant to something I will talk about later.

Mr Downer then ordered the Australian Secret Intelligence Service to bug East Timor's negotiations. ASIS installed listening devices inside East Timor's ministerial rooms and cabinet offices under the cover of a foreign aid program, piling cynicism onto callousness. The espionage operation occurred at the same time the Jemaah Islamiyah terror group bombed the Australian Embassy in Jakarta on 9 September 2004, when Mr Downer and Prime Minister John Howard were assuring the public that they were taking every measure against extreme Muslim terrorism in Indonesia.

Introducing another character into the story, Mr Nick Warner was involved in the spying operation. Mr Warner went on to become the head of ASIS and has since been appointed as the Director-General of the Office of

National Intelligence. I also note that Mr Frydenberg was an adviser in the Prime Minister's office at the time of the spying. I will have more to say on that on another day.

Spied on, threatened and unable to seek redress at the International Court of Justice, East Timor signed a treaty in January 2006. This blatantly unfair treaty denied them their right to a maritime border on the median line. It also, in effect, created a permanent regime over the length of the Greater Sunrise project's commercial life. The major beneficiary of this negotiation was Woodside Petroleum. The then Secretary of the Department of Foreign Affairs and Trade, Dr Ashton Calvert, had already resigned and joined the board of directors of Woodside Petroleum. Mr Downer took a lucrative consultancy with Woodside after leaving parliament in 2008. There are also credible rumours of disquiet within ASIS over the diversion of scarce intelligence assets away from the war on terror and towards East Timor.

Aware of Mr Downer's consultancy work for Woodside, Witness K complained to the Inspector-General of Intelligence and Security about the East Timor operation. ASIS took steps to effectively terminate his employment—an outcome that is not unusual for whistleblowers in this country. In response, Witness K obtained permission from the IGIS to speak to an ASIS-approved lawyer, Bernard Collaery, a former ACT Attorney-General. After 2½ years of research, Mr Collaery determined that the espionage operation in East Timor was unlawful and may also have been an offence under section 334 of the Criminal Code of the ACT.

Going to the specifics, the case rested on the fact that the then director of ASIS, David Irvine, ordered Witness K, the head of all technical operations for ASIS, to place covert listening devices in the East Timorese government buildings. Those instructions enlivened the section 334 offence in that it constituted a conspiracy to defraud Australia's joint venture partner, East Timor, by gaining advantage through improper methods when the Commonwealth was under a legal obligation to conduct good-faith negotiations.

The events that followed are well known. The East Timorese took Australia to the Permanent Court of Arbitration, which saw Australia eventually agree to renegotiate the treaty. That was an acknowledgement that the operation had occurred. As part of those proceedings, Witness K was to give evidence in a confidential hearing. David Irvine—that's the name I introduced a moment ago—in his subsequent role as Director-General of ASIO, organised raids on the homes and offices of Bernard Collaery and Witness K on 3 December 2013. At the same time the raids occurred, the Australian government revoked Witness K's passport. We know from inquiries made at estimates last year by then Senator Xenophon that the competent authority in law advising the foreign minister on Witness K was not the AFP or ASIO, as you would normally expect. Rather, it was ASIS, headed by a somewhat conflicted Nicholas Warner, noting his involvement in the original illegal bugging operation.

The day after the raids, former Attorney-General George Brandis came into this Senate chamber and threatened criminal prosecutions for 'participation, whether as principal or accessory, in offences against the Commonwealth'. I've recently found out through Senate estimates that the AFP received a referral from ASIO about this matter on 13 December 2013. The AFP began its investigation on 10 February 2014, a few months later. One year later, on 18 February 2015, the AFP gave a brief of evidence to the Commonwealth Director of Public Prosecutions. The result? Nothing. Zip. Nada—until now.

In May 2018, three years later, and just after the Joint Standing Committee on Treaties finally held public hearings on the Timor Sea Treaty, the CDPP filed charges. Sarah Naughton SC from the CDPP really has to explain this interesting timing. Did she and her predecessor hold off until diplomacy was out of the way? And that's not all she has to explain. Amongst the charges before the ACT court—this is public domain information—are conversations Collaery is alleged to have had with a number of ABC journalists and producers: Emma Alberici, Peter Lloyd, Connor Duffy, Marian Wilkinson and Peter Cronau. In fact, the first time this was reported in the press, the journalist responsible was Leo Shanahan on 29 May 2013 in *The Australian*. Shanahan quoted Collaery directly as saying:

Australia clandestinely monitored the negotiation rooms occupied by the other party ...

... ..

They broke in and they bugged, in a total breach of sovereignty, the cabinet room, the ministerial offices of then prime minister ... and his government.

But Leo Shanahan wasn't mentioned on the charge sheet. Only the ABC journalists were. Is she trying to protect him because she's hoping to get friendly coverage of a case from his employer, *The Australian*? Is she going after the government's perceived enemies at the ABC? The prosecution requires the consent of the Attorney-General, Mr Christian Porter. Mr Porter consented, claiming on 28 June this year that all he did was agree to an independent decision by the CDPP, but as the Attorney-General he is no cipher. He is well aware he has the power to decline prosecution, for example, by questioning the general deterrent value of such court action. What is the

utilitarian value of such a prosecution this former lecturer at the University of Western Australia could have asked?

Relevant to this, on 1 July, three days after the Attorney's press release acknowledging his consent, Niki Savva, former senior adviser to Prime Minister John Howard and Treasurer Peter Costello and now journalist and commentator, said on ABC's *Insider*:

I just think it's very fraught, the whole thing, because from my understanding, George Brandis had asked for an additional piece of information from the CDPP on this issue which fortuitously or not landed on Christian Porter's desk when he took over with a very strong recommendation to prosecute. So I think if Porter had ignored that and it had subsequently come out, then he would have faced a lot of grief so I don't think he had any choice but to proceed. So everything hinges now on the court case.

This extraordinary statement cries out for an explanation. How would Niki Savva know what Brandis had asked the CDPP for and whether it had been provided to Porter and when or what the CDPP's brief contained? Is there a leak? Did Attorney-General Christian Porter leak the contents of the brief to Niki Savva either directly or through an intermediary or did the CDPP leak it? One thing we do know is that Ms Savva made the remarks and we know she's not a fantasist.

My colleague in the other place Andrew Wilkie referred Niki Savva's statement to the AFP the next day, on 2 July. They wrote to him on 18 July and said they couldn't accept the matter but would reassess if he provided more information. Of course, this is something that's very difficult to do. I asked some questions on notice to the Attorney-General last month and got a rather uninformative response, which I've subsequently written to him about. I'm curious to know why the AFP did not, at the very least, make a few calls to the A-G's department. Surely the A-G would respond properly to a preliminary investigation by the AFP. It's a question I will ask the AFP at our next estimates.

Moving along, I, along with Mr Wilkie and my Senate colleagues Senator McKim and Senator Storer, also asked the AFP to investigate the original conspiracy to defraud the government of East Timor under section 334 of the Criminal Code of the Australian Capital Territory. The AFP advised us that, should further material become available indicating Commonwealth offences were being committed, the AFP will reassess the matter. This is a catch-22 situation if I ever saw one. Clearly, the details of Mr Downer's alleged conspiracy to defraud the government of East Timor are unavailable to people outside the principal alleged conspirators. How are we meant to get those details? There's a prima facie case of a section 334 violation, patently so because Witness K is an amenable witness. It's up to the AFP to request an interview with Witness K himself.

Intelligence officers are not above the law. We know this from a number of cases, including the High Court case of *A v Hayden*, also known as the ASIS case. The AFP advised me on 3 August this year that they have no jurisdictional issues investigating crimes committed by intelligence agencies, so why haven't they? Perhaps the relations with Minister Frydenberg and the government are more important. Perhaps the fact that the AFP are now technically part of the intelligence community that Mr Nick Warner happens to head has created resistance to investigate.

I did ask the Attorney-General to confirm if the current head of ASIS, Mr Paul Symon, was informed of the prosecution of Witness K and Mr Collaery. I asked the same about Minister Frydenberg and Mr Nick Warner—no response. There are many more questions. Ms McNaughton is handling the case through her organised crime and counterterrorism unit as though Witness K and Bernard Collaery are potential terrorists. The avenue of attack sees the use of the National Security Information Act 2004, which was enacted during the war on terror in response to terrorist threats. It gave enormous power to the prosecution to seek orders from the court to classify information as confidential based on decisions by the executive as to what information is confidential.

Of course some secrecy is needed. ASIS officers' identities must be kept secret, because if foreign governments know who our spies are then they can identify the agents in their countries and take countermeasures against them. If foreign governments were to learn Witness K's real name, they might be able to identify his agents in their countries and take countermeasures against them. People who betray their country would no longer dare risk their safety by dealing with Australian spies.

But Witness K and Mr Collaery appear fully committed to this kind of secrecy. Indeed, Witness K can give evidence whilst having his identity concealed. That is precisely what happened in the British inquest into the downing of an RAF Hercules aircraft in 2005. Among those killed was an Australian airman, Flight Lieutenant Pau Pardoel. All the special forces witnesses who testified had their identities protected. The same method could easily be handled by the ACT Magistrates Court.

But in this case a fundamental unfairness occurs because the prosecution is proposing orders that the entire matter be heard in secrecy. This is from a government which repeatedly makes national security public interest

claims in this place in respect of orders for production and has been found to be wrong consistently. This government has lost all credibility in this space. The approach is blatantly aimed at giving the executive the power to classify lawful behaviour as secret and to prevent that behaviour from being disclosed. In plain English, the government is trying to prosecute people for revealing its crimes.

The people of East Timor have traditionally been good allies and loyal friends of Australia. Their support of our soldiers fighting the Japanese in 1942 was vital. The East Timorese suffered 40,000 deaths due to aerial bombings and the destruction of villages suspected of sheltering Australian troops by the Japanese. Australian troops were protected at the expense of and the lives of many, many East Timorese people, Senator Neville Bonner said in a statement to the Senate in 1977. And yet the government ordered an espionage operation against East Timor's negotiators to gain significant advantage in those negotiations. The operation has caused considerable disruption, ending only recently when we renegotiated the treaty—hopefully, this time without spying.

In the period between the spying and now, East Timor's sentiment towards Australia has deteriorated substantially and China has managed to increase its influence through the use of soft power. The government sanctimoniously calls for a rules based international order, and that just looks like sheer humbug. It's time for this farce to end; it's time to bury this issue. We did the wrong thing to East Timor. It was called out by honourable people and now we seek to prosecute them. Australia committed a crime; the government committed a crime. No-one is above the law and we need to investigate that properly. All of this stuff to do with Witness K and Mr Collaery in the courts is just ripping the scar off a wound in East Timor, and I urge the government to rethink the process they're going through. Thank you.