Bernard Collaery

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This is a story about spies, international espionage, betrayal and billions of dollars' worth of contested natural resources lying under the ocean floor.

In this story, one of the richest countries in the Asia-Pacific region spied on and betrayed one of the very poorest. The beneficiary of the Australian state-sanctioned spying operation was an oil and gas company.

The story traverses five countries – The Netherlands, Indonesia, Australia, the UK, and one of the world's newest nations, Timor-Leste, formerly known as East Timor.

The history of bravery and betrayal

The story begins with Timor Leste's transition from Indonesian rule into an independent nation in 2002. This was a violent transition, in which 'more than 150,000 people, a quarter of the population, were murdered or deliberately starved to death between 1974 and 1999, when the territory was under Indonesian rule.'

Australia and Timor share a long history together, with Timor having proved itself as a staunch ally to its bigger, wealthier neighbour. In the First World War, a company of Allied soldiers, including Australian, Dutch and British fighters, were trapped in Timor, and came under heavy fire after disrupting the Japanese military presence. The Allies retreated into the mountains and were hid and protected by the Timorese, at a terrible cost to themselves. The East Timorese suffered 40,000 deaths due to aerial bombings and the destruction of villages that the Japanese forces suspected of sheltering Australian troops.

Timor is one of the poorest nations in South-East Asia, ranking 131st out of 182 countries on the UN's 2018 Human Development Index.

By comparison Timor's neighbour Australia is wealthy. The flight from from Dili, the capital of Timor, to Darwin, Australia's northern-most capital city, 722kms (449 miles) away, only takes about an hour, and yet it is a world away in terms of child malnutrition and poverty.

So when Timor gained its independence, it was not surprising that Australia offered to send international aid support to the new nation.

But it also sent spies.

Timor only has one major source of wealth: natural resources that include valuable oil and gas fields. These are under the ocean bed in the Timor Sea that divides Australia and Timor. In order to develop those resources, the two allies were obliged to share the revenue. How the two countries would divide the undersea resources was the subject of treaty negotiations on their maritime boundaries.

The Australian Government sought to gain an unfair advantage in these negotiations by sending Australian Secret Intelligence Service (ASIS) agents to bug the offices of the Timorese prime minister and his cabinet. The Australians would have heard the Timorese negotiating positions. One of the key protagonists in this story is Witness K, an unnamed ASIS officer who was asked to lead the bugging operation.

The spying operation was technologically sophisticated:

The electronic bugs placed inside the Palácio do Governo "were turned on and off by a covert agent inside the building. They then beamed the recording by microwave signal to a line-of-sight covert listening base set up inside the Central Maritime Hotel … The digital recordings were then allegedly couriered across town to the Australian embassy, and sent to Canberra for analysis."

"The 127-room Central Maritime Hotel was a converted Russian hospital ship that was rebuilt in Finland, used as a hotel in Myanmar and then towed to Dili because there were no hotels or restaurants of suitable standard for international visitors. It was conveniently moored opposite the waterfront white-stuccoed Palácio do Governo."

The Timorese didn't know their private cabinet discussions about the treaty had been secretly breached. The Australian Government's cover story for the bugging was an aid program to renovate the Timor government offices.

In 2006, foreign ministers Alexander Downer of Australia and Jose Ramos-Horta of Timor signed an agreement to divide up the resources under the Timor Sea. Australia was the clear winner in those negotiations, gaining a significant financial advantage compared to what would have been the standard position under international law.

A major beneficiary of the new bilateral agreement was a resources company, Woodside Petroleum. In 2008, Foreign Secretary Downer left politics to take up a lucrative contract with Woodside. The then Secretary of the Department of Foreign Affairs and Trade had already resigned and joined the board of Woodside.

The bugging operation did not sit well with some inside ASIS, Australia's overseas intelligence agency. The situation was described by Australian Senator Rex Patrick in a 2018 speech in Parliament:

'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.'

In 2012, Timor's leadership became aware of the spying, and started proceedings in the Permanent Court of Arbitration in The Hague. Timor intended to argue that Australia had acted in bad faith by spying during the negotiations, which would void the Timor Sea agreement.

Witness K was to be the star witness, supported by his lawyer, Bernard Collaery. Collaery had flown to The Netherlands early to prepare for the hearing in December 2013. The Hague had a special significance to him because his father, a WWII fighter pilot had been shot down and killed on an Allied mission near The Hague. Collaery had located the spot the plane went down in waters just offshore.

While Collaery was abroad, Australia's domestic spy agency ASIO and the federal police simultaneously raided Collaery's home and barristers' chambers, as well as the home of Witness K. They took K's passport, so he would not be able to travel anywhere. The raids had been organised by David Irvine, who had then become head of ASIO.

Collaery would not go quietly. Witness K would not be able to identify himself, but Collaery provided a voice to call out the campaign of persecution and harassment being conducted against them both. He fearlessly spoke up about the raid.

If the raid on the former intelligence officer and his lawyer was meant to dampen down Timor's agitation for a revised treaty, it failed.

By 2018, the Australian Government had been shamed into renegotiating the treaty. This time around, Timor won a much fairer deal with an appropriately larger share of the sea bed and its resources.

In this way, the people of Timor Lest have finally won rightful ownership over their own natural resources. The increased revenue will have a significant impact in a country where the population suffers in so much poverty.

The story is not however over for Witness K and Bernard Collaery. In 2018, four months after the signing of the new treaty, and four and a half years after the raids, the Australian Government chose to charge Witness K and his lawyer, Bernard Collaery.

Each faces criminal charges for conspiring to share information protected by Section 39 of the Intelligence Services Act, which prohibits the unauthorised communication of official information.

Witness K has indicated he will plead guilty to breaching the Intelligence Services Act. Bernard Collaery is continuing to fight in the ACT (Australian Capital Territory) Supreme Court in Canberra.

Proceedings have been opaque and expensive. The Australian Government has already spent some $2 million AUD prosecuting Collaery and Witness K, despite the proceedings being still only in a pre-trial stage. That Collaery faces four charges only came to the public after nine months of hearings and seven judgments.

The Australian Government has insisted that Collaery's court proceedings be held in secret. While some secrecy, such as protecting Witness K's identity, is important, there is a great deal about this case that can and should be heard in open court.

The Law Council of Australia, the nation's peak legal body, has thrown its support behind Collaery and criticised the government's use of secret courts.

The president of the Council said that the use of the 2004 National Security Information Act, which was enacted during the war on terror in response to terrorist threats, to close the court room, offends 'the principles of open justice'. Justice being served openly is a "basic rule of the common law", she said.

Open courts are a cornerstone of Australia's legal system. One of the major risks with secret courts is that a government will try to prosecute people for revealing its crimes, and those crimes will never come to light.

In Timor-Leste, according to Kim McGrath's book, Crossing the Line: Australia's Secret History in the Timor Sea, **'**the streets of Dili are graffitied with kangaroos carrying away buckets of oil.'

Congratulations to Bernard Collaery, the winner of the 2020 Blueprint International Whistleblowing Prize.