



# Would spying on East Timor by the Australian Secret Intelligence Service be illegal?

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**Spying by the Australian intelligence services on officials of other countries is an issue that just will not go away. The latest controversy concerns Australia's relationship with East Timor.**

East Timor is challenging the validity of the 2006 Certain Maritime Arrangements in the Timor Sea (CMATS) treaty through an international arbitration process in The Hague in The Netherlands. It has been alleged that the Australian Security Intelligence Service (ASIS) bugged the offices of East Timorese cabinet members during treaty negotiations in 2004 and consequently Australia gained an unfair economic advantage from one of the world's poorest countries.



**PHOTO:** Mr Collaery's claim ASIS exceeded its powers by allegedly spied in East Timor is unlikely. (ABC)

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On December 3, Bernard Collaery, the Australian lawyer representing East Timor in The Hague, said on ABC's Lateline that the "director of the Australian Secret Intelligence Service... ordered a team into Timor to conduct work which was well outside the proper functions of ASIS. Our Australian people don't expect their espionage service to be assisting revenue deliberations and commercial negotiations between partners".

ABC Fact Check takes a look at whether ASIS has the power to undertake spying of the type alleged.

## The spying allegations

The location of the sea boundaries between Australia and East Timor has been an issue of

**The claim:** Bernard Collaery says the head of ASIS ordered a team into East Timor to conduct work which was well outside the proper functions of ASIS.

**The verdict:** Mr Collaery is unlikely to be

contention between the two countries since East Timor attained independence in 2002. Their differing positions matter because there are major oil and gas reserves lying beneath the Timor Sea, known as the Sunrise and Troubadour deposits.

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Following a series of negotiations, Australia and East Timor signed the CMATS treaty on January 12, 2006 and it came into force on February 23, 2007. The purpose of the CMATS treaty was "to allow the exploitation of the Greater Sunrise gas and oil resources" by providing for "equal sharing of the upstream government revenues flowing from the project". It was also agreed that Australia and East Timor would not make further claims over territory in the Timor Sea for 50 years.

The Sunrise project was to be developed by private oil and gas companies including Woodside, Shell and ConocoPhillips.

Both the Australian and East Timorese governments supported the treaty at the time it was signed, although Dr Clive Schofield of the Australian National Centre for Ocean Resources Security at the University of Wollongong notes some have argued that "the treaty is inequitable, favouring Australia at East Timor's expense and that it is the consequence of an unfair bargaining process".

More recently, allegations have arisen about Australia's conduct during the negotiations for the treaty. Mr Collaery told ABC Radio on December 4 that "the director general of the Australian Secret Intelligence Service and his deputy instructed a team of ASIS technicians to travel to East Timor in an elaborate plan, using Australian aid programs relating to the renovation and construction of the cabinet offices in Dili, East Timor, to insert listening devices into the wall... So this was a bugging operation on sovereign Timor territory". East Timorese advocate Father Frank Brennan says that East Timor has evidence of the espionage from "very credible whistleblowers" including a retired ASIS agent. Australia denies the allegations.

In a media release issued on May 3, 2013, former foreign affairs minister Bob Carr and former attorney-general Mark Dreyfus said East Timor had initiated arbitration proceedings in The Hague in April 2013, seeking that the Treaty be declared invalid on the basis that Australia did not negotiate in good faith by engaging in espionage. According to the release, the "allegations are not new and it has been the position of successive Australian governments not to confirm or deny such allegations. However, Australia has always conducted itself in a professional manner in diplomatic negotiations and conducted the CMATS treaty negotiations in good faith."

## Powers of ASIS

The main legislation dealing with ASIS is the Intelligence Services Act 2001.

That legislation says that ASIS is to deal with intelligence-gathering outside Australia and is accountable to the Minister for Foreign Affairs. It has broad powers.

Section 6(1) sets out the functions of ASIS. They include obtaining "in accordance with the Government's requirements, intelligence about the capabilities, intentions or activities of people or organisations outside Australia" as well as a general catch-all provision that allows the Minister to

direct ASIS to undertake "other activities...relating to capabilities, intentions or activities of people or organisations outside Australia".

Section 11(1) sets broad overall limits on the functions of ASIS, being that it should perform its functions "only in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being and only to the extent that those matters are affected by the capabilities, intentions or activities of people or organisations outside of Australia". Section 12 requires that ASIS only carry out activities "necessary for the proper performance of its functions".

There are stronger protections in relation to activities about or concerning Australians, which require the Minister to authorise certain operations. However, East Timor would not have the benefit of these protections.

## Did ASIS exceed its powers?

Given that ASIS has broad powers in relation to the collection of intelligence overseas, and one of its specific functions is to obtain intelligence in relation to Australia's economic well-being, it is unlikely that espionage in relation to negotiations over multi-billion dollar energy reserves would be outside the agency's proper powers.

Professor Ben Saul of the University of Sydney tells Fact Check that its powers seem "to extend to gathering intelligence which may assist Australian government agencies or Australian (or indeed foreign) companies in competitive commercial negotiations, as long as there is a sufficient link to the economic well-being of Australia". He says that while the "legislative power is arguably over-broad and objectionable... the [alleged] operation would seem to be lawful under domestic law".

Dr Patrick Emerton, a senior lecturer in the School of Law at Monash University similarly takes the view that the surveillance would have fallen within the proper functions of ASIS because "negotiation of the Timor Sea treaty would seem relevant both to Australia's foreign relations and Australia's national economic well-being". He says that "if the government at the time required intelligence relevant to the negotiation of that treaty that concerned the intentions and activities of the government of East Timor" it would be lawful for it to direct ASIS to obtain that information. Under the Westminster system, decisions relating to foreign affairs priorities are left to the executive government rather than the courts.

Mr Collaery and East Timor may argue about the morality and fairness of the alleged actions of ASIS. However, these are not relevant considerations under Australian law. As Dr Emerton says: "The law, and especially the law relating to Australia's intelligence agencies, makes many things lawful that are nevertheless objectionable."

Other issues may be raised at The Hague. Any decision there will ultimately be decided on the basis of international rather than domestic law. Professor Saul says the alleged "operation was certainly unlawful under international law [and] it was also likely a crime under Timorese law".

A recent fact check examined whether alleged spying by another Australian intelligence agency, Australian Signals Directorate, in Indonesia was illegal under international, Indonesian or

Australian law.

## The verdict

Mr Collaery is unlikely to be correct. Australia's foreign intelligence agencies have wide-ranging powers. One of the functions of ASIS is to engage in espionage in relation to negotiations between Australia and a foreign state to protect Australia's economic interests.

## Sources

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