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## The Hague rules on Timor-Leste material seized in ASIO raids

With vast oil and gas reserves at stake, did the federal government use its espionage agencies to foil Timor-Leste's case against it in The Hague?



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Lawyer Bernard Collaery, left, speaks with Timor-Leste's Foreign Affairs Minister Jose Luis Gutierrez at the International Court AAPIMAGE

**W**hen the doorbell rang about 9.30am at 5 Brockman Street, Narrabundah, in suburban Canberra, Chloe Preston was starting her day at work as a legal clerk. She opened the door of the home that doubles as a law office, and was confronted by a team of national intelligence agents, who began combing the building. They seized papers, an iPhone, a laptop and a USB.

The 15 or so agents, mostly from Australia's domestic spy agency, the Australian Security Intelligence Organisation, as well as some from the Australian Federal Police, did not say what they were seeking or why. They showed Preston a search warrant, which included large sections that were blacked out. In any case, she later admitted, she was too intimidated to read it and the agents refused to give her a copy, saying it would be a breach of national security.

But Bernard Collaery, the lawyer who employed Preston, and lived and worked at the house, knew exactly what the agents were looking for.

Collaery is representing Timor-Leste in its effort to invalidate a \$40 billion oil and

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gas treaty with Australia signed in 2006. He has potentially explosive evidence from a former Australian spy, who allegedly admitted to extensive espionage by Australia as the two nations negotiated the division of an underwater oil and gas field.

As the December 3 search in Brockman Street proceeded – it lasted until about 4pm – a separate group of agents were swooping on the former spy, seizing his passport and preventing him from travelling to The Hague to testify at an arbitration case launched by Timor-Leste to overturn the treaty on the division of the fuel reserves.

Australia is accused of sending spies disguised as aid workers to plant bugs inside holes in the walls of government offices in Dili almost a decade ago, at a time when the small coastal city was awash with Australian troops, government officials and members of aid agencies.

This was just two years after the impoverished nation declared its statehood, in May 2002, following a battle led by Australian troops to secure independence from Indonesia. The espionage operation apparently allowed Australia to monitor discussions by

Timorese officials, both in their cabinet room and in a negotiating room specially designed for the treaty talks.

Details of the spying were stored in Collaery's home office, along with reams of other material for the arbitration case in The Hague. As the agents conducting the ASIO search were no doubt aware, Collaery was in Europe for a hearing at the time.

But the seizing of data from Brockman Street in December resulted in a separate international dispute between Australia and Timor-Leste, which landed in the International Court of Justice. It led to a ruling this week that involved the somewhat unusual order to Attorney-General George Brandis, who oversees ASIO and issued the Brockman Street search warrant, to not inspect the seized documents and to keep them "under seal". The court also ruled that Australia must not "interfere in any way in communications" between Timor-Leste and its lawyers.

Brandis, who has undertaken to inform the court if he ever needs to read the documents, says he was pleased that Australia was not ordered to return the seized material.

“These orders will, of course, be complied with,” he says. “This is a good outcome for Australia.”

Observers of the long-running dispute have pointed to the December operation as confirmation that Australia did indeed spy on Timor-Leste, a nation whose economic future largely depends on the revenues from the reserves beneath the Timor Sea. The elaborate spying operation was allegedly conducted by the Australian Secret Intelligence Service, Australia’s foreign intelligence agency.

Collaery was in Europe this week for the ruling and told *The Saturday Paper* he didn’t want to comment on the December search as it was now before the court. Prior to the latest hearings he was less reserved, describing the raids on him and the former spy as “crass” and an attempt to block evidence and “intimidate our witness”.

The opposition has labelled Brandis “inept”, suggesting the raids were poorly timed, putting undue attention on Australia’s alleged espionage on the eve of the arbitration hearings. Brandis has denied it, telling Parliament in December the claim was “wild and injudicious”.

“The search warrants were issued, on the advice and at the request of ASIO, to protect Australia’s national security,” he says.

## **Conflicts of interest?**

The espionage in Dili is alleged to have been ordered in 2004 by the then head of ASIS, David Irvine. It was Irvine again, as head of ASIO, who asked Brandis to approve the December raids nine years later. But Irvine is far from the only figure to have overlapping roles in an unfolding saga that has proved embarrassing to Australia and raised concerns about the uses of its intelligence agencies.

It is believed that the former spy who blew the whistle, a director of technical operations at ASIS, had become angry that two of the people intimately involved in the treaty talks – Ashton Calvert, then head of the Department of Foreign Affairs and Trade, and Alexander Downer, then the foreign minister overseeing ASIS – both subsequently secured work for Woodside Petroleum, the Australian company leading the venture to exploit the reserves.

The late Calvert, a veteran diplomat, became a director of

Woodside and Rio Tinto after retiring from the diplomatic corps in 2005. Downer told *The Saturday Paper* he only gave Woodside advice for several months during 2011 and 2012, and he strenuously denied the job was a payoff for his work in securing the treaty.

“This was years later – they [Woodside] wanted advice on East Timor’s position,” he says. “There was no conflict of interest. I knew about the issue because I was a minister. Did Woodside say to me during the negotiations, ‘If you get this treaty up, we will give you a job in the future?’ Of course they didn’t.”

Downer wouldn’t comment on whether Australia spied on Timor-Leste, but says of the alleged whistleblower: “I don’t know who he is. I don’t know what his issues are. I don’t care what he thinks ... You didn’t have to spy on East Timor to find out what their position is. This is all complete hogwash.”

## **Greater Sunrise maritime treaty unfair**

The oil and gas field treaty has been a long-running source of friction between the two nations. It included a 50-50 split of the revenues from the Greater Sunrise fields, which are

closer to Timor-Leste. They would effectively belong wholly to Dili if a midway point between the nations were used as the maritime boundary, as is the more common practice in international law.

Clinton Fernandes, a University of NSW academic at the Australian Defence Force Academy, says the treaty was blatantly unfair and should be renegotiated. “Australia has shared the revenues disproportionately. The Greater Sunrise fields are twice as close to Timor as Australia. It is not fair. How is Australia getting any of these resources? We should be getting none.”

Fernandes was further critical of the actions of Australia’s spy agencies. “This ASIS agent believed that the espionage services were not being used as they should have been used. The episode is undoing all the goodwill that the Australian Diggers did in 1999.”

But the Howard government, which signed off on the treaty in 2006, always insisted the deal was a “generous” compromise. It argued that Australia would have received far more of the revenues under borders that it agreed with Indonesia, the previous governors of Timor-Leste.



Following long-simmering claims about Australia's espionage operations in Dili, Timor-Leste launched a case last April to have the treaty invalidated in the Permanent Court of Arbitration, in The Hague, claiming that the spying rendered the deal unlawful. The case will ultimately decide the fate of the \$40 billion reserves – and the alleged spying by Australia could ultimately lead to the treaty being thrown out.

An expert on international law and the law of the sea, Donald Rothwell, of the Australian National University, says Australia is likely to challenge the jurisdiction of the court to hear the case. The government will argue that the dispute mechanism Timor-Leste is relying upon stems from an earlier 2002 treaty, which did not include Greater Sunrise.

“Whether that mechanism extends to the 2006 treaty and the way in which it may have been negotiated is a live issue that the tribunal will need to consider,” Rothwell says. If the case proceeds, he says, Australia would have a hard time winning because there is a longstanding convention that countries must conduct treaty talks in good faith.

“If espionage is proven, that

would be a strong argument to show that a treaty ought to be invalidated. Covert intelligence operations – such as those being suggested – would not be taken as a state conducting itself in good faith.”

Nonetheless, Timor-Leste may find it harder to prove its case in The Hague if its star witness remains stuck in Canberra without a passport.

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