

## Richard Ackland: Joining the dots could produce red faces among our spymasters

Richard Ackland

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Let's try to join a few dots.

**Dot One:** In 2004, David Irvine, the head of the external spy agency, the Australian Secret Intelligence Service, ordered the bugging of rooms used by ministers of East Timor.

The alleged aim of that espionage was for Australia to find out what the East Timorese ministers were thinking about the negotiations over resources in the Timor Sea (the CMATS treaty).

Irvine had been promoted to ASIS from the diplomatic stream by his boss, the minister for foreign affairs Alexander Downer. One of the areas subject to negotiation was to be developed by a consortium of oil and gas companies, including Woodside.

**Dot Two:** In March 2009, Irvine is appointed head of the internal spy agency, the Australian Security Intelligence Organisation.

**Dot Three:** In April 2013, East Timor initiated arbitration proceedings in The Hague seeking that the CMATS treaty be declared invalid or void because of illegal activity by Australia.

**Dot Four:** One of the people directed to do the bugging is a key witness for East Timor in the proceedings before the Permanent Court of Arbitration (PCA), now known as Witness K.

**Dot Five:** In December 2013, ASIO gets its new boss, Attorney-General George Brandis, to sign a warrant to allow it to raid the premises of Bernard Collaery, the lawyer representing East Timor at the PCA and Witness K - ostensibly on the grounds of protecting national security. Witness K's passport is cancelled and documents relating to the case in The Hague are removed from Collaery's law firm.

**Dot Six:** Some time after his departure from politics in 2007, the cigar-smoking, pinkie-ring wearing Downer took up as a partner of the lobbying firm Bespoke Approach, one of whose clients is Woodside Petroleum.

That is enough of the dots about stuff we know. However, if you join them all up, a question legitimately arises: in view of the pending proceedings in The Hague touching on illegality, does the protection of Australia's national interest have some synchronicity with the interests of people who ordered the bugging in the first place?

The evidence that East Timor can muster in seeking a declaration that the treaty is invalid or void will be crucial in finding the answer.

Let's look at invalidity first. Australia and East Timor are both parties to the Vienna Convention on the Law of Treaties. Article 49 says that if a country is induced to agree to a treaty by the fraudulent conduct of another party, then it may invoke fraud to invalidate its consent. Here fraud extends to deliberately deceitful behaviour. Spying to obtain confidential information is deceitful, but whether that deceitful behaviour led East Timor to be induced to enter the CMATS treaty is less certain.

Professor of law and the ANU College of Law, and a leading international lawyer, Donald Anton, argues in a recent paper that the answer will depend on what East Timor's evidence discloses (hence the importance of Witness K).

He says: "If the evidence adduced proves a deceitful inducement, it appears that Australia will have the dubious distinction of being the first known [country] to have a treaty declared invalid on account of its fraud."

National security aside, it becomes a little clearer why this case is also of direct importance to the people alleged to have initiated the bugging. If East Timor can't jump the fraud hurdle, it does have other grounds. Again I'm drawing on Professor Anton's research.

Spying by bugging could also constitute a breach of good faith under international law. As he says: "To seek to gain a further upper hand by way of spying is the antithesis of good faith."

Treaties brought about as a result of an absence of good faith may not be invalid, but they may well be void under international law.

Then there is the issue of Australia's alleged intervention in the affairs of East Timor. Anton again: "Deliberately sending spies into another state without permission to secretly obtain confidential, privileged and classified information of the other state is ... clearly prohibited by international law."

This makes sense when you consider that countries vigorously protest when it is discovered they are being spied on, diplomats accused of spying are expelled and countries worldwide send spies to jail if they steal state secrets.

In 2011 Rio Tinto was being sued in the US courts by people in Indonesia alleging human rights abuses, torture and so on. Australia argued, as *amicus curiae*, that these proceedings violate international law because "it would interfere fundamentally with other nations' sovereignty". As Anton puts it, sending spies into another state without permission to obtain confidential information is a much more significant intervention into the exclusive sovereign domain and is clearly prohibited by international law.

While under Australian legislation ASIS has a wide remit to spy externally, the case at The Hague will be decided by international law or possibly by the terms of the Vienna Treaty. An altogether more difficult kettle of fish with potentially embarrassing consequences for our spymasters.

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