

National security, legal professional privilege, and the Bar Rules

Address at the Australian National University

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Bernard Collaery



1. In the early hours of the morning of 3 December 2013 I was asleep in my hotel having just arrived at The Hague. One of our team banged on the door, and said that ASIO officers had just spent most of the day in my Chambers searching through files, folders, drawers, bookcases, cupboards and a security safe. The identities of those involved were not disclosed. They had taken the mobile phone of the sole staff member present and refused to give her a copy of the Search Warrant. Before entering they asked if any weapons were present in the house. Fifteen or more unidentified officers had come and gone all day “with big black boxes”. Other officers had brought ladders in to climb through ceiling manholes retrieving items in the ceiling. Others were seen kneeling on the kitchen floor with an electronic device, most probably a spectrum analyser looking for the source of the signal coming, as they no doubt found, from a water pump.
2. My immediate impression was that my office and home had had clandestine listening and/or viewing devices installed at some earlier stage. On whose warrant with whose affidavit is yet to be determined. Nevertheless, I shall never lie in bed again and look with equanimity at an air-conditioning vent.
3. The Director General of ASIO at that time was David Irvine. He had secured a Search Warrant under s25- the post-9/11 power-now in the ASIO Act 1979 from the Attorney-General Senator George Brandis. I had last come across George Brandis when he had the contrary position to me in a moot here at this university sponsored by the International Red Cross regarding the Geneva Conventions and irregular forces. He seemed a decent enough fellow. I had some regard for him as he took a principled stand during the ‘children overboard affair’ and I withhold judgement as to whether he knew the facts of what I now speak of when he signed those warrants at the request of David Irvine who had been the Director-General of ASIS when an unlawful ASIS mission took place in Dili in 2004.
4. At any one time in Canberra there may be several thousand persons who will fit the description of employees subject to the provisions of the *Intelligence Services Act 2001* (Cth). Such persons may need legal advice.

5. In certain cases private legal representation requires approval including the cognisance of the Inspector-General of Intelligence and Security (IGIS). That official, currently Ms Vivienne Thom until 18 July 2015, occupies an office within the Department of Prime Minister and Cabinet.
6. You may be approached by a person, as we were, who informs you that he or she seeks legal representation and has the approval of the IGIS to seek advice. The process, may involve security intelligence officials obtaining an acknowledgment from you in writing that you are cognisance of the relevant secrecy provisions of the law. In the case of an employee of the Australian Secret Intelligence Service that might include sections 39 and 41 of the *Intelligence Services Act* 2001 (Cth) You will be aware of the general provisions of the criminal law relating to State secrets. Apart from the legislative protection afforded recently to Special Intelligence Operations (SIO's) these laws cannot be used to inhibit the disclosure of criminal activity by the Executive or its agents.
7. Following the passing of recent legislation the Government now believes it may have legislative authority to commit criminal actions via special intelligence operations. There are very heavy penalties for the disclosure of information relating thereto, direct or indirect. However the vast bulk of intelligence activity is not accompanied by Special Intelligence Operations (SIOs) and as the High Court expanded at length in both the *Scientology*¹ and the *Sheraton Hotel* cases², the Executive has no right to break the law. The Executive is as bound as we are to observe the law.
8. Indeed, in the *Sheraton Hotel* case, Brennan J, as he then was, raised the question whether it would be constitutionally possible for the Parliament to legislate to allow criminal law breaking by State agents.³ That issue is for another day. What I am addressing tonight is how one tests the legality of actions carried out, purportedly, as part of the 'national security' functions of an intelligence agency. I shall now tell you how we analysed the actions of ASIS in bugging the out of session deliberations of the Timor-Leste Cabinet during revenue negotiations with Australia.
9. National security like public morality is an amorphous concept. For a meaning, one must look to the context. Although the days when Ministers claimed the right

¹ *Church of Scientology v Woodward* [1982] 154 CLR 25.

² *A v Hayden* (1984) 156 CLR 532.

³ *A v Hayden* (1984) 156 CLR 323 at [6]-[8].

to define public morality are gone in this country Ministers may still assert that they alone may judge 'national security'. My message tonight is that there are circumstances where this does not hold good.

10. There are those of you here who have experience of the concept in administrative appeal hearings for the release of documents under FOI. Associate Professor Clinton Fernandez, who I note is in the audience, is a fount of knowledge on that issue. Tribunals in Australia have declined to order the release of 30-40 year old papers on the basis that they may affect diplomatic relations with States. Yet those very papers hide truths that may lead to a better and more just society and development of the Rule of Law.
11. Tonight I am going to address 'national security' in the context of intelligence operations. I acknowledge also the presence of Hitoshi Nasu, a senior lecturer here whose excellent article *State Secrets Law and National Security* in the most recent issue of the *International Comparative Law Quarterly* provides a global overview of state secret legislation.⁴

Criminal behaviour by Australian government officers

12. In Witness K's case the criminality disclosed spoke for itself under the ACT Criminal Code and could not be excused by being cast as a lawful function of ASIS.
13. I am indebted to my colleagues Alan Conolly and Nicholas Cowdery QC for the following few paragraphs:

The relevant criminal law is the *Criminal Code 2002 (ACT)*. This is because the acts complained of were committed in the Australian Capital Territory.

Those acts were:

- a) the then Director-General of Intelligence, Mr David Irvine, reached an agreement with others to covertly listen to and record the conversations of the Timor-Leste negotiating team in Dili, in order to advantage the Australian negotiating team in connection with the Treaty on Certain Maritime Arrangements in the Timor Sea;

⁴ Hitoshi Nasu, 'State Secrets Law and National Security' (2015) 64 *International and Comparative Law Quarterly* 365-404.

- b) the Director-General and his deputy instructed Witness K to secretly install listening devices in the Timor-Leste Cabinet room for this purpose.

Section 334 of the *Criminal Code* creates the offence of conspiracy to defraud.

That section relevantly provided, from 9 April 2004:

- 1) *A person commits an offence if a person conspires with someone else with the intention of dishonestly obtaining a gain from a third person.*
- (2) *A person commits an offence if a person conspires with someone else with the intention of dishonestly causing a loss to a third person.*
- (3) *A person commits an offence if a person –*
 - (a) *conspires with someone else to dishonestly cause a loss, or a risk of loss, to a third person; and*
 - (b) *knows or believes that the loss will happen, or that there is a substantial risk of the loss happening.*
- ...
- (5) *A person commits an offence against this section (conspiracy to defraud) only if:*
 - (a) *a person enters into an agreement with at least 1 other person; and*
 - (b) *the person and at least 1 other party to the agreement intend to do nothing under the agreement; and*
 - (c) *the person or at least 1 other party to the agreement commits an overt act under the agreement.*
- ...
- (7) *A person must not be found guilty of conspiracy to defraud if, before the commission of an overt act under the agreement, the person:*
 - (a) *withdrew from the agreement; and*
 - (b) *took all reasonable steps to prevent the doing of the thing.*
- ...
- (9) *Any defence, procedure, limitation or qualifying provision applying to an agreed offence applies also to an offence of conspiracy to defraud in relation to the agreed offence.*
- (10) *A court may dismiss a charge of conspiracy to defraud if it considers that the interests of justice require it to dismiss the charge.*
- ...

“Dishonest” is defined (s300) as:

- (a) *dishonest according to the standards of ordinary people; and*
- (b) *known by the Defendant to be dishonest according to the standards of ordinary people.*

The agreement *prima facie* constituted a conspiracy to defraud under section 334. This was constituted by the agreement to instruct, and then instructing, Witness K, in his capacity as an officer of ASIS, to place covert listening devices in Timor-Leste government buildings, so that Australia would be able to gain a more favourable outcome from treaty negotiations, leading to a

financial gain to others. Such conduct was dishonest by the standards of ordinary people.

Section 62 of the *ACT Criminal Code 2002* extends the application of any ACT law that creates an offence beyond the territorial limits of the ACT and Australia if the required geographical nexus exists for the offence.

Section 64 of the *Criminal Code* provides:

- ii. *An offence against a law is committed if –*
 - (a) *disregarding any geographical considerations, all elements of the offence exist; and*
 - (b) *a geographical nexus exists between the ACT and the office.*
- iii. *A geographical nexus exists between the ACT and an offence if –*
 - (a) *the offence is committed completely or partly in the ACT, whether or not the offence has any effect in the ACT, or*
 - (b) *the offence is committed completely outside the ACT (whether or not outside Australia) but has an effect in the ACT.*

The conspirators formed their agreement in the ACT, and gave instructions to Witness K in the ACT. This sufficed to enliven the ACT conspiracy offences set out above, even though the placing of covert listening devices took place in Timor-Leste.

The *Intelligence Services Act 2001* does not exonerate the conspirators from this criminal liability. Section 14 of the *Intelligence Services Act* provides indemnity for liability for certain acts. Subsection (2) is the relevant provision:

- (2) *A person is not subject to any civil or criminal liability for any act done inside Australia if:*
 - (c) *the act is preparatory to, in support of, or otherwise directly connected with, overseas activities of the agency concerned; and*
 - (d) *the act:*
 - (i) *taken together with an act, event, circumstance or result that took place, or was intended to take place, outside Australia, could amount to an offence; but*
 - (e) *(ii) in the absence of that other act, event, circumstance or result, would not amount to an offence; and*
 - (f) *the act is done in the proper performance of a function of the agency.*

ASIS is an agency under the *Intelligence Services Act* (s3).

Whether section 14(2) would exempt the conspirators depends on whether the entry into the agreement was done in the “*proper performance*” of a function of ASIS.

The word “*proper*” is important. Section 14(2) might more easily have referred merely to the “*performance of a function of [ASIS]*”, but the legislature took the trouble to include the word “*proper*”.

The nature of the operation ASIS was ordered to undertake took that operation outside the phrase “*proper performance of a function*” of ASIS in section 14(2).

It is permissible, when interpreting an Act, to look at the Second Reading Speech made in Parliament by the responsible Minister, and the explanatory memorandum relating to the Act (section 15AB of the *Acts Interpretation Act 1901* (Cth)).

Both the Second Reading Speech and the Explanatory Memorandum in respect of the *Intelligence Services Act* downplay the breadth of section 14.

In the Second Reading Speech (Hansard, House of Representatives, 27 June 2001, p 28,637), the Minister (Mr Downer) said:

Occasionally, [ASIS and DSD] are inhibited in the conduct of their activities outside Australia by the unintended consequences of Australian laws. It will be apparent that the original intention of the legislators who drafted these laws was not to inhibit Commonwealth agencies from fulfilling their charter at the behest of the Commonwealth. Accordingly, this bill seeks to provide limited immunities for both ASIS and DSD in respect of the proper conduct of their functions.

The Explanatory Memorandum stated:

[Section 14] provides immunity from civil and criminal liability for activities, carried out by the agencies for the purpose of collecting intelligence information about the capabilities, intentions or activities of people or organisations outside Australia, as intended and required by the Government, which might otherwise be prohibited by the unintended consequences of certain Australian laws. The purpose of the clause is to provide immunity in a limited range of circumstances directly related to the proper performance by the agencies of their functions. It does not provide a blanket immunity from Australian laws for all acts of the agencies. This limited immunity is necessary as certain Australian law, including State and Territory law, could impose liability on the agencies.

Both the Second Reading Speech and the Explanatory Memorandum stress that section 14 is intended to relieve against *unintended* consequences of certain Australian laws.

The operation of the sections of the ACT *Criminal Code 2002* set out above is not an unintended consequence of those sections. Rather, those sections have the direct intention of forbidding the sort of fraudulent behaviour at issue here.

It is also necessary to refer to section 11(1), which provides:

The functions of the agencies are to be performed 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 Australia.

This section, according to its terms, restricts what ASIS is authorised to do. It does not itself authorise ASIS to do something merely because that thing is in

the interests of Australia's national security, Australia's foreign relations, or Australia's national economic well-being.

14. Nevertheless, to be sure we went through the exercise of measuring the conduct against the legislatively approved functions of ASIS using public domain sources.

15. The template upon which our analysis had to be made has not changed save for the new SIO law. There have been legislative amendments to the ISA since 2004 but none are germane to the events about which I speak.

16. Section 6 of the *Intelligence Services Act 2001* (Cth) says:

6 Functions of ASIS

- (1) The functions of ASIS are:
 - (a) to obtain, in accordance with the Government's requirements, intelligence about the capabilities, intentions or activities of people or organisations outside Australia; and
 - (b) to communicate, in accordance with the Government's requirements, such intelligence; and
 - (ba) to provide assistance to the Defence Force in support of military operations and to cooperate with the Defence Force on intelligence matters; and
 - (c) to conduct counter-intelligence activities; and
 - (d) to liaise with intelligence or security services, or other authorities, of other countries; and
 - (da) to co-operate with and assist bodies referred to in section 13A in accordance with that section; and
 - (db) to undertake activities in accordance with section 13B; and
 - (e) to undertake such other activities as the responsible Minister directs relating to the capabilities, intentions or activities of people or organisations outside Australia.
- (2) The responsible Minister may direct ASIS to undertake activities referred to in paragraph (1)(e) only if the Minister:
 - (a) has consulted other Ministers who have related responsibilities; and
 - (b) is satisfied that there are satisfactory arrangements in place to ensure that, in carrying out the direction, nothing will be done beyond what is necessary having regard to the purposes for which the direction is given; and
 - (c) is satisfied that there are satisfactory arrangements in place to ensure that the nature and consequences of acts done in carrying out the direction will be reasonable having regard to the purposes for which the direction is given.
- (3) A direction under paragraph (1)(e) must be in writing.

Note: If the Minister gives a direction under paragraph (1)(e), the Minister must give a copy of the direction to the Inspector-General of Intelligence and Security as soon as practicable after the direction is given to the head of ASIS (see section 32B of the *Inspector-General of Intelligence and Security Act 1986*).
- (3A) A direction under paragraph (1)(e) is not a legislative instrument.
- (4) In performing its functions, ASIS must not plan for, or undertake, activities that involve:
 - (a) paramilitary activities; or
 - (b) violence against the person; or
 - (c) the use of weapons;by staff members or agents of ASIS.

Note 1: This subsection does not prevent ASIS from being involved with the planning or undertaking of activities covered by paragraphs (a) to (c) by other organisations provided that staff members or agents of ASIS do not undertake those activities.

Note 2: For other limits on the agency's functions and activities see sections 11 and 12.

Note 3: For *paramilitary activities* see section 3.
- (5) Subsection (4) does not prevent:
 - (a) the provision of weapons, or training in the use of weapons or in self-defence

- techniques, in accordance with Schedule 2; or
- (b) the use of weapons or self-defence techniques in accordance with Schedule 2.
- (6) ASIS must not provide weapons, or training in the use of weapons or in self-defence techniques, other than in accordance with Schedule 2.
- (7) In performing its functions, ASIS is not prevented from providing assistance to Commonwealth authorities and to State authorities.

Section 11 of the Act states:

11 Limits on agencies' functions

- (1) The functions of the agencies are to be performed 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 Australia.
- (2) The agencies' functions do not include:
 - (a) the carrying out of police functions; or
 - (b) any other responsibility for the enforcement of the law.

However, this does not prevent the agencies from:

- (c) obtaining intelligence under paragraph 6(1)(a), 6B(a), (b), or (c) or 7(a) and communicating any such intelligence that is relevant to serious crime to the appropriate law enforcement authorities; or
- (d) in the case of ASIS—performing the function set out in paragraph 6(1)(da) or providing assistance as mentioned in subsection 6(7); or
- (e) in the case of AGO—performing the functions set out in paragraphs 6B(e) and (f); or
- (f) in the case of ASD—performing the functions set out in paragraphs 7(e) and (f).

Note: For *police functions* and *serious crime* see section 3.

- (2AA) An agency may communicate incidentally obtained intelligence to appropriate Commonwealth or State authorities or to authorities of other countries approved under paragraph 13(1)(c) if the intelligence relates to the involvement, or likely involvement, by a person in one or more of the following activities:
 - (a) activities that present a significant risk to a person's safety;
 - (b) acting for, or on behalf of, a foreign power;
 - (c) activities that are a threat to security;
 - (d) activities related to the proliferation of weapons of mass destruction or the movement of goods listed from time to time in the Defence and Strategic Goods List (within the meaning of regulation 13E of the *Customs (Prohibited Exports) Regulations 1958*);
 - (e) committing a serious crime.
- (2A) The agencies' functions do not include undertaking any activity for the purpose of furthering the interests of an Australian political party or other Australian political organisation.
- (3) Subsection (1) does not apply to the functions described in paragraphs 6(1)(da), 6B(b), (c), (d), (e), (f) and (g), and 7(c), (d), (e) and (f).

17. The community puts great faith in the Director-Generals of our intelligence agencies. They must be persons of integrity and moral strength able to advise ministers on what is properly a function of the intelligence service and what would be an improper function. The power given to an intelligence agency goes with, as the High Court has emphasised, the responsibility to act within the law.

18. Having said that I am a strong proponent of giving statutory independence to certain of our agencies. In my view the status of the Director-General of ASIS should be enhanced. No person of a non-professional intelligence background particularly an acquaintance of a sponsoring Minister should be appointed to the

counter-espionage role. ASIS should be disentangled from the DFAT club, certainly, the trade function.

19. Two years of very comprehensive research, advice and anxious consideration took place before we concluded that the actions in Dili in October 2004 not only constituted criminal conduct but fell outside the proper functions of ASIS under its governing legislation. We had regard also to the declared objectives of the Government at that time of leaving no stone unturned in the Bali Bombing investigation and expanding the resources required to combat foreign espionage.⁵
20. The aggressive attempt to cover-up the Dili bugging scandal is itself a compounding of the conduct committed in 2004. In both 2004 and 2013 the Executive has acted as if it is above the law. The inquiry into the allegations now levelled by Witness K and supported by Timor-Leste in proceedings at The Hague in which there is a common interest in a finding of illegality provides the first opportunity to audit the conduct of ASIS since the Parliament made clear after the *Scientology* case and the *Sheraton Hotel* scandal that intelligence agencies must abide by their proper functions and cannot be used by the Executive for unlawful purposes. This audit provides compelling evidence of why recent amendments to the ASIO Act that shroud the agencies from review are a significant threat to democracy.
21. But first let me explain in abbreviated fashion the Arbitration and the ICJ litigation. Using the commercial arbitration provisions of the 2002 Timor Sea Treaty Timor-Leste sought a declaration that the 2006 CMATS Treaty was invalid for fraud. The Arbitration is confidential and certain evidence is by agreement to be in camera. On the eve of an arbitral tribunal meeting in The Hague Australia cancelled Witness K's passport and searched and seized documents. If the Attorney's advisers believed that we might enter the Federal Court lists to assert legal professional privilege (LLP) under the current response of the courts in this country to national security they were mistaken. In that regard the views of Hayne J in dissent in *Thomas v Mowbray*, regarding the relationship between the rule of law and national security are apposite.⁶ Instead, a provisional measures application was made to the ICJ seeking return of the documents and other orders

⁵See *Submission to the Senate Inquiry into Asylum & Protection Visas for Consular Officials*, 26 July 2005, <<http://www.cclaw.com.au/wp-content/uploads/2012/10/Submissions-to-Senate-Inquiry-re-Asylum-Protection-Visas-for-Consular-Officials.pdf>>.

⁶*Thomas v Mowbray* [2007] HCA 33, [391]-[425] (Hanya J).

including a cessation of the interception of legally privileged communications. The application was successful and the documents seized have been returned.

22. Now let me respond to the question we are often asked as to why the issues I now explain were not before the ICJ and why the Australia got away as it knew it would with its smokescreen nonsense about Australia's national security being imperilled.
23. Domestic legal circumstances of an offending State are irrelevant to excuse inquiry into breaches of fundamental principles of international law. To give a simplified example, States that are brought to account for torture for instance cannot plead domestic national security concerns to avoid being brought before an international court. Likewise, the principle of *pacta sunt servanda*-good faith in Treaty making- is immutable and at the basis of treaty making between States. If domestic laws could block international court activity, States could just legislate immunity to themselves. Australia is either a rules based democracy or a rogue State.
24. Australia cannot dodge an examination of its egregious breach of good faith in treaty negotiations because Witness K might disclose some operational technique or names. He hasn't and won't in any event. A Timor-Leste Minister's claim ten years on that he knew who the spies were has since been qualified. Australia's national security has never been compromised by the 30 plus years in my practice of representing intelligence personnel. At the ICJ Australia knew that TL would not engage on any debate as to alleged domestic security concerns. This meant that the allegations against our legal team and Witness K would go unanswered by TL which in any event is in no position to debate the sovereign security concerns of another State. I shall have more to say about that in terms of professional conduct shortly.
25. Here now is the abbreviated route to the conclusion that ASIS acted outside its legislatively approved functions. But first let me emphasise that the eavesdropping was no collateral product of a legitimate clandestine mission. The sole targeting was to capture clear voice transmission of out of session deliberations. I recall as Attorney-General ordering police to remove listening devices from David Eastman's apartment wall for reasons including that the collateral product would nevertheless include his conversations with his lawyers.

26. The 2004 Dili ‘black op’ was not such a situation. The instructions given establish conclusively that there was a sole objective—namely, what the other side was deliberating. No amount of ‘colour’ about collateral gains, if any, can repaint that motive.

Functions of ASIS

27. The sole functions of ASIS set by Parliament after the Sheraton scandal are:

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 - (b) to communicate, in accordance with the Government’s requirements, such intelligence; and
 - (c) to conduct counter-intelligence activities; and
 - (d) to liaise with intelligence or security services, or other authorities, of other countries; and
 - (da) to co-operate with and assist bodies referred to in section 13A in accordance with that section; and
 - (e) to undertake such other activities as the responsible Minister directs relating to the capabilities, intentions or activities of people or organisations outside Australia.
- (2) The responsible Minister may direct ASIS to undertake activities referred to in paragraph (1)(e) only if the Minister:
 - a) has consulted other Ministers who have related responsibilities; and
 - b) is satisfied that there are satisfactory arrangements in place to ensure that, in carrying out the direction, nothing will be done beyond what is necessary having regard to the purposes for which the direction is given; and
 - c) is satisfied that there are satisfactory arrangements in place to ensure that the nature and consequences of acts done in carrying out the direction will be reasonable having regard to the purposes for which the direction is given.
- (3) A direction under paragraph (1)(e) must be in writing.
Note: If the Minister gives a direction under paragraph (1)(e), the Minister must give a copy of the direction to the Inspector-General of Intelligence and Security as soon as practicable after the direction is given to the head of ASIS (see section 32B of the Inspector-General of Intelligence and Security Act 1986).

28. The alleged ASIS Dili mission could only be supported as a function of ASIS if the ‘*people or organisations*’ referred to may embrace the sovereign Cabinet Office of a friendly foreign power and then only if no law-breaking is involved. In peacetime, in 2004, any obtaining of intelligence involving breaches of Australian, international, and, foreign domestic criminal laws was outside the functions approved by the Parliament.⁷

⁷ *A v Hayden* [1984] HCA 67; (1984) 156 CLR 532, per Mason J. at [2] and Brennan J. at [8].

29. In short, if other *activities* beyond just obtaining intelligence passively without breach of laws were given Ministerial authorisation, s6(1)(e) required all of the steps stipulated therein to be satisfied before ASIS could lawfully cause to be inserted any listening device into the Timor-Leste Cabinet room, to monitor and record what was said, to transcribe the recorded conversations, and to provide such transcriptions to its treaty negotiation team.
30. In wartime or imminent threat situations the situation may be different. In defence terms the difference between a state of peace and a state of war may be blurred. The Court recognised this in *Thomas v Mowbray* with Callinan J putting it succinctly.⁸ However, there can be no question that the CMATS treaty negotiations involved any issues relevant to the defence of Australia.
31. It is necessary to consider whether in peacetime s6(1)(a) allows ASIS to ‘*obtain*’ intelligence passively without law-breaking. Again, in peacetime, in empowering ASIS to undertake ‘*other activities*’ via s6(1)(e), the IGIS would need to consider the lawfulness of physical actions to evade immigration controls and to trespass on Timor-Leste’s sovereign governmental headquarters in order to plant a listening device to enable Australia, fraudulently, in breach of a fiduciary obligation to a joint-venture partner to gain an advantage in commercial Treaty negotiations.
32. Putting aside for the sake of argument the breaches of the criminal law of this Territory for ASIS to take positive specific actions of this kind abroad, specific statutory authorisations were necessary to so act, as such actions by ASIS went beyond the mere step in s6(1)(a) of obtaining ‘*intelligence*’ such as passive signals

Relevantly, s3A(10) the *Crimes (Overseas) Act 1964* (Cth) excludes ASIS employees from liability for crimes committed in a foreign country provided that at the time the act or acts were done the employee was acting in course of a proper function of ASIS. Section 3A contains a footnote which says:

Section 14 of the *Intelligence Services Act 2001*:

- (a) authorises the Inspector-General of Intelligence and Security to give a certificate certifying any fact relevant to the question whether an act was done in the proper performance of a function of ASIS, DIGO or DSD; and
- (b) provides for such a certificate to be prima facie evidence of the facts certified in any proceedings.

⁸ *Thomas v Mowbray* (2007) HCA 33, 583; ‘Defence is not something of concern to a nation only in times of a declared war. Nations necessarily maintain standing armies in times even of apparent tranquility. Threats to people and property against which the Commonwealth may, and must defend itself, can be internal as well as external. With respect, insufficient critical attention to these matters was given by the majority in the Communist Party Case. The references by Dixon J to ‘ostensible peace’ (at [713]) and protection against external enemies as the ‘central purpose’ (at [714]) of the defence power evince both a preoccupation with the events of the recent past, of a declared war, uniformed, readily distinguishable external enemies, generally culturally, ethnically, ideologically and religiously homogenous states, and an incomplete appreciation, despite Hiroshima and Nagasaki, of the potential of weaponry for massive harm.’

interception. Clearly, s6(1)(e) where it states ‘to undertake such other activities ...’ must be taken to be stipulating the only potential source of power for the 2004 ASIS Dili mission.

33. This approach is consistent with the requirement in s6(2) for the responsible ‘Minister’ to direct ASIS to undertake such other activity and only to do so after the Minister had first taken the steps required in paragraphs (a), (b) and (c) of s6(2). Notably, a direction under s6(1)(e) must be in writing. If ASIS performed the activities without the benefit of a written direction being given beforehand under s6(1)(e) any such activities by ASIS may not be regarded as performance of the functions of ASIS.
34. Let me interpolate here and say that I am certain that my classmate Philip Ruddock who was Attorney at the time would not have countenanced this operation. He must be allowed to comment in the appropriate forum, presumably in camera, on the question whether he saw or was aware of any written authorisation for the Dili mission. Certainly, K, a senior official, never saw one.
35. Further protections are provided by s9(1) which requires that before a Minister gives an authorisation under s9, the Minister must be satisfied that various activities, things done, and the nature and consequences of acts done meet the standards set out in paras (a), (b) and (c) of s9(1). In light of subsequent events I believe the considerations given or the lack thereof by the responsible Minister are now justiciable but what of the role of the IGIS in forestalling improper and unlawful activities by ASIS?
36. S 6 of the Intelligence Services Act contains a footnote which reads:

If the Minister gives a direction under paragraph 1(a) the Minister must give a copy of the direction to the Inspector General of Intelligence and Security as soon as practicable after the direction is given to the head of ASIS (section 32B of the *Inspector-General Intelligence and Security Act 1986*).

37. Likewise, s8 of the Intelligence Services Act contains a footnote which reads:

The Inspector General of Intelligence and Security has oversight powers in relation to Ministerial directions and authorisations given under this Act. See in particular section 32B of the *Inspector-General of Intelligence and Security Act 1986* (which requires the Minister to give a copy of a direction under this section to the Inspector General of Intelligence and Security as soon as practicable after the direction is given).

38. Surely, the Australian people are entitled to know whether the IGIS was aware, as stipulated by law, of the 2004 ASIS Dili mission before it was carried out. If so, having been informed by the Director-General on what basis would the IGIS located then as now in the offices of the Department of Prime Minister and

Cabinet have proceeded to question, hopefully Mr Downer's plans? Would then Prime Minister Howard have intervened? Was he aware of the intended ASIS mission?

39. I repeat, the whole question of a written authorisation is in any event moot. It is for the AFP, the ACT Director of Public Prosecutions and the ACT courts to reaffirm that Federal politicians are subject to the law and no written authorisation can dispense them from that obligation. This City, sister city to Dili cannot be used as a springboard for such activity whether or not coloured as somehow related to national security, foreign affairs or national economic well-being.

Standards of Probity Required of Director-General ASIS

40. A first step in the analysis undertaken by my office (which a Judicial Inquiry into the Australian Government conduct in 2004 and 2013 should now undertake) started with the standards of probity required of the Director-General of ASIS.

41. On a date, Witness K met with the then Inspector-General of Intelligence and Security, Mr Ian Carnell. He informed Mr Carnell that he was dissatisfied with the outcome of the Selection Committee that had not recommended him for permanent appointment to a senior position in the Australian Secret Intelligence Service ("ASIS") in which he had acted for a considerable period. Witness K met again with the Inspector-General after which the Inspector-General wrote to Witness K. In that letter, the Inspector-General advised Witness K that the following options:

... would appear to include the following:

- *Subject to confirmation by me that I do have jurisdiction, and advice from you that this is what you want, I could pursue an inquiry into the particular selection exercise you have queried, as per section 11 of the Inspector-General of Intelligence and Security Act 1986. Such an enquiry would necessarily involve informing the responsible minister and agency head, and in all probability also revealing your identity.*
- *the agency head could be asked about the possibility of a Grievance Review Pane investigating your concern about the selection exercise referred to.*
- *You, or somebody acting on your behalf, could make representations to the responsible minister, and the minister could then determine what, if any, further action should be taken (this could include referral back to this office with a request that your concerns be investigated).*
- *You could pursue private legal action.*

42. Witness K wrote to the Inspector-General. The Inspector-General replied at which stage Collaery Lawyers wrote to the Inspector-General and informed the Inspector-General that the firm was acting for Witness K.

43. Section 11(4) of the *Inspector-General of Intelligence and Security Act 1986* (Cth)

(“IGISA”) says relevantly:

Where the Inspector-General is of the opinion that a complainant has or had a right to cause action to which a complaint relates to be reviewed by a court or a tribunal but has not exercised that right, the Inspector-General may decide not to inquire into the action or not to inquire into the action further if, in the opinion of the Inspector-General, it would be reasonable for the complainant to exercise, or would have been reasonable for the complainant to have exercised, that right.

44. Section 11 of the IGISA anticipates that an ASIS employee may exercise any right he or she may have to have a complaint reviewed by a court or tribunal. Although Witness K was not excluded from taking action in a ‘*court or tribunal*’ (*Inspector-General of Intelligence Act 1986*, s 4) Witness K could not blithely file an application revealing a name or names or collateral detail. Indeed as the IGIS conceded in a recent submission to a Parliamentary Committee it was not even clear whether and on what basis Witness K could tell the IGIS about the unlawful operation.⁹ Then and now Intelligence employees are caught in a dilemma. With the Office of IGIS moribund and no judicial forum-even in camera- they have no route to a remedy. It is the remedy we found in confidential international Arbitration that has so rattled Coalition skeletons.¹⁰

45. Witness K’s complaint related to the failure of ASIS management to confirm him in a senior position he had long held. The explanation he was given was the need for ‘*generational change*’. Witness K perceived the ‘*generational change*’ as involving the use of ASIS technical operations in a manner that was not in conformity with ‘*morality*’, or expressed in another way the principles of the public service. Witness K was not alone in being displaced.

46. Section 35 of the *Intelligence Services Act 2001* (Cth) (“ISA”) says:

Applicability of principles of Public Service Act 1999

Although employees of ASIS are not employed under the Public Service Act 1999, the Director-General must adopt the principles of that Act in relation to employees of ASIS to the extent to which the Director-General considers they are consistent with the effective performance of the functions of ASIS.

⁹ IGIS Submission to the PJCIS Inquiry into the National Security Legislation Amendment Bill (No1) 2014, 4/8/14. (IGIS PJCIS submission 2014)

¹⁰ The Arbitral Tribunal is composed of Professor Tullio Treves, Lord Lawrence Collins QC of Mapesbury and Professor Michael Reisman

47. The *Public Service Act 1999* (Cth) (“PSA”) binds the Crown (s 4). The PSA extends to things done outside Australia (s 5). The Australian Public Service (“APS”) values that the Director-General of ASIS must adopt are:

APS Values

Committed to service

The APS is professional, objective, innovative and efficient, and works collaboratively to achieve the best results for the Australian community and the Government.

Ethical

The APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does.

Respectful

The APS respects all people, including their rights and their heritage.

Accountable

The APS is open and accountable to the Australian community under the law and within the framework of Ministerial responsibility.

Impartial

The APS is apolitical and provides the Government with advice that is frank, honest, timely and based on the best available evidence.

48. Relevantly, section 13 of the PSA says:

1) *The APS Code of Conduct*

- i. *An APS employee must behave honestly and with integrity in connection with APS employment.*
 - ii. *An APS employee must act with care and diligence in connection with APS employment.*
 - iii. *An APS employee, when acting in connection with APS employment, must treat everyone with respect and courtesy, and without harassment.*
 - iv. *An APS employee, when acting in connection with APS employment, must comply with all applicable Australian laws. For this purpose, **Australian law** means:*
 - v. *any Act (including this Act), or any instrument made under an Act; or*
 - vi. *any law of a State or Territory, including any instrument made under such a law.*
 - vii. *An APS employee must comply with any lawful and reasonable direction given by someone in the employee’s Agency who has authority to give the direction.*
- 1) *An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister’s member of staff.*
 - 2) *An APS employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment.*
 - 3) *An APS employee must use Commonwealth resources in a proper manner.*
 - 4) *An APS employee must not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee’s APS employment.*
 - 5) *An APS employee must not make improper use of: (a) inside information; or (b) the employee’s duties, status, power or authority; in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.*
 - 6) *An APS employee must at all times behave in a way that upholds:*
 - i. *the APS Values and APS Employment Principles; and*
 - ii. *the integrity and good reputation of the employee’s Agency and the APS.*
 - 7) *An APS employee on duty overseas must at all times behave in a way that upholds the good reputation of Australia. Public Service Act 1999 11*
 - 8) *An APS employee must comply with any other conduct requirement that is prescribed by the regulations.*

49. Section 14 of the PSA says that agency heads and statutory office heads are bound by the Code of Conduct. Some exceptions may apply but are not relevant in this situation. Section 16 of the PSA requires agency heads to establish procedures for an APS employee to make a report (a whistle-blower report) of a breach or an alleged breach of the Code of Conduct to the agency head or to a person authorised for the purpose of this section by the agency head.
50. No such procedures had been established at the relevant times for Witness K and in any event the alleged breach of the Code of Conduct was by the agency head acting in concert with the responsible Minister. The reaction by the Coalition to the threat of exposure by Witness K sustains us in the decision not to petition either Mr Downer or the then PM on Witness K's behalf.
51. Witness K needed to find a judicial remedy of unimpeachable integrity with in camera protections but first the issue had to be analysed against the ACT Criminal Code and ASIS's legislatively approved functions. The first analysis was fairly straightforward having regard to the ACT *Criminal Code 2002*.
52. If anyone wants to debate whether Witness K has a right to disclose in an appropriate forum so much detail as would allow of a remedy they may be arguing with Brett Walker SC. I might say also that they might be arguing with the High Court where in *Lange* it was unanimously stated that:

*This Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia.*¹¹

Lawful Functions of ASIS

53. The key empowerment is contained in Section 11 of the ISA, relevantly:

*The functions of the agencies are to be performed 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 Australia.** (emphasis added)*

¹¹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571.

National Security

54. Each of the elements of s11 needs to be analysed against the facts. How was, ‘...Australia’s national security... affected by’ Prime Minister Alkatiri and his Cabinet? The instructions given were to ensure that there was a clandestine recording of discussions to be held by the Timor-Leste negotiating team before and after negotiating sessions with the Australian team. This was a limited target for clear voice transmission.
55. The central issue for the negotiation between the joint-venture partners was the ratification of the IUA held up over Timor-Leste’s dissatisfaction with the revenue split agreed to in the 2003 agreement. Australia’s interest in the negotiation was explained by a senior DFAT official, Geoffrey Raby, during testimony before an Australian Parliamentary Committee:

Dr Raby: *On the first question of the relationship between the IUA and the treaty, the question, as I recall it, was: what was in Australia’s national interests? As I said last time, from the government’s point of view Australia’s national interest will be maximised and preserved if the treaty, the IUA and all other instruments, including the PSCs, come into effect simultaneously.¹²*

...

Mr Wilkie: *Would it be more or less beneficial for East Timor to have ratification prior to or at the same time as unitisation?*

Dr Raby: *I think both sides would benefit from ratification and unitisation being agreed at the same time.*

Mr Wilkie: *Equally?*

Dr Raby: *No. As I said last time, our interest in this package is different. The big Australian interest is with Sunrise and, as we have just heard from one of the commercial partners, we need a unitisation agreement to realise that interest.*

Mr Wilkie: *You made the statement that Australia’s interests are maximised and preserved if treated simultaneously. What I want are reasons as to why you have made that statement. Why is that the case?*

Dr Raby: *I think that gives us the comfort, if you like, that we have both elements together. The East Timorese element and interest is with the early development of Bayu-Undan. We have some interest in Bayu-Undan, but Australia’s bigger interest is demonstrably with the development of Greater Sunrise. To do the treaty without having concluded an IUA for Sunrise would leave us possibly in a situation of less confidence and less certainty than at present.¹³*

56. The potential value to the respective State tax revenues of the Greater Sunrise Field depended upon the estimated gas yield and net return after all development

¹² Commonwealth of Australia, Joint Standing Committee, Timor Sea Treaties, Monday, 14 October 2002, Canberra, 271.

¹³ Ibid, 272-3.

and production costs incurred by the commercial contractors with whom both Australia and Timor-Leste had, under the JPDA structure, subsisting Production Sharing Contracts (“PSCs”). Therefore, Timor-Leste and Australia met as existing joint-venture partners with consequent mutual fiduciary duties to renegotiate the Greater Sunrise revenue split in good faith.

57. Any doubt about that proposition is dispelled by the terms of the Memorandum of Understanding signed on Independence Day 20 May 2002 by Prime Ministers Howard and Alkatiri whereby they committed themselves, in language familiar to commercial lawyers, as fiduciaries in express terms to work, ‘...*expeditiously and in good faith.*’ to conclude a revenue unitization agreement.¹⁴
58. If we as lawyers could then turn around in Collins Street, Melbourne and bug the fiduciary’s Boardroom we may, I dare say, attract substantial civil and criminal penalties. The crucial issue now for Australia on the world stage is whether Australia is a rogue State with politicians above the law. I might add here that in 2004-5 Australia was working in New York with the UN on the drafts of the *International Convention against Corruption* that Mr Downer signed in 2005 on behalf of Australia.¹⁵
59. The anticipated tax revenues from Greater Sunrise calculated by the Treasury¹⁶ were not of any dimension relative to Australia’s GNP so as to ‘*affect*’ Australia’s national security. Not so Timor-Leste, which, without any other long-term revenue source, had a vital national security concern with the negotiations both as to revenue and an expectation derived from Article 8 in the Exchange of Notes,¹⁷ which came into force on 10 February 2000, and the replicate Article 8 in the 2002 TST, that a second gas pipeline would land in Timor-Leste and boost the local economy in a manner commensurate with the way the Bayu-Undan pipeline had boosted the Australian Northern Territory economy.

¹⁴ *Memorandum of Understanding Between the Government of the Democratic Republic of East Timor and the Government of Australia Concerning an International Utilization Agreement for the Greater Sunrise Field, East-Timor-Australia*, signed 20 May 2002.

¹⁵ *United Nations Convention against Corruption*, 2349 UNTS 41, entered into force 14 December 2005.

¹⁶ Andrew Wilkie MP, Official Committee Hansard, JSCOT, Monday 26 February 2007, Questioning of Mr John Hartwell, Transcript of Evidence, p.35 ‘...we work together with Treasury on this one (revenue)...’

¹⁷ Exchange of Notes Constituting an Agreement between the Government of Australia and the United Nations Transitional Administration in East Timor (UNTAET) concerning the Continued Operation of the Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia of 11 December 1989, Australia-UNTAET, signed 10 February 2000 [2000] ATS 9 (entered into force 10 February 2000, with effect from 25 October 1999).

60. However, the commercial contractors made clear that they wished to avoid the construction of a second pipeline and, in working closely with the Australian Government, expected Australia to keep the pipeline issue off the table in negotiations with Timor-Leste. In fact, Royal Dutch Shell as part of the contractor consortia, already favoured a Floating Liquid Natural Gas (“FLNG”) processing facility. But Timor-Leste remained in hope for a pipeline to land in Timor-Leste.
61. In this context, the interest of the Government of Timor-Leste in securing upstream secondary industrial advantages from the piping of gas and oil to its mainland met with counter-arguments by the Australian Government and Woodside Petroleum, arguing that a pipeline to East Timor traversing the Timor Trough was not a feasible prospect. Woodside published illustrated diagrams showing the trough to be steep-sided and impractical to traverse. On numerous occasions, Foreign Minister Downer endorsed Woodside’s assertions.
62. Both parties understood that the maritime boundary delimitation dispute between them would remain in abeyance as agreed in the 2002 TST. However, there was a live question as to how long the boundary dispute would remain off the table. Nevertheless, there had never been any suggestion by Australia that the maritime boundary issue between Timor-Leste and Australia had any national security implication. The area of the Timor Sea in dispute contains no natural feature that would affect Australia’s national security in the accepted meaning of the words in ordinary English language understood in the statutory context.
63. In terms of Australia’s “energy security”, there is no provision in any of the Timor Sea suite of treaties between Timor-Leste and Australia allowing either government to requisition, in circumstances of emergency, any of the petroleum product. The Production Sharing Contracts are equally silent in respect of any emergency power. All of the LNG flowing to Darwin via the Bayu-Undan Pipeline is exported. Whilst there is a national gas grid connection at Darwin, this is a back-up export facility.
64. In any event, Australia is massively endowed with natural gas resources. Australia’s energy security program had come a long way since the 1972 OPEC crisis and is now conducted by Geoscience Australia with an export trade focus. Multinational companies conduct under Australian issued permits exploration activities in the areas of Timor Sea sea-bed the subject of the Side-Letters to the

CMATS treaty. Royalty income to Australia that may flow to Australia is hardly a matter of ‘national security’.

65. The likely conclusion is that there was no “national security” imperative “affected by” the Timor-Leste Cabinet to justify the clandestine eavesdropping mission. Indeed, if there was any declared national security imperative *vis-à-vis* Timor-Leste, successive Australian Defence White Papers have emphasised that Australia’s broad national security interests are served by a stable prosperous Timor-Leste in the Region.¹⁸ Not only are there broad national defence interests but there is a positive defence interest in having an unsinkable aircraft carrier and a deep sea-port close to Australia’s vital sea lanes in the hands of an abiding and economically stable ally.
66. Indeed, the trade policy objectives outlined by Mr Downer and his officials in evidence to Parliamentary committees raise the question whether the emphasis given to levering a largely foreign private commercial joint-venture consortia into an advantageous position to the detriment of Timor-Leste’s long term economic future was compatible with Australia’s long-term national security interests. Shortly, I shall explain why the CMATS manipulation was also to the detriment of Australia’s national economic well being.
67. In all the years I have worked closely with the Timorese leadership there has been a positive and effective defence relationship between Timor-Leste and Australia. The Timor-Leste President Taur Matan Ruak and Xanana Gusmao both heroes of a humane resistance, have most effective ties to the Australian defence establishment. Any doubt about that would have been dispelled by the sight of Xanana Gusmao and his FALANTIL veterans marching down Martin Place last ANZAC Day. Bringing those to account for maverick behaviour in 2004 and invalidating a fraudulently procured treaty will not endanger those ties.

Foreign Relations

68. The second question to ask is were ‘*Australia’s foreign relations ... affected by...*’ Prime Minister Alkatiri and Cabinet participating in internal deliberations regarding the proposed CMATS Treaty.

¹⁸ Commonwealth of Australia, Defence White Paper 2013, available at <http://www.defence.gov.au/WhitePaper2013/docs/WP_2013_web.pdf>.

69. On the ABC Four Corners programme on 17 March 2014, the former Foreign Affairs Minister Alexander Downer claimed that foreign relations with Indonesia were a factor in the CMATS negotiations. Mr Downer was referring to treaties negotiated in 1971 for the Arafura Sea and in 1972 for the Timor Sea. The 1971 median line treaty was uncontroversial and was resolved on settled principles. In 1972, Indonesia accepted a maritime boundary line on the continental shelf between West Timor and other Indonesian islands, and, Australia, significantly further north of where the median line is between the two countries.¹⁹

70. Mr Downer said:

*And if we had made special provisions for East Timor, then naturally enough the Indonesians would've come back to us and said, well, in that case why should we adhere to these earlier treaties? And then in that context all of our maritime boundaries and seabed agreements would unravel, and that would be diplomatic folly for Australia.*²⁰

71. This claim was not new. Mr Downer made a similar claim in 2002 while defending the 2002 TST asserting that a radical change to delimitation of the boundaries was unacceptable:

*As I explained to the East Timorese some time ago, we are happy to hear what they have to say but we don't want to start renegotiating all of our boundaries, not just with East Timor, but with Indonesia. It has enormous implications. As I have explained to them, our maritime boundaries with Indonesia cover several thousand kilometres. That is a very, very big issue for us and we are not in the game of renegotiating them.*²¹

72. Mr Downer's reference to the boundary agreements with Indonesia being potentially unstable is misleading. The 1971 Treaty that established a boundary line in the Arafura Sea between Australia and Indonesia was drawn on the principles of the then Geneva Convention on the Continental Shelf endorsed by the International Court in the North Sea Cases²² and since reaffirmed in the 1982 UNCLOS. Namely, that as the Arafura Sea is mostly at a depth of 200m or less, a median line was appropriate. A declassified 1965 Australian Cabinet Submission

¹⁹ Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing Certain Seabed Boundaries, Australia-Indonesia, signed 18 May 1971, ATS 1973 No. 31 (entered into force 8 November 1973); Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing certain seabed boundaries in the area of the Timor and Arafura Seas, Supplementary to the Agreement of 18 May 1971, Australia-Indonesia, signed 9 October 1972, ATS 1973 No. 32 (entered into force 8 November 1973).

²⁰ Marian Wilkinson and Peter Cronau, ABC Four Corners, 17 March 2014, 'Drawing the Line', Transcript p.7, available at <<http://www.acb.net.au/4corners/stories/2014/03/17/3962821>>

²¹ Don Greenlees, 'Downer: no change to Timor borders', The Australian, 25 May 2002 in Robert J. King, July 2002, 'The Timor Gap, 1972-2002', 45.

²² North Sea Continental Shelf (Federal Republic of Germany v Denmark, Federal Republic of Germany v Netherlands) (Judgement) [1969] ICJ Rep 3.

bears out Australian acceptance of those principles.²³ Contrary to Mr Downer's claim nothing in the Arafura Sea can 'unravel' as the boundary is set in accordance with established principles accepted by Indonesia.

73. The 1972 Treaty between Australia and Indonesia concerned a Timor Sea boundary issue in which Australia rejected equidistance principles and pursued a "two-shelves" approach. This boundary is less than 1000 km in length, not the 'thousands of kilometres' asserted by Mr Downer in his Four Corners interview. Moreover, the area between the 1972 Treaty seabed boundary and the median line which might conceivably 'unravel', is miniscule when compared to Australia's 12.75 million square km of continental shelf entitlement.
74. The miniscule area in question has been almost fully explored for hydrocarbon potential. Apart from Greater Sunrise, to which Timor-Leste has the claim and Indonesia has made no claim, no significant commercially viable petroleum deposits between the notional Indonesia median line with Australia and the 1972 agreed line have been identified. Indonesia is well endowed with energy resources elsewhere and has yet to develop significant identified reserves well within its sovereign boundaries. What incentive could Indonesia have to now seek a median line in a relatively barren area?
75. Indonesia would have to unilaterally abrogate the 1972 Treaty for the line to 'unravel' as a result of any Australian agreement with Timor-Leste. Indonesia has made no demarches whatsoever during the lengthy public debate between Australia and Timor-Leste over the median line claimed by Timor-Leste.
76. It is true that in 1977, during a period of strained relations with Australia, the then Indonesian Foreign Minister, Dr Mochtar Kusumaatmadja, a law of the sea expert who had been an Indonesian negotiating official during the 1971 and 1972 negotiations with Australia, claimed that Australia had, "...taken Indonesia to the cleaners", in the negotiations over the long-line seabed boundary. Dr Mochtar said, 'The Australians were able to talk us into accepting that the Timor Trench constituted a natural boundary between the two shelves, which is not true.'²⁴
77. A more sanguine view emerged in 2004 when a senior Indonesian diplomat, Hashim Djalal, then participating with Indonesia in the revised economic zone

²³ David Fairbairn, Charles Barnes and Billy Snedden, *Submission 1165 to Cabinet, Off-Shore Petroleum, Legislation To Give Effect To Joint Commonwealth-State Legislative Arrangements*, 25 November 1965.

²⁴ Michael Richardson, 'Jakarta's Tough Sea Boundary Claim', *The Australian Financial Review*, 20 December 1978.

seabed negotiations, said that the Indonesian Government was unaware of the Timor Sea's oil and gas potential at the time.²⁵ Mr Djalal acknowledged that Indonesia, in negotiating its 1972 boundary, wanted to be a good neighbour to Australia after the armed confrontation in the 1960s between Indonesia and Malaysia that was supported by Britain, Australia and New Zealand.

78. In lodging a comprehensive Continental Shelf submission in 2009 to the Commission on the Limits of the Continental Shelf (CLCS) at the UN, Indonesia did not signal in any way its intent to seek to renegotiate or abrogate the 1972 Treaty.²⁶ Indeed, Indonesia cited in its submission both the 1971 and 1972 treaties as settled, and, domestic laws passed by the Indonesian parliament without controversy accepting the 1971 and 1972 agreements as exceptions to Indonesia's adherence to UNCLOS principles.²⁷ This was unsurprising, for at no time during the ten years of negotiations between Australia and Indonesia in relation to the eventual 1989 Timor Gap Treaty did Indonesia seek any concession with respect to the 1972 boundary line.
79. A review of 1987 Cabinet papers reveal that during the post-1979 negotiations, Indonesia indicated that it wanted an economic share of the petroleum revenue to be acquired from the areas of the eventual zone of cooperation in the Timor Gap up to the 200 nautical mile limit not already covered by petroleum titles granted by Australia.
80. Indonesia expressed the sensible view that when existing petroleum titles issued by Australia for that area expired, the vacated title area should become part of Indonesia's co-economic interest. In other words, in negotiating with the additional leverage available to it after invading Timor-Leste, Indonesia sought no concessions in relation to the 1972 boundary line but only concessions in relation to the Timor Gap. The concession was made and Zone A became an area of joint Australian-Indonesian "co-prosperity".
81. If, in the context of the 1989 Timor Gap Treaty, Indonesia did not seek a concession in relation to the 1972 boundary line with Australia or in relation to

²⁵ Robert J. King, *July 2002*, 'The Timor Gap, 1972-2002'.

<http://www.aphref.aph.gov.au_house_committee_jsct_timor_subs_sub43.com>

²⁶ *Division for Oceans Affairs and the Law of the Sea, Office of Legal Affairs, United Nations*, Submission in Compliance with the Deposit Obligations Pursuant to the United Nations Convention on the Law of the Sea (UNCLOS) (7 March 2012), available at <<http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/IDN.htm>>.

²⁷ Act No. 6 of 8 August 1996 Regarding Indonesian Waters; Act No. 17 of 1985 on Ratification of the United Nations Convention on the Law of the Sea.

the lateral close to Greater Sunrise, it is hard to comprehend the basis upon which it could be asserted that if a median line was agreed with Timor-Leste, Indonesia would seek a renegotiated boundary. When speaking to Four Corners Mr Downer would have known that the prospect of Indonesia re-opening the 1972 boundary agreement was ruled out by the then Australian Cabinet in 1987 and by Indonesia itself in its 2009 Continental Shelf Submission.

82. Moreover, the 1987 Cabinet Submission that canvassed the bases upon which Australia might reach the eventual 1989 Timor Gap Treaty with Indonesia noted that:

...under International Law Australia's and Indonesia's seabed rights in the Timor Gap extend from their respective coastlines to the bathymetric axis (the deepest point) of the Timor Trough, which is the end of their respective continental shelves in this area.

...

...Indonesia's position has been that there is one shared continental shelf between Australia and Indonesia and that accordingly, a boundary equidistant between the two coasts (the median line) would be appropriate. In addition, Indonesia argues that recent developments in the law of the sea, incorporated in 1982 United Nations Convention on the Law of the Sea, conferring jurisdiction over the seabed and water column out to 200 nautical miles, (the Exclusive Economic Zone – "EEZ") regardless of geomorphology, support the median as the appropriate delimitation. No agreement on the principles for a permanent delimitation seems possible.

...

Indonesia has not accepted and is unlikely to accept the compulsory jurisdiction of the Court because it shares the traditional antipathy of less developed countries to compulsory third party settlement of disputes.²⁸

83. In March 2002, like the less developed countries referred to in the above cabinet submission, Australia withdrew from all Law of the Sea adjudication concerning maritime boundaries. In consequence, any concern that Indonesia might submit to International Court jurisdiction and litigate any boundary issue with Australia was well gone before the 2004 ASIS bugging mission in Dili. Indonesia's Foreign Minister, Hassan Wirajuda, had observed on 26 February 2002 that '*in due course*' Indonesia might wish to be part of a three-way process in redefining the boundaries of the Timor Gap. In this context, the Indonesian Foreign Minister was referring only to the adjustment of the lateral boundaries between what is now Timor-Leste and Indonesia out to tri-junction points out in the Timor Sea.

²⁸ Cabinet Submission No. 5261 – 'Australia – Indonesia Maritime Delimitation Negotiations', Canberra, 6 October 1987, 2.

Because the Aust-Indonesia boundary in the Timor Sea is not a median line a portion of each of the laterals requires a three-way process.

84. On other bilateral fronts, Indonesia has accepted the joint maritime arrangements at sea whereby Australia has assumed responsibility out to the 1972 negotiated line. Indonesia is still resolving maritime boundaries issues elsewhere and it would seem highly unlikely for Indonesia as a democratic state to seek to abrogate a long-standing international treaty. The 1997 EEZ Treaty between Indonesia and Australia reaffirmed the original 1972 line but neither Australia nor Indonesia has ratified the 1997 EEZ Treaty.
85. In this submission, Mr Downer's claim that Indonesia might renege on a treaty it has set in stone in international and domestic law is an unconvincing justification for spying to defraud Timor-Leste in revenue sharing negotiations. The question whether the claim, an insult to Indonesia's democratic leadership, is backed by a 2004 Direction by Australia's Cabinet National Security Committee to bug the Timor Leste Cabinet needs to be asked.
86. I am confident that a full judicial enquiry with appropriate phases in camera will evidence that there was and is no such "foreign relations" issue with Indonesia. The time-honoured device of briefings in confidence about intelligence acquired 'whispers of discontent' in Jakarta may not stack up against the objective evidence.
87. What is necessary in law is for the former Minister and his former Director-General to establish that the Alkatiri Cabinet was affecting a foreign relations issue that would or could be reasonably expected to cause actual or significant compromise to Australia's national interests. It seems unlikely that the Executive may evade, on national security grounds, judicial and/or tribunal scrutiny of Mr Downer's improbable claims.²⁹

National Economic Well-Being

88. The third issue requiring analysis was the question whether the CMATS treaty negotiations were in the interests of Australia's national economic well being. On 17 March 2014 in the aftermath of the bugging scandal Mr Downer told Four Corners:

²⁹ *Thomas v Mowbray* (2007) HCA 33, 307.

*We were close to all stakeholders and we would've been derelict in our duty had we not been. Galbraith was working for the United Nations, that's a different thing; the United Nations doesn't have an oil company. But of course when we're involved in negotiations we maintain contact with Australian companies. The Australian government isn't against Australian companies, or if it is it's derelict in its duty. The Australian government supports Australian business and Australian industry. The Australian government unashamedly should be trying to advance the interests of Australian companies.*³⁰

89. Mr Downer's candid admission ten years after the bugging confirmed our earlier analysis. A key issue we studied was how does advancing the interests of Australian companies fit within the legislative scheme of the *Intelligence Services Act 2001*? The legislative terminology was viewed in the first instance in light of successive statements of Australian foreign and trade policy, namely:

*The values which Australia brings to its foreign policy are the values of a liberal democracy. These have been shaped by national experience... but reflect a predominantly European intellectual and cultural heritage. They include the rule of law, freedom of the press, the accountability of the government to an elected parliament, and a commitment to a "fair go".*³¹

90. Article 5 of CMATS requires that Australia and Timor-Leste 'share equally' revenues derived from the upstream exploitation of petroleum resources within the Sunrise IUA area.³² According to Australia, the Greater Sunrise field contains an 'estimated 8.4 trillion cubic feet of gas and 295 million barrels of condensate.'³³ The consortium holding the rights to develop the field is led by Australian oil major Woodside Energy Ltd, and the projected costs of development were approximately AUD\$6.6 billion.³⁴

91. Following negotiation of CMATS, then Foreign Minister Alexander Downer noted that equal sharing of the upstream revenues deriving from Greater Sunrise

³⁰ Marian Wilkinson and Peter Cronau, ABC Four Corners, 17 March 2014, 'Drawing the Line', Transcript, p.8, available at <<http://www.abc.net.au/4corners/stories/2014/03/17/3962821.htm>>.

³¹ Australian Government (1997), Australia's Foreign and Trade Policy White Paper, <<http://www.dfat.gov.au/ani/index.html>>. Also see <http://www.foreignminister.gov.au/releases/1997/fa106_97.html>.

³² CMATS, Article 5(1). The remainder of Article 5 provides details on the calculation of each party's taxation revenues, while Article 6 provides the terms for appointing an assessor to review adjustments to the calculation of the revenues referred to in Article 5, if deemed necessary by either party. The 'petroleum resources' are defined in Article 7 as constituting those contained in CMATS itself, the TST, the Sunrise IUA and 'any future agreement between Australia and Timor-Leste as referred to in Article 9 of the Timor Sea Treaty' (Article 7 (1, d)). With regard to 'Unit Area', Article 1 of CMATS, which is devoted to definitions, provides that the term Unit Area refers to the area outlined in Attachment I to the 'Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitization of the Sunrise and Troubadour Fields, done at Dili on 6 March 2003' ("IUA").

³³ Australian Government's National Interest Analysis – CMATS Treaty. [9], available at <www.aph.gov.au/house/committee/jsct/6_7_february2007/treaties/timor_nia.pdf>.

³⁴ Woodside owns 33.4% of Sunrise in partnership with ConocoPhillips (30%), Royal Dutch/Shell Group (26.6%) and Japan's Osaka Gas Co. (10%). Estimates as to the projected cost of the project vary, although US\$5 billion is often quoted.

*'could result in Australia and Timor-Leste each receiving up to US\$10 billion over the life of the project.'*³⁵

92. Thus, the purely fiscal impact of CMATS on Australia and Timor-Leste over the estimated 30-year life of the project can be assessed as between the estimated revenue from the non risk-adjusted 8.4tcf claimed by Australia, and, in standard petroleum trade terms, a risk-adjusted estimate that might reduce field potential by 15- 20%.
93. Timor-Leste had already secured what amounted to an 18.1% share of the reserve through the TST and IUA. The National Interest Analysis tabled in the Australian Parliament with the CMATS Treaty estimated that it would involve transfers to Timor-Leste of around \$AUD4 billion over the expected 30 year life of the project.³⁶ The difference between what Timor-Leste would have received under the 2003 IUA and what was negotiated under the 2006 CMATS is up to \$AUD6 billion.
94. Although Timor-Leste gained from the CMATS Treaty negotiation more than double the revenue than it would otherwise have derived under the IUA, it failed to secure the main prize. During the run up to the negotiation of CMATS, Timor-Leste argued for the processing facility to be located in Timor-Leste in order to provide much needed stimulus to the local economy. Prime Minister Alkatiri noted that some estimates of the economic benefits of locating the facilities in Darwin were as much as \$AUD22 billion. He also asserted that given Australia was receiving the downstream benefits processing from the Baya-Undan field, it would be fair if Timor-Leste were to benefit from the Sunrise field.³⁷
95. In fact, Dr Alkatiri had a treaty basis for this negotiation position. Article 8 in both the 2002 TST and its precursor agreement, the Exchange of Notes between UNTAET and Australia of 10 February 2000, provided:

(c) In the event a pipeline is constructed from the JPDA to the territory of either Australia or East Timor, the country where the pipeline lands may not object to or impede decisions of the Joint Commission regarding a pipeline to the other country...

96. The silence of CMATS on the location of processing facilities was, on Timor-Leste's analysis, a \$AUD22 billion wildcard. On one view, the major beneficiary

³⁵ Department of Foreign Affairs and Trade, 'Entry into Force of Greater Sunrise Treaties with East Timor', Alexander Downer, Minister of Foreign Affairs, Australia, media release, 23 February 2007, available at www.foreignminister.gov.au/releases/2007.

³⁶ National Interest Analysis [2007] ATNIA 4, Documents tabled by the Australian Government in the Australian Parliament on 6 February 2007, [10].

³⁷ Mari Alkatiri, 'All Timor-Leste Seeks is a Fair Go,' The Age, 3 November 2004.

from CMATS in economic terms was the Woodside consortium, as the untying of Article 8 of the TST in its application to Greater Sunrise lost Timor-Leste the right to land a pipeline in Timor-Leste. To avoid this debacle, Timor-Leste would have required a term in the CMATS Treaty that preserved Article 8 and applied it explicitly to any Greater Sunrise Development Plan and to Production Sharing Contracts executed in anticipation of a Greater Sunrise Development Plan being approved.³⁸ It was not only Timor-Leste that missed out. Australia could have required Woodside to link a pipeline from Greater Sunrise to the existing Bayu-Undan pipeline to Darwin by treaty terms.

97. By CMATS Timor-Leste and Australia accepted a 50% share each of the total anticipated upstream tax revenues from Greater Sunrise without knowing what the tax deductible cost of the most important variable in the equation would be, namely, the outstanding costs of exploration, gas recovery, delivery and processing. In not securing the right to either stipulate or maintain a veto right to influence the LNG processing method Australia and Timor-Leste left the anticipated tax revenue return from Greater Sunrise to commercial dictates.
98. In a provision remarkable for its hands-off approach, the CMATS Treaty simply required the State parties to agree with the Contractors within six years on a Greater Sunrise Development Plan, which included the gas processing decision.³⁹ By April 2010, the long anticipated decision that the consortium favoured an FLNG as the processing and delivery method was confirmed.⁴⁰ Thus, both Timor-Leste and Australia are, as matters stand, going to miss out on the multi billion-dollar infrastructure and employment boost from a landed facility.
99. In Australia's case, and adopting an Australian argument, the loss is all the more galling because a pipeline under Australian supervision would be available from the Bayu-Undan Field to Darwin and a seabed connecting line from Greater Sunrise to the Bayu-Undan flange could present no unusual engineering challenges. Once at the Bayu-Undan flange, ullage in the line to Darwin could be taken up to transport an Australian allocated gas stream from Greater Sunrise, and TL's share of LNG and condensate sales could be made direct from the Bayu-

³⁸ Production Sharing Contracts: PSC JPDA 03-12 and Appendix X, PSC 03-19, and PSC 03-20.

³⁹ *Treaty with the Government of the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea* (CMATS) [2007] ATS 12 (entered into force 23 February 2007) Article 12(2)(a).

⁴⁰ Shell Global, *Shell floating LNG technology chosen by joint venture for Greater Sunrise project* (29 April 2010), <<http://www.shell.com/global/aboutshell/media/news-and-media-releases/2010/flng-technology-greater-sunrise-29042010.html>>.

Undan plant. Although not a proposal by TL it would have been open to the parties to negotiate a treaty agreement to share infrastructure gains by ship transport of some or all of TL's LNG to on-shore processing on TL's south coast thus funding a deep sea port of strategic importance.

100. On 6 February 2007, the Australian Government tabled the CMATS Treaty in the Federal Parliament with a National Interest Analysis that did not address the economic significance of the pipeline infrastructure issues **for Australia** as well as Timor-Leste. The following day the Government declared the legislation implementing the IUA operative.
101. On 22 February 2007, on the eve of the Exchange of Notes the following day in Dili between Timor-Leste and Australia to bring the IUA and the CMATS Treaty simultaneously into force, Mr Downer informed the Chair of the Joint Standing Committee on Treaties (JSCOT) that he was invoking the rarely used national interest exemption and would proceed to ratify the CMATS Treaty before the stipulated twenty day sitting period following tabling elapses. This unscrutinised process represented a major strategic win for the largely foreign consortia, and, contrary to the perception of many pro-Timor Leste campaigners, a big gain for the consortia and a significant potential loss for Australia.
102. Nevertheless, the leapfrogging of the parliamentary process did not pass unnoticed. When the JSCOT met on 26 February 2007, the following exchange took place between the Acting Chair, Mr Andrew Wilkie MP, and a DFAT official, Ms Penny Richards:

Acting Chair: Thank you very much. Before we proceed to questions on the treaty itself, I have a few questions about the process of invoking the national interest exemption. Given this treaty was signed in January 2006 and that the minister made the statement to parliament in February last year that the treaty would be brought forward virtually as quickly as possible to the Australian parliament for consideration, why has it taken until February this year for the treaty to be tabled so that this committee can investigate it?

Ms Richards: The feeling was that both governments wished to move as closely in-step as possible through their domestic processes. As you know, the processes are somewhat different, so it is difficult to dovetail them exactly, but East Timor had requested us to arrange for synchronous entry into force of the treaty. The East Timorese processes were disrupted by domestic developments in 2006 but, towards the end of last year and the beginning of this year, the East Timor government was in a position to move quickly and had requested that Australia proceed with synchronous exchange of letters and entry into force. So the Australian government sought to meet

- that East Timorese request to be in a position to exchange notes on the same day.*
- Acting Chair: So the Timorese parliament have followed their due process in considering the treaty, but Australia has not; is that right?*
- Ms Richards: Mr Downer, as you know, on 22 February invoked the national interest exemption, which is a provision allowing for unusual measures in the event of safeguarding Australia's national interest. It was felt in this case, because the treaties bring significant national benefits to both countries and because there was possibly a very narrow window of opportunity to bring them into force in the short term, that it was important to take advantage of that window of opportunity.*
- Acting Chair: Then why didn't the government ask the treaties committee at the last sitting fortnight to look at urgently considering this treaty within that week and reporting as quickly as possible, rather than invoke a national interest exemption that bypasses the committee completely?*
- Ms Richards: The treaty was tabled on 6 February, the first available tabling day this year, and it is the government's intention to answer the committee's questions. As I mentioned, the treaty has been available to the general public for a full 12 months but, as I said, there was a rapidly closing window of opportunity, developments were moving quickly in East Timor, and in the national interest it was thought best to grab that window before it closed.*
- Acting Chair: This a rather blunt question, but whose incompetence led to this situation, given that this treaty could have been examined by this committee at any point in the last 13 months and it has taken until now for it to be tabled? Is that a decision of the minister or the department?*
- Ms Richards: East Timor had requested the government to try and move in step with it, to ratify synchronously if that were possible, and in good faith the government sought to respond to that and move step by step with East Timor as closely as the procedures allowed.*
- Acting Chair: I think it is outrageous that this committee was not given the opportunity to examine the treaty in due time, and it is a failing on behalf of both the minister and the department which I find totally unacceptable. Does anyone have any questions?⁴¹*

103. The suggestion that the timing was to meet a request by Timor-Leste was disingenuous to say the least. In 2002, Mr Wilkie's questioning had elicited from another DFAT official an intended modus vivendi whereby a revenue flow for Timor-Leste anticipated by the 2003 IUA, would not commence until a deal for Greater Sunrise was agreed to by Timor-Leste.⁴² In other words, the IUA would not be ratified until there were treaty rights to Greater Sunrise for commercial contractors. By 2007, the Alkatiri Government had collapsed in civil strife and an

⁴¹ Commonwealth of Australia, Official Committee Hansard, Joint Standing Committee on Treaties, Reference: Treaties tabled on 6 December 2006 and 6 February 2007, Monday, 26 February 2007, Canberra, 32-33.

⁴² Andrew Wilkie MP, Official Committee Hansard, JSCOT, 14 October 2002, Questioning of Mr Geoffrey Raby, 270-284.

interim government, still largely reliant upon donor funds, was preparing for elections.

104. Mr Downer attributed uncertainty arising from the national elections in Timor-Leste as the reason why he invoked a national interest exemption to exclude an inquiry into the CMATS Treaty by the JSCOT.⁴³ Mr Wilkie's retort to this claim was:

...but could someone please explain to me why on the DFAT webpage there is a media release from the minister dated 8 February, which says the process is not the timing of the elections. It says it was agreed to move through in parallel, which has already been stated, but that it was not the timing of the elections that dictated the government's approach. That is totally the opposite of what you just said.⁴⁴

105. Ultimately, in terms of the ASIS Dili mission, the question is whether the silence of CMATS on the location of processing facilities is to the benefit of Australia's national economic well-being or primarily of commercial gain to the Woodside led consortia. On any current analysis of information in the public domain, abdication of government control over sovereign resource processing was to both Australia and Timor-Leste's detriment as the upstream economic development gains of a landed processing facility would dwarf total anticipated tax revenue stated in the National Interest Analysis to be worth up to \$AUD10 billion each to Australia and Timor-Leste.

106. Thus if the Greater Sunrise Field gas is processed by an internationally moored FLNG using flown in foreign labour, the infrastructure and employment gains to Timor-Leste and Australia of a landed facility may largely be lost.

107. Just what "wealth" would accrue to Australia is not spelt out in Mr Downer's recollection during his 17 March 2014 television interview:

Alexander Downer: Woodside is a huge Australian company and they were proposing to invest billions of dollars in Greater Sunrise to create wealth, which would inter alia have been wealth for Australians, but obviously substantially for the East Timorese as well. So I was all in favour of that. I was all in favour of it...⁴⁵

Marian Wilkinson: ... Woodside executives led by Voelte lobbied the government strongly during the 2004 negotiations.

Alexander Downer: Me, for my part, I reckon, I don't know, I mean I

⁴³ Alexander Downer, letter dated 22 February 2007 to Dr Andrew Southcott MP, Chair, Joint Standing Committee on Treaties: 'It is uncertain when an opportunity would arise after the East Timorese election period.'

⁴⁴ Andrew Wilkie MP, Official Committee Hansard, JSCOT, Monday, 26 February 2007, Questioning of Ms Richards, 34.

⁴⁵ Marian Wilkinson and Peter Cronau, ABC Four Corners, 17 March 2014, 'Drawing the Line' Transcript, p.10, available at <http://www.abc.net.au/4corners/stories/2014/03/17/3962821.htm>.

haven't checked, but I would've had certainly more than one, I should think three or four meetings with the CEO of Woodside and no doubt he had a couple of other people there and I would talk to them about how the negotiations were progressing. Well, of course I did. But I mean like there's some...⁴⁶

...
Alexander Downer: You don't need to ask me about the intelligence operation allegations because you know no Australian government, past or present, will ever get into any discussion about intelligence operations. But suffice it to say the um Australian government was on Australia's side in the negotiations and we did our best to make sure that we were ah able to achieve our objective, which was particularly an objective in relation to the delineation of the maritime boundaries.⁴⁷

108. The emphasis on LNG trade expansion also unfolds in the contemporaneous evidence of DFAT Senior Legal Adviser, Ms Penny Richards:

The CMATS Treaty and the IUA are good deals for Australia and very much in our national interest. The treaty will promote further investment in Australia's offshore petroleum industry. Australia is currently the fifth largest exporter of LNG, with seven per cent of global volume. The development of Greater Sunrise has the potential to build significantly on Australia's standing in the global energy market.⁴⁸

109. The conclusion must be that no direct Australian national economic well-being interest was being served by ASIS eavesdropping on the internal deliberations of the Timor-Leste Cabinet. The 2002 TST had already committed Timor-Leste to including Greater Sunrise in the Joint Venture with Australia, so the eavesdropping was not to get Greater Sunrise for Australia. The maritime boundary dispute was to be deferred and Indonesia was not making any claims on Greater Sunrise. The absence of a pipeline tie in the terms of the CMATS Treaty deprived both Timor-Leste **and Australia** of a chance to directly boost their economies.

110. The principal beneficiary from this debacle was the Woodside-led consortia, which had been closely involved with Alexander Downer in the negotiations.⁴⁹

⁴⁶ Marian Wilkinson and Peter Cronau, ABC Four Corners, 17 March 2014, 'Drawing the Line' Transcript, p.10, available at <http://www.abc.net.au/4corners/stories/2014/03/17/3962821.htm>.

⁴⁷ Ibid, 11.

⁴⁸ Commonwealth of Australia, Official Committee Hansard, Joint Standing Committee on Treaties, Reference: Treaties tabled on 6 December 2006 and 6 February 2007, Monday, 26 February 2007, Canberra, 31.

⁴⁹ The Terms of Reference for a Judicial Inquiry should include investigation into whether information secured, not only from eavesdropping out of session deliberations by the Timor-Leste Cabinet, but from expert advisers and oil executives conferring with the Timor-Leste Prime Minister. Woodside Executives had many meetings with Timor-Leste Ministers and officials. For example, on 13 September 2004, Woodside CEO Don Voelte and officials including Gary Gray flew into Dili for preliminary meetings prior to discussions in Canberra later that month.

The bulk of the earnings by the Contractor parties are repatriated to non-Australian entities. Announcements by the Australian Government during negotiations between Australia and Timor-Leste were often preceded by or followed by similar announcements by Woodside Petroleum. During negotiations between Timor-Leste and Woodside Petroleum, an official from DFAT was “seconded” to Woodside Petroleum’s offices in Dili.

111. In September 2005, Ashton Calvert, the then recently retired head of DFAT, was appointed to the Woodside Board. It was under Calvert’s tenure as head of DFAT and under the same roof that instructions for the eavesdropping ASIS operation were given. In 1999, the then National Secretary of the Australian Labour Party, Gary Gray, resigned. In early 2001, he was employed by Woodside Petroleum as an adviser, later joining the company’s executive board. In 2007, he was elected to the Federal Parliament. During the last phase of the Gillard Labor Government Gary Gray was Australia’s Minister for Natural Resources Energy and Tourism.
112. While the 2004 and now 2013 Coalition scandals await due inquiry the conclusion regarding the 2004 negotiations must be that the Timor-Leste delegation was cheated and the Australian Parliament left uninformed as to the real significance of the pipeline issue for Timor-Leste and Australia.⁵⁰ The Australian Parliament was not informed by Foreign Minister Downer that a pipeline landed in Timor-Leste had significant implications for the economic growth of Timor-Leste as a stable prosperous neighbour thus meeting a vital element of Cabinet endorsed defence policy.
113. The Foreign Minister relied on Woodside to dismiss arguments that Australia should support Timor-Leste’s wish for a landed pipeline. Arguments that the Timor Trough was impractical to traverse by pipeline were supported by the Foreign Minister in tandem with Woodside’s claims that the Trough was too steep to lay a pipeline across.
114. By 2010 and 2011, well after the 2004 treaty negotiations that took place against assertions by the Woodside-led consortium backed by Mr Downer that it was not technically feasible to cross the Timor Trough by pipeline, Timor-Leste was able to commission and pay for an independent bathymetric survey of the seabed areas embracing the Timor Trough adjacent to the south coast. Contrary to

⁵⁰ National Interest Analysis [2007] ATNIA 4, Documents tabled by the Australian Government in the Australian Parliament on 6 February 2007.

the assertions by Woodside Petroleum and Australia, the seabed survey revealed gradients in and around the trough that, according to current pipeline technology, may accommodate a gas pipeline without significant challenge.⁵¹

115. It is for due enquiry of Australia's scientists to establish whether *Geoscience Australia* had access to bathymetric data that might contradict Woodside's claims concerning the steepness of the Trough. The Parliament was not informed whether DFAT had sought verification from *Geoscience Australia* as to the reliability of the claims made by Woodside. Geoscience executives should have been well aware of the claims made by Woodside and adopted by Mr Downer. .
116. Woodside as we have seen survives the vicissitudes of government in Canberra where it remains both influential and an instrument of foreign policy by proxy. In late 2014, with both parties locked in litigation at The Hague over the gas-fields it came as no surprise for an adjournment to be announced when Woodside signalled a possible change to its long preferred option of a floating LNG plant.⁵² Time and time again over the years the Timor-Leste negotiation teams are baited with Woodside 'initiatives' only to be disappointed at the table.

Activities of People or Organisations

117. The final element in its empowering legislation upon which ASIS might rely to justify the Dili bugging mission is Parliament's expectation that ASIS should be able to monitor and deal with the, '*...Capabilities, intentions or activities of people or organisations*'
118. Capturing, unlawfully, the internal Cabinet deliberations of the Ministers of State and advisers of a friendly, law-abiding sovereign State concerning a joint-venture treaty that would divide the economic benefits of a mutually shared resource between that State and Australia, could not on any stretch of the statutory language of s11, even without extrinsic aid to interpretation, justify such a function of ASIS in the national interest. Taking the ordinary meaning of words in context, law abiding Cabinet Ministers with no harmful intent to Australia are not

⁵¹ See Minister Alfredo Pires comments in Andrew Fowler and Peter Cronau, ABC, *Four Corners*, 1 October 2012, 'Taxing Times in Timor', Transcript, available at <<http://www.abc.net.au/4corners/stories/2012/09/27/3599022.htm>>.

⁵² See Aaron Sheldrick, Nov.6,2014, [http://www.rigzone.com/news/oil_gas/a/135783/Woodside East Timor in Talks for Onshore Plant for Sunrise LNG](http://www.rigzone.com/news/oil_gas/a/135783/Woodside%20East%20Timor%20in%20Talks%20for%20Onshore%20Plant%20for%20Sunrise%20LNG).

the ‘*people*’ the legislature intended to embrace, and nor is such a Cabinet of Ministers an ‘*organisation*’ within the contemplation of parliament.

Outcome of review

119. The significance of a conclusion that ASIS had operated unlawfully was that Witness K had much wider scope for redress for the loss of his career for not measuring up to the so called need for ‘generational change’ within ASIS. Secrecy laws as they then stood could not be applied to make the reporting of a crime a crime itself. The next step was to assess the applicability of Australia’s secrecy laws having regard to the approval Witness K had from the Inspector-General of Intelligence and Security to *inter alia*, take, ‘...private legal action’. Specifically, was there a forum available in which Witness K could agitate a grievance without compromising any legitimate Australian security intelligence concern.
120. It is not the province of this paper at this stage to traverse the ‘common interest’ issues concerning Witness K and the Government of Timor-Leste. An Arbitration will resume. A Judicial Inquiry into the ASIS conduct in 2004 will expose ASIS to the scrutiny the Australian Coalition Government is so anxious to stop on spurious ‘national security’ grounds.⁵³ A finding of unlawful conduct is inevitable and that finding must be followed by a Royal Commission into the direction and control of our intelligence services. Witness K and colleagues so unfairly treated must be vindicated for the premature end of their careers.
121. I shall now move to the question you may need to consider if your client’s complaint is likely to be faced in an appropriate forum with a ‘national security’ non-justiciability argument
122. In *Church of Scientology v Woodward*,⁵⁴ the Church challenged ASIO’s assessment of it as an organization constituting a risk to national security. The plurality agreed that ASIO could not act on the basis of implied powers beyond the limits set by its empowering legislation. Mason J. put it as:

There is a clear distinction to be drawn between acts which are unauthorized and those which are illegal. Section 17 is not a prohibition against the carrying on of activities which stand outside the functions described in s.17(1). The section is expressed in terms

⁵³ Commonwealth of Australia, Senate Estimates Committee, 26 May 2014, 171 (Nick Xenophon).

⁵⁴ *Church of Scientology v Woodward* (1982) 154 CLR 25 (19 November 1982).

*of functions, authorized and unauthorized. It constitutes the exclusive and comprehensive charter of ASIO's activities. It therefore effectively limits the activities in which ASIO as a government department is authorized to engage. So long as its enactment is within the field of legislative power Parliament can deprive corporations, authorities or government departments of capacity or authority which they might otherwise possess.*⁵⁵

123. Unlike the court in the *Scientology Case* the court in *A v Hayden*⁵⁶ was not concerned with any argument as to whether the Executive can act beyond the powers contained in the enabling legislation because at the time of the Sheraton Hotel incident, ASIS had no statutory basis. In the *Scientology* case Gibbs CJ stated that ASIO's decisions on national security should be immune from legal challenge if, '*...individual rights are not involved and there is no bad faith.*'⁵⁷

124. Significantly, Mason J noted that the then Australian Solicitor-General Sir Maurice Byers QC in argument in the case, '*disavowed any claim that the Acts completely excluded the operations of ASIO from judicial review and conceded that decisions made and acts done corruptly or mala fides were open to such review.*'⁵⁸ His Honour went on to observe:

*[I]f Parliament intends to take the radical step of ousting judicial review then it is reasonable to suppose that it will express its intention with directness and clarity upon the topic, thereby taking the responsibility upon its own shoulders for that result rather than leaving the Court to spell it out from a series of provisions not specifically addressed to that question.*⁵⁹

125. His Honour concluded that:

*4. The approach of the courts to the construction and application of privative clauses is instructive. The privative clause is the conventional expression of the legislative intention that a decision shall not be challenged in the courts. Yet, notwithstanding the wide and strong language in which these clauses have been expressed, the courts have traditionally refused to recognize that they protect manifest jurisdictional errors or ultra vires acts. It would be ironical in the extreme if we were now to hold that what for so long Parliament has failed to achieve by express provision, it has now achieved without any provision at all, and this in a case in which, as we shall see, Parliament has been insistent that ASIO's activities should be confined to security.*⁶⁰

126. Wilson J also put this point succinctly:

It is one thing to say that security intelligence is not readily susceptible of judicial evaluation and assessment. It is another thing to say that the courts cannot determine whether intelligence is "relevant to security" and whether a communication of intelligence

⁵⁵ *Church of Scientology v Woodward* (1982) 154 CLR 25 (19 November 1982), [12] (Mason J)

⁵⁶ *A v Hayden* [1984] HCA 67; (1984) 156 CLR 532.

⁵⁷ *Church of Scientology v Woodward* (1982) 154 CLR 25 (19 November 1982), [8] (Gibbs CJ).

⁵⁸ *Ibid*, [2] (Mason J).

⁵⁹ *Ibid*, [3] (Mason J).

⁶⁰ *Ibid*, [4] (Mason J).

is "for purposes relevant to security". Courts constantly determine issues of relevance.⁶¹

127. In language reminiscent of his subsequent decision in *A v Hayden*, Brennan J made clear that the functions of ASIO:

*...are not left at large. Parliament defined its functions in s. 17 of the Act. That provision is not merely facultative: it marks the limits of legitimate organizational activity, which might otherwise have a "chilling effect"...*⁶²

His Honour went on to say:

*As the law which sustains the Organization in existence limits its functions, it would mock the will of Parliament to deny that the functions which it has defined may be exceeded without restraint by the courts.*⁶³

128. Since the 2004 ASIS Dili mission was founded in bad faith including corrupt fiduciary breach the *Scientology Case* alone should have alerted Australia's legal advisers to consider how Australia should act when found out. Aware that while Australian courts are usually reluctant to engage in assessment of issues involving questions of national security, the High Court had declared no such reluctance where the facts alleged relate to bad faith, corruption or other illegal activity⁶⁴ Australia's legal advisers had a clear ethical path to follow.

129. A momentous question for our profession is whether any lawyers holding practising certificates were aware of the clandestine eavesdropping in 2004 during negotiations, and, perhaps our premises in 2013, and advised on the proposed seizure of our legally privileged papers and the allegations to be made of criminality against Witness K and legal advisers when they knew that the activities of ASIS as pleaded by Timor-Leste were on reasonable grounds unlawful.

130. When Timor-Leste promptly applied to the International Court for provisional orders over the raiding of my chambers Australia's Coalition Government had something to hide and the catch-cry of 'national security' offered a deep snow-drift in which to cache the conduct. The role subsequently adopted by Australia in proceedings at the International Court of Justice must be of profound concern to the Australian and international legal community. I cannot at this stage draw upon

⁶¹ *Church of Scientology v Woodward* (1982) 154 CLR 25 (19 November 1982), [19] (Wilson J).

⁶² *Ibid*, [3] (Brennan J).

⁶³ *Ibid*, [5] (Brennan J).

⁶⁴ See Professor Michael Head, 'ASIO, Secrecy and Lack of Accountability' (2004) 11 *Murdoch University Electronic Journal of Law*, 31, <http://www.austlii.edu.au/au/journals/MurUEJL/2004/31.html>

the transcripts of the Arbitration proceedings and I make clear that at this stage I refer to the public records of the ICJ.⁶⁵

Australian Conduct at the International Court- Legal Professional Privilege and the Bar Rules.

131. Timor-Leste's legal team led by Sir Elihu Lauterpacht a *doyen* of international law with three former students on the Court's Bench may have anticipated that the Australian legal team would perceive the weakness of the Australian argument and give appropriate advice to the Executive. Sir Elihu may have had reason to anticipate that approach by Australia as he had been a member of the eminent and principled legal team including Sir Maurice Byers QC Australia had fielded during the Nuclear Tests Case against France. Regrettably, in reply to Timor-Leste's application Australia made no response to the allegation of Australian misconduct in 2004 and instead relied on boldly asserted national security concerns.

132. A packed Court heard the Australian Solicitor-General accuse myself, and effectively Timor-Leste and its legal team of complicity in a breach of official secrecy laws by the former ASIS officer ("Witness K").⁶⁶ In an address which he knew would require my withdrawal from the Bar table the Solicitor-General failed to address the Court as was his duty on the applicability or otherwise of the ACT *Criminal Code* 2002, the common law background to the legislation governing ASIS⁶⁷, the salient case law, and, the antecedent requirement that for secrecy laws to apply ASIS needed to be acting within power when the spy missions took place.

133. I am again indebted to my Sydney colleagues for the following summary position regarding the applicable Bar Rules:

Rules 25 to 27 of the New South Wales Barristers Rules, as from 6 January 2014, provide:

⁶⁵ See the ICJ Transcripts at Questions relating to the Seizure and Detention of Certain Documents and Data (Timor--Leste v. Australia), 20-22 January 2014, available at <<http://www.icj-cij.org/docket/index.php?p1=3&p2=1&case=156>>.

⁶⁶ See the ICJ Transcripts at Questions relating to the Seizure and Detention of Certain Documents and Data (Timor--Leste v. Australia), 20-22 January 2014, available at <<http://www.icj-cij.org/docket/index.php?p1=3&p2=1&case=156>>.

⁶⁷ See *A v Hayden* [1984] HCA 67; (1984) 156 CLR 532.

25. *A barrister has an overriding duty to the Court to act with independence in the interests of the administration of justice.*
26. *A barrister must not deceive or knowingly or recklessly mislead the Court.*
27. *A barrister must take all necessary steps to correct any misleading statement made by the barrister to a court as soon as possible after the barrister becomes aware that the statement was misleading.*

A lawyer has a duty not to mislead a Court regarding the facts or law. This extends further than not deliberately misleading the Court – the lawyer must assist the Court in correctly understanding and applying the law. See *Kyle v Legal Practitioners Complaints Committee* (1999) 21 WAR 56, where Ipp J said (at paragraph 12):

It is a basic precept of the legal profession that lawyers owe a duty of honesty and candour to the court. It is the general duty of lawyers not to mislead the court by stating facts which are untrue, or mislead the Judge as to the true facts, or conceal from the court facts which ought to be drawn to the Judge's attention... ”.

Similarly, Lord Reid in the House of Lords in *Rondel v Worsley* (1969) 1 AC 191, said (at 227):

Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is not sufficient basis in the information in his possession.

These principles extend to all Australian practitioners concerned in the litigation before the International Court of Justice and the Arbitral Tribunal.

Further, Rule 31 of the New South Wales Barristers Rules provides:

A barrister must, at the appropriate time in the hearing of the case if the court has not yet been informed of that matter, inform the court of:

- (a) *any binding authority;*
- (b) *where there is no binding authority any authority decided by an Australian appellate court; and*
- (c) *any applicable legislation;*

known to the barrister and which the barrister has reasonable grounds to believe to be directly in point, against the client's case.

In the New South Wales Barristers' Rules, “court” is defined as:

any body described as such and all other judicial tribunals, and all statutory tribunals and all investigations and inquiries (established by statute or by a Parliament), Royal Commissions [the Criminal Justice Commission/ICAC or equivalent], arbitrations and mediations.

The International Court of Justice and the Arbitral Tribunal fall within the definition of a “court”. It appears the Solicitor-General is a barrister admitted to

practice in New South Wales, and that the above rules apply to him when appearing before any court.

134. The grave accusations of concurrent wrongdoing by Witness K and myself,⁶⁸ apparently, on the instructions of Senator Brandis,⁶⁹ without reference to the fact that Witness K and the author had authorisation from the Inspector-General of Intelligence and Security to, among other matters, pursue private legal action, raises important issues concerning professional conduct.
135. The allegations, framed against an Australian stance of neither confirming nor denying the bugging, were broadcast internationally and included an outrageous claim that Australian lives had been placed in danger.⁷⁰ There had never been a compromise of security related information by the author's practice in more than 30 years and Australia well knew that collateral security issues were likely to have been protected from disclosure. A simple enquiry could have resolved the issue. This conduct aptly demonstrates how the recently introduced s35P(2)(c)(ii) of the ASIO Act could be misused by the Executive.
136. Timor-Leste is a young nation reliant and respectful of Australia in many ways. Key members of the Timor-Leste Cabinet dealing with the bugging scandal are dual Timor-Leste-Australian citizens who see their future in like terms. The allegation of complicity by Timor-Leste in the disclosure by Witness K was quite unfounded. Two years of diligent research to verify unlawful ASIS activity was undertaken before a remedy settled by eminent Senior Counsel via confidential international arbitration that would involve Timor-Leste became evident. A simple enquiry would have so informed the Solicitor-General.
137. Neither the Attorney-General nor the Solicitor-General revealed prior to or with their allegations of wrongdoing that Witness K was the author's IGIS approved client cleared to embark on private legal action. Indeed, in his submissions to the International Court the Solicitor-General in an unfortunate address referred sarcastically to Sir Elihu Lauterpacht QC's "claim" that Witness

⁶⁸ See the ICJ Transcripts at Questions relating to the Seizure and Detention of Certain Documents and Data (Timor--Leste v. Australia), 21 January 2014, p 17 [32] (Gleeson); p 33 [16]-[17] (Burmester), and 22 January 2014, p 11 [13]-[14] (Gleeson), available at <<http://www.icj-cij.org/docket/index.php?p1=3&p2=1&case=156>>.

⁶⁹ Conceded by Senator Brandis. Marian Wilkinson and Peter Cronau, ABC Four Corners, 17 March 2014, 'Drawing the Line', Transcript, p.7, available at <http://www.abc.net.au/4corners/stories/2014/03/17/3962821.htm>; 'All propositions or arguments advanced by Australia in the ICJ proceedings were advanced by the Solicitor General on the instructions of the Australian Government and those instructions came immediately through me'

⁷⁰ Paul Cleary, 'Lawyers may have committed crimes' The Australian etc

K was a client.⁷¹ The Solicitor-General referred to Edward Snowden inferring that Witness K who followed approved procedures to the letter was a ‘whistle-blower’ like Snowden.⁷² Once again the Solicitor-General knew or should have known the likely consequences of his allegations.

138. The Solicitor-General knew or should have known that other allegations made, were likely, as in *Clyne*,⁷³ to force Collaery Lawyers from the proceedings. It was inevitable that as a senior practitioner and former Attorney-General administering the Legal Practitioners Act 1971 (ACT) that I should have to withdraw. The allegation of ‘complicity’ against Timor-Leste completely unfounded, raised, unjustifiably, a potential conflict of interest.

139. Standing like a beacon for those who led the attack was the last celebrated case involving ASIS where, relevantly, Gibbs CJ addressed the strength of evidence required to justify an allegation (in that case on the question of privilege):

*It would be necessary to show, at the very least, that there is reasonable ground to believe that any plaintiff whose identity it is sought to disclose is implicated in the commission of an offence. Put in another way, at least what has to be shown prima facie is that there is "a bona fide and reasonably tenable charge of crime" against any plaintiff whose identity is sought to be disclosed.*⁷⁴

140. The common law background to the role for ASIS is well known to all the actors in this affair. The Solicitor-General could not have been unaware of the notorious “ASIS Sheraton Hotel” case that led to the placing of ASIS on a statutory footing following a training operation debacle on 30 November 1983 in Melbourne, Australia when ASIS agents allegedly committed criminal trespass

⁷¹ Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia), Verbatim Record, 21 January 2014, [30] (per Gleeson) and Verbatim Record, 21 January 2014, [42] (per Gleeson).

⁷² Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia), Verbatim Record, 21 January 2014, [30] (per Gleeson) and Verbatim Record, 21 January 2014, [43].

⁷³ *Clyne v New South Wales Bar Association* (1960) 104 CLR 186 at 200, where the Full High Court agreed to the removal of a Barrister from the Roll of Barristers for unjustified allegations of criminality against a solicitor.:

‘Rules of the other class are not merely conventional in character. They are fundamental. They are, for the most part, not to be found in writing. It is not necessary that they should be reduced to writing, because they rest essentially on nothing more and nothing less than a generally accepted standard of common decency and common fairness. To the Bar in general it is more a matter of "does not" than of "must not". A barrister does not lie to a judge who relies on him for information. He does not deliberately misrepresent the law to an inferior court or to a lay tribunal: cf. *Carr v Wodonga Shire* (I). He does not, in cross-examination to credit, ask a witness if he has not been guilty of some evil conduct unless he has reliable information to warrant the suggestion which the question conveys.’

⁷⁴ *A v Hayden* [1984] HCA 67; (1984) 156 CLR 532 (Gibbs C), [2].

and other offences during a training exercise. Victoria police action led to an important High Court decision, excerpts of which resonate with the facts concerning the 2004 Dili mission 20 years later, namely:

*Gibbs CJ: It is fundamental to our legal system that the Executive has no power to authorize a breach of the law and that it is no excuse for an offender to say that he acted under the orders of a superior officer.*⁷⁵

141. Mason J put the issue more succinctly:

*For the future, the point needs to be made loudly and clearly, that if counter-espionage activities involve breaches of the law they are liable to attract the consequences that ordinarily flow from breaches of the law.*⁷⁶

142. Mason J went on to state definitively the following:

*The conduct in Victoria out of which the case arose was apparently intended as training for what might be done by an Australian-directed group in other countries. The plaintiffs' case as first presented appeared to assume that without Parliament's authority, the Government (or its officers or agents) can authorise persons, whether officers of the Commonwealth or not, to engage in other countries in conduct which is against the laws of those countries (apart from what is authorised by international law). Neither the Commonwealth nor any of its Ministers, officers or agents, military or civilian, can lawfully authorise the commission by anyone in another country of conduct which is an offence against the laws of that country and is not authorised by international law (for example, by the laws of war). Whether Parliament could empower such authorisation does not arise for decision; it has never purported to do so. Under our Constitution and laws, Australia is a law-abiding member of the community of nations.*⁷⁷

143. Brennan J, prophetically, went to considerable lengths to ensure that the Director-General of ASIS would never again believe he/she had some authority to breach laws. His Honour's remarks are worth quoting at length:

...The incapacity of the Executive Government to dispense its servants from obedience to laws made by Parliament is the cornerstone of a parliamentary democracy. A prerogative to dispense from the laws was exercised by mediaeval kings, but it was a prerogative "replete with absurdity, and might be converted to the most dangerous purposes" (Chitty Prerogatives of the Crown (1820), p.95). James II was the last King to exercise the prerogative dispensing power (see Holdsworth A History of English Law, vol.vi, pp.217-225), and the reaction to his doing so found expression in the Declaration of Right. It was there declared that "the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal". By the Bill of Rights the power to dispense from any statute was abolished (1 Will. & Mar. Sess.2, c.2, s.XII). Whatever vestige of the dispensing power then remained, it is no more. The principle, as expressed in the Act of Settlement, is that all officers and ministers ought to serve the Crown according to the laws. It is expressed more appropriately for the present case by Griffith C.J. in Clough v. Leahy [1904] HCA 38; (1904) 2 CLR 139, at pp 155-156:

"If an act is unlawful - forbidden by law - a person who does it can claim no protection by saying that he acted under the authority of the Crown."

This is no obsolete rule; the principle is fundamental to our law, though it seems sometimes to be forgotten when Executive Governments or their

⁷⁵ *A v Hayden* [1984] HCA 67; (1984) 156 CLR 532 (Gibbs C), [2].

⁷⁶ *Ibid*, (Mason J), [2].

⁷⁷ *Ibid*.

agencies are fettered or frustrated by laws which affect the fulfilment of their policies. Then it seems desirable to the courts "that sometimes people be reminded of this and of the fate of James II, as Scrutton L.J. reminded the London County Council" in *R v. The London County Council. Ex parte The Entertainments Protection Association (1931) 2 KB 215*, at p 229 (per Windeyer J. in *Cam and Sons Pty. Ltd. v. Ramsay [1960] HCA 82; (1960) 104 CLR 247*, at p 272).

i. ...

...These parts of the stated cases seem calculated to raise, perhaps obliquely, the plea of superior orders sometimes raised by military personnel (cf. *O'Connor and Fairall Criminal Defences (1984) pp.136-138; Oppenheim's International Law 7th ed. (1967), pp.568-572*). It may be that the ASIS officers who induced the beliefs stated and who issued the "exercise cards" regarded ASIS as a para-military force and encouraged the plaintiffs so to regard it. That may be a correct view. But if that view engenders the proposition that participation in an ASIS exercise exempts ASIS officers from obedience to the ordinary laws of the land, the proposition must meet with the same reply that Hale C.J. gave some 300 years ago to a captain of military who asserted exemption from the jurisdiction of the ordinary courts:

"Whatever you military men think, you shall find that you are under civil jurisdiction, and you but gnaw a file, you will break your teeth ere you shall prevail against it." (*The Case of Captain C (1673) 1 Ventris 250*, at p.251 (86 E.R.167, at p.168)).

8. *The Commonwealth Parliament has made no law granting to ASIS officers exemption from any law; it is unnecessary to consider whether its constitutional powers could support such a law in times of peace. It is sufficient to say that none of the approvals given is capable of affecting any criminal responsibility which a particular plaintiff may have incurred in the exercise at the Sheraton Hotel. The exercise cards with which they were issued were no passport to immunity from the operation of the ordinary laws of Victoria.*⁷⁸

144. Brennan J completed his review by citing the opinion of the Supreme Court of the United States in *Mapp v Ohio [1961] USSC 142*:

"Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."

145. Brennan J continued:

*No agency of the Executive Government is beyond the rule of law. ASIS must obey the law and, if its officers do not, the Executive Government must be free to do what it thinks right in the public interest in the circumstances as they occur.*⁷⁹

146. It may be unsurprising that the language of the *Intelligence Services Act 2001* introduced after the Sheraton Hotel Case employs the word 'proper' in relation to the functions of ASIS. Clearly, Parliament intended any improper activity to be justiciable. The test now, while Witness K, an Australian hero, waits for his passport to be restored is whether the Coalition and Labor party rooms so hopelessly compromised by their leaders over East Timor can contribute to a working democracy founded on the rule of law.

⁷⁸ *A v Hayden [1984] HCA 67; (1984) 156 CLR 532 [6]-[8]* (Brennan J).

⁷⁹ *Ibid*, [18] (Brennan J).

Role of IGIS

147. The alternative urged by the Executive is review by the Inspector General of Intelligence and Security (IGIS). But justiciability is ever more indicated following the reluctance of IGIS to enquire into the 2004 Dili operation by ASIS. In her response to questioning about the alleged 2004 ASIS Dili mission the current Inspector-General Ms Vivienne Thom told Senator Xenophon that she did not intend to conduct an enquiry at this time into the matter.⁸⁰ Asked about the lawfulness of commercial espionage Ms Thom said that she would look first as to whether it met the government's requirements set by Cabinet's National Security Committee and then whether it came within the three statutory tests, namely, national security, foreign affairs or national economic well-being. Ms Thom observed that these elements might overlap and that the issues could be complex. What a sad joke. The current Inspector-General's reluctance to enquire, even now, ten years later, sustains the eventual advice to Witness K that confidential international arbitration was appropriate.⁸¹

148. The IGIS in reporting to its Minister lacks independence especially if it is the responsible Minister who has driven the unlawful conduct.⁸² It should have been an easy matter for the current Inspector-General to obtain any documentary records of the Dili mission to determine whether the Dili mission met the then Cabinet's National Security Committee's requirements and was within statutory power. Indeed, as soon as Prime Minister Julia Gillard received on 7 December 2012 the letter of complaint from Prime Minister Gusmão she should have been advised to ensure that all documentary records of the Dili mission were secured by the IGIS.

149. Instead, it appeared from subsequent comments by then Foreign Minister Bob Carr and the then Attorney-General Mark Dreyfus that the advice given to them was that the complaint related to '*old rumours of espionage*'.⁸³ This was patently

⁸⁰ Nicholas Xenophon MP, Official Committee Hansard, Finance and Public Administration Legislation Committee, Estimates, Monday 26 May 2014, Questioning of Dr Vivienne Thom, Transcript of Evidence, 120-130.

⁸¹ Nicholas Xenophon MP, Official Committee Hansard, Finance and Public Administration Legislation Committee, *Estimates 26February, 2015*.

⁸² Inspector-General of Intelligence and Security Act 1986, s15.

⁸³ Senator the Hon. Bob Carr and The Hon. Mark Dreyfus QC MP, Media Release, *Arbitration under the Timor Sea Treaty*, 3 May 2013, <http://foreignminister.gov.au/releases/2013/bc_mr_130503.html>; Leo Shanahan, 'Aussie spies accused of bugging Timor Cabinet', *The Australian*, 29 May 2013,

untrue as the details provided by PM Gusmão were explicit and had never before been in the public domain.⁸⁴ Who gave that advice to Mr Dreyfus QC and Senator Carr and why? As Timor-Leste had kept complete secrecy about its demarche to PM Gillard why did Australia go public on what was to be a confidential Arbitration accessible to Witness K?

150. Of further concern is the absence of any response by the IGIS on the response to Messrs Dreyfus and Carr on behalf of Timor-Leste on 29 May 2013 that the 2004 ASIS Dili mission was unlawful and based on a ‘*criminal conspiracy*’.⁸⁵ Thereafter, there was ample time before the ICJ hearing to connect our firm and the complaint by Witness K with the Dili Mission.

Legal Professional Privilege

151. The Australian Solicitor-General referred to *Commissioner, Federal Australian Police and Another v Propend Finance Pty Ltd*⁸⁶ to assert, uncontroversially that LLP may be lost if the conduct of the lawyer seeking privilege has involved criminality. The Solicitor-General then asserted that the exclusion in *Propend* applied ‘*on reasonable grounds*’ to our conduct.⁸⁷ He failed again to address the issues I referred to earlier particularly the antecedent requirement that for secrecy laws to apply ASIS needed to be acting within power when the spy missions took place. He should have been well aware of the clear reservation his distinguished predecessor Sir Maurice Byers QC conceded in the *Scientology Case*. Namely, that national security could not shroud decisions made and acts done corruptly or *mala fides* from judicial review.

<<http://www.theaustralian.com.au/national-affairs/policy/aussie-spies-accused-of-bugging-timor-cabinet/story-fn59nm2j-1226652599040#>>.

⁸⁴ Any doubt about this is dispelled by subsequent claims by Australia at the International Court that *Timor-Leste had improperly accessed Australian state secrets*: Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia), Verbatim Record, 21 January 2014, [30] (per Gleeson) and Verbatim Record, 22 January 2014, 10, [11] (per Gleeson).

⁸⁵ Leo Shanahan, ‘Aussie spies accused of bugging Timor Cabinet’, *The Australian*, 29 May 2013; Commonwealth of Australia, Parliamentary Debates, Senate, 26 May 2014, 171 (Nick Xenophon).

⁸⁶ *Commissioner, Federal Australian Police and Another v Propend Finance Pty Ltd* [1997] HCA 3, 49-50.

⁸⁷ See the ICJ Transcripts at Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), 21 January 2014, available at 29, <<http://www.icj-cij.org/docket/index.php?p1=3&p2=1&case=156>>.

152. The Solicitor-General denied the LLP held by Witness K and Timor-Leste without any reference to the long line of Australian and UK authority on common interest LLP that supports the proposition that the interests need only be in common and not identical,⁸⁸ so long as they are not hostile or adverse⁸⁹, and as Sheller J.A. observed,

*Common interest is not a rigidly defined concept. A mere common interest in the outcome of litigation will be sufficient to enable any party with that interest to rely on it.*⁹⁰

224. Finally, you may see why the response by the Australian Government to the Dili Cabinet bugging allegation raises similar rule of law concerns as arose in *A. v Hayden*. Australia stands as the first nation to be accused before the International Court of treaty making fraud and its response is to attack the witness, the lawyers and the State that exposed the fraud. In *Hayden* it was the Victoria Police who exposed the misconduct. Unlike perhaps our modest law firm the Victoria Police were too big a target in 1984 for the Executive to attack in response. In both the 2004 unlawful bugging activity and the 2013-2014 attempted cover-up the Coalition Government has placed itself above the law despite the High Court's unambiguous warning to the Executive.

225. Since none of those the Australian team attacked had any standing in Court to reply the allegations made against us have gone unanswered until this evening. I am deeply grateful to ACT Council for Civil Liberties, the ANU School of Law, The ACT Bar Association and, the ACT Law Society for providing us with an opportunity to respond. I might add that I also speak for two young Australian women lawyers resident in London both with young children and graduates of this University who I was obliged to retrench when my first fee-paying retainer in 35 years work for East Timor came to an abrupt end.

⁸⁸ *Thiess Contractors Pty Ltd v Terokell Pty Ltd* [1993] 2 Qd R 341, 343 (per Derrington J).

⁸⁹ *Patrick v Capital Finance* [2004] F.C.A. 1249.

⁹⁰ *Farrow Mortgage Services Pty Ltd v Webb* [1996] 39 NSWLR 601, 609.