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## Uberrima Fides? Witness K, East Timor and the Economy of Espionage

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“There is an air of unreality about this stated case. It has the appearance of a Law School moot based on an episode taken from the adventures of [Maxwell Smart](#)”.

It was with some levity that Justice Mason described the Australian Secret Intelligence Service’s botched training session at the Sheraton Hotel, Melbourne, in November 1983. In that case, the High Court decided the identities of the ASIS operatives could be disclosed to the Police, but, perhaps, ought not be. While their identities remained concealed, their antics were revealed.

Now, fast-forward three decades. ASIS operatives are again in the public spotlight and before the High Court. Although this time the hijinks has been revealed by one of their own, and with disturbing consequences. It is a story about blowing-the-whistle on the entanglement of intelligence, politics and commercial interests. It is also a story about exposing where all three unite.

Some context is in order to set the scene. The escapade starts in 2004, when the government of John Howard authorized ASIS to clandestinely bug the offices of the East Timorese Prime Minister and his cabinet in [Dili](#). By doing so Australian officials were able to covertly record internal discussions revealing the East Timorese negotiating position and strategy over the maritime boundaries of an oil and gas treaty known as ‘Certain Maritime Arrangements in the Timor Sea’ (CMATS). Over its lifetime, that treaty is estimated to have a multi-billion-dollar value, and is was a much-needed source of revenue to the East Timorese government and people.

At this point, keep in mind East Timor is not a hostile country toward Australia. It is more ally than adversary. Also keep in mind that the Timor bugging operation occurred not too long after the Bali terrorist bombings in Indonesia had killed over 200 people. Terrorism in the region was imposed on the minds and screens of the public and security agencies alike. One might, then, ask questions about where Australia’s intelligence priorities lay and how intelligence recourses were allocated.

It would appear that economic priorities took precedence and that ever-malleable concept, national security, became a metonym for private commercial gain. Indeed, the direction and authorisation to conduct the Timorese bugging operation was rationalised under the justification that it was in the interests of Australia’s ‘economic well being’ (dare one say: advantage?). But this is highly contentious. Why? Because the principal beneficiary of the treaty, to which Australia obtained an undue (possibly illegal) advantage through the intelligence gleamed from the negotiations, would have gone to a private consortium led by Woodside Petroleum. But more on this shortly.

First, a deeper question needs addressing: how is covertly bugging the East Timorese government in the interests of

Australia's economic well being when the pecuniary benefits of the treaty would have gone to a private consortium? Answers, indeed, became rather vague.

When quizzed on this very issue, the former Inspector General of Intelligence and Security (that alleged impartial body responsible for oversight of the intelligence community), Dr Vivian Thom, had trouble explaining the difference between spying for national security and spying for private commercial gain. 'National economic well being', Thom averred, 'is a broad umbrella' and the differentiation is not always clear.

Matters of setting intelligence priorities are equally vague. As Dr Thom stated, it is up to the Executive or National Security Committee of cabinet (NSC) to decide what is an appropriate intelligence requirement.

It might not surprise, then, that the NSC is hardly what could be called 'bi-partisan' in constitution. Consider the implications of the 'quotation marks'. It's comprised entirely of members of the incumbent government. It's chaired by the PM. And, it sits within the Department of Prime Minister and Cabinet. The leader of the Opposition can be asked to sit in on major decisions, but such courtesies do not extend to any Independents or Greens. Likewise, its decisions do not require the endorsement of the full cabinet. The government's assurances that an intelligence agency has been directed to act in the national interest must be taken a face value — a fool's gold standard of accountability and transparency. Just as Dr Thom explained. In her view, ASIS collected intelligence inline with requirements set by the government. In short, ASIS did what the government asks it to do. Nothing to see hear. Next question.

Little wonder, then, that after becoming aware of the bugging the East Timorese government protested. It declared Australia's conduct had rendered the treaty invalid under international law because the negotiations had not been undertaken in good faith. When it comes to the economics of espionage, Uberrima Fides, appears as flexible as national security.

Using parliamentary privilege, Andrew Wilkie made his feelings about the matter quite clear. The result, as he aptly put it, was 'one of the richest countries in the world forced East Timor, the poorest country in Asia, to sign a treaty which stopped them obtaining their fair share of oil and gas revenue'. East Timor's Prime Minister, Rui Maria Araujo, concurred, calling such actions a 'moral crime', while former President, Xanana Gusmao, referred to the matter as a 'criminal act'.

Some intelligence personnel held similar qualms about the operation. But, just pause for a moment to remember what happens to intelligence personnel that take a stand, or blow that shrieking whistle on the alleged improper use of intelligence.

Still memorable is the resignation of former ONA officer, Andrew Wilkie, due to Australia's use (or misuse) of intelligence to justify the case for the invasion of Iraq in 2003. History tells us what happened here. Does Mr Bolt ring any bells? But that only took twelve years to clear up, and there was nothing to see there either.

One might also consider the cases of Lance Collins and Martin Toohey or even the most despicable circumstances that led to the death of Mervin Jenkins. And these are just case that are known to the public.

Now consider the case of Witness K. You might have some clairvoyance of where this is going? K is a former distinguished and decorated ASIS Officer that was directly involved in the Timor bugging operation. K initially sought advice from the Inspector General of Intelligence and Security (IGIS) after being 'constructively dismissed' from ASIS in 2008. Again, read between the quotations marks.

But K suspects that his dismissal was more in relation to concerns he raised about the East Timor bugging operation. The IGIS advised K that he could seek private legal counsel regarding a means of redress. (The IGIS denies having ever received K's complaint.)

K thereafter sought the advice of lawyer, Bernard Collaery. After investigating K's claims, Collaery, determined that the Timor operation likely fell outside ASIS's remit under the *Intelligence Services Act 2001*. Collaery and K then sought to have the matter brought before the International Court of Justice, at the Hague.

But the sledgehammer fell. On 3 December 2013, under warrant issued by the Attorney General, ASIO raided Witness K's home and confiscated his passport, while also raiding the offices of Mr Collaery seizing documents and electronic

data relevant to the case. K was thus stymied from leaving the country.

The Commonwealth Director of Public Prosecutions subsequently filed criminal charges against Witness K and Bernard Collaery, for breaching section 11.5 of the Criminal Code and section 39 of the *Intelligence Services Act*. While the Attorney General theoretically has the power to stop these legal proceedings under the *Judiciary Act 1903*, he did the opposite.

But, not only did the Attorney General, Christian Porter, consent to the prosecution, the prosecution is now seeking to have the judicial proceeding conducted without commentary, under the provisions of the *National Security Information Act 2004*. If this occurs, details of the proceeding will remain classified. The actions of the government may never be heard in an open court. As K might just find out, the law can beat you with its own gavel.

But here is what makes this case so much more disturbing. Aside from the unscrupulous nature of the bugging operation and the persecution of whistleblowers and their legal representatives, there is a glaring impression of government impropriety.

As it turns out, the minister with statutory responsibility for authorising the ASIS bugging operation, former Foreign Minister Alexander Downer, went on to consultant for Woodside Petroleum after he left parliament in 2008. Note that he took a retainer, too. Several other political links can be established. Again, *perceptions* are important. Former Secretary of the Department of Foreign Affairs and Trade, Ashton Calvert later obtained a position on its Board of Directors. Likewise, the Howard government's Minister for Resources and Energy, during the Timor operation, Ian MacFarlane, now sits on the Board of Directors. After resigning from his position as National Secretary of the Australian Labor Party, Gary Grey went on to be Woodside's principal strategic advisor and later joined the Executive Board. [1]

It is on this point that the proximity between intelligence, policy, and commercial interests seemed to have blurred considerably. By 2007, Grey was holding the Federal position of Minister for Natural Resources Energy and Tourism in the Gillard government. The inequity is clear. Those that speak out are exiled and punished; others appear to act with impunity.

There are significant implications to be realised here. First, there is a conspicuous absence of options available to intelligence personnel that decide to speak out about any impropriety. Whistleblower protections are somewhat muted.

Some protections do fall under the *Public Interest Disclosure Act 2013* (PID). But consider what legal scholars, Keiran Hardy and George Williams, have to say about that:

Requirements under the PID will be particularly difficult to satisfy where the information being disclosed relates to the conduct of intelligence agencies. This is because special restrictions on information connected with intelligence agencies due to the greater risk involved to national security.

The exhumation of national security, again, works as a metonym for 'there are just some things we don't have to tell you'.

Likewise, limited protections can be found in section 79 of the *Crimes Act* that provide for disclosures made in the interests of the Commonwealth. But, disclosures about one friendly nation spying upon another are unlikely to be in the Commonwealth's interest. Overall there are fairly minimal protections for whistleblowers that disclose security information because of the special status given to intelligence information, and that broad umbrella—'national security'.

But the Timor case gives rise to another significant issue. The case of Witness K emphasises several implications. One is the possibility of an Australian intelligence agency being abused not just for political ends, but also for private commercial gain. Another is that the act of whistleblowing is always framed as one of political rebellion, rather than political reform.

One more is the perception that ASIS collection activities seem to have been aligned with the commercial interests of a private company. Ultimately, the perceived impartiality of ASIS could be diminished. Indeed, perceptions of impropriety become evident by posing the simple question: did this ASIS intelligence operation serve the Australian public interest, those of a minister, or a private company?

There are significant moral and legal questions that need addressing. Witness K and Bernard Collaery are accused of conspiring to reveal secret information. Yet, there is no evidence available that Australia's national security has ever been compromised by the incident. Nonetheless, initial proceedings for the case began in the High Court on 12 September. It lasted 15 minutes before the directives were adjourned. The Attorney General wants that case to be conducted behind closed doors. The defence wants only that which is essential to the preservation of K's anonymity and national security heard in confidence.

What's remarkable is that three decades ago, Justice Mason, when ruling on the ASIS—Sheraton incident, may have unwittingly summoned a prophecy. 'For the future,' he said, '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.' Whether his prophecy comes true remains to be seen. The case resumes on 29 October 2018.

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#### **Notes.**

[1]See Cleary, P. *Shakedown, Australia's Grab for Timor Oil*, (Allen & Unwin, NSW, Australia, 2007), pp. 93-94; and, "The Dark Politics of the Timor Spy Case", *The Saturday Paper*, 7 July 2018. pp. 1 & 10

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