



PARLIAMENT OF AUSTRALIA

Our ref: NC-AFP/CP

Commissioner Andrew Colvin OAM APM
Australian Federal Police
GPO Box 401
Canberra ACT 2601

BY EMAIL: andrew.colvin@afp.gov.au

Dear Commissioner,

REQUEST TO INVESTIGATE

1. We are writing to you to request that you open an investigation into allegations raised by Timor-Leste during the *Arbitration under the Timor Sea Treaty (Timor-Leste v. Australia)* in the Permanent Court of Arbitration (the "PCA"), namely, that in 2004 the Australian Government clandestinely recorded Cabinet discussions of the Timorese Government whilst state fiduciaries were conducting lawful good faith deliberative sessions relating to certain maritime arrangements in the Timor Sea. It has been alleged publicly by eminent jurists such as Prof. Nicholas Cowdery AM QC and the Hon. Stephen Charles AO that the direction of and preparations for the conduct of this intelligence operation constituted a conspiracy to defraud under Section 334 of the *Criminal Code 2002 (ACT)* (the "Act").
2. The Statement of Claim dated 18 February 2014 tendered by the sovereign State of Timor-Leste during the Arbitration sets out the high level act that ground the 'conspiracy to defraud' allegation:

1.4. The circumstances...are that during the negotiation of the 2006 Treaty between Timor-Leste and Australia in 2004, Australia covertly spied on the Timor-Leste negotiating team by means of listening devices surreptitiously and unlawfully placed by Australian personnel in the Timor-Leste government offices. This enabled the Australian negotiating team to become aware of the private discussions of the Timor-Leste negotiating team and of its position in relation to various issues arising in connection with the 2002 Treaty and the attempt to amend it by the drafting of the 2006 Treaty. The extent to which the Australian team made use of this illicitly obtained information cannot be determined, but in any case that is not an issue. It is enough that Australia put itself in a position to anticipate the negotiating stance of Timor-Leste, and the reasoning underlying that stance, and to benefit from that knowledge.

3. Section 334 of the *Criminal Code 2002 (ACT)* creates an offence of conspiracy to defraud:

- (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.

4. Section 62 of the Act 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 Act 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 offence.**

- 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.

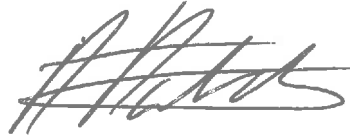
5. Going to the specifics, it is alleged that the then Director-General of the Australian Secret Intelligence Service (ASIS), David Irvine, instructed Witness K, in his capacity as an officer of ASIS, to place covert listening devices in Timor-Leste government buildings. Those instructions were provided in Canberra thereby enlivening the conspiracy offence under the ACT legislation even though the placing of covert listening devices took place in Timor-Leste.
6. We point out that the Australian Government does not deny the allegation set out in paragraph 5 above. Indeed they give legitimacy to it in paragraph 3.3 to 3.9 of Volume 1 of the Australian Government's 28 July 2014 counter memorial in 'Questions relating to the Seizure and Detention of Certain Documents and Data' Timor-Leste v Australia (International Court of Justice).
7. Any investigation should also consider whether the *Intelligence Services Act 2001* would exonerate the conspirators from criminal liability as Section 14(2) requires that "*the act is done in the proper performance of a function of the agency.*" It is put that the conduct of ASIS officers in this matter does not fall within the functions of ASIS as defined under Section 6 and Section 11 of the *Intelligence Services Act 2001*.
8. We believe that an investigation is required to determine whether the actions by the Australian Government officials involved in this matter constituted a conspiracy to defraud under Section 334 of the Act.
9. We ask that an investigation be undertaken by the AFP as a matter of priority, noting the following:
 - (1) The acts that ground the allegations have been pleaded by a sovereign state in the PCA.
 - (2) The Australian Government does not deny the acts.
 - (3) The allegations go to international relations and economic crime, made all the worse by cheating or attempting to cheat a joint venture partner, an offence that would carry heavy civil and criminal penalties under Australian laws.
 - (4) The importance the resolution of this matter has on public confidence in both the Australian Government and Australia's intelligence services.
 - (5) The significant political and media interest in this matter.

We would be happy to discuss our concerns with you further if required.

Yours sincerely,



SENATOR MCKIM
12 July 2018



SENATOR PATRICK
11 July 2018



SENATOR STORER
11 July 2018



ANDREW WILKIE MP
12 July 2018