

## **Secret injustice for Timor Leste - the AAT reveals more than intended, but still not the facts**

*By Rex Patrick in MichaelWestMedia, April 18, 2023*

Efforts to dud Timor of its oil and gas are still kept secret as today's justice system still covers up for Howard government machinations 23 years ago. **Rex Patrick** reports on his journey to reveal the truth and the real reason for the secrecy.

Most people instinctively know that secret trials carry with them the risk of injustice, but having their suspicion confirmed is problematic because of the very secrecy that gives rise to the suspicion in the first place. However, in a recent dispute in the Administrative Appeals Tribunal, where the presiding officer did a last minute reveal, the injustice was left lying in plain sight.

Open justice is a fundamental element of our legal system. The statues of justice that adorn our older courts are blindfolded, symbolising that key principle that judicial systems should operate without fear or favour. Equally symbolic is the prominent placement of such statues, justice should be in plain sight. Transparency enables all citizens to see what happens in our courts and to know that justice is done.

Open justice is often in short supply in Freedom of Information cases. When you're fighting a transparency battle with the government, citizens start with one arm tied behind their back. Unlike the well-paid and well-resourced Government lawyers who are defending the Government's refusal to provide information, you're not allowed to see the very documents you are arguing about.

But the Government can also tie the other hand behind your back. There's a provision in the Administrative Appeals Tribunal (AAT) Act that permits the Attorney General to issue a secrecy directive which means the person arguing for the documents can't even see the Government's arguments or evidence.

And that's exactly what happened to me as I sought to unlock our history in regard to Timor-Leste's independence and our negotiations with our neighbour over the maritime boundary between the two countries, and the division of the spoils of significant oil and gas resources under the seabed.

### **Cabinet reveal, or not**

January 1st is the biggest day of the year for the National Archives. Whilst most folk are recovering from late night celebrations and, in some cases, a few too many ales, the Archives opens up the Cabinet documents from 20 years prior.

In contrast to practice in past decades, the majority of Cabinet documents are not assessed for release on 1 January. They just sit and await an access request from members of the public.

On New Year's Day the media just report what has been packaged up for them by the Archive's public affairs team, a process that started early in the previous year.

Just after mid-year, the selection of Cabinet documents from the government of the target year are digitised and sent to government departments and agencies for advice on what should and should not be released.

Those agencies include Australian Security Intelligence Organisation, Australian Secret Intelligence Service, the Attorney General's Department, Defence, Foreign Affairs and Trade, Home Affairs, Office of National Intelligence, and the Department of the Prime Minister & Cabinet. Having regard to the intra-governmental advice, National Archives then prepare the selected Cabinet papers for release.

Decisions are also taken to withhold files from public release.

## **Timor-Leste controversy**

One of the documents in the year 2000 list was a cabinet submission and decision on the Timor Sea maritime boundary negotiations, but the document was left closed from public view.

There's been great controversy over those negotiations, with a sordid history of Australia trying to steal the oil and gas reserves under the Timor Sea that lie closer to Timor Leste than to Australia. That controversy began in 2004 when, after shaking hands and agreeing to negotiate in good faith, the Australian Government spied on the Timorese negotiating team. It caused the treaty to be terminated and renegotiated in 2018, on much fairer terms to Timor-Leste.

I challenged the National Archives for keeping the 2000 Cabinet file closed, a matter that ended up in the AAT. As soon as the matter landed in the Tribunal, without me so much as making a submission, the Archives capitulated and gave me a lot of the documents. (With regard to both the 2001 and 2002 Cabinet files, the Archives' starting position for similar documents was also "closed", until challenged when the files were partly opened, that's how disingenuous the original examination process is.)

### **An unfair fight**

As the 2000 challenge advanced, the National Archives applied to then Attorney General, Michaelia Cash, for a certificate to keep their evidence and arguments secret.

But I fought on. I made a reasonable guess they were worried that disclosure of the document would reopen wounds between Australia and Timor.

I asked Professor Clinton Fernandes, an expert on Australian foreign policy, national security and Australian-Timorese relations, to paint a full picture of our (mis)conduct towards Timor that spanned from World War II to the current day.

I got renowned international maritime law expert Professor Andrey Serdy, Professor of the Public International Law of the Sea at the University of Southampton in the United Kingdom, to cogently argue that revealing the negotiating strategy for a 20-year-old agreement, no longer in force, could not cause harm to the relationship.

I got his excellency Xanana Gusmao, a former Timor-Leste President and national hero, to advise the AAT that being honest with Timor moving forward was the best thing for the relationship and put on evidence from Timor's current head of state, President Jose Ramos Horta, to the same effect.

For two days I cross examined DFAT officials on various aspects of the Australian-Timor relationship. I was not permitted to be present when the Government presented their argument.

In the end, I lost the fight. But as was revealed in the decision, it's because I was in the wrong fight.

### **The wrong fight**

On day one of a two day hearing I asked the Department of Foreign Affairs and Trade what relationship would be harmed. They refused to tell me, hiding behind the Attorney-General's certificate.

I spent my time arguing there'd be no harm to the Australia-Timor relationship if the document was released; while the Government was secretly arguing its release would harm the Australia-Indonesian relationship.

In his decision reasoning the AAT Deputy President stated:

The potential for damage extends beyond Timor-Leste to Indonesia because the two countries are geographically proximate to each other and yet their respective maritime boundaries with Australia differ. There is an inherent sensitivity with respect to international relations with Indonesia in circumstances where the maritime boundary fixed between Australia and Timor-Leste is more favourable to Timor-Leste when compared to the maritime boundary between Australia and Indonesia. Disclosure of the negotiating positions of Australia vis a vis Timor-Leste would cause those inherent sensitivities to come to the surface with potentially damaging consequences for Australia's international relationship with Indonesia. Professor Serdy refers in his affidavit to the risk that disclosure might prompt Indonesia to terminate its treaty with Australia and demand renegotiation of the 1972 treaty boundary. He argues that there is no risk because Indonesia took no such action upon the publication of the 2018 Maritime Boundary Treaty with Timor-Leste (which was very favourable to Timor-Leste), but I note that the 1997 Perth Treaty dealing in part with outstanding maritime boundaries between Australia and Indonesia has not yet entered into force which suggests that the issue of maritime boundaries between Australia and Indonesia are not completely resolved. In my view, there are reasonable grounds for concluding that disclosure of the Cabinet record could cause damage to the international relations of Australia with Indonesia. The confidential affidavits and evidence of Dr French and Mr Hayhurst deal with this in more detail and support my view.

AAT decision re Timor-Leste documents (extract)

It's also worth pointing out that the Government applied to the Tribunal in an effort to have the highlighted sentences in the decision suppressed from the public, which resulted in barrister's arguing at 10 paces before a special hearing, which ultimately saw the Government back down.

## **Injustice**

And therein lies a definitive example of how unfair secret trials are.

As far as the Government is concerned – including the current Attorney-General Mark Dreyfus, when it comes to any challenge to Australia's diplomatic secrets – justice isn't in plain sight; rather it's to be kept behind closed doors with the Government's opponents blindfolded, unable to see or hear what was going on.

Blind to their case, I was in the wrong fight. I didn't have a chance.

A further injustice is that the documents in question will remain sealed from historians and academics who will be left guessing as to the facts and lessons that could otherwise come from that part of our history.

Knowing the correct issue, hopefully I can enter the battle for the 2001 Cabinet papers with more of a fighting chance.

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