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Précis Paper

Fighting Government Secrecy

In this edition of BenchTV, Dr Clinton Fernandes and Ian Latham, barrister, present on Dr Fernandes' applications for records from the National Archives related to Australia's history with East Timor. They also explore wider issues relating to the history of East Timor, and the low level of legislative oversight of intelligence activities in Australia.

Discussion Includes

- Australia's history with East Timor
- Dr Fernandes' applications to the National Archives
- Appeals against non-release of records to the AAT – secret hearings
- A culture of non-release of records and over-classification
- A failure to have any real oversight of the Australian executive government by the legislature

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Fighting Government Secrecy

1. In this edition of BenchTV, Dr Clinton Fernandes and Ian Latham, barrister, present on Dr Fernandes' applications for records from the National Archives related to Australia's history with East Timor. They also explore wider issues relating to the history of East Timor and the low level of legislative oversight of intelligence activities in Australia.

2. Dr Fernandes is a Professor at the University of New South Wales at the Australian Defence Force Academy. His principal research area is International Relations and Strategy. He is a former intelligence officer in the Australian Army, is the author of three books, and maintains the 'East Timor Companion' website. His scholarship sheds light on East Timor's struggle for independence.

3. Mr Latham is a barrister who has assisted Dr Fernandes pro bono in his attempts to obtain records from the National Archives.

History of East Timor

4. Indonesia invaded East Timor in 1975 and occupied that country for 24 years. During the occupation, about 31% of East Timor's population perished, most of whom died in a nineteen-month period from 1978 to 1979. This was the largest loss of life relative to population since the Holocaust.

5. Dr Fernandes argues Australia's encouragement of the Indonesian invasion and occupation was crucial.

6. Prior to the invasion, Dr Fernandes suggests that Australia said that it would prefer East Timor to be part of Indonesia, and that this crystalised thinking regarding annexing East Timor. According to Dr Fernandes, "Indonesia would never have been able to invade and stay there had it not been for Australia's role."

7. Dr Fernandes states that since the 1960s the Australian foreign policy establishment has regarded East Timor as an inconvenient country, and would rather it did not exist as an independent state.

Applications to the National Archive

8. Dr Fernandes is particularly interested in attaining diplomatic and intelligence records of what Australia told Indonesia, and how Australia worked with Indonesia, including at the

United Nations, to provide diplomatic cover. He also wishes to see Embassy and intelligence records that reveal Australia's knowledge of what Indonesia was doing in East Timor.

9. Timorese academics and historians are particularly interested in the records, due to the country's limited written patrimony.

10. The National Archives holds over 40 million documents. Under the *Archives Act 1983* (Cth), records are publically available once they are in their "open access period", provided that they are not an "exempt record" (s 31(1A)).

11. The "open access period" for a record, other than a Cabinet notebook or a record containing Census information, is, in substance, the period starting 20 years after the record came into existence (s 3(7)).

12. An "exempt record" is defined in s 33(1) of the *Archives Act*:

SECTION 33:

Exempt records

(1) For the purposes of this Act, a Commonwealth record is an exempt record if it contains information or matter of any of the following kinds:

(a) information or matter the disclosure of which under this Act could reasonably be expected to cause damage to the security, defence or international relations of the Commonwealth;

(b) information or matter:

(i) that was communicated in confidence by, or on behalf of, a foreign government, an authority of a foreign government or an international organisation (the foreign entity) to the Government of the Commonwealth, to an authority of the Commonwealth or to a person who received the communication on behalf of the Commonwealth or an authority of the Commonwealth (the Commonwealth entity); and

(ii) which the foreign entity advises the Commonwealth entity is still confidential; and

(iii) the confidentiality of which it would be reasonable to maintain;

(c) information or matter the disclosure of which under this Act would have a substantial adverse effect on the financial or property interests of the Commonwealth or of a Commonwealth institution and would not, on balance, be in the public interest;

(d) information or matter the disclosure of which under this Act would constitute a breach of confidence;

(e) *information or matter the disclosure of which under this Act would, or could reasonably be expected to:*

(i) *prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance;*

(ii) *disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement or administration of the law; or*

(iii) *endanger the life or physical safety of any person;*

(f) *information or matter the disclosure of which under this Act would, or could reasonably be expected to:*

(i) *prejudice the fair trial of a person or the impartial adjudication of a particular case;*

(ii) *disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or*

(iii) *prejudice the maintenance or enforcement of lawful methods for the protection of public safety;*

(g) *information or matter the disclosure of which under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person);*

(h) *information or matter relating to trade secrets, or any other information or matter having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information or matter were disclosed;*

(i) *information or matter (other than information or matter referred to in paragraph (h)) concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organization or undertaking, being information or matter the disclosure of which would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organization or undertaking in respect of its lawful business, commercial or financial affairs.*

13. Section 35 sets out how exempt records are identified. Essentially, the Director-General must consult with the responsible Minister, or a person authorised by the responsible Minister, to make arrangements for identifying exempt records.

14. According to Mr Latham, the *Archives Act* has rarely been litigated and there remains uncertainty in its operation and processes.

15. One uncertainty arises in practice because it may be unclear under which ground the government is asserting that the materials are exempt records.

16. Mr Latham suggests that Parliament should revisit the *Archives Act*, with a view to clarifying some of these issues.

17. An applicant who is dissatisfied with an Archives' decision can appeal to the Administrative Appeals Tribunal (**AAT**). This appeal is a full merits review of the decision, and the AAT may re-exercise the decision maker's power, and make what it considers to be the correct or preferable decision.

18. However, where the government considers that the evidence before the AAT would be too sensitive for public exposure, the Attorney-General can issue a certificate under s 36 of the *Administrative Appeals Tribunal Act 1975*. This section relevantly states:

SECTION 36:

Disclosure not required: Attorney-General's public interest certificate

...

(1) If the Attorney-General certifies, by writing signed by him or her, that the disclosure of information concerning a specified matter, or the disclosure of any matter contained in a document, would be contrary to the public interest:

(a) by reason that it would prejudice the security, defence or international relations of Australia;

(b) by reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet; or

(c) for any other reason specified in the certificate that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information or the matter contained in the document should not be disclosed;

the following provisions of this section have effect.

Protection of information etc.

(2) A person who is required by or under this Act to disclose the information or to produce to, or lodge with, the Tribunal the document in which the matter is contained for the purposes of a proceeding is not excused from the requirement but the Tribunal shall, subject to subsection (3) and to section 46, do all things necessary to ensure that the information or the matter contained in the document is not disclosed to any person other than a member of the Tribunal as constituted for the purposes of the proceeding, and, in the case of a document produced to or lodged with the Tribunal, to ensure the return of the document to the person by whom it was produced or lodged.

Disclosure of information etc.

(3) Where the Attorney-General has certified in accordance with subsection (1) that the disclosure of information, or of matter contained in a document, would be contrary to the public interest but the certificate does not specify a reason referred to in paragraph (1)(a) or (b), the Tribunal shall consider whether the information or the matter should be disclosed to all or any of the parties to the proceeding and, if it decides that the information or the matter should be so disclosed, the Tribunal shall make the information available or permit the part of the document containing the matter to be inspected accordingly.

Attorney-General taken to be a party

(3A) Where, in relation to a proceeding to which the Attorney-General would not, but for this subsection, be a party, the Attorney-General certifies in accordance with subsection (1) that the disclosure of information, or of matter contained in a document, would be contrary to the public interest but the certificate does not specify a reason referred to in paragraph (1)(a) or (b), the Attorney-General shall, for the purposes of this Act, be deemed to be a party to the proceeding.

What Tribunal must consider in deciding whether to disclose information etc.

(4) In considering whether information or matter contained in a document should be disclosed as mentioned in subsection (3), the Tribunal shall take as the basis of its consideration the principle that it is desirable in the interest of securing the effective performance of the functions of the Tribunal that the parties to a proceeding should be made aware of all relevant matters but shall pay due regard to any reason specified by the Attorney-General in the certificate as a reason why the disclosure of the information or of the matter contained in the document, as the case may be, would be contrary to the public interest.

19. The Attorney-General issued such a certificate in the proceedings instituted by Dr Fernandes.

20. Where the Attorney-General issues a certificate, the applicant has a limited ability to influence the AAT's decision. There are initial public hearings which are generally limited to an outline of the statutory provisions and very short cross-examinations of public witnesses.

21. Following this stage, the matter moves to a private hearing from which the applicants and their legal representatives are excluded.

22. Finally the applicants are asked to provide submissions on what was said in the private hearing – from which they were excluded. These submissions are necessarily short.

23. It is possible to seek judicial review of the issuance of the certificate. However, as the applicant will necessarily have limited knowledge about the documents that it is seeking to

make public, and perhaps even about the certificate itself, it is generally very difficult to prove any jurisdictional error.

24. Despite the difficulties involved with the AAT proceedings, Dr Fernandes and Mr Latham were successful at the AAT (*Fernandes and National Archives of Australia* [2011] AATA 202) and certain records were released.

25. Dr Fernandes and Mr Latham demonstrated that the intelligence collection technology that was used to generate the relevant documents was obsolete, and its exposure now could not cause any harm.

26. Furthermore, Dr Fernandes and Mr Latham also took issue with the so-called "mosaic theory". This theory states that you cannot look at any record in isolation. You have to consider the effect of each record as part of the entire collection of records.

27. The difficulty with mosaic theory is that, if it is taken to its logical conclusion, it may justify all government documents being withheld from public scrutiny – even such documents as a telephone book.

28. Downes J, the then President of the AAT, found that there were no issues of confidentiality in several previously-withheld sections of the relevant documents, and ordered that these sections be released.

29. In relation to a second application made by Dr Fernandes, the National Archives appealed the decision of the AAT to the Federal Court, which ordered that the documents in question not be released: *National Archives of Australia v Fernandes* [2014] FCAFC 158. The appeal was subject to the same strictures of secrecy as the original proceedings. The Commonwealth produced secret submissions, secret evidence, and, at least initially, a secret list of legal authorities.

30. The entire process, through the AAT and to the Federal Court, requires significant funds. This is particularly so in the Federal Court, where, if the applicant loses, the usual course will be that the applicant will have to pay the government's costs. This represents a substantial deterrent, even though technically the onus to prevent release is on the National Archives.

31. The government also has an enormous forensic advantage, in that it knows the content of the records in dispute.

32. Finally, the Commonwealth has vast financial and intellectual resources, which means that it is often difficult for individuals to maintain litigation in these circumstances.

33. It is a fundamental principle, that as far as possible, justice should be done publicly, so that citizens maintain their confidence in the legal system. The process for reviewing decisions of the Archives not to release records directly confronts this principle.

Improving the process

34. Mr Latham suggests that the process be improved, so that justice might be determined transparently, applicants can confront the issues against them and test the evidence and arguments of their opponents before an independent body.

35. The recent development by the AAT of allowing the applicant to propose a series of questions to the government which are to be answered during the secret AAT proceedings has somewhat improved the fairness of the proceedings.

36. The English use of 'Special Counsel' whereby a lawyer is security cleared as an independent arbiter that may appear in secret hearings for applicants might be an appropriate reform to the procedure.

37. Finally, the provision to the applicant of the *gist* of the arguments by the Commonwealth, without disclosing the documents in question, might also improve the process.

Government culture and lack of legislative oversight of the executive

38. Dr Fernandes also highlights the culture of secrecy within the Australian government. There is a view that the documents are government property rather than the people's property. When a member of the public requests a document that the government would prefer kept secret, the culture is one of "who are you to ask?"

39. The legislature's role in overseeing the executive government's decisions relating to the declassification of documents is described by Dr Fernandes as "minimalist."

40. The Parliamentary Joint Committee on Intelligence and Security has a limited mandate, and may examine only the administration and financing of the intelligence agencies – they have no oversight of past, present, or proposed intelligence operations.

41. This level of oversight directly contrasts with that of the United States, where the so-called "gang of four" and "gang of eight", which include members of the legislature from both major parties, are briefed on the specific details of intelligence operations. They do not have power to interfere with the operation of the intelligence agencies, but they are kept informed. This acts as a disincentive to the potential overreach of the executive government.

42. Further, when a new government takes power in Australia, the convention is that the new government is briefed on current intelligence operations, but not past ones.

43. Dr Fernandes concludes that the current system allows the possibility of executive overreach in which intelligence operations may be conducted to further the narrow interests of a particular minister or corporation, not the national interest.

44. Dr Fernandes recommends that there be more effective legislative oversight, and that oversight similar to that in the United States would act as an internal control over operations not truly in the national interest.

BIOGRAPHY

Ian Latham

Barrister, Denman Chambers

Ian specialises in in industrial and employment law, Occupational Health and Safety, Criminal, Appellate, Mediation and Alternative Dispute Resolution, Inquests/Specialist Tribunals, Payroll Tax Law.

Ian was admitted as a solicitor in 1986. He was admitted to the Bar in 1997.
He has appeared in a number of important industrial cases including the Tristar litigation, the first case about the Independent Contractors Act, the first case about the sham contractor provisions and a major case about accessorial liability. Ian writes for the Butterworths Fair Work Act 2009 (Cth) and NSW Industrial Relations Act, 1996 loose leaf services. Ian also writes articles and on industrial and employment law and Australian Rules football.

His current projects include Fair Work Act Annotated, Registered organisations lecture, NSW Industrial Relations Act Annotated, Rejecting a settlement offer in an unfair dismissal case: the risk of costs, (2015) 21(3) ELB at 35, Practical Applications of Statutory Interpretation, Legalwise CPD 1 September 2015, Workplace Law: Legal Issues Involving Challenging Employees which he began in November 2015.
He also speaks French.

Ian was admitted to the Bar in 1997. He specialises in Industrial and Employment Law and also practices in Occupational Health and Safety, Criminal, Appellate, Mediation and Alternative Dispute Resolution, Inquests/Specialist Tribunals and Payroll Tax areas. He writes for the Butterworths Fair Work Act 2009 (Cth) and NSW Industrial Relations Act, 1996, as well as regular articles on Industrial and Employment Law.

Dr Clinton Fernandez

Dr Clinton Fernandes is Professor of International and Political Studies at the University of NSW. He holds dual appointments at the School of Humanities and Social Sciences and the Australian Centre for Cyber Security. His research agenda is linked to the Australian Research Council's strategic priority area of 'Securing Australia's place in a changing world.'

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Focus Case

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National Archives of Australia v Fernandes [2014] FCAFC 158

Judgment Link

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Legislation

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