

CIVIL LIBERTIES

Liberties and APEC

DALE MILLS revisits Sydney's hosting of the APEC forum in September last year

The main meeting of the Asia-Pacific Economic Cooperation (APEC) forum was held during 2–9 September 2007 with 21 heads of government visiting Sydney, including US President George W. Bush. In addition to the anti-terrorism legislation already in existence, the New South Wales government passed the *APEC Meeting (Police Powers) Act 2007 (NSW)* ('the APEC Act').¹ The NSW Police Commissioner, Andrew ('Skippy') Scipione, was in charge of the security operation costing about \$170 million and involving the use of a recently purchased \$600 000 water cannon.²

New laws

The new laws introduced for APEC were in force between 4 July 2007 and 12 September 2007. The APEC Act created a combination of 'declared' and 'restricted' areas, collectively known as 'APEC security areas' and included the formation of a list of 'excluded persons', extra powers for police in relation to stop and search, seizure of items, giving reasonable directions and road closures and as well as awarding police immunity from the tort of nuisance. Breach of some of the APEC laws carried a maximum sentence of two years' imprisonment.

The list of excluded persons, which received a great deal of media publicity, allowed the Police Commissioner to put a person on the list and thereby have them prohibited from entering an APEC security area. There was no appeal or correction mechanism available for those put on the list, and no requirement for the person to have a prior criminal conviction. Despite police assurances that the list would not be published, it was leaked to the press with Sydney's *Daily Telegraph* deciding to publish the list of names with photos, involving unknown consequences for those persons' jobs and reputations.

In a section reminiscent of a genuinely authoritarian state, s 8 of the APEC Act stated that:

An order made or purportedly made under a provision of this Part ... [by the Police Minister or Police Commissioner as to whether an area attracts extra police powers] may not be challenged, reviewed, quashed or called into question on any grounds whatsoever before any court, tribunal, body or person in any legal proceedings.

It is a reenactment (in a largely public order piece of legislation) of s 13(1) of the *Terrorism (Police Powers) Act 2002 (NSW)*. The latter section has not been challenged on the grounds of its potential lack of constitutionality — that is, the Parliament's attempt to exclude judicial review of administrative decisions. Therefore, it is open to conjecture what would have happened had there been a challenge to s 8 of the APEC Act. The concern, however, is the Parliament's attempt to remove some of its decisions from judicial scrutiny.

The protest

The main protest was planned for APEC by the Stop Bush Coalition, a group whose membership largely consisted of members of the Stop the War Coalition and which has organised peaceful protests against the Iraqi war for some years.³ The original plan involved a march from Sydney Town Hall to the Opera House. When it became known that the Opera House would be a key venue for APEC delegates the organisers initiated a change, choosing a small march from Town Hall to Hyde Park via King Street, in the hope of alleviating police concerns. This would bring the marchers some tens of metres into the APEC security area, but many hundreds of metres from any venues of real security concern.

A Notice of Intention pursuant to the *Summary Offences Act 1988 (NSW)*⁴ was lodged with the police, with the new protest route in mind, and weeks of negotiations passed into months, with the police ultimately taking the matter to the New South Wales Supreme Court at the last moment.⁵ The eventual protest, a march from Town Hall to Hyde Park via Park Street, was high-spirited and mostly peaceful.

In contrast to the largely 'family and kids' atmosphere of the protest, the APEC security was a combination of aggression and high farce. Remember — this was the time that the professional jokers from *The Chaser's War on Everything* comprehensively breached APEC security by coming within 10 metres of the US President's hotel and where it only took a man to be dressed in a dark suit to be told by a police officer 'the road is yours'.⁶

The evidently amateur and relaxed nature of the security was in contrast to the aggression shown by police against peaceful protesters. Without any clear lawful authority (certainly not under the APEC Act) police officers told protesters at Town Hall that they could not have poles longer than one metre supporting their banners — the police apparently confusing their powers with the special powers within the APEC security areas, which were in force hundreds of metres away.⁷

Unlawful arrests?

More worrying than having poles taken off protesters were the rugby tackle-style arrests of several people by organised groups of police officers. One such arrest, of Paddy Gibson, occurred long after the protest had finished, when police approached him and claimed that he was an excluded person within an APEC security area. He was released later without charge.⁸

The seizure of poles, apparent unlawful arrest of Paddy Gibson and apparent unlawful arrest on the same grounds of at least one other person, leads to real concerns about police either being confused about their own powers, or deliberately pretending to have powers they didn't possess. This observation

REFERENCES

1. The APEC Act has lapsed and is unavailable online. Notably, also passed was the *Industrial and Other Legislation Amendment (APEC Public Holiday) 2007 (NSW)* which gave a public holiday to Sydney residents to make it easier for the authorities to arrange APEC security.
2. More information about the APEC meeting security logistics can be found at <www.apec2007.org>.
3. More information about the Stop the War Coalition at <www.stopwarcoalition.org>.
4. Part 4 of the *Summary Offences Act 1988 (NSW)* has a notification procedure for those planning protests — or 'assemblies' or 'processions' in the language of the Act. Those completing the relevant form and submitting it to NSW Police (the 'Notice of Intention') with seven days clear notice attracts a defence against any subsequent charges of obstruction or unlawful assembly.
5. *New South Wales Commissioner of Police v Bainbridge* [2007] NSWSC 1015. The organiser of the protest, Alex Bainbridge on behalf of the protest group, lost the action and the march proceeded instead along Park Street with police approval.
6. A comment made by a police officer filmed by *The Chasers's War on Everything*. A copy of the footage has been recorded and is in possession of Human Rights Monitors.
7. Comment by police on length of poles noted by Human Rights Monitors.
8. Witnessed by Human Rights Monitors and shown on television broadcast. A copy of the footage is in possession of Human Rights Monitors.

is reinforced by at least two incidents where police demanded to search persons, without reasonable excuse, outside the APEC security areas where such searches would have been lawful. Two women near Central station — about 500 metres from an APEC security area — were searched by police, and both were identified as 'protesters' on the basis that one had a 'Save the Trees' sticker on her bicycle. Another woman in about the same location refused consent to an attempted search without reasonable suspicion when she pointed out that the APEC powers did not extend that far geographically and having pointed out (correctly) that the laws had not yet come into force. On being so challenged, the police officers did not continue with their attempt to search, raising the issue as to whether the police were really motivated by security concerns in the first place. Perhaps it was a matter of 'getting the job done' and letting the lawyers worry about the legality later.⁹

Identification badges

It was this attitude that may have been behind the hundreds of NSW police officers not wearing identification badges, in breach of requirement in the NSW police manual.¹⁰ Police officers asked why they were not wearing badges refused to comment or said they were acting under instructions, although this was denied by the Police Commissioner.¹¹ His defence of the officers became ludicrous, saying that even velvet badges could be taken from the officers by protesters and police officers could be assaulted by their own badges.¹² One hates to think how the police can prevent themselves being relieved of their pepper spray and handgun. According to a journalist who was part of a police briefing, police started to spread reports that only a 'few' officers were not wearing their badges. In response, a newly-created website published the photographs of over 200 officers who were not wearing identification badges.

Despite calls, no independent inquiry has been held into such a massive breach of police manual requirements. An internal (police) inquiry concluded that no action was necessary against any police officer in relation to the non-compliance with instructions to wear identification badges.

Not wearing identification badges may seem a trivial matter, but wearing them is important as a way of holding accountable individual police officers. Even with a photo, cases of complaint about an officer if sent to the police will be met with the observation that there are many thousands of police officers in NSW, and police cannot help in tracking down and naming the officer.¹³ In addition, local police tend to operate in local areas but, with large protests, police may be called in from many dozens of police stations, making visual identification difficult in the absence of an identification badge indicating a name or equivalent identifier.

Human Rights Monitors

In preparation for APEC, Sydney group Human Rights Monitors had 30 legal observers at the APEC protests, with a brief to collect evidence of misbehaviour or illegal activity by the police. It was this group that circulated photos of police without identification badges, leading to the extensive media publicity of the

issue. Additionally, some 30 solicitors and barristers volunteered their time to give legal advice to those arrested during the APEC meetings. They were — thankfully — underemployed, as only about dozen people were arrested during the protest, although police had emptied 500 cells to contain all those it was prepared to arrest on the day.

Overall, my feeling at the end of APEC was one of immense relief. If it weren't for equine flu, the police would have had large numbers of police horses and, as animals are unpredictable, there could have been injuries. The riots and disturbance that the police had predicted turned out not to happen, and the 'dangerous elements' intent on serious violence didn't materialise.

But the police were prepared to use Tasers, riot police and the water cannon.¹⁴ It is my opinion that they wished to do so with as little accountability as possible and that is why so many removed their identification badges. On balance, I don't think it was a directive to remove badges from superiors. Rather, it was part of the rank-and-file arrogance that too many of us expect from the police, while their supervising officers turned a blind eye.

With few but notable exceptions (the Police Commissioner, Police Minister, Premier and the then Prime Minister John Howard) the police behaviour at the APEC protests has been universally condemned. Even right-wing columnist Miranda Devine, who knew one of the people arrested at the protest while crossing a road but who was not part of the protest, spoke out.¹⁵

In my view, the internal police inquiry that was held is akin to asking Al Capone to conduct an inquiry into the sly grog trade. The perceived conflict of interest, for the police to excuse police misbehaviour, is so great that it is difficult to give such process credibility.

At the time of writing, the NSW Ombudsman's office has made no public statement endorsing or criticising the conduct of NSW police during the APEC protests. This includes no investigation of the incident where New York-based photographer Paula Bronstein was pushed to the ground so hard that she urinated herself, or the police officer who punched an arrested man with both fists while his colleagues held the man on the ground. Footage of both incidents was repeated numerous times on the television. There is also the question of confining thousands of people to Hyde Park with doubtful legal authority.

The APEC laws have now lapsed, but there is a provision which requires the Police Commissioner and Police Minister to report on the usefulness of similar legislation at large-scale protests in the future. NSW community legal centres are undertaking a research project to analyse the human rights protections that were available during the APEC meetings, and which will assist in assessing the appropriateness of such legislation and approaches for future events.

The APEC forum may have come and gone, but I don't think it will be the last we have heard of laws specially passed to control protests in Sydney.¹⁶

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9. Reports are from private conversations by the author with the women who were approached by police.

10. The NSW police manual gives guidance as to what police officers should do; breaches of the manual may lead to disciplinary action, but not necessarily to criminal offences being committed. Interestingly, it is a criminal offence (maximum penalty: 5 penalty units or \$550 at the time of writing) for a member of the Australian Federal Police or a Protective Service Officer not to wear an identification badge which is 'clearly visible' on his or her uniform. See ss 64A and 64AAA of the *Australian Federal Police Act 1979* (Cth).

11. The refusal to comment was witnessed by the author with a journalist from a national daily newspaper present. The comment that it was under instructions was recorded on video held by Human Rights Monitors.

12. Numerous press reports, including in the *Sydney Morning Herald*, 19 September 2007.

13. This observation is based on prior experience by Human Rights Monitors.

14. Tasers are currently available to members of the NSW Police Public Order and Riot Squad, members of which were present in significant numbers during the APEC protest. Following comments by the NSW Police Association about the inadvisability of using Tasers at public order events, there have been conflicting reports about whether officers were equipped with Tasers during the APEC protest. At the time of writing, Parliamentary Budget Estimate questions put to the Police Commissioner about this matter by Sylvia Hale MLC (Greens) have yet to be answered.

15. Miranda Devine, 'Pumped up cops are stepping over the thin blue line', *Sydney Morning Herald* (Sydney), 9 September 2007.

16. Special laws passed, and at the last minute. For example, weeks before the visit by His Holiness the Pope to Sydney, further restrictions were made law; *World Youth Day Amendment Regulation 2008*, *Government Gazette* No 75, 25 June 2008.