THIRTY YEARS SINCE SYDNEY'S HILTON HOTEL BOMBING: UNANSWERED QUESTIONS

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I INTRODUCTION: A MAJOR UNRESOLVED CRIME

By any objective measure, the 1978 Sydney Hilton Hotel bombing remains one of Australia's most serious unresolved crimes. Not only were three people killed and several maimed, but the blast was allegedly directed against an international summit of government leaders. Moreover, the event was proclaimed the opening of a new era of terrorism, triggering Australia's first-ever military call-out onto urban streets and a significant boosting of the powers and resources of the police and intelligence agencies. Furthermore, a series of unsuccessful police frame-ups, unsatisfactory judicial reviews and political cover-ups ensued.

Thirty years on, two developments highlighted the unanswered questions that persist about the bombing. One was the release of the Federal Cabinet papers for 1977, shedding more light on the extent of the police and intelligence operation mounted before the explosion against the religious sect, Ananda Marga, members of which were later accused of responsibility for the blast. The other event was the laying of a memorial plaque at the site of the bombing, accompanied by official speeches and articles declaring that the explosion proved the need for today's indefinite 'war on terror'. These two developments underscore the causes for concern about how the crime was used politically, and continues to be used, to justify unprecedented expansions of the powers of the police, security and military agencies and deep inroads into fundamental civil liberties and legal rights.

First some background. At 12.40 am on February 13, 1978, a bomb exploded in a garbage bin outside the Hilton Hotel, the venue for the Commonwealth Heads of Government Regional Meeting (CHOGRM), a gathering of government leaders from former British colonies. The blast killed two garbage collectors, Alex Carter and William Favell, and a police officer, Paul Birmistriw. A number of other people were injured, some seriously, including another police officer, Terry Griffiths, who

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has continued to raise questions about the bombing and to campaign for a judicial inquiry.[1]

Amid blazing media headlines, Prime Minister Malcolm Fraser and New South Wales Premier Neville Wran ordered the military onto urban streets for the first time in contemporary Australia, claiming that a new era of terrorism had arrived. 'Troops Placed on Anti-Terror Alert' was *The Australian's* headline.[2] 'Terrorism now 'fact of life'—All Australians should morn: Wran', reported the *Sydney Morning Herald*,[3] which editorialised: 'Australia is not immune from the international disease of terrorism and violence'.[4] Without any clear legal or constitutional authorisation[5], the federal Liberal government and the state Labor government deployed nearly 2,000 heavily-armed troops, some with bayonets fixed, accompanied by armoured personnel carriers and helicopters. Units took up positions along a major highway on Sydney's outskirts and patrolled the Southern Highlands towns of Bowral and Mittagong, near the site of a scheduled CHOGRM leaders' summit.[6] Local residents were shocked and disturbed by the appearance of troops on the streets.[7]

The Hilton attack was not the first terrorist incident in contemporary Australia.[8] Over the ensuing 18 months, however, Fraser's government, with the Labor opposition's essential support, used the Hilton bombing as the pretext to carry through a far-reaching expansion in the powers and resources of the police and security apparatus. As detailed later in this article, the changes included legalised surveillance powers for the Australian Security Intelligence Organisation (ASIO), the formation of the Australian Federal Police (AFP), the creation of para-military SWAT-style units in state police forces and domestic Special Air Service (SAS) units in the Australian Defence Forces (ADF) and the establishment of Crisis Policy

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1 For an account of the events see J Hocking, *Terror Laws: ASIO, counter terrorism and the threat to democracy*, Sydney, UNSW Press, 2004, 82-85.

2 *The Australian*, 14 February 1978, 1.

3 *Sydney Morning Herald*, 14 February 1978, 2.

4 Ibid, 6. For a survey of the national and local press response, see D Cahill and R Cahill, 'Civilian responses to peace-time military occupation: the 1978 Bowral call-out and its implications for the 'war on terrorism'', History Cooperative, Australian Society for the Study of Labour History Conference Proceedings http://www.historycooperative.org/proceedings/asslh/cahill.html, accessed 18 February 2008.

5 See M Head, 'The military call-out legislation — some legal and Constitutional questions' (2001) 29 *Federal Law Review* 273-294, especially 282-284. See also A Blackshield, 'The Siege of Bowral — The Legal Issues' (1978) 4 *Pacific Defence Reporter* 6; and 'Current Topics: Legal and constitutional problems of protective security arrangements in Australia' (1978) 52 *Australian Law Journal* 296.

6 Hocking, above n 1, 86. See also Cahill and Cahill, above n 4.

7 For a survey of residents' responses, as reported by local media, see Cahill and Cahill, above n 4.

8 Between 1963 and 1972, Australian members of the Croatian Ustashi organisation were involved in 26 bombing attacks against Yugloslav targets around the world, but the security authorities denied that any terrorist group existed in Australia. See F Cain, *ASIO: An Unofficial History*, Melbourne, Spectrum, 1994, 206-208.

Centres with the authority to take control over parts of the country in times of alleged emergency.

The 1977 Cabinet Papers

Federal Cabinet papers for 1977, released under the 30-year rule on January 1, 2008, show that Fraser's Cabinet had considered outlawing Ananda Marga, and was told on December 19, 1977 that the organisation was under close monitoring by ASIO and the state police Special Branches.[9] Cabinet decided, following its earlier Decision number 3957 of 4 October, 1977, and Decision number 4252, dated 1 November 1977, that 'ASIO and police inquiries continue to be pursued, as vigorously as possible'.[10] It noted that its recommendations had been considered and endorsed by a Special Incident Task Force, upon which the following were represented: the departments of Administrative Services, Prime Minister and Cabinet, Foreign Affairs, Education, Immigration and Ethnic Affairs, and Attorney-General, ASIO and the Commonwealth Police.[11] Submission 1848 also recorded that an interim summary threat assessment had been sent to the Prime Minister by ASIO on 2 November, 1977, and that an Indian Foreign Ministry expert in Ananda Marga matters had spoken in detail at a police/intelligence conference in Canberra on 28 September.[12] The 11-page submission said ASIO had reported that Ananda Marga intended to hold a conference from January 23 to 29, 1978 at a Seventh Day Adventist Youth Camp near Sydney, which was considered acutely of interest 'in the light of the knowledge that the Indian Prime Minister is expected to visit Australia in February next, 1978' (for the CHOGRM).[13]

These documents confirm that an intensive surveillance and infiltration operation had been mounted against Ananda Marga for several months prior to the bombing, orchestrated from the highest levels of the Fraser government and the security authorities. Some idea of the intensity of the operation was already known. Previously, it had been reported that Ananda Marga had been monitored closely by ASIO and police Special Branches since at least 1975. By 1977, police and/or ASIO officers had permanent taps on telephones in five of Ananda Marga's State headquarters, they were using listening devices, reading mail, engaging in 'physical surveillance', running informants inside the cult, and had circulated a 'substantial paper' to regional ASIO offices and all State police special branches.[14]

The significance of these circumstances is two-fold. ASIO later claimed to have no forewarning of the Hilton bomb, a claim that was upheld in 1993 by the Inspector-

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9 National Archives of Australia, 1977 Cabinet Records – Selected Documents, Submission 1848, 'Report on Ananda Marga', 320-330.

10 Ibid, 329.

11 Ibid, 327-328.

12 Ibid, 322.

13 Ibid, 324.

14 B Hills, 'The Hilton fiasco', *Sydney Morning Herald*, 12 February, 1998 <http://www.benhills.com/articles/articles/SCM38a.html>

General of Intelligence and Security (who also reported that, 'I have not seen or heard anything which substantiates rumours regarding ASIO involvement in the bombing').[15] If Ananda Marga were indeed responsible for the blast, this claim is hardly credible. Such a comprehensive intelligence could surely not have failed to detect some evidence of a plan to place a bomb outside the Hilton. Alternatively, the extent of the surveillance and particularly the involvement of infiltrators may indicate that ASIO operatives or agents were themselves involved in the bombing. Further light may be shed on these matters by the release of the Cabinet papers for 1978, although the release of documents by the National Archives of Australia under the 30-year rule is confined to formal Cabinet submissions and decisions (the more extensive Cabinet notebooks, which record the discussions inside Cabinet are not released for 50 years) and all the material is vetted on the grounds of national security.[16]

The 30th Anniversary Ceremony

The official commemoration of the 30th anniversary of the Hilton bombing indicates that today it is being used to justify the further extension of police-intelligence-military powers and measures by the Federal and State governments under the rubric of the 'war on terror'. A memorial plaque was unveiled at the site of the blast in Sydney's George Street on the 30th anniversary, and to mark the occasion, NSW Premier Morris Iemma wrote an article for the Sydney *Daily Telegraph*, in which he stated:

> On today's 30th anniversary of this gutless and cowardly attack, the whole NSW community honours the victims, their families and the survivors. They are not forgotten. The Hilton bombing was terrorism, pure and simple... It brought Australia into the terrorist era... Since 2001, investment by the Federal and State governments in counter-terrorism has more than doubled. We have sacrificed a share of our civil liberties so police can thwart the sneaky, insidious methods of the terrorists. And, unlike 1978, we are all much more aware. Thirty years down the track, it is clear the Hilton bombing wasn't just an historical one-off but a tragic entree to an age of terror that remains with us.[17]

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15 IGIS Annual Report 1992-93, http://www.igis.gov.au/annuals/92-93/pg8.cfm#COMPLAINTSASIO> accessed 18 February 2008.

16 National Archives of Australia, 'About cabinet records', http://www.naa.gov.au/collection/explore/cabinet/records/index.aspx, accessed 3 March, 2008.

17 M Iemma, 'Remembering the Hilton Hotel bombing', *Daily Telegraph*, 13 February 2008, <http://www.news.com.au/story/0,23599,23206442-5007146,00.html#> accessed 18 February 2008. At the ceremony to unveil the plaque, similar remarks were made by Sydney Lord Mayor Clover Moore and NSW Police Commissioner Andrew Scipione. See 'Sydney remembers Hilton bombings' *Sydney Morning Herald*, 13 February 2008 <http://www.news.com.au/story/0,23599,23206442-5007146,00.html#>, accessed 18 February 2008.

Yet, the question of who actually carried out the Hilton bombing remains unresolved. As this article will review, twice, the police and intelligence agencies effectively framed-up people, who were convicted and jailed in connection with the explosion, only to have those frame-ups later fall apart ignominiously. Then came a series of judicial and political reviews that failed to provide any answers, or hold anyone to account for the wrongful prosecutions. Moreover, no genuine inquiry has ever been conducted into the Hilton affair. It will be argued that a careful review of the evidence, all the unanswered questions and the political background points to the distinct possibility that the security agencies themselves were involved or implicated in the bombing.[18]

II THE STILL-UNKNOWN EXPLOSION

Many issues are raised by the Hilton blast itself and the police and intelligence operations surrounding it. An overflowing rubbish bin containing some form of explosive material blew up when the bin was thrown into a Sydney City Council garbage compactor truck. The explosion scattered pieces of the truck for 30 to 40 metres and killed the two council workers, Favell and Carter, instantly. Birmistriw later died of his injuries and there were eight other casualties.[19]

Officially, nothing is even known about the bomb's materials or how they were detonated. According to the police, no explosive residue could be detected. Calling for a Federal-State royal commission, Independent MP John Hatton told the NSW Legislative Assembly in 1991: 'Despite extensive investigations by Federal and State authorities no forensic evidence has been forthcoming about the types of explosives used in the blast. One has to stop and wonder in sheer amazement that such a statement could be made so many years later.'[20] Hatton and other speakers in the debate contrasted the police claims with the 1988 Lockerbie bombing, where police reportedly identified minute fragments of the plastic explosives material used to blow up Pan Am Flight 103 over Scotland.

There is evidence that whoever planted the explosives in the bin intended them to be found before they were detonated. Two anonymous warning calls were made to the media just before the blast. One to the *Sydney Morning Herald* said: 'You'll be interested in what the police are going to be doing down at the Hilton soon,' followed by a garbled reference to a bomb. At 12.30 am, a man rang the Sydney police CIB headquarters and said: 'Listen carefully. There is a bomb in a rubbish bin outside the Hilton Hotel in George Street.'[21]

In the lead-up to the blast, police and security officials inexplicably prevented council garbage trucks from emptying the bin. It appears that Favell and Carter

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18 See also Hocking, above n 1, 116-119, and T Molomby, *Spies, Bombs and the Path of Bliss*, Sydney, Potoroo Press, 1986, 409-412.

19 Hocking, above n 1, 82-86.

20 *Hansard*, NSW Legislative Assembly, 9 December 1991, 5939.

21 Molomby, above n 18, 409-412.

arrived ahead of schedule, just after 12.30 am, and proceeded to pick up the bin before the police could intervene.[22] The prior failure by police to search the bin was in breach of NSW police permanent circular 135, dated 28 November 1972, which clearly stipulated that all waste bins should be searched in any potential bomb situation.[23]

The many unanswered questions include: Why did the agencies responsible for CHOGRM security—ASIO, the Commonwealth Police, the ADF and the NSW state police—fail to detect the explosive material earlier? Why were established security protocols, which require the searching of rubbish bins, breached? Why were military sniffer dogs, whose services had previously been requested, not used? Did police officers direct that the bin not be emptied for three days before the explosion? These were among 34 questions asked by independent MP Ted Mack in federal parliament in 1991.[24]

Few explanations appear to exist for such elementary breaches of security. One is complete police and intelligence service incompetence and dereliction of duty. Another is that the security agencies knew of the plan to plant explosives in the bin. It is indeed possible that the explosive materials were placed in the bin by, or with the knowledge of, security officials, with the intention of having the materials discovered by the police or ASIO in the midst of the CHOGRM conference. Such a discovery could have been used to claim a police 'success', while creating a terrorist scare to justify the build-up of the police-military apparatus.

III The Military Call-Out

Many questions remain about why, and by what legal authority, the unprecedented decision was made to call out the Australian Defence Force (ADF) in immediate response to the Hilton blast.[25] On the evening of February 13, 1978, after consultations between Prime Minister Fraser and Premier Wran, Governor-General Sir Zelman Cowan signed an Executive Council minute to call out the ADF to safeguard 'the national and international interests of the Commonwealth of Australia' from 'terrorist activities and related violence'.[26] The minute was to remain 'in force until revoked'.[27] For three days, troops patrolled highways and streets and occupied the small town of Bowral. On the first morning, February 14, residents of Bowral were awoken at 6.30 am by the sound of helicopters circling

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22 Ibid.

23 J Hatton MP at *Hansard*, NSW Legislative Assembly, 9 December 1991, 5940.

24 *Hansard*, Parliament of Australia, House of Representatives, 8 October 1991, p. 1481.

25 See M Head, above n 5.

26 E Andrews, 'Civil Power, Aid to the (ACP)' in P Dennis, J Grey, E Morris, R Prior, *The Oxford Companion to Australian Military History*, Oxford University Press, Melbourne, 1995, 153.

27 Order by the Governor-General of the Commonwealth of Australia, 14 February 1978, no. S30, The Commonwealth of Australia Gazette, February 1978; reprinted as Appendix 111 in Hocking, above n 1, 255.

overhead, while teams of soldiers scoured garbage bins, drains, hedges and shrubbery.

It is hardly surprising that the sight of armed soldiers caused public consternation, with rumours that martial law had been imposed.[28] Journalists from two local newspapers recorded both fear and confusion among residents. One interviewee said: 'Now we have an idea what life in Northern Ireland is like. This is frightening.' Reflecting residents' uncase, the Bowral-based *Southern Highlands News* described 'the virtual siege conditions in Bowral (and to a lesser extent Mittagong) and commented: '[T]hose who remember Franco's Spain could see a parallel in the pairs of uniformed men, all heavily armed, steadily walking their beat, always in sight of each other.'[29]

Until 1978, the deployment of troops within the country had been both politically contentious and clouded by legal uncertainties. Although Australia was established as a penal colony under military administration, 'with the passage of time, the evolution of the Australian political system ensured a clear distinction between military powers and civil powers'.[30] During the 19th century, martial law was declared several times to deal with riots and rebellions, but the last clear 19th century exception to the military-civil division of power occurred in 1891 when the Queensland Government used troops to help the police suppress a sheep shearers' strike.[31]

This division of power was enshrined in the Constitution at federation in 1901. The military power was handed to the Commonwealth under s 51(xxxi), the colonial defence forces were transferred to the Commonwealth by s 69, and under s 114 the states were forbidden to raise military or naval forces without the consent of the Commonwealth Parliament. Residual authority over domestic law and order remained in the hands of the States and their police forces. A limited, though vaguely worded, provision allowed for States to ask the Federal government to intervene militarily: s 119 of the Constitution provided that 'the Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State protect such State against domestic violence'. Although 'domestic violence' was nowhere defined legally, it was derived from American usage and meant to relate to intense political, industrial or social crises that imperilled the very existence of the state.[32]

The constitutional demarcation became embedded in public consciousness. Domestic use of the armed forces became widely regarded as conduct to be expected of a military or autocratic regime, not a democratic government. In the

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28 Cahill and Cahill, above n 4.

29 Ibid.

30 C Doogan, 'Defence Powers Under the Constitution: Use of Troops in Aid of State Police Forces — Suppression of Terrorist Activities' (1981) 31 *Defence Force Journal* 31.

31 Ibid 31.

32 Head above n 25, 281.

early years of the 20th century, Australian state governments requested military intervention on at least six occasions, to deal with such anticipated incidents as 'general strike riot and bloodshed', 'disturbances', wharf strike 'violence', 'labour troubles' and the 1923 Victorian police strike. On each occasion, it seems, the Federal Government declined on the basis that the state police were capable of dealing with the threat (although troops were sent to guard federal buildings, including post offices, during the Victorian police strike).[33]

Troops were mobilised to break strikes on several occasions during the 20th century. Most notably, the Chifley Labor Government sent in soldiers against the coal miners' strike of 1949. In a lesser-known case, the Menzies Liberal Government sent troops to break a wharf labourers' strike in Bowen, Queensland in 1953, but was forced to withdraw the soldiers after tensions involving strikers and state police, followed by a protest by the Queensland Government.[34] These operations provoked bitter recriminations and questions as to their legality.[35]

The Government's response to the Hilton bombing raised at least two significant legal questions: (1) Were such interventions constitutional and, if so, what was their precise constitutional basis? (2) What were the powers and rules of engagement of the military personnel and the rights of civilians in relation to the military? Neither question was addressed in the two formal documents ordering the military intervention, namely the joint statement by the Prime Minister and the New South Wales Premier, and the Executive Order issued by the Governor-General.[36] In his statement to Parliament, Prime Minister Fraser stated that the New South Wales Premier had concurred with the call-out but had not requested it. He did not specifically refer to s 119 of the Constitution, or explain the precise legal basis for the call-out.[37]

Three months later, after some speculation as to the legal basis for the Government's action, the Attorney-General Peter Durack confirmed that no recourse had been made to s 119 of the Constitution. This left several possibilities. One, asserted by Justice Hope in his 1979 *Protective Security Review*,[38] was that the Governor-General acted under s 68 of the Constitution, which states, without qualification, that: 'The commander-in-chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative'. Another possibility, canvassed by academic commentators, was that the Federal Government exercised its executive power, also formally exercisable by the Governor-General, under s 61 of the Constitution to ensure the 'execution and

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33 H P Lee, *Emergency Powers,* 1984, 201.

34 See *Call Out the Troops: an examination of the legal basis for Australian Defence Force involvement in 'non-defence' matters*, Australian Parliamentary Research Paper 8 (1997-98) 19.

35 Ibid 19.

36 For these documents, and general discussion, see Hocking, above n 1.

37 Commonwealth, *Parliamentary Debates*, House of Representatives, 23 February 1978, 159 (Malcolm Fraser, Prime Minister).

38 R Hope, *Protective Security Review Report*, Commonwealth of Australia, 1979.

maintenance of this Constitution, and of the laws of the Commonwealth'. References were also made to the Commonwealth's defence power (s 51(vi) of the Constitution), combined with the external affairs power (s 51(xxix)), and the incidental powers (s 51(xxxix)). Other possibilities mentioned were an 'inherent self-protecting' power of the Commonwealth, 'inherent law and order powers' and the Crown's prerogative power over defence and military matters.[39]

Despite this lack of constitutional clarity, no legislation was introduced to provide clear authority for military deployment. Quoting the 18th century conservative Edmund Burke, Justice Hope called for legislation, observing that:

> Use of the military other than for external defence, is a critical and controversial issue in the political life of a country and the civil liberties of its citizens. 'An armed disciplined body is in its essence dangerous to Liberty; undisciplined, it is ruinous to Society'. Given that there must be a permanent Defence Force, it is critical that it be employed only for proper purposes and that it be subject to proper control.[40]

Given the political sensitivity of the issue, the Fraser Government did not legislate. Instead, the only relevant legislative instruments remained the Australian Military Regulations and internal Defence Instructions, not all of which have been made public. It was not until 2000, on the pretext of protecting the Sydney Olympics from terrorism, that a Federal Government felt able to bring forward legislation purporting to provide legal authority and guidelines for the domestic deployment of the ADF. Nevertheless, the mobilisation of troops in 1978 established a precedent, and provided military experience, that arguably helped prepare the political and legal ground for future use of the armed forces to deal with civil disturbances.

IV Frame-Ups And Cover-Ups

After the bombing, the authorities and the media immediately pointed the finger of blame at Ananda Marga, a religious sect opposed to the government of Indian Prime Minister Morarji Desai, who attended the CHOGRM summit.[41] On February 14, a heading on the Australian's front-page reported, 'Massive hunt for three suspects in bomb attack' and there was a link to a feature article, entitled 'Baba – the clerk who has sparked a crusade', about the founder of Ananda Marga.[42] During 1977, members of the sect had been accused of several acts of violence in Australia directed against the Indian government, and ten days before the bombing the group had lodged a complaint with the Commonwealth Ombudsman about some 17 police actions against the sect, including false arrests and police perjury.[43]

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39 See 'Current Topics: Legal and constitutional problems of protective security arrangements in Australia' (1978) 52 *Australian Law Journal* 296, and P H Lane, *An Introduction to the Australian Constitution* (1974) 77.

40 Hope, above n 38, 142.

41 Molomby, above n 18, 11-14.

42 Ibid.

43 Ibid, 18-22.

Four months after the bombing, a police agent named Richard Seary, who had joined the Ananda Marga after the blast, convinced two members of the sect, Paul Alister and Ross Dunn, to accompany him to paint graffiti on the home of the extreme right-wing National Front leader Robert Cameron. Unknown to the pair, Seary had planted explosives in the car. The three were arrested on the way to Cameron's house and charged with conspiracy to murder. Ananda Marga's media spokesman, Tim Anderson, was also charged. Seary later claimed that, while in the car on the way to Cameron's house, the Alister and Dunn had boasted of the Hilton bombing. This irrelevant and highly prejudicial statement was permitted to be admitted into the evidence at the trial, and the defendants were allowed to be cross-examined about the allegedly violent and revolutionary activities of Ananda Marga and groups said to be associated with it. Anderson, Alister and Dunn were convicted in the NSW Supreme Court, with the media widely depicting their jailing for 16 years as punishment for the Hilton blast.[44]

In 1982, a belated NSW coronial inquest into the Hilton deaths heard testimony from a police officer injured in the blast, senior constable Terry Griffiths, who tendered six items of evidence pointing to ASIO and/or NSW police Special Branch involvement in the bombing.[45] Two items indicated that the police had concealed the time at which police headquarters had received the warning call, and that it had been made at 12.30pm, ten minutes earlier than reported. Other items indicated that ASIO and police Special Branch officers had known in advance about the bomb, and that military personnel had placed the explosives in the rubbish bin.

Before this evidence could be probed, the inquest was closed down by the coroner after Seary testified once more. His evidence led the coroner to find a prima facie case against Alister and Dunn for having murdered the Hilton Hotel victims, obliging the coroner to terminate the inquest,[46] even though the police knew that Alister had not been in Sydney at the time of the bombing. No charges ever went to trial, but the inquest was never re-opened.

High Court Appeal

In 1983, Anderson, Alister and Dunn unsuccessfully sought special leave to appeal to the High Court against their convictions.[47] There were three grounds of appeal. One, Alister's appeal on a key aspect of the murder charge was rejected narrowly, by a three-to-two majority. Another, against irrelevant and prejudicial cross-examination at the trial on the allegedly violent record of Ananda Marga and its responsibility for the Hilton blast, was rejected by four-to-one, although all five judges regarded aspects of the cross-examination as improper. Wilson and Dawson JJ commented: 'The evident purpose behind this line of questioning was to establish that these organisations were committed to revolutionary activities involving the

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44 Ibid, 232-240.
45 Ibid, 409-412.
46 Under s 19 of the *Coroners Act* (NSW).
47 *Alister v R* [1983] HCA 45, (1984) 154 CLR 404.

use of violence.'[48] Murphy J was alone in declaring that the convictions should be quashed:

> I conclude that the highly prejudicial 'cross-examination' by the prosecutor and the introduction of inflammatory extraneous material designed to prejudice the accused, caused a substantial miscarriage of justice.[49]

The third ground of appeal proved even more contentious. By three-to-two, the judges held that the trial judge had erred in law by setting aside a subpoena directed to ASIO requiring it to produce all files relating to Seary's involvement in Ananda Marga activities. The majority judges decided to inspect the ASIO documents subpoenaed by the defence, despite a ministerial certificate claiming public interest immunity on national security grounds. Strong statements of principle were made. Brennan J said:

> It is of the essence of a free society that a balance is struck between the security that is desirable to protect society as a whole and the safeguards that are necessary to ensure individual liberty. But in the long run the safety of a democracy rests upon the common commitment of its citizens to the safeguarding of each man's liberty, and the balance must tilt that way.[50]

Nevertheless, upon inspection, a differently-constituted majority (with Murphy J dissenting) held that none of the documents was relevant to the issues at the trial. Given that this exercise was conducted in absolute secrecy, it is difficult to give credence to this outcome. Murphy J expressed his unwillingness to dismiss the relevance of the ASIO files without hearing the views of the defence and prosecution and declared the result to be 'an injustice' that 'casts a further shadow' this 'strange and disturbing case'.[51] In any case, ASIO's relations with Seary remained hidden from public scrutiny.

After a seven-year public campaign, Anderson, Alister and Dunn were finally pardoned by the NSW government in May 1985, although denied compensation. A judicial inquiry headed by Justice James Wood ruled that Seary had lied on at least 50 occasions. Wood described Seary as 'a person of considerable intelligence and imagination who craved recognition and status and who was willing to exaggerate, bend the truth and lie in appropriate circumstances'.[52] Yet, the judge made no findings against the police. Instead, he sanctioned the use of highly dubious undercover agents:

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48 154 CLR at 440.
49 Ibid at 430.
50 Ibid at 456.
51 Ibid at 470.
52 Molomby, above n 18, 365-373.

> I am satisfied that police engaged in the shadowy area of intelligence have to work with the personnel and inside sources available. In very few cases will a potential informer or non service agent be a person of unblemished character.[53]

A Second Frame-up

Four years later, in 1989, the NSW police mounted another frame-up of Anderson, arresting him for the Hilton blast. This time the two key police witnesses were a prison informer, Raymond Denning, who claimed that Anderson had admitted the bombing while in jail, and an ex-Ananda Marga member, Evan Pederick, who testified that Anderson had instructed him to plant the explosives in the garbage bin. When Anderson was convicted by a Supreme Court jury in October 1990, the *Sydney Morning Herald* ran the headline 'Guilty: the Hilton bomber' and the newspaper declared the bombing to be 'finally solved'. Anderson was sentenced to 14 years jail on three counts of being an accessory before the fact to murder.

Eight months later, however, in June 1991, Anderson was released after the NSW Court of Criminal Appeal found obvious flaws in the evidence. Prison records showed that Denning and Anderson were not even in the same prison on one of the days Denning claimed Anderson had confessed to him. As for Pederick, he and the police advanced three different versions of his story, all supposedly related to Desai's arrival and departure times from the Hilton. An examination of the movement times demolished each version. The appellate court concluded that Pederick had been entirely discredited:

> On any view of the matter, his account of the events of 12 February 1978, and in particular of the circumstances relating to his actual attempt at assassination, is clearly unreliable. He is incapable of giving a description of those events which does not involve serious error.[54]

Perversely, the sole person remaining in jail was Pederick, who was convicted of murder in 1989 after the Director of Public Prosecutions rejected his application for immunity in return for giving evidence against Anderson. Following Anderson's acquittal, Pederick unsuccessfully appealed against his own conviction.[55] In rejecting his appeal, the NSW Court of Criminal Appeal insisted that its decision 'cannot be validly interpreted as casting doubt upon its previous decision to acquit Anderson'.[56] Despite the court's earlier finding that Pederick's account was 'clearly unreliable,' Hunt CJ argued that Pederick's confession to having placed the bomb in the bin was 'extraordinarily strong evidence against him'.[57] Pederick remained in jail for about eight years. Questions remain about his relations with ASIO. He had first come to ASIO's attention in late 1977, when he was arrested at a demonstration, and was employed at the Department of Foreign Affairs in Canberra

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53 Ibid, 374.
54 *R v Anderson* (1991) 53 A Crim R 421 at 444.
55 *R v Evan Dunstan Pederick* [1996] NSWSC 623
56 Ibid at 13.
57 Ibid at 12.

a year after the bombing, with a security clearance up to 'secret: level. According to his 1979 ASIO security clearance, it could find 'no evidence of Pederick's involvement in acts of violence'.[58]

Despite the collapse of two police frame-ups, the state Liberal and federal Labor governments effectively blocked demands for an official inquiry into the Hilton affair. In October 1991, the Hawke government's Attorney-General Michael Duffy refused to answer questions from independent MP Ted Mack about ASIO's role in the bombing. Invoking a bipartisan practice, he refused to confirm or deny matters relating to ASIO's operations. Duffy asserted that simply because the Hilton bomb involved offences against NSW law (when Commonwealth law was also clearly breached), it was up to the state to convene an inquiry:

> While the Commonwealth had a direct responsibility for and interest in the safety of the visiting delegates at the 1978 CHOGRM, the bomb explosion outside the Hilton Hotel in Sydney in fact involved offences against the laws of New South Wales. Therefore, it is for that State and not the Commonwealth to decide whether another inquiry might be warranted. If the New South Wales government were to decide that there should be a further inquiry, the Commonwealth would, of course, co-operate fully.[59]

Duffy's suggestion that NSW might conduct an inquiry was never taken up. Two months later, the NSW parliament passed a resolution, moved by independent MP John Hatton, calling for a joint federal-state inquiry. Hatton stated that two questions remained about the Hilton bombing and the Cameron case:

> [W]ho was responsible and, of more importance, was there a cover-up? The answers lie with the Commonwealth and State officials who failed in their duty, were incompetent, dishonest and devious, obfuscated the truth, abused the due process of the courts, and knowingly lied and presented false evidence.[60]

The motion meant little, given the federal Labor government's insistence on burying the issue. NSW Attorney-General Peter Collins told parliament that the state government did not need to be convinced of the need for an inquiry but 'I have not been successful in my requests for the Federal government to join us.'[61]

V WHO BENEFITED?

The Hilton bombing occurred in a period of ongoing social and political turmoil, following the 'Canberra Coup' of November 1975, when Governor-General Sir John Kerr invoked the prerogative powers of the monarchy to dismiss the elected Labor government of Gough Whitlam. In 1976, the trade unions called Australia's first-ever official general strike, a one-day stoppage against the Fraser government's

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58 Hills, above n 14.

59 *Hansard*, Parliament of Australia, House of Representatives, 8 October 1991, 1481.

60 *Hansard*, NSW Legislative Assembly, 9 December 1991, 5938.

61 Ibid, 5941.

dismantling of the Medibank health scheme, and 1977 saw a number of significant strikes and work bans, under conditions where the government was seeking to introduce a new workplace relations policing agency, the Industrial Relations Bureau.[62] Unemployment was a major issue, with the official jobless rate rising from 5.1 percent in May 1977 to 6.2 percent a year later.[63] Throughout 1977, opinion polls indicated that the Fraser government faced defeat.[64] Although the government was re-elected at the end of that year, it remained extremely concerned about the depth of opposition to its policies.

There is evidence that Ananda Marga may have become a convenient target for a 'terrorist' scare campaign that could justify expanded police and intelligence agency powers. In September 1977, the Indian military attaché in Canberra and his wife were attacked, allegedly by a member of the sect, and 'ASIO had its knuckles rapped for taking six weeks to produce an urgent threat assessment'.[65] ASIO was instructed to send the assessment to the Prime Minister and, as noted earlier, the Cabinet considered an 11-page 'Report on Ananda Marga' from Administrative Services Minister Reg Withers.[66]

Whoever was responsible for the Hilton bombing, it became a vehicle for the government to implement a sweeping build-up of the police-intelligence apparatus, the basis for which had been laid by the Whitlam government. Facing hostility in the labour movement over the openly right-wing activities of ASIO and the police Special Branches, Prime Minister Whitlam had commissioned a royal commission headed by Justice Robert Hope.[67] In his report, ultimately delivered to the Fraser government in mid-1977, Justice Hope found that there may have been times when ASIO departed from the principles of legality, propriety and staying within its charter.[68] Specifically, he concluded that ASIO was operating with questionable legality in some operations, such as intercepting other forms of telecommunications, opening mail, using listening devices and entering and searching premises.[69] It was also committing errors in security vetting, producing a risk of 'a grave and permanent injustice ... to the person the subject of the assessment'.[70]

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62 J. Stokes, '1977 Cabinet records – the historical context and issues of interest', National Archives of Australia, http://www.naa.gov.au/collection/explore/cabinet/by-year/historian.aspx, accessed 20 February 2008.

63 Ibid.

64 Ibid.

65 Ibid.

66 National Archives, above n 9, 320-330.

67 R Hall, *The Secret State – Australia's Spy Industry*, Melbourne, Cassell, 1978, 79-95; D McKnight, *Australia's Spies and their Secrets*, Sydney, Allen & Unwin, 1994, 285-291.

68 R Hope, The Royal Commissioner, *Intelligence and Security*, Fourth Report, Canberra, AGPS, 1977, Vol 1, 70-71.

69 Ibid, Volume II, 150-174.

70 Ibid, Second Report, 22-61.

Despite suggesting that ASIO had broken the law, Hope did not reveal any of the transgressions, let alone call for prosecution. Instead, he urged legislation to make its operations lawful. He also recommended a strengthening of the intelligence apparatus, via the establishment or enhancement of four new institutions: (1) the Protective Security Coordination Centre (PSCC) to coordinate police, intelligence and military operations; (2) the Standing Advisory Committee on Commonwealth/State Cooperation for Protection Against Violence (SAC-PAV) to coordinate counter-terrorism plans nationally and assist specialist anti-terrorist police in each state; (3) the Office of National Assessments (ONA), a central security and intelligence agency, located in the office of the Prime Minister; and (4) the Cabinet Committee on Intelligence chaired by the Prime Minister.[71] Worried that ASIO was casting its net too widely, Hope recommended that it recruit or train university experts in Marxism to concentrate on the real 'subversive' threat. He warned: 'It may be said that the radical or extreme pot is simmering but not boiling.'[72]

In the meantime, Whitlam's government had been removed. That dismissal fuelled further concerns about the role of the security services. In November 1977, Premier Don Dunstan's Labor government in South Australia commissioned an inquiry by Justice White, which reported that the state's police Special Branch, with the assistance of ASIO, maintained files or index cards on 40,000 people, including Labor MPs, union members, civil libertarians and peace protestors.[73] Labor MPs were even placed under physical surveillance at public meetings, and there were index cards on judges, magistrates, clergy and at least one former governor of South Australia.[74] The Hope and White reports re-ignited calls within the Labor Party and wider labour movement for the abolition of ASIO. Just four days before the Hilton bombing, NSW Premier Wran was forced to announce an inquiry into the links between ASIO and the NSW Special Branch.[75] As a result of the bombing, Wran dropped the inquiry.

After the Hilton blast, two reports, one by former London police chief Sir Robert Mark[76] and another by Justice Hope,[77] recommended a significant boost to the powers of ASIO, the establishment of the Federal Police, wider domestic use of the SAS, and the creation of 'anti-terrorist' and SWAT-style squads in state police forces. In addition, Mark's report revealed that Crisis Policy Centres had been set

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71 For further details see J McCulloch, *Blue Army, Paramilitary Policing in Australia*, Melbourne University Press, 2001, 59-67.

72 Hope, above n 68, Fourth Report, Volume II

73 Acting Justice White, 'Special Branch Security Records', Initial Report to the Honourable Donald Allan Dunstan, Premier of South Australia, 21 December 1977.

74 P Grabosky, *Wayward Governance: Illegality and its Control in the Public Sector*, Canberra, Australian Institute of Criminology, 1989, 113-128.

75 Molomby, above n 18, 3-6.

76 R Mark, *Report to the Minister for Administrative Services on the organisation of police resources in the Commonwealth area and other related matters*, Commonwealth of Australia, 1978.

77 Hope, above n 38.

up to facilitate the provision of 'military aid to the civil power'. The centres were to be activated by PSCC, which included representatives of the Prime Minister's National Security Council, ONA, ASIO, ASIS, the military and the federal and state police.[78]

Three weeks after the explosion, an ASIO Bill was introduced into federal parliament. As proposed by Hope, the legislation, which became the 1979 ASIO Act, authorised ASIO to intercept mail and telecommunications, use bugging devices, and carry out searches and seizures. The Act's definition of 'security' was effectively widened by replacing the word 'subversion' with the phrases 'politically motivated violence', 'promotion of communal violence' and 'attacks on defence and security'.[79] The Director-General could obtain warrants to enter and search premises, remove records, use listening devices, and gain access to postal articles. He need only 'suspect a person of being engaged in, or of being likely to engage in, activities prejudicial to security'.[80] It became a serious offence for anyone to make public the identity of any ASIO officer, employee or agent, with a penalty of a fine of $1,000 or imprisonment for one year.[81]

VI THE 'WAR ON TERROR'

Premier Iemma's comments on the 30th anniversary suggest that a thread runs from the Hilton bombing to today's 'war on terror'. The measures adopted in 1978-1979, the greatest expansion of the powers and resources of the police-intelligence apparatus since World War II, helped lay the foundations for the even more draconian provisions introduced since 2001 on the pretext of combating terrorism.[82] By the end of 2005, more than 40 pieces of Federal 'anti-terrorism' legislation had been introduced. All the measures had basic bipartisan support, and most are mirrored in matching State and Territory legislation. In 2002 the leaders of the State and Territory Labor governments agreed to formally refer their constitutional powers over terrorism to Canberra. Their decision has the potential to give the Commonwealth substantially unfettered law-making and police enforcement power over politically-related crime for the first time since Federation in 1901.

In late 2005 the Australian Federal, State and Territory governments introduced into their respective parliaments far-reaching Anti-Terrorism Bills that were agreed upon by Prime Minister John Howard and the State and Territory Labor leaders in a

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78 Hocking, above n 1, 177. See also M Halliday, 'Crisis Policy Centres' (12, 19, 26 January 1980) *Workers News* Parts I, II, III.

79 *ASIO Act 1979*, s 4.

80 Ibid, ss 25-28.

81 Ibid, s 92.

82 For details of the anti-terrorism laws, see M Head, Editorial: 'Detention and the Anti-Terrorism Legislation' *University of Western Sydney Law Review*, No. 9, 2005, 1-8. M Head, ''Counter Terrorism' Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights' (2002) 26 *Melbourne University Law Review* 666 and M Head, 'Another threat to democratic rights: ASIO detentions cloaked in secrecy' (2004) 29 *Alternative Law Journal* 127.

joint communiqué from the September 27, 2005 Council of Australian Governments (COAG) 'counter-terrorism' summit. The measures agreed at this summit also included the *Defence Legislation Amendment (Aid to Civilian Authorities) Act* 2006 (Cth), which considerably expanded military call-out powers first enacted in 2000.[83] In particular, the legislation enhanced the Federal government's unilateral power to mobilise troops internally and gave the military, once called-out, unprecedented domestic powers. The procedures for calling out the ADF were expedited so that in 'sudden and extraordinary emergency' situations the Prime Minister or two other 'authorising ministers' can give the order, which does not need to be in writing. Moreover, standing orders can be issued for the activation of the ADF whenever the Chief of the Armed Forces deems it necessary.[84]

The purpose of many of the amendments was to give ADF officers and members explicit powers and provide immunity from legal action when their exercise results in death, injury or loss. Once deployed, the military will be legally authorised, inter alia, to shoot down aircraft, sink ships, use deadly force, demand answers to questions and require the production of documents. ADF personnel had powers to use lethal force under the existing legislation but the use of 'reasonable and necessary force' was restricted to where they believed it was needed to protect the life of, or prevent serious harm to, another person.[85] The changes extend the use of potentially lethal force to where it is considered necessary to protect any infrastructure that the government designates as 'critical'.[86] All the ADF powers are now protected by a defence of 'superior orders,' which exempt ADF members from criminal liability, except if the order they obeyed was 'manifestly unlawful'.[87]

The Constitutional scope for federal governments to use the military call-out provisions was extended in 2007 when the High Court upheld the validity of an interim 'control order' imposed on a Melbourne worker, Jack Thomas, sanctioning one of the central features inserted into the *Criminal Code* (Cth) by the *Anti-Terrorism Act 2005* (Cth).[88] In effect, by a 5 to 2 majority, the court upheld the constitutional validity of the anti-terrorism legislation that the Howard government and its state Labor counterparts have introduced since 2002. In doing so, by a margin of 6 to 1 (Kirby J dissenting alone on this aspect) the court also condoned the extension of the Commonwealth parliament's defence power under s 51(vi) of the Constitution beyond war and external threats.

In a joint judgment, Gummow and Crennan JJ spoke of 'the defence of the realm against threats posed internally as well as by invasion from abroad by force of

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83 M Head, 'Militarisation by Stealth: Should Domestic Security be a 'Core Business' of the Armed Forces?' (2007) 188 *Overland* 68-73; M Head, 'Australia's Expanded Military Call-out Powers: Causes for Concern' (2006) 3 *University of New England Law Journal*, 145-150.

84 *Defence Act 1903* (Cth) s 51AB.

85 Ibid, s 51T.

86 Ibid, s 51T(2A).

87 Ibid, s 51WB.

88 *Thomas v Mowbray* [2007] HCA 33.

arms'. These propositions are broad enough to sanction the use of the military to suppress political protests and civil unrest. Gummow and Crennan JJ cited a 1781 English case, *R v Lord George Gordon*[89] where Lord Mansfield denounced a mass demonstration outside parliament that had demanded the repeal of a statute. Mansfield and his fellow judges decided unanimously that 'an attempt, by intimidation and violence, to force the repeal of a law, was levying war against the King; and high treason'.[90] Gummow and Crennan JJ also relied upon a 1532 English statute, *The Ecclesiastical Appeals Act*, which declared that the English people were bound to bear 'a natural and humble obedience' to the King, as well as God.[91] Such trawling back through the legal texts to the days of the absolute monarchy highlights the disturbing character of the High Court decision. It represents a reversion to absolutist conceptions of the state in relation to the 'war on terror'.

The decision has torn asunder the half century-old proposition, adopted by the High Court in the *Communist Party Case* of 1951, that the defence power cannot be used in peacetime for domestic political purposes.[92] The majority judgments declared that the court was obliged to accept as 'notorious facts' that the Commonwealth faced unparalleled dangers from terrorism. Ordinarily, courts require evidence to substantiate the claims made by litigants, including governments. In criminal cases, it is up to the prosecution to prove its charges 'beyond a reasonable doubt' and in cases involving deprivation of liberty it has been accepted, until now, that governments must prove their allegations. In *Thomas v Mowbray*, however, the judges broadened the concepts of 'constitutional facts' and 'judicial notice' to accept all the assertions made by the Federal and State governments and their security agencies, such as ASIO.

During the 2007 Federal election campaign, the Labor Party pledged to maintain the 'anti-terrorism' laws. The unanswered questions left by the Hilton affair, and the subsequent cover-up by the previous Federal Labor government, underscore the need to constantly challenge the claims being made by all governments about the 'war on terror' and to oppose every erosion of civil liberties and basic legal rights being carried out in its name. Rather than 'an entrée to an age of terror', the Hilton bombing was a highly suspicious event that demands a full independent investigation.

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89 (1781) 2 Dougl 590 [99 ER 372].

90 [2007] HCA 33, [140].

91 Above, [142]

92 *Australian Communist Party v The Commonwealth* [1951] HCA 51; 83 CLR 1.