'First restrain, next blockade, lastly destroy'*

Trespassers will be prosecuted

Roland Browne

New trespass laws in Tasmania are clearly aimed at eliminating protest that is not government-approved, and at facilitating police powers of arrest and prosecution of offenders

Within the past ten years Tasmania has seen many organised demonstrations in response to a range of environmental and social issues. These include both the Franklin dam dispute in 1982 where 1272 people were arrested for trespass-related offences (with a total of 1324 charges laid), and the protest in the Picton valley south of Hobart in 1986-87 where some 120 people were arrested for preventing road construction machinery from crossing Farmhouse Creek. Trespass[1] laws have figured prominently in the disputes, though in a variety of forms. The laws have not remained static; since 1982 they have gradually been amended in an effort to protect the challenged activities. However, the new Groom Liberal Government in Tasmania has, in 1992, brought in the *piece de resistance* — the *Police Offences Amendment Act* 1992.[2] New heights in the attempted suppression of protest by government have been reached in Tasmania: it is no cliche to claim that civil liberties are being eroded.

The development of the law over the last decade has all the appearance of a chess game played between government, courts and demonstrators. Protests in different areas have prompted changes to legislation, primarily to the *Police Offences Act* 1935 and the *Forestry Act* 1920, leading to court challenges and, in turn, further changes to the law. This article will trace the development of the trespass laws since 1982. It will consider, in particular, the impact of the amendments on the right to protest.

The Gray gambit

Before 1982,[3] s.14B of the *Police Offences Act* provided that it was an offence to *enter* the land of another person. The Gray Liberal Government made three significant changes to the *Police Offences Act* in 1982.[4] It altered the provision to read 'enter *or remain* on the land of another person'; gave police the power to arrest a person for remaining on land; and increased the penalty. The police did not hesitate to utilise this power of arrest at the Franklin blockade, in some 1000 cases.

However, the trespass laws only applied to private land or to land that was vested in a 'person': trespass had to be to the land of 'another person'. The trespass laws did not apply to public land, whether streets, Crown land or State forest, etc. This limitation would appear to be a relic from the past, as the common law always recognised the individual's access to public lands. On the other hand, trespass laws protected private land and, for example, land that was vested in a public authority such as the Hydro Electricity Commission (who were building the Gordon below Franklin dam).

In late 1982 all charges laid against protesters were to be dealt with in the Court of Petty Sessions. The police, however, had overlooked s.66 of the *Police Offences Act* which provided that a magistrate could not determine a claim to title. For protesters arrested on the Crotty Road (an access road to the dam site), this was precisely the point in issue in relation to a substantial number of the charges. The protesters claimed that the Hydro Electricity Commission did not have title to the land; that, in fact, the land was a public road. Eventually, a test case proceeded as far as the Full Court of the Supreme Court of Tasmania[5] where it was held that the Magistrate had no jurisdiction to hear the case.[6] As a consequence, 1000 charges were dropped. For the moment the protest movement was in control of the chessboard and had the Government 'in check'. However, soon after, s.66 was excised from the *Police Offences Act*.[7]

The Farmhouse Creek variation

The next move was at Farmhouse Creek in 1985-86. This time it was the turn of the Forestry Commission, which was pushing a road through unlogged forests south of Hobart, to try to control protesters who had established a camp on the south bank of Farmhouse Creek. The road had progressed as far as the creek, and the company (Risby Forestry Industries) intended to cross the creek and continue the road southwards. The

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* Nimzovitch's axiom about the obstruction of pawns by other chess pieces.

police had no power to act to remove protesters as the land, being State Forest, was public land. At that time there was no offence of trespass in State Forest, it being Crown land, not 'the land of another'.

On 7 March 1986, 60 timber workers, directed by Anthony Risby and under the watchful eye of the police, man-handled protesters out of the path of the machinery in the creek bed. The creek was crossed and the construction work continued. As a result of this incident protesters laid a number of complaints to police for assault; however, the police refused to prosecute. Accordingly, private prosecutions were launched against Anthony Risby and two of his employees. Risby was charged with instigating the assaults by his employees on Judith Richter. The prosecutions failed before the magistrate, who held that the middle of the creek was a public road for the purposes of the *Traffic Act*, and that therefore the workers had a claim of right and were able to avail themselves of the remedy of self-help. On appeal to the Supreme Court this decision was over-turned,[8] notwithstanding that Cox J agreed that the middle of the creek was a 'public road'.[9] In the result, Risby and his employees were convicted.

The Forestry Commission acted swiftly. The Government introduced amendments to the *Forestry Act*[10] which provided a process for gazetting various areas of State Forest to be areas which people were prohibited from entering. This complex system involved the publishing of a statutory rule with a map attached to it identifying the land upon which people were neither allowed to enter nor to remain without a permit. There was an immediate challenge in the Supreme Court when the first charge was laid.[11] However, Underwood J refused to hear the case, holding that the Supreme Court would not provide a remedy where the defendant had not gone through the appropriate channel to defend the charge. Hence, the defendant (Geoffrey Law) went back to the Court of Petty Sessions, successfully defending the charge[12] on the basis that the gazettal process was uncertain. This decision was appealed to the Supreme Court where the motion to review was upheld[13] on the basis that the Forestry Commission had correctly followed procedures set out in the Act and that there was no lack of certainty. Accordingly, Tasmania now had a system, cumbersome as it was, of preventing access to public forest.

The Salamanca attack

Trespass laws next came into the spotlight in 1987 at Hobart's famous Salamanca market. The Tasmanian Gay and Lesbian Rights Group commenced handing out information about the reform of Tasmania's criminal laws prohibiting sexual acts between consenting males. Hobart City Council opposed this activity and indicated to the group that if it continued to hand out leaflets members would be arrested for trespass in the market. The group continued to promote its cause and arrests commenced in October 1988. A total of 97 people were arrested and charged with trespass (i.e. 'remaining') contrary to s.14B of the *Police Offences Act*. Again, all charges were dropped; this time because it turned out that the Council had not correctly declared Salamanca Place to be the property of the corporation, it being a public street.[14] Without an adequate declaration the land did not 'belong' to the corporation for the purposes of s.14B of the *Police Offences Act*.

Then, in February 1992, the Full Court of the Supreme Court of Tasmania handed down a decision in an unrelated case that was to have a major impact on the law of trespass.[15] Nigel Gow was convicted of trespass following an entry to a neighbour's home at 3.00 a.m. in North Hobart. Gow had no reason to be at the home of his neighbour and, in fact, was staying at his sister's flat across the road. At the time of the entry he was severely intoxicated and it appeared that he had no idea where he was. Gow was convicted and, on appeal to a judge, the case was stated for the Full Court of the Supreme Court. Cox, Zeeman and Slicer JJ each held that a requirement of the offence of trespass (i.e. 'entering or remaining on the land of another') was that the person charged knew that the premises entered belonged to another person.

This decision cast an onus on the police they never knew they had. Police had traditionally prosecuted trespass as if it was a strict liability offence. Now, they had to prove a mental element, which necessitated taking statements from defendants. However, the real significance of this decision was reflected in subsequent government action in May 1992 when the trespass laws were amended (see further below).

The Picton check

Meanwhile, at the Picton River a fresh protest was brewing. Protesters had blockaded a road to prevent further construction work, with the blockade enduring for some six weeks. Police were powerless to act (again) as the trespass provisions of the *Forestry Act* had actually been repealed by the resource security legislation that passed through the Tasmanian Parliament in November 1991.[16] All that now existed in the *Forestry Act* was an offence of refusing to obey a direction of an authorised person who had requested another person to leave an area of State Forest.[17] This, however, was not an arrestable offence.

The Government's response both to this protest and to *Gow v Davies* was the introduction of the *Police Offences Amendment Act* 1992.[18] This legislation changed the trespass provisions of both the *Police Offences Act* and the *Forestry Act* in such a way that it can be said that there is no longer any public land in Tasmania. The new s.14B of the *Police Offences Act* reads:

> A person shall not, without reasonable or lawful excuse (proof of which lies on him), enter or remain on land, without the consent of the owner or occupier of the land or the person in charge thereof.

A trespass can now be to any land, rather than being 'to the land of another'. In other words, even if a person is on Crown land or in State Forest or a national park, if he or she does not have either the consent of the owner to be on that land, or a reasonable excuse to be there, he or she can be charged with trespass. The other result of this amendment is that the mental element of trespass has been removed. It is no longer necessary for a person to know that he or she is on land of another person. The person must merely *be* on that land.

The trespass laws in the *Forestry Act* were also reintroduced, and in a drastic form.[19] New offences of interfering with either machinery or the operation of machinery have been introduced, together with a maximum penalty of a $20 000 fine and/or 12 months imprisonment. There is also an offence of failing to abide by the direction of a police officer, with a similar penalty. Further, magistrates have been given a power to assess damages for any interruption to forestry operations that arise out of the offences set out above. Section 46(2) provides as follows:

> A court that convicts a person of an offence under subsection (1) or (1A) may, in addition to any other penalty it may impose, order that person to pay to any other person-
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> (a) a sum, being all or part of a sum equivalent to the cost of making good any damage done, or any loss incurred,

by that other person, by reason of the convicted person's act; and

(b) such other costs as the court considers appropriate.

This provision gives a magistrate an extraordinary power to make an assessment of damages against a person in respect of an act that goes beyond the offence committed: that is, while the defendant may have committed a trespass, he or she may be liable for a civil claim for lost income from the Forestry Commission, or from logging companies, that has no direct relevance to the act charged. Section 46(2) is yet to be tested in the courts.

The civil liberties defence

When the Bill for this legislation was introduced into Parliament there was a public outcry. The Bar Association, the Tasmanian Council for Civil Liberties and the media condemned the legislation. Of primary concern was the provision in the original Bill for a minimum penalty of $1000 for offences under the *Forestry Act*. There was also a proposed power of arrest of any person who threatened or intimidated any public officer in the course of his or her duty under any statute. Yielding to public pressure, both of these provisions were excised from the Bill.

Yet the draconian form of the legislation remains and police have extraordinary powers to arrest people for trespass anywhere. The arrest powers given to police in the *Forestry Act* are so wide as to inevitably lead to a discretionary application. The use of the power is dependent on a police officer having a reasonable suspicion that a person is going to interfere with forestry operations or with forest machinery. What is a 'reasonable suspicion' in such circumstances? How will the arrest power be used? Will the government direct the police as to whom they should arrest? The answer should be an emphatic 'no'. However, it was a qualified 'yes'. During parliamentary debate on the Bill (just before the bitter dispute at the APPM mill at Burnie) the Government was pressed on whether the legislation could be used against trade unionists in the course of industrial action. To this question the Premier, Ray Groom, gave an astonishing response. Having declared that '... it is for the police and other authorities to enforce this law ...',[20] he said '... it would not be our intention to arrest people who are involved in legitimate protests around the State in the streets, parks, gardens and all the rest of it'.[21]

In any other State this assertion would be outrageous. It was not outrageous in Tasmania. In fact, Mr Michael Hodgman, QC MP rose in Parliament to point out[22] that the police have had a policy for 25 years of not enforcing the laws prohibiting consensual sexual acts between males (i.e. ss.122-123 of the *Criminal Code*).

The end game?

The question is, how is this power to be monitored? Who is to decide what is a legitimate protest and when the police are to intervene? Is it a political or a police decision? The new legislation is clearly aimed both at eliminating protest that is not government-approved and at facilitating police arrest and prosecution of protesters. The laws can only politicise both the police and the courts and bring them into disrepute. The legislation itself invites criticism because, as Green Independent Christine Milne pointed out, the penalty for attempting to interfere with forestry operations is now much greater than the penalty for indecent assault of a child or for ill-treating a child.[23]

Given that police have already failed to arrest a group of Aborigines protesting at Risdon Cove in Hobart and at Rocky Cape National Park in Northern Tasmania in support of land rights, it appears the process of politicisation of the police has already commenced. At the same time, the trespass laws continue to appear in the news. For example, during the Burnie mill dispute in May 1992, five employees of the APPM mill were arrested at their workplace and charged with trespass at the beginning of a shift because they were not doing the work they 'were employed to do'. On 20 July 1992 a Hobart magistrate dismissed a charge of trespass against a police officer.[24] According to the evidence, the officer (who was off duty) climbed through the laundry window of a house in New Town at 2.00 a.m. and confronted the occupants (a family of Laotian refugees). The police were called and the defendant was led away, although not until after he had retrieved his revolver which had fallen into the laundry tub as he climbed through the window. The defendant's explanation (which the magistrate held was extraordinary although not shown to be untruthful) was that he thought he had seen some young people run towards the house and he assumed they had gone inside. This astonishing case is being appealed to the Supreme Court on the basis that the magistrate erred in law in not requiring the defendant to prove his defence on the balance of probabilities (as is required by s.14B of the *Police Offences Act*).

Most recently, trespass laws have been publicised in Tasmania when 56 waterside workers were arrested and charged with trespass on 10 August 1992 after setting up a picket line to protest the use of non-union labour for unloading fishing boats. In the terms of the Premier, Ray Groom (see above) this was clearly not a 'legitimate' protest!

It is expected that protests will continue in Tasmania over a range of issues including forestry, mining activity in the World Heritage Area, land rights, pollution, industrial relations, waste dumping, etc. It would be a mistake to assume that the protest movement has been silenced. The next move in the chess game will be a challenge in the courts, with the police use of their discretion to prosecute under close scrutiny. The real question, however, will be the extent to which the Government will go to eliminate protests of any sort. Will they attempt checkmate?

References

1. There is no actual charge of 'trespass' in Tasmania, rather one of 'unlawful entering or remaining upon land'. For simplicity, in this article, I will refer to these and allied offences as 'trespass'.
2. No. 4/1992.
3. For a brief history of s.14B see *Strickland v Killen* [1983] Tas.R. 31.
4. No.74/1982.
5. *Strickland v Killen* [1983] Tas.R. 31.
6. For a discussion of this point see Blackshield, Tony, in *The South-West Dam Dispute: The Legal and Political Issues*, University of Tasmania, 1984.
7. By the *Police Offences Amendment Act* 1984.
8. *Richter v Risby* (Tas. Unrep. No. 18/1987).
9. At p.22.
10. Sections 20B and 46A.
11. *Law v Attorney-General* (Tas. Unrep. No. 43/1986).
12. *Williams v Geoffrey Michael Law*, Decision of M.A. Hannon Esq., 21 October 1986.
13. *Williams v Law* (Tas. Unrep. No. 28/1987).
14. Although the charges were dropped, an application for costs was pursued successfully in the Court of Petty Sessions: *Lowe v Burton*, Decision of M.A. Hannon Esq., 21 March 1989.
15. *Gow v Davies* (Tas. Unrep. No. 8/1992).
16. *Public Land (Administration of Forests) Act* 1991.
17. Section 44A.
18. No. 4/1992.
19. See the new ss.44A and 46.
20. Hansard, 6 May 1992, p. 866.
21. Hansard, 6 May 1992, p. 866.
22. Hansard, 6 May 1992, p. 867.
23. Hansard, 6 May 1992, pp. 809, 821.
24. This offence was contrary to the legislation as it stood in August 1991. However, the issues raised are the burden of proof and the powers of police to enter private property, none of which were affected by the amendments of 1992.