

# THE ESSENTIAL SERVICES ACT – A CIVIL LIBERTIES PERSPECTIVE

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No one likes strikes. Employers don't. People who are inconvenienced don't. Striking workers and their families don't enjoy losing wages during strikes. The fact that people don't like strikes is no reason to ban them. Just as the fact that people don't enjoy being inconvenienced by street marches is no reason to ban street marches. If we want to live in a free society we have to tolerate people exercising their rights. So what rights are involved when people go on strike?

Striking involves breaching a contract of employment which allows the other party to the contract to exercise some of his rights, such as to not pay wages and seek stand-down orders. With that rough picture we have to ask what role the government should play, in the public interest, in what are otherwise contractual relations. The proper role for governments is setting up conciliation and arbitration procedures to get the parties together, and thus reduce dislocation. The Federal Minister for Finance, Mr. Robinson, has bluntly said,

“Governments cannot solve strikes”

But even if we had a watertight guarantee from the government that it could solve strikes, that still would not justify an act like The Essential Services legislation. Without the right to withhold their labour, workers can be locked into working in unsafe places for inadequate pay. Ask any Philippino factory worker.

But The Essential Services Act not only takes away the right to strike, it takes away the right to threaten to strike. The mere threat of industrial action can allow the massive powers of the executive government to come into operation (s.5). The industrial implications of this were spelled out by Peter Beattie recently here in Toowoomba:

”[It] completely ignores the fact that many threatened strikes result in intensive negotiations between unions and employers often in the form of compulsory conferences and as a result strikes frequently do not eventuate ... It will also encourage unions not to announce their intention to embark on industrial action so as to avoid the declaration of an emergency until the strike has actually begun”.

The civil liberties implications are equally offensive. For example, if a union official says, “unless you provide information on the cost of our demand for a 35 hour week we'll strike”, a State of Emergency can be declared.

Once a State of Emergency has been declared, Ministers gain virtually unfettered powers. A Union leader who **fails** to counsel his members to comply with a ministerial direction is liable to a fine not exceeding \$1,000. In any court action the normal onus of proof is reversed: s.9 (2). In Australia we already have numerous restrictions on free speech. The Essential Service Act breaks new ground. It doesn't merely penalise for speaking in the form of

inciting or counselling others to take industrial action. It penalises people for **not** speaking, for not echoing a government's direction, for refusing to say something that they find offensive. The criminal offences which the Act creates don't only apply when workers down tools. Workers can be penalised not for their actions, but for their opinions. Not only does the Act abrogate the right of free speech, it introduces **F O R C E D S P E E C H**.

All this can happen **before** any industrial action has actually taken place. After a State of Emergency has been proclaimed, government ministers are given sweeping powers to "provide, operate, maintain, control, regulate, and direct" the relevant essential service (s.6).

It would be hard to envisage powers like these operating other than in wartime. They include the power to direct work to be done, to call in strike-breakers, to prohibit the use or consumption of the service and to requisition property. These executive acts would be virtually impossible to challenge in the courts. 200 years ago Thomas Paine said:

"All power is a trust handed to Government by the people. Any other power is usurpation".

A State of Emergency usurps to the government of the day, power in excess of that necessary for democracy. A declaration of a State of Emergency is an admission by a government of its own inability to govern democratically. The definition of essential service includes a large part of the service industries of Queensland, but also extends to any activity concerned with supplying any commodity for an essential service, and any other service declared by the Governor-in-Council to be an essential service (s.3 (h), (i)). Hardly an industry in Queensland escapes the operation of the Act. The Government can take over a particular business, requisition property with compensation (s.11), and run up debts which have to be paid by the owner of the business.

In short, the Bjelke-Petersen government has brought us socialism in our time. Section 14 might be called the **Jackboot** section. It says that the Minister and his delegates "shall not incur any liability at law on account of anything done without negligence and that ... is done in good faith in a belief on reasonable grounds that it is authorised by ... a direction, requisition or authority issued under s.6."

This means that if the draconian powers conferred by the Act are not wide enough (and it is hard to imagine this arising) acts done in "good faith" (ie without malice) outside these powers won't involve civil liberty.

If you wonder who can be a delegate of the Minister look at section 10. The Minister can in writing "delegate all or any of his powers under section 6". The provisions don't only affect unionists. Section 8 of the Act allows oral directions to be given by delegates of the Minister to **any** person. So a police officer or a public servant who has been delegated by the Minister can requisition property, direct people to break a strike, and enter buildings and do "all such things as **in his opinion**, should be done for the provision of the essential service..." S.6(3)(b).

Once a State of Emergency is in operation a Minister and his delegates can make all sorts of orders and directions. Directions to Unions are deemed to be made to all their members (s.9(2)(a)). A failure to comply with a direction is an offence with a penalty for individuals of \$1,000 and a daily penalty of up to \$50. Where a Union is involved a penalty of up to

\$10,000 applies with a daily penalty up to \$500. In the case of Unions, the onus is on the Union to prove that it took all necessary steps to comply with the direction. The Act is sprinkled with other cases where the onus of proof is reversed: ie people are assumed guilty unless they can prove their innocence. This is intolerable.

The Act introduces the obnoxious concept of guilt by association. If during a State of Emergency two or more persons employed in an essential service fail to comply with a direction made under the Act, their Union is deemed to have procured the non-compliance and is liable. The Union can only escape liability if it discharges a heavy onus of proof. For example, suppose that a State of Emergency is declared over the transport industry and a Minister directs a return to work. If the relevant Transport Union agrees to return to work, but a few of its members defy the direction by staying out on strike, the Union is still liable.

Time doesn't permit me to elaborate on the frequency and ease with which Union leaders, unionists, non-unionists, business owners, indeed all citizens can risk criminal penalties under the Act.

Criminal sanctions are an entirely inappropriate device in industrial relations where issues are never clear cut. However the Act does more than introduce criminal sanctions. It rejects the traditional legal principles which govern criminal law – proof beyond reasonable doubt with the onus of proof on the prosecution. In summary, The Essential Services Act extends the heavy hand of the criminal law to both industrial action and the threat of industrial action.

It not only abrogates freedom of speech, but forces people to give directions which they find objectionable. The Act replaces conflict resolution through conciliation, with conflict escalation through the criminal law. As the President of the Council for Civil Liberties observed:

“The philosophy of the Bill is directed towards giving unfettered power to the Executive to coerce citizens to obey the instructions of Ministers of the Crown”.

Given the deplorable record of the Queensland Parliament in controlling the excesses of executive government, the sole provision in the Act for parliamentary supervision is something of a dead letter. The Member for Toowoomba North, Dr. Lockwood, seems comforted by the fact that “every organisation has an executive to handle the day to day running of its affairs. From tennis clubs to big business the same applies” (*Toowoomba Chronicle* 3/10/79).

While this analogy might make Mr. Bjelke-Petersen the Bjorn Borg of Queensland politics, it is of little comfort to us. Given the long periods for which the Parliament does not sit, and the ability of the Government to postpone its recall, Queensland citizens face the threat of emergencies proclaimed at the fiat of the Executive and maintained for many months without any opportunity for Parliament to review the situation.

The Essential Services Act is a charter for executive government. The Act is suspect in its philosophy, deficient in its provisions and offensive to civil rights. In 1971 the Government thought that 15 footballers justified the declaration of a State of Emergency. The performance of the Government since 1971 shows that citizens can't hope that the Parliament will control the excesses of executive government. Citizens can't rely on a government armed with massive powers to exercise those powers in good faith. Citizens can't depend on

politicians of any political party to protect their civil rights when it comes to the crunch. The Justices Act fiasco showed us that:

“The present government is not going to change its style or substance unless we demand it. A change to a Liberal or Labor government would not alter the fact that our civil rights can be violated at any time. We have to make the enactment of a Bill of Rights an issue for the next election. We have to insist on reforms that give the Parliament real rather than illusory control over the Executive.”

When I joined the Council for Civil Liberties in 1976 the burning of hippies’ huts at Cedar Bay seemed the last gasp in the violation of people’s freedoms. In the same year a solitary police assault on a student demonstrator moved a fellow law student to sue the Premier to the High Court when the police investigation into the incident was stopped by Cabinet.

I wonder sometimes whether the frequency of violations against civil rights in this State blunts, rather than sharpens our sense of outrage.

I don’t know if The Essential Services Act was passed as an electoral ploy. We’ll never know whether the street march ban was intended to drum up a ‘Law and Order’ campaign in 1977. Whether The Essential Services Act was passed for short term electoral advantage or with sinister intent does not alter its character as a repressive and illiberal document.

The rhetoric of the Government is “Law and Order”. The record of the Government is “Order without Law”.

The Government’s actions are motivated by fear.

Fear that citizens will begin to tell the Government what the law should be, instead of the Government telling the citizens what the law is.

Fear that citizens like ourselves will rediscover our sovereignty and begin to shape institutions that promote human rights, not suppress them.

We have to rediscover our sovereignty. That will require a lot of time and a lot of work. But in the end we will have earned our idealism.

PREPARED ON BEHALF OF THE QUEENSLAND COUNCIL FOR CIVIL LIBERTIES  
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