



**ANU** LAW  
STUDENTS'  
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**LAWS2202**  
**Commonwealth Constitutional Law**  
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## Question 3

83/100

- (i) the Constitutional validity of s 5 of the Civil Disobedience Act (Cth) (CDA)

Amanda would like it to be found that s 5 of the CDA is invalid either because the Commonwealth has no legislative head of power, or a relevant limitation prevents them from exercising it. [✓]

### HEADS OF POWER

#### 1. External Affairs

S 5 of the CDA may be upheld under the Commonwealth's external affairs power, contained in s 51(xxix) of the Commonwealth Constitution [✓], as it seeks to protect both UN representatives and the Australian public at large. [marker underlined] The safety of the UN representatives, nationals of other countries, will clearly be something that affects Australia's relations with other nations (R v Sharkey) due to the international political [✓] nature of the safety of these people. This was confirmed in Thomas v Mowbray. A matter of 'international concern' has also been considered by the courts as a potentially free-standing sub-head of the external affairs power. [✓] Introduced by Stephen J in Koowarta, and further discussed in Tas Dams, the way in which refugees are treated (e.g. the detention conditions) is arguably a matter of international concern [✓] that could provide an alternative basis for the Commonwealth to use the external affairs power here. Given the EA power exists on the 'relations with other nations' argument, and possibly also on the 'matter of international concern' argument, the court will ask the proportionality question [✓] (Thomas). That is, whether s 5 of the CDA is reasonably appropriate and adapted to protect the UN delegates, promoting good relations with other nations (Deane J in Tas Dams) [marker circled the this bracketed clause].

In this legislation, there is no timeframe [✓] or location specified. Because of the nature of the AFP, they have a presence all over Australia which means this provisions could potentially be used to catch many other people [✓] engaged in protests about something entirely different. In addition, the penalty in s5(2), of 50 units, or around \$5000, is quite considerable [✓] and it is likely that a smaller fine would also have succeeded in discouraging protests. Because of this very general application, combined with a harsh penalty, s 5 of the CDA is unlikely to be found to be an appropriate and adapted [✓] means of achieving the Cth purpose of protecting UN officials. The court may be able to read s 5 down as only applying to protestors at detention

centres during the time of the UN visit, but this may be difficult due to its very general application. [excellent]

## 2. Defence

Historically, the defence power has been constrained to protecting Australia or Australians (or groups thereof) from external threats [✓] (e.g. Stenhouse v Coleman, the Communist Party Case). However, since Thomas v Mowbray, ‘that s 51(vi) is concerned only to meet the threat of aggression [✓] from a foreign nation should not be accepted’ (per Gummow and Crennan JJ). Thus, the Commonwealth will likely be able to use s 51(vi) of the Cth Constitution, the defence power, [✓] to protect groups of Australians from the threat of potentially violent protesters. This may be particularly relevant given that the train station at Leightonfield is well frequented by members of the public. Traditionally also the fact that the Defence power is said to wax and wane may be of concern here as Australia is not at war; [✓] implying that the Defence power will be construed narrowly. However, since Thomas, query whether this distinction is to be maintained in polar form [✓]. The fact that only a section of the Aust public is to be protected here will not prevent the Defence power being used [✓] (Thomas). Like for external affairs, a proportionality question will be asked given the Cth [✓] will likely make out that s 5 is for the purposes of defending groups of Australians from an internal threat of violence. As for discussion on the EA power, a proportionality test will likely fail as time and place to which this provision applies are unspecified. [✓] [excellent]

## 3. Nationhood

Nationhood, the Cth power derived from either ss 51(xxxix) and 61 or the Constitution as a whole may be a ‘last resort’ Commonwealth attempt to make out a head of power [✓] as s 5 of the CDA seeks to control violent protests and maintain the peace which is in the interest of the nation as a whole. However, this is a weaker source of Cth power [✓] and the link here is more tenuous. Even if nationhood was made out, coercive measures are problematic (Davis) and s 5 CDA will fail on proportionality analysis. [✓]

### LIMITS ON COMMONWEALTH POWER

#### (a) Communist Party Principles

Whether s 5 CDA is made out under the EA or Defence head of power, the Communist Party principles will severely limit [✓] the power of the Cth. ‘The link to power cannot rest on the unreviewable decision of an administrator’ [✓] (Communist Party Case). Here, the opinion of the AFP officer is what makes a person’s actions (protesting) illegal. [✓] To substantiate this

argument more information is needed but there don't appear to be any factors the AFP officer has to take into account and there are no stated means in the CDA Act for someone ordered under s 5(1) to appeal this decision. [✓] These factors both point to a breach of the Communist party principle which will likely make s 5 CDA unconstitutional. [✓] [excellent]

(b) Freedom of Political Communication

It will also be a relevant question if s 5 limits political communication which is a limit on Cth power. [✓] FoPC from ss 7, 24, 64, 128 Constitution [applied in ACTV] [marker circled bracketed clause]. This law effectively burdens freedom of communication because it is disallowed and has a coercive penalty attached (Lange) [✓]. It is likely political communication because communication about refugees and detention and their rights is a matter of political concern. [marker underlined] [good] (Lange) Then it must be asked, 'is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with... the system of government prescribed in the Constitution? (Lange + Coleman) Here, protesting is potentially prohibited across the board, not just about refugees [✓] → this will not be appropriate and adapted.

Thus, the Cth will likely have power under EA and Defence but s 5 is not proportional and is also limited by Communist Party case and freedom of pol com → will be unconstitutional.

(ii) Justin

Justin can make all the same arguments as Amanda about a Cth head of power, as well as a potential acquisition of property argument. [✓] He can rely on the Communist Party limitation but his FoPC arguments are weaker than Amanda's. → see (i) for EA, Defence, Nationhood HoP arguments and Communist Party Case limitation. [✓]

(a) Additional HoP for Justin: Acquisition of Property

Re J, the Cth may have an additional acquisition of property HoP argument. The Cth can use s 51(xxxi) to acquire property. [✓] Justin's digeridoo, along with other possessions in s 6(1), will be property. (Bank Nationalisation)

Acquisition?

For an 'acquisition of property' to occur there must be some identifiable advantage for the Cth (Mutual Pools) [✓]. Here, that advantage might be said to be the patrolling by the AFP, free of Justin's interest [✓] (Newcrest).

With respect to s 51(xxxi)?

This potential acquisition of property is to prevent using things to protest or disrupt protests. Because this is a forfeiture penalty [✓], it will not be an acquisition with respect to s 51(xxxi) and will fail on this count. [excellent]

## LIMITATIONS

The Communist Party principles also apply as a limit on Cth power a whether an item is to be used to protest or disrupt protest rests on the opinion of the AFP officer [✓] (Communist Party). This will limit the Cth's use of the EA of [sic; or] Defence power, likely making s 6(1) CDA inlaid.

## Freedom of Pol Comm

Justin will have more difficulty than Amanda making out the FoPC limitation on Cth power. While Justin may perceive his playing as political communication as it conveys his support for the refugees, this may not be able to be objectively ascertained. [✓] Levy provides that emotive communication can be political communication, but unlike Mr Levy holding up dead ducks it may be unclear what Justin is intending to convey by his playing [✓✓]. If so, unlikely to be political communication and J likely can't rely on this limitation

### (iii) Const. validity of s 6(2)

Rhys will need to look @ the Cth head of power arguments of Defence, EA and nationhood in (i). However, with regard to Rhys, his selling of merchandise does not in any way amount to a violent protest. [✓] This severely limits the capacity of the Cth to use at least Defence [✓] and probably EA as well. EA is more likely to be used as seeing anti-immigration merchandise will likely cause the UN officials to think poorly of Australia, impacting on Aust's relations with other nations (Sharkey). [✓]

## LIMITS

Freedom of pol comm. will likely be made out by Rhys due to similar facts as in Davis, where shirts/slogans/symbols were held to be political communication. [✓]

S 6(2) specifically raises a proportionality issue here. If the Cth enacts s 6(2) CDA under s 51(xxix) of the Const, the EA power, to promote Aust's relationships with other nations they are

doing so to prevent protesters at UN inspections. 30 days may not be proportionate given items only need to be confiscated for the duration of the UN visit. [✓] However, need more facts to know how long the visit is and the fact that Rhys intends to go around to all inspections, points to this provision being more appropriate [✓] as it stops people from attending multiple protests. Proportionality will likely be made out → Cth can enact s 6(2) using EA power, [✓] (not Defence; not violent) and confiscation time may be proportionate.

However, Rhys is having his right to FoPC infringed as this law burdens his capacity to communication about immigration [✓], a political matter (Lange). Therefore unless Cth can show s 6(2) is appropriate and adapted, FoPC will apply. Here, general application re time and place → not proportional. Unless court can read down as only applying to areas where the UN delegates are; will not be proportional → s 6(2) will be invalid.

[Your analysis was a pleasure to read, thorough, well argued + structured. Great work, well done!]