

**IN THE HIGH COURT OF AUSTRALIA**

**CANBERRA REGISTRY**

**No C1 of 2025**

BETWEEN:

ANDREW MAXWELL DWYER

Plaintiff

AND

MINISTER FOR THE ENVIRONMENT AND NATIONAL PARKS

Defendant

**GIBBS MOOT PROBLEM 2025<sup>1</sup>**

1. Between 2023 and late 2024, a number of young people suffered from drug overdoses at festivals and raves held around Australia, including in the Northern Territory and Australian Capital Territory. Tragically, some died.
2. In February 2025, the Commonwealth Government introduced the Drug Enforcement at Territory Events and Raves Bill 2025 (Cth). In delivering the second reading speech in the House of Representatives, the responsible Minister said:

How many young people must die before the States and Territories wake up to the reality that the cause of deaths at music festivals and raves is their lax enforcement of drug laws? They would have you believe that pill testing and on-site medical care will make events safer. They could not be more wrong. These measures only encourage young people to take illicit drugs, having been given false confidence that they are safe. What we need to do is to protect our young people by enforcing the bans on these drugs more effectively. We need good, old fashioned policing, supported by stronger powers to detect, disrupt and deter those who supply or use drugs at these events.

There is nothing that the Government can do about the misguided approach that is being taken by the States. But we do not need to stand by and watch as young people die in the Territories. We can and must act, as Territory Governments have failed to do, to give the AFP the powers it needs to respond to this urgent threat to the safety of the next generation.

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<sup>1</sup> Prepared by Dr Stephen Donaghue KC, Solicitor-General of Australia.

3. Speaking against the Bill in the Senate, Ronald Swanson, Senator for Victoria, said:

Madam Speaker, everyone agrees that our young people should be safe from drugs. But this Bill is overkill. The Government says it wants to give police officers powers they need, but what do they need them for? To intimidate festival-goers into not turning up at all? Their nanny-state attitude will achieve nothing except even further decimating our festival scene and the many small businesses that depend on it.

4. The Bill passed both Houses and received Royal Assent on 25 February 2025. The *Drug Enforcement at Territory Events and Raves Act 2025* (Cth) (**DETER Act**) contains the following relevant provisions:

## **An Act for Better Securing Compliance with Drug Laws at Territory Events**

### **Part 1 – Preliminary**

#### **1 Short title**

This Act may be cited as the *Drug Enforcement at Territory Events and Raves Act 2025*.

#### **2 Commencement**

This Act commences on the day after it receives the Royal Assent.

#### **3 Definitions**

In this Act, unless the contrary intention appears:

***adult*** means a person of or above 18 years of age.

***constable*** means a member or special member of the Australian Federal Police.

***controlled drug*** means a substance that is:

- (a) a controlled drug as defined in s 301.1 of the *Criminal Code* (Cth); and
- (b) possessed by a person who does not hold a valid prescription for the substance written under s 88 of the *National Health Act 1953* (Cth).

***frisk search*** means a search of a person conducted in accordance with section 4.

***rapid test***, of a sample collected from a person during a frisk search, means a test reasonably capable of:

- (a) being conducted at or near the location of the search; and
- (b) detecting, within 1 hour, the presence in the sample of any indicator that the person

was, at the time the sample was taken, affected by any controlled drug.

***relevant event*** means an organised event:

- (c) entry to which is granted to the holder of a ticket;
- (d) in respect of which at least 1,000 tickets have been sold or offered for sale;
- (e) at which music is performed or played; and
- (f) held entirely within a Territory.

***search*** means a frisk search or a strip search.

***strip search*** means a search of a person conducted in accordance with section 5.

## **Part 2 – Additional powers of constables in relation to events**

### **4 Frisk searches may be conducted at random of adults entering relevant events**

- (1) A constable may conduct a frisk search of a person if:
  - (a) the constable reasonably believes that the person:
    - (i) is an adult; and
    - (ii) is present at, or seeking to enter, a relevant event; and
  - (b) the person has been randomly selected using a method that does not depend upon any personal characteristics of the person.
- (2) In conducting a frisk search of a person, a constable may:
  - (a) quickly run the constable's hands over the person's outer clothing;
  - (b) require the person to remove a coat or jacket or similar article of clothing and any gloves, shoes, socks and hat;
  - (c) require the person to provide to the constable for examination anything in the person's possession; and/or
  - (d) examine anything in the possession of the person.
- (3) No more than 15 per cent of the total number of persons entering a relevant event on a particular day may be subjected to a frisk search.

### **5 Strip searches may be conducted with cause of adults entering relevant events**

- (1) A constable may conduct a strip search of a person if:

- (a) the person is present at, or seeking to enter, a relevant event;
  - (b) the person is an adult; and
  - (c) the constable reasonably suspects that the person is in possession of a controlled drug.
- (2) Without limiting subsection (1), if a constable suspects that the person is in possession of a controlled drug, that suspicion is taken to be reasonable if the person has failed or refused to comply with a requirement made by a constable in accordance with section 4 of this Act.
- (3) In conducting a strip search of a person, the constable:
  - (a) may:
    - (i) require the person to remove any or all of their clothes;
    - (ii) examine the person's clothes;
    - (iii) require the person to open their mouth;
    - (iv) visually examine the person's body and the inside of their mouth (but not any other body cavity);
    - (v) take a sample of the person's saliva or of the person's hair; and
    - (vi) conduct a rapid test of any sample collected from the person.
  - (b) must conduct the search in a private area, and may require the person to remain in that area until the search is completed;
  - (c) must not, without the express consent of the person being searched, conduct the search in the presence or view of a person:
    - (i) of a different sex to the person being searched; or
    - (ii) whose presence is not necessary for the purposes of the search.
- (4) For the purposes of paragraph (3)(b), a strip search of a person is taken not have been completed until:
  - (a) each of the steps proposed or commenced to be taken under paragraph (3)(a) has been completed;
  - (b) a constable notifies the person that the strip search has been completed; or
  - (c) in any case – 1 hour has passed from the time at which the search commenced.

- (5) A person must not fail or refuse to comply with a requirement made by a constable under subsection (3).

Penalty: Imprisonment for 18 months.

- (6) Offences against this section may be heard and determined by a court of summary jurisdiction.

## **6 Preservation of privacy and dignity during search**

- (1) So far as is reasonably practicable in the circumstances, a constable conducting a search of a person must:
  - (a) ask for the person's co-operation;
  - (b) conduct the search in a way that provides reasonable privacy, and as quickly as is reasonably practicable;
  - (c) conduct the least invasive kind of search that the constable reasonably considers appropriate;
  - (d) inform the person whether the person will be required to remove clothing during the search, and, if so, why it is necessary to remove that clothing; and
  - (e) allow the person to dress as soon as a search is finished.
- (2) A search must be conducted by a constable of the same sex as the person searched.
- (3) A failure to comply with subsection (1) shall not affect the validity of any search.

5. In March 2025, following a general election, the Government lost its majority in the House of Representatives. Mr Swanson's party formed government, having won a bare majority of seats in the House of Representatives, but lacked a majority in the Senate. Mr Swanson continued to be a Senator, having been elected in 2022. On 24 March 2025, he was sworn in as the Minister for the Environment and National Parks.

6. On the weekend of 12 and 13 April 2025, the "Parkes and Recreation" music festival was held on the Parkes Place East Lawn in the Australian Capital Territory. The festival was open to persons above 16 years old, had sold over 4,000 tickets, and was to be headlined by a number of famous international acts. As the festival was after a Parliamentary sitting week, and Mr Swanson decided that it afforded him an opportunity to see first-hand how the DETER Act was operating in practice. He purchased a ticket.

7. At around lunchtime on 12 April 2025, Mr Swanson lined up to enter the festival. Upon reaching the front of the line, an attendant scanned his ticket before waving him through a turnstile. On the other side of the turnstile was a line of uniformed AFP members. An AFP member directed Mr Swanson to the right, towards some benches and tents. “Excuse me”, Swanson asked, “but why are you sending me there?” The member replied: “You’ve been randomly selected for a screening search.”
8. At the benches, Mr Swanson was met by another AFP member who said: “G’Day sir. I’m Senior Constable David Sanderson. I’m going to have to ask you to remove your shoes and hat and place them in this tray here. And then I’m going to pat you down. Should be over quickly enough.” Mr Swanson did as he was instructed, and SC Sanderson ran his hands over Mr Swanson’s outer clothing. The following exchange then occurred:

SC Sanderson: What’s that bulky item you’ve got in your pocket?

Swanson: That’s a pill canister. It’s for my medication.

SC Sanderson: I’d like to see it please. [Swanson takes the canister out of his pocket and hands it to SC Sanderson.] Dexamphetamine,<sup>2</sup> it says. Do you have a script for that?

Swanson: Of course. I was actually going to get it re-filled tomorrow. As you can see, the canister is empty.

SC Sanderson: It is strange that you are carrying an empty pill canister. Do you have the script on you?

Swanson: Not physically. It’s an e-script that gets delivered to my phone.

SC Sanderson: Do you have your phone on you? [Swanson takes out his phone, unlocks it, and opens up the e-script from his text messages.] Could you please hand your phone over? I’d like to take a closer look to make sure that’s genuine.

Swanson: I’d prefer not to, if it’s all the same to you. I use my phone for work. There’s a lot of confidential material on it. Besides, you can see the script there.

SC Sanderson: I’m going to need you to hand me your phone so I can examine it.

Swanson: I don’t think that I will. I’ve co-operated so far, but this is an outrageous invasion of my privacy.

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<sup>2</sup> Dexamphetamine is a “controlled drug” within the meaning of s 301.1(1)(a) of the *Criminal Code* (Cth), by reason of reg 11(a) of the *Criminal Code Regulations 2019* (Cth), read with item 72 of the table in Sch 1.

SC Sanderson: I'm sorry, sir, but I am just doing my job, and at the moment I'm not confident that you have a valid script for those pills, or that you haven't got them somewhere else on your person. Come with me, please.

9. SC Sanderson led Mr Swanson into a nearby tent, where he explained that as Mr Swanson had not complied with his request to provide his phone, he was going to need to strip search him. The following exchange occurred:

Swanson: Are you seriously going to strip search me? Forget it, I'll just go home.

SC Sanderson: At this point, sir, I'm going to have to require you to stay in this tent until we're done with the search. I'm also going to take some swabs of the inside of your cheek, so we'll have to wait for that to be tested on-site. It won't take long.

Swanson: You're kidding.

SC Sanderson: I'm afraid not, sir. Now, where did I put those swabs ... Just stay put a minute while I go get more, will you? Please remove your shirt and pants – you can put them over there.

10. SC Sanderson left the tent. Ten minutes later, he had not yet returned. Mr Swanson, impatient, looked outside the tent. Seeing no-one about, he left the tent, returned to the entrance to the festival, passed through a designated exit turnstile, and went home.
11. On 14 April 2025, by information laid before a Magistrate, SC Sanderson charged Mr Swanson with two offences against the DETER Act, namely 1 count each of: (i) failing to comply with a requirement to remove items of clothing, contrary to ss 5(3)(a)(i) and (5); and (ii) failing to comply with a requirement to remain in the search area, contrary to ss 5(3)(b) and (5). The Magistrate issued a summons, which was duly served later that day, requiring Mr Swanson to appear before the ACT Magistrates Court on 21 April 2025.
12. On 21 April 2025, Mr Swanson appeared before the Court. He had decided that he did not need a lawyer, because if he pleaded guilty he was sure he would just get a slap on the wrist. After Mr Swanson pleaded guilty, and made lengthy submissions in mitigation, the Magistrate decided to record a conviction on both counts but to adjourn the matter until 28 April 2025 for sentencing. She released Mr Swanson on bail, reminded him of the serious penalties he faced, and suggested he might want to reconsider representing himself.

13. On 28 April 2025, Mr Swanson appeared and was represented by a lawyer. His lawyer successfully applied for an order that Mr Swanson be released without passing sentence, on the sole condition that he remain of good behaviour for 6 months.<sup>3</sup> Mr Swanson left the Court and went home thinking that it had all gone rather well.

14. The Senate next sat on 5 May 2025. That morning, Senator Leslie Knope, Leader of the Opposition in the Senate, moved that the chamber determine the question of whether Mr Swanson's place in the Senate had become vacant. She said:

It has come to my attention that one of our number, Ron Swanson, was on 21 April 2025 convicted of serious offences under the DETER Act passed by the last Parliament. The Constitution is crystal clear in this situation. Once a Senator is convicted and subject to be sentenced for such offences, their seat becomes vacant. And any question respecting such a vacancy is for the Senate to determine, unless we refer it to the High Court.<sup>4</sup> There's no point wasting the Court's time with such a simple matter, so I move that the question be put to a vote.

15. Mr Swanson spoke in his defence. He said:

This is an outrageous attempt to engineer my departure from this chamber for political reasons. As the Leader of the Opposition well knows, the offences with which I was charged resulted from a misunderstanding I had with a police officer. The Magistrate accepted my version in releasing me without any sentence.

There is another reason this House cannot kick me out. My lawyer recently advised me that the DETER Act is constitutionally invalid, so I cannot have committed any offence against that Act. Even if you disagree with me about that, decency requires that I be given my day in Court. I therefore move that the question whether my seat is vacant be referred to the High Court for determination.

16. The Senate voted on both motions. Mr Swanson's motion was defeated. Ms Knope's motion carried. The Senate then adopted, by majority, the following resolution introduced by Ms Knope:

The Senate –

- (a) finds that Senator the Honourable Ronald Ulysses Swanson was on 21 April 2025 validly convicted of, and from 21 to 28 April 2025 was subject to be sentenced for, offences

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<sup>3</sup> Under s 20(1) of the *Crimes Act 1914* (Cth).

<sup>4</sup> Under s 376 of the *Commonwealth Electoral Act 1918* (Cth).



against the *Drug Enforcement at Territory Events and Raves Act 2025* (Cth) punishable by imprisonment for one year or longer;

- (b) determines that the Honourable Senator thereby became subject, on 21 April 2025, to the disability mentioned in s 44(ii) of the Constitution; and
- (c) determines that the Honourable Senator's place in the Senate thereupon became vacant under s 45(i) of the Constitution.

17. After Mr Swanson refused to depart the Senate, the Speaker asked the Usher of the Black Rod to remove him, which then occurred.

18. On 6 May 2025, Prime Minister the Hon. Ann Perkins MP said in a press conference:

The action taken yesterday by the Opposition-controlled Senate to expel Minister Swanson was a low act which seeks to deprive the people of Victoria of representation by the Senator they voted for. But it wasn't just a low act; it was also done in blatant contravention of our Constitution. My Government stands by Minister Swanson. We think the Senate's unconstitutional determination was legally ineffective. If the Opposition thought it had proper legal grounds, it would have referred the matter to the High Court. Ron Swanson remains a Senator, and he will continue to serve as a Minister in my Cabinet.

19. Mr Swanson attended and voted at meetings of Cabinet. He continued to attempt to attend each sitting of the Senate, but was blocked by the Usher of the Black Rod from entering.

20. Sir Andrew Maxwell Dwyer KBE wishes to operate a hunting ranch in Tasmania. He applied to the Minister for the Environment and National Parks for approvals under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). On 25 July 2025, Mr Swanson decided not to grant the approvals.

21. On 13 August 2025, Sir Andrew commenced this proceeding in the original jurisdiction of the Court, seeking a writ of certiorari quashing Mr Swanson's decision made on 25 July 2025 and a writ of mandamus requiring his application under the EPBC Act to be determined according to law. By his Application, Sir Andrew contended that, as a consequence of Mr Swanson's place in the Senate becoming vacant on 21 April 2025 and by operation of s 64 of the Constitution, he had ceased to be a Minister from 22 July 2025, and therefore lacked power to make the decision.

22. In his Response, Mr Swanson contended that the DETER Act was invalid as contrary to Ch III of the Constitution, such that the offences of which he was convicted were not known to the law, and therefore that his place in the Senate had not become vacant or, alternatively, that the Senate had exceeded its authority in determining that it had.<sup>5</sup> In Reply, Sir Andrew contested the justiciability of several matters raised in Mr Swanson's Response.<sup>6</sup>

23. The following questions have been reserved for the consideration of the Full Court, pursuant to s 18 of the *Judiciary Act 1903* (Cth):

- (1) Is the DETER Act invalid, in whole or part, because it infringes Ch III of the Constitution?
- (2) Having regard to s 47 of the Constitution, does the High Court's jurisdiction under s 75(v) of the Constitution extend to determining Question 3?
- (3) If Question 1 and 2 are answered "yes", did the place in the Senate occupied by the Defendant become vacant on or after 21 April 2025 by operation of ss 44(ii) and 45(i) of the Constitution?

**Note 1:** With the exception of the *Acts Interpretation Act 1901* (Cth), the parties should not refer to any legislative provisions other than those referred to in the above problem.

**Note 2:** The parties should confine their submissions to the issues specifically identified in the questions reserved for the consideration of the Full Court.

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<sup>5</sup> Apart from Australian authority, in support of this last contention Mr Swanson also relied on *Powell v McCormack*, 395 US 486 (1969).

<sup>6</sup> Apart from Australian authority, Sir Andrew relied on *Nixon v United States*, 506 US 224 (1993).