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STUDENTS'
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Question 1

76/100

Part (i)

Generally, States have plenary legislative power. However, there are express/implied limitations that might apply. In Leo's situation, it is appropriate to consider whether the express limitation that the Commonwealth has exclusive legislative power over excise duties applies given that the Congestion Act is a State law. Leo's constitutional issues surround the validity of mainly sections 5, 6 and 7 of the Congestion Act. If these sections (namely 5 & 7) are found to be invalid State excise (s 90 Constitution), Leo will not have to conform to these laws.

Validity of s 5

It is necessary to first consider whether the named Congestion fee is a tax. According to Latham CJ's definition in *Matthews v Chicory*, a tax "is a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered". However, this definition is not exhaustive (*Air Caledonie*). In the facts given, the congestion fee is a compulsory exaction of money that is to be collected by the NSW Department of Motor Vehicles, which is a public authority. Furthermore, it is given that the money raised will be used to establish a light rail network around Central Sydney. This purpose is arguably a public purpose given that all members of the public will be able to use the light rail to commute around Central Sydney and thereby minimising the detrimental effects flowing from the transportation crisis. The congestion fee is unlikely to be a fee for service as the money raised is to be used for governmental purposes. This is analogous to *Parton v Milk Board* where the fee was held to be a tax as it was used to improve the quality of milk in Victoria. Similarly, transport system is being improved here. As Dixon J said in *Parton v Milk Board*, "the Board performs no particular service...[to] be considered as a fee or recompense". In section 5, the NSW government does not perform a service. Therefore, the congestion fee is most likely a tax.

Secondly, it is appropriate to consider whether this tax is an excise duty. In *Ha*, the majority concluded that an excise is a form of tax on goods. In the present case, the tax appears to be for the use of Sydney roads, which is a service and thus may not be classified as an excise. However, for present purposes, assuming the congestion fee is a tax on goods, and services are included as well, it should be noted that the tax falls on the consumption point (i.e. you pay the fee is you use the road). Therefore, this may be a consumption tax that is exempt from being classified as an excise. The majority in *Ha* confirmed *Dickenson's Arcade* authority for the approach to consumption taxes. Gibbs J, who was in the majority in *Dickenson's Arcade*, favoured a criterion of liability approach (i.e. form over substance). If the criterion of liability is consumption, the tax will not be an excise. In the present case, the congestion fee is clearly a tax on the consumption of Sydney roads (i.e. using it). Therefore, the congestion fee is not an excise.

With both the arguments, it is unlikely that the congestion fee will be an excise. The fact that the tax is not on goods specifically further supports that view. Thus section 5 is a valid State law.

Validity of s 7

In determining whether the registration and renewal fee is a tax, the previous discussion on congestion fee should be referred to. Similar to the congestion fee in s 5, the fees here appear to be collected by the NSW Department of Motor Vehicles, which is a public authority. Furthermore, it is a compulsory exaction for container lorries and the money raised appears to be used to establish the light rail. Therefore, both the registration fee and renewal fee are taxes.

Is the registration fee an excise?

The registration fee is not a tax on good and thus cannot be rightly classified as an excise (*Ha*).

Is the renewal fee an excise?

The renewal fee is clearly a tax on goods, namely the load carried by the container lorries. It should be considered whether this tax on good is an exception to excise and is a licence fee. There is a narrow majority regarding the status of licence fees as an exception, however *Ha* did not overrule *Dennis Hotels* which is the authority for the validity of such taxes. Gibbs J in *Dennis Hotels* is authority for a licence fee not being an excise if it can be “quantified by reference to the amount paid or payable for goods purchased during a period preceding” the period which the licence is to be granted. In s 7, the tax of 50c per tonne load carried per kilometre is calculated based on the preceding 6-month period. However, the licence period is only for 6 months before it has to be renewed again. The shorter the licence period, the more likely it will be an excise. Furthermore, Mason J in *Hematite* stated that if the fee is to be passed onto consumers, it will most likely be an excise. It is clear that Leo may pass on this cost to consumers who purchase his produce. Also, the fact that s 7 provides for “whichever fee is higher”, it indicates that the purpose is not simply regulatory but has a substantial revenue purpose.

Therefore, from the above facts, it is highly likely that the renewal fee is an invalid State excise. Therefore, Leo should not have to pay for the renewal fee.

Part (ii)

Since the use of the Commonwealth-owned trucks are for purposes of the Commonwealth government, an implied Commonwealth immunity may apply (*Engineers Case*).

In *Henderson's Case*, a majority of the Court stated that a state law is valid if it is a “general body of law [affecting] dealings by the Executive government...in the course of the ordinary administration of government” (Gummow J). In the given facts, the relocation of staff in a Commonwealth department seems to fall in the category espoused by Gummow J as it is involved with the administration aspect and does not regulate “the capacities of the [Cth] Crown...its rights, powers, privileges and immunities” (*Henderson's Case*).

Therefore, Commonwealth immunity is unlikely to be applied and Tobey will have to meet the requirements of s 8 of the Congestion Act.

Part (iii)

- a) In advising Tobey on the validity of ss 10 and 11 of the Aussie Roads Act, the Commonwealth law must be enacted under a head of legislative power.

Validity of s 10

The transport of goods for interstate trade falls in the core of the trade and commerce power (s 51(i) Constitution; *ANA Case*, Dixon J). The fact that the permit is issued on the absolute discretion of the Minister is irrelevant. In *Murphyores Case*, a prohibition on import or export of goods interstate which is subject to a conditional exception is still a law that operates in the core area of s 51(i). Therefore, section 10 is a valid law.

Validity of s 11

Since this provision relates to intrastate trade and commerce, it should be explored as to whether s 11 can be valid in the incidental area of s 51(i). The purpose of the law is necessary for such analysis (Dixon CJ in *Bank Nationalisation Case*). It is stated in *R v Burgess* that the domestic power of the State can only be affected to the extent necessary to make effectual exercise. There also has to be a threat of physical interference (*Second Airlines Case*). In the present case, the threat of physical interference is the high number of fatal accidents. It appears that the effectual exercise of the power for the minimisation of accidents will not be satisfied unless intrastate trade is also regulated. Therefore, s 11 is valid. Similar to s 10, the conditional prohibition is irrelevant to the validity of s 11.

- b) Claudia's advice would be different to part (ii) because there may be a s 109 inconsistency between the State and Cth laws. Since s 8 of the Congestion Act and the Aussies Roads Act are valid, s 109 operates (*Carter v Egg and Egg Pulp*). In the present case, there may be a "covering the field" inconsistency, similar to the issue discussed in *Second Airlines Case*. It is unclear whether the Cth's intention is for the Aussie Roads Act to be exclusive. However, given that the name of the Cth Act is directed to Australian Roads Transport, it can be argued that it intends to legislate to cover the field for interstate and intrastate transport of goods. Although the provision in the Congestion Act each require the same person to comply with different standards, the ends or legislative intention are directed to different subject (i.e. fatal accidents prevention vs congestion minimisation and air quality). This is analogous to the *Second Airlines Case*, where there was held to be no inconsistency between the two licensing regimes.

In conclusion, Claudia's advice would still be the same but due to different reasons since there is no 109 inconsistency here.