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LAWS2202

Commonwealth Constitutional Law 2nd Semester 2009

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Question 1

Mark = 80

Is the state act valid and does it apply to Leo?

1) IS THE STATE ACT VALID?

States have a broad plenary power over any matter that the Constitution does not prevent them from legislating on (Engineers). The Congestion Act may be invalid if it imposes a duty of excise to which s90 applies. If the state act imposes an excise it will be beyond state legislative competence and thus invalidated (s90). [✓]

SECTION 5

To be an excise, it must first be established that s5 constitutes a tax. Traditionally, a tax is a 'compulsory exaction of money by a public authority, for public purposes, enforceable by law and not a payment for services rendered' (Matthews v Chicory). However, Air Caledonia and Tape Manufacturere tell us that this definition is not exhaustive [✓]. Section 5 imposes a fee of 15c per km, this appears to be a compulsory exaction. The NSW dept of motor vehicles is a public authority and the public purpose is reducing traffic congestion. Thus, this section appears to implement a tax.

IS THE TAX AN EXCISE?

The majority in Ha held that an excise is a tax imposed on the production, manufacture, sale or distribution of goods (Ha v NSW). The fact that this tax is included in a regulatory regime is not determinative (Dennis per Dixon J). It is unclear here whether the tax is imposed on a particular good. Leo could argue that it is a tax on petrol. This depends on how the tax is levied and when it is paid. In Peterswald, the tax imposed on brewers per year was held to be a genuine licensing system and not related to the commodity sold. This could be the case with s5.

Alternatively, NSW could argue that this is a true consumption tax as it is imposed after the cars have been driven on Sydney's roads (Dickenson's).

CONCLUSION

If s5 imposes a duty of excise, it will be invalid and Leo will be able to drive his Prius free of charge in Sydney. However it is likely that the tax is not directly related to a commodity and thus a genuine licensing system or a true consumption tax and thus not an excise (Dickenson's).

IS S7 VALID?

S7 will also be invalid it is an excise

IS THE FEE IMPOSED BY S7 A TAX?

The \$100 registration fee and renewal fee are compulsorily collected by a public authority for public services and not a fee for service, they are thus likely to be a tax (Matthews v Chicory).

DOES S7 IMPOSE AN EXCISE?

Here, s7(a) appears to be more closely related to 'goods' as it imposes a fee of 50c per tonne-load carried. This clearly bears some relationship to the quantity/ value of the commodity (Matthews) [✓]

IS S7 A LICENSE FEE?

The initial registration appears to be a license fee. As it is only \$100, is it likely to be a personal tax on the vehicle owner and thus not an excise (Dennis Hotels, Hematite) [✓].

The fee in s7(a) appears to be a prior period license fee. [✓] A narrow majority in Dennis hotels held that license fees based on activities in prior periods are not excises. The court has affirmed in Ha that it will look closely at the type of license fee to determine whether it is an excise. [✓] Here, the renewal fee is quite high at 50c per tonne-load carried per km for trucks that frequently transport goods. This makes it more likely to be an excise. The gap between the application and period of paying is only 6 months which also leads to it being an excise. This fact that the law is regulatory and not merely revenue raising may be a factor but the size of the fee indicates that substantial revenue will be raised.

NSW will argue that s7(a) is a prior period license fee like in Dennis Hotels but the period is shorter, and the fee higher therefore this is likely to be an excise duty. [✓]

CONCLUSION

If s7(a) is held to impose an excise, Leo will be able to transport fruit and veg in container homes without paying the fee. It is likely that the \$100 registration fee will not be an excise [✓].

PART II

Does s8 of the act apply to the Cth department of administrative affairs?

S8 prescribes that all trucks must comply with exhaust fume emission standards and imposes a penalty. The Cth may be immune from this provision due to the implied Cth

immunity limitation on state legislative capacity (Cigamatic) [✓]. For the state act to bind the Cth, it must purport to bind the Crown in right of the Cth, and it must be constitutionally possible for NSW to bind the Cth (Hendersons).

DOES NSW INTEND TO BIND THE CTH?

This is a question of statutory interpretation (Bropho). The act does not explicitly bind the crown but it does address 'all trucks' and prescribe a penalty for disobedience. The State is pursuing a policy related to safety and the environment, this would be frustrated if too many people were immune from its operation [✓]. Assume that the Cth is bound by the act.

IS IT CONSTITUTION POSSIBLE TO BIND THE CTH?

States cannot regulate the capacities of the Cth, its rights, powers, privileges and immunities (Hendersons). Hendersons case distinguishes between state laws which regulate the capacities of the crown and those which merely regulate the exercise of those capacity. This case is similar to Pirrie v McFarlane in which a Cth officer was bound by state traffic laws. [✓] The Cth department here is merely relocating, no 'Cth capacity' to drive trucks is being regulated, merely regulating the Cth like every other citizen. Therefore the Cth department will be bound by the State act.

PART III(A)

IS THE CTH ACT VALID?

The most credible head of power to support ss10 and 11 is the trade and commerce power (s51(i)). This gives the Cth power to legislate with respect to trade and commerce with other countries and among the states.

VALIDITY OF S10

S10 regulates transporting of goods for reward inter-state. The Cth may prohibit, regulate and control and authorize activities that fall within the core of s51(i) for any purpose (murphyores) [✓]. S10 clearly regulates [*inter-state*] trade and commerce as it involves transport of goods for reward (W&A MacArthurs).

As this section operates within the core of s51(i), it is valid, and the minister may issue permits for whatever reason. [✓]

VALIDITY OF S11

This section purports to regulate intra-state trade, [✓] which is not within the core of s51(i). The Cth must establish that i) a sufficient physical connection exists between intra and inter-state trade activity and (ii) that the laws operation on intra-state activities protects the physical integrity of interstate trade (Second airlines) [✓].

S11(1) appears to regulate the physical safety of driving as it requires a road safety course. 2nd Airlines involved air-transport which was described as 'sui generis', but prof zines indicates that this is likely to extend to other forms of transport. [√] This provision may be valid.

S11(2) does not regulate the physical aspect of intra state trade, therefore unlikely to be valid.

S109 INCONSISTENCY

If the Cth act conflicts with the state act, the conflicting provisions will be held to be inappropriate. If s8 is in conflict with the Cth act it will not apply to the Cth department.

The Cth could argue indirect inconsistency, and that they evinced an intention to 'cover the field' (Viskauskas v Niland). The Cth wishes to regulate lorries traveling in trade, however there may be gaps that the state law can still cover. [√]

- Rights inconsistency
- Either way, Cth department going to have to get a license or comply with s8 of the state act.

[a bit more analysis needed at the end here – were you out of time. Overall a strong response, well done].