

# Guide to Public Law & Statutory Interpretation

High Distinction

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*The law is like apparel, which alters with the time.*  
Sir John Dodderidge, BA (Oxford), Lawyer (Middle Temple)

## **Abstract**

This is a students revision guide to the fundamental Public Law and Statutory Interpretation principles in Australia. It is intended wholly for comprehensive exam revision. We will not summarise cases throughout the notes but short summaries are organised according to topic and alphabetically at the end of the notes. You may refer to these should you wish to refresh your memory.

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# Part I

## Introductory Public Law

# 1 Overview

## 1.1 Public Law and Its Purpose

Public Law encompasses the exercise of public power, focusing on the separation of powers and the relationships between citizens and public bodies. Its object is to determine the limit and scope of each branch's power and, in doing so, enumerate the rights of citizens (and non-citizens) in their dealings with public bodies. Ergo, *the rules for living in the state*.<sup>1</sup> This cannot be understated, for the State has the ability to determine fundamental rights and our international affairs. But simply put, Public Law is *a study of the Institutions of State*,<sup>2</sup> and key to this is the Rule of Law.

## 1.2 The Rule of Law

The Rule of Law is the notion that no one is above the law, *it is binding on all including the Crown*.<sup>3</sup> Although sometimes described as 'KING' itself,<sup>4</sup> the Rule of Law is not necessarily an entrenched rule but a moral tradition/convention of respect of the law.<sup>5</sup> It aims to:

- ensure fairness and equality before the law.<sup>6</sup>
- curtail abuses of power.
- uphold the Constitution's authority.

This results in the object of constraining the Government no less than its citizens.<sup>7</sup> In *Australian Communist Party v Commonwealth*, it was held that the Rule of Law itself provides authority to the Constitution.<sup>8</sup> *Plaintiff S157/2002 v Commonwealth* affirmed that the 'Australian Constitution is framed upon the assumption of the rule of law' (Gleeson CJ), confirming its use an *interpretive method*.

Jurisprudence Views on the Rule of Law (RoL):

*Freidrich Hayek*: RoL does not empower the state and, procedurally, laws must be general and equally applied (no targeting groups). Fundamentally, certainty and stability must be accorded to citizens. Further, it is

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<sup>1</sup>Keep in mind that Australian Public Law is shaped by the predominant Anglo-American doctrine of Liberalism which considers the functioning of society as, largely, separate from Government. Which, in consequence, should be small and limited.

<sup>2</sup>Its more than the a study of Government constraints, covering the public interest, or common good, and more.

<sup>3</sup>The Crown is used synonymously with the State but specifically refers to the Executive in its role of applying the law.

<sup>4</sup>Thomas Paine, Common Sense

<sup>5</sup>See Dicey, it must be upheld by society itself for it to be effective.

<sup>6</sup>There is something to be said of *ad hominem* laws - the targeting of specific individuals through an Act whether positive or negative - as conflicting with this.

<sup>7</sup>See our discussion of Constitutionalism in 1.3.3.

<sup>8</sup>Despite Dixon J describing it as an 'assumption' of the constitution, it isn't well held.

- Accordingly, whilst a construction regulating conduct against the expression of religious beliefs would be valid, the word ‘annoyance’ poses problem due to its *textual indeterminacy* - it could apply to a wide, unclear, number of things and means different things to different people.
- ‘the conduct regulated by cl 7(1)(b) so far as it relates to “annoyance” may extend to expressions of opinion which neither disrupt nor interfere with the freedoms of others, nor are objectively offensive in the sense traditionally used in State criminal statutes. Breach of this provision as drafted affects freedom of speech in a way that, in our opinion, is not supported by the statutory power conferred by s 58 properly construed’
- ‘The term “inconvenience” has a more objective content ... It is used in a transitive sense by reference to the effect of the relevant conduct by participants.’
- Indeed, whilst the term is still broad it does not depend on the subjective reactions of the participants but whether the words themselves would have an effect of harming, injuring or causing misfortune or trouble to them.
- It requires a more objective judgement by the authorised officer.

## 6.8 Al-Kateb v Godwin

### 6.8.1 Facts

Stateless Palestinian arrived in Australia by boat. Application for protection visa refused and no state wished to receive him. Relevant provisions:

- s 196: *must* keep in detention until removed.
- s 198: *must* make arrangements to remove as soon as reasonably practicable.

In essence, the Migration Act provides that unlawful non-citizens (those who have entered Australia without permission or no longer have permission to reside here) may be detained (this is mandatory, it must occur).

This provision is constitutionally valid: incidental to the executive’s power to process and deal with aliens.

The issue: Act specifies no period of detention and certain situations may lead to an unclear length of detention. There is an issue, as at present, of indefinite detention where removal of the alien is not possible (as opposed to Chu Keng where it was found that detention, although uncertain in length, will be finite).