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**ESSAY GUIDE CONTAINING BREAKDOWN AND CRITIQUE OF CASES
(MAJORITY AND MINORITY JUDGMENTS) FROM TOPIC 7: EXECUTIVE
DETENTION OF ASYLUM SEEKERS**

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STATUTORY INTERPRETATION GUIDE

Within the Statutory Interpretation Guide is a breakdown of Ch's 9 and 10 of the Public Law textbook.

Included within this guide is

- (i) **Text**
- (ii) **Context**
- (iii) **Purpose**
- (iv) **Statutory Presumptions** — Syntactical (e.g. Ejusdem Generis) and Legal (Charter / Principle of Legality)

Topic 1 – Foundational Concepts

1.1 What is Public Law

- Public law is an **umbrella concept** that **governs the relationship between the State and its citizens**
- Normally exercised by public bodies (eg Dept of Immigration, Administrative Appeals Tribunal) but also, increasingly, by private bodies — outsourcing of detention of prisoners and asylum seekers to corporations)
- Themes: accountability, transparency, review
- Public law may be **described as the body of legal principles that apply to public power**.
- Public law principles determine the scope of public power — its nature, its limitations and the procedures by which it can be exercised — as well as who can exercise it.

The exercise of public power determines how a legal system — and a nation — operates.

Examples:

The exercise of public power will determine:

- (i) who can and cannot **enter the country**
 - (ii) who is entitled to **important licences and permissions** (such as permission to mine for precious minerals, or develop land, or operate businesses)
 - (iii) how much we are **taxed**, and on what basis;
 - (iv) what the money raised by taxation is spent on, and relatedly, the operation of many vital public institutions **such as schools and hospitals and public transport**;
 - (v) who is entitled to **welfare payments**, and on what basis; and when our armed forces are deployed to take part in international conflicts.
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- Underpinning values of *freedom, equality and community*
 - Underpins almost every other legal discipline because its principles determine the scope of governments power to make, administer and adjudicate laws in every area (*e.g. criminal law*)

Question 1: Public Law v Private Law

Difference one: Definitions

Public law typically regulates the relationship between those exercising public power, or those exercising public power and the people, whereas **private law** typically regulates the relationship between 'private' actors.

Difference two: Requirement of Legal Authority to Act

Ordinary people can typically do a lot of things without some law specifically authorising them to do so. We can enter a contract to buy a house, or start up a new business, or make any other number of decisions. When we do these things, we have to comply with the law, but we do not need legal authority to do them in the first place. In general terms, we can do whatever we want, unless and until the law prohibits us from doing so.

Public power is said to differ because (at least in our legal system), no one person enjoys inherent public power. Rather, public power must be **conferred** by law, and **exercised** in **accordance with the law**.

The distinction is not always clear.

- Public power can be much more coercive than private power

Difference three: Laws about imprisonment

- For example, there are public powers to arrest and detain people, and keep them in prison or other forms of detention against their will. But, generally, ordinary people cannot do these things: the law forbids them from doing so.

Difference four: Laws about taxation where ordinary person are not empowered to take taxes

Another good example of coercive public power was introduced above: it is the power to create laws with respect to taxation, and collect taxes accordingly. An ordinary person cannot take away someone else's money. That would generally be unlawful.

- Individuals are free to act until the law prohibits this = public power cannot be enjoyed inherently, it must be conferred by and exercised in accordance with the law

Sample Essay Guide Notes

Indefinite Executive Detention: Al-Kateb v Godwin ('Al-Kateb')

- ◉ This was a case which explored the issue of indefinite executive detention and whether the Migration Act could allow it.
- ◉ A study of ruthless liberalism and victory of form over substance (Juliet Curtin 2005)

Facts:

Al-Kateb was a Palestinian asylum seeker coming from Kuwait who did not qualify for an Australian visa so was detained. However, as Palestine nor Kuwait would accept him, he was deemed stateless and couldn't leave either. Al-Kateb was stuck between his inability to be granted a visa and the refusal of other countries to accept him for deportation; he faced potential indefinite detention (Crawford, 2017).

The HC interpreted S **196** of the Migration Act, which stated 'an unlawful, non-citizen detained must be kept in immigration detention until they are

- (1) **deported**: the person was **removed** from Australia, either voluntarily or following an unsuccessful attempt to obtain a visa OR
- (2) are **granted a visa** which entitled them to enter Australia.

As both these options were inapplicable to Al-Kateb, a gap in the law emerged (Castan and Emerton, 2018).

Al Kateb argued that the provisions only allowed unlawful noncitizen to be detained while removal was a practical possibility, and that if removal was not a practical possibility, then they should be released from detention.

The respondents argued that the provisions required that unlawful non-citizens be detained until their removal, and that the purpose of removal, on which the detention was founded, did not cease to exist just because it was not practicable in the foreseeable future to carry out that purpose

Section **198** states that an officer of the Commonwealth must remove, as soon as is **reasonable practicable**, an unlawful non-citizen who asks the Minister, in writing, to be so removed

A detainment of aliens is for the eventual deportation or expulsion of aliens (there is a link between these). Therefore, if the deportation and expulsion are not possible, should the detainment be allowed?

Held: Majority (McHugh, Hayne, Callinan, Heydon JJ)

The decision of the majority was made on strict legalistic grounds whereas the minority judges decided the case on more purposive grounds (Boyle, 2005 in Executive detention : A law unto itself? A case study of Al-Kateb v Godwin.)

- Found the government was entitled to detain Al-Kateb, until removal to another country was '**reasonably practicable.**'

It was for non-punitive purposes (the exclusion of Al-Kateb from Australian society not punishment) and therefore not a judicial power. This meant the separation of the judicial power had not been violated and legislation was valid.

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Held: Minority (Gleeson CJ, Gummow, Kirby J)

The Migration Act did not **permit** the **executive to detain Al-Kateb in these circumstances.**

SS 1196 and 198 were ambiguous

Ratio:

Principle of Legality

The minority applied the **principle of legality**, stating if the law intended to interfere with fundamental rights, it would do so unambiguously.

The minority favoured individual liberty to resolve the ambiguity in this case; finding the government had to release him.

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Statutory Interpretation Guide

Process of Statutory Interpretation (Project Blue Sky)

- (i) **Text** (Ordinary Natural Meaning) (*Alcan, Evans v NSW*) — Literal text of the Act, eg definitions and dictionary
- (ii) **Context** — Look at the other sections of the Act; what does the Act as a whole do?
- (iii) **Purpose** — What is the problem the Act is trying to solve? Intrinsic then extrinsic
- (iv) **Statutory Presumptions** — Syntactical/Legal (Charter / Principle of Legality)
- (v) Apply

Conclude:

X would argue ...; Y would counter-argue ...; X might rebut ... conclude with which interpretation. Court would consider best, and apply...

Within each of these categories argue both sides:

1. (On one hand) A would (further) argue/point out...construed (broadly/narrowly)
2. (On the other hand,) B would argue...construed (broadly/narrowly)

Introduction:

*To interpret a statute, consideration is given to ‘... the [legal] meaning that the legislature is taken to have intended them to have. ... the grammatical meaning of the provision ... the context of the words, the consequences of a literal or grammatical construction, the purpose of the statute [and]... the canons of construction’ (Project Blue Sky). This must be done with reference to s 35 of the Interpretation of Legislation Act 1984 (Vic) (‘ILA’) which states that the interpretation that best achieves the Act’s purpose should be used as well as s 35(b) ILA which allows for the use of extrinsic materials in limited circumstances. Headings to sections and parts are part of the Act (ILA s 36(2A) and (1A), respectively). Further consideration should be given to s 32(1) of the Charter of Human Rights and Responsibility Act 2006 (Vic) which states ‘so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights’ as well as the principle of legality (*Coco v The Queen*). Any section which is mentioned, unless specified otherwise, is said to be a section of [the Act being interpreted]’*

X would argue ...; Y would counter-argue ...; X might rebut ... conclude with which interpretation Court would consider best, and apply...

STEP 1 - Ordinary Natural Meaning of the (Text)

The starting point of the process of statutory interpretation is the words on the page and statutes must be interpreted in a way that is consistent with the language used in that statute (per McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky*).

"The duty of the court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have" (*Project Blue Sky*). First, the court will ask **what the ordinary, natural meaning of the words and phrases is**.

Model sentence:

- 'On its ordinary natural meaning, this is very broad/narrow.'

Q's to ask:

- Is there an absurdity that follows when a certain interpretation occurs?

General Interpretation rules:

- All words in a statute have meaning and effect (*Project Blue Sky*) 'a court construing a statutory provision must strive to give meaning to every word of the provision'.
- Dictionaries not conclusive of meaning: *Re Mark*
- Dictionaries seem to be a sensible place to look for confirmation of the ordinary meaning (*Evans v NSW*)

TEXT	
Project Blue Sky	This case represents the modern approach to statutory interpretation, whereby: 1) 'Every word serves a purpose' 2) 'All words in a statute have meaning and effect' (<i>Project Blue Sky</i>) 3) 'a court construing a statutory provision must strive to give meaning to every word of the provision'.
Alcan Alumina v Commissioner	To understand the purpose of a statute, 'statutory interpretation must first begin with the consideration of the text itself'
CIC Insurance v Bankstown	Each statute read in light of its context'