

# RULE OF LAW

## INSTITUTE OF AUSTRALIA

# Using the Legal System

## Contents

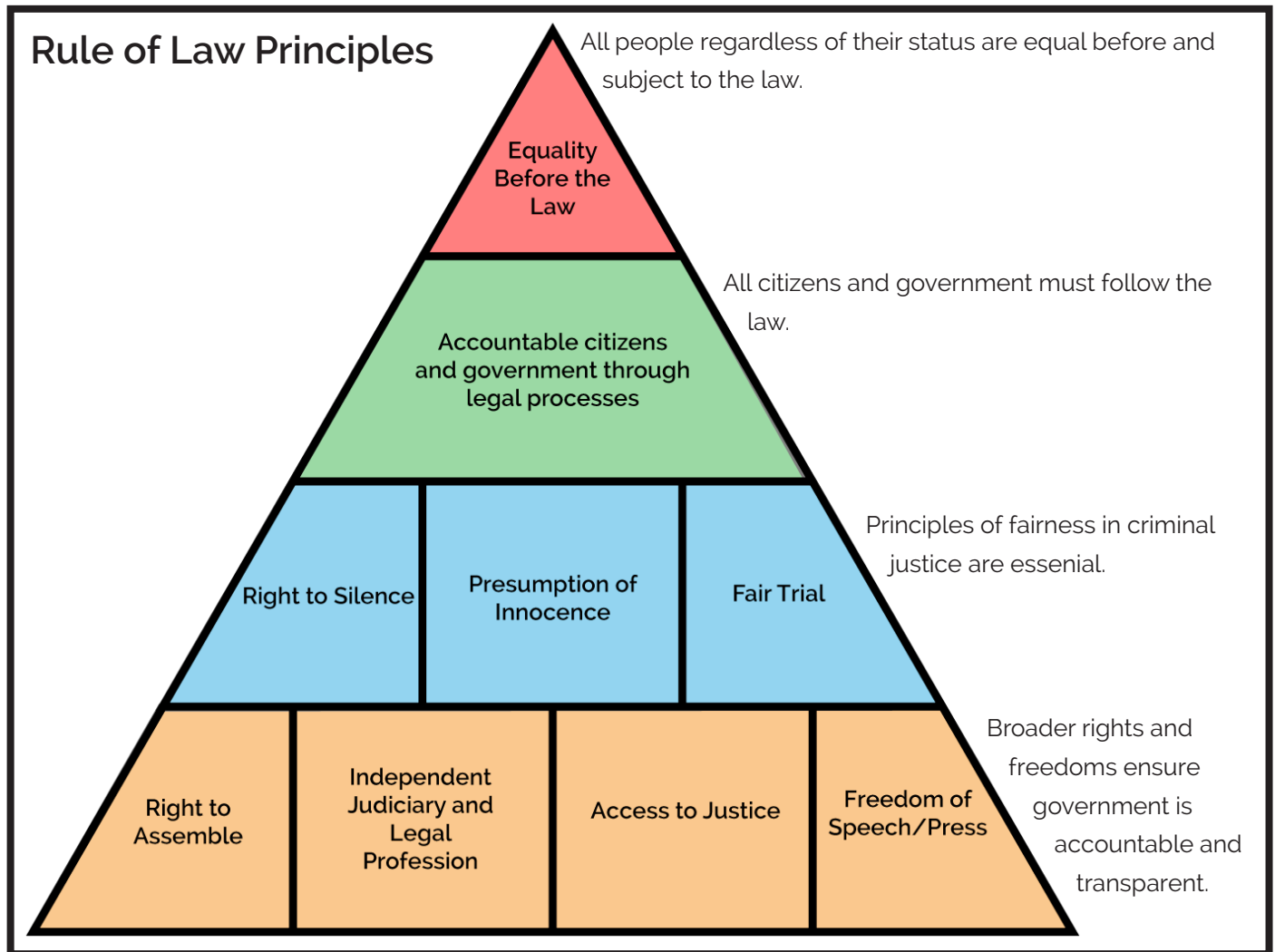
What is the Rule of Law?	2
Rule of Law = Rights and Responsibilities	3
Access to Justice	4
Pro bono	5
Ho v Greater Dandenong City Council [2013] VSCA 168 (27 June 2013)	6
Dietrich v The Queen [1982] HCA 57	7
Activities	8
Glossary	9

The Rule of Law Institute of Australia is an independent not-for-profit organisation which promotes discussion of rule of law issues in Australia. It seeks to uphold transparency and accountability in government and strongly supports the presumption of innocence, independence of the judiciary and procedural fairness in the Australian legal system.

Have a question about this resource or a rule of law issue?

Ask us on Facebook or Twitter: 'Rule of Law Institute of Australia' / @  
RoLAustralia

# What is the Rule of Law?



**Rules** - guidelines or expected standards of behaviour.

**Laws** - rules passed with the authority of parliament which apply to all people in society.

The **right to assemble** is important because it allows people to gather in public and express their opinion about an issue. An assembly can be anything from a protest march to a celebration.

**Freedom of speech** is not broadly defined under Australian law. Australia's laws do not provide an express freedom of speech. The High Court has found that the Australian Constitution implies that there should be freedom of political communication which means that people can talk about politics and politicians in public without breaking the law.

The right to assemble and freedom of speech are important for the rule of law as people need to be able to publicly express their views on the government and the laws that it makes.

# Rule of Law = Rights and Responsibilities

The rule of law provides the best way for rights to be protected. All rights come with responsibilities, which means following the law.

Formal processes exist to deal with situations where the law is broken. It is one of the most important aspects of the legal system in Australia that a person should not be punished unless they have been found guilty of breaking the law.

A person has the right to do what they want, as long as they do not break the law. If they are found guilty of breaking the law their freedom can be taken away.

"With great power comes great responsibility"

- Uncle Ben

## What does The Rule of Law Mean for You?

**Presumption of Innocence** means that if someone is charged with an offence they are innocent under the law until a court finds them guilty beyond a reasonable doubt.

**The Right to Silence** is the right to say nothing when arrested or questioned by police. It also means that people do not have to incriminate themselves when being interviewed. This is called the privilege against self-incrimination.

Laws should not give unrestricted power to individuals, organisations or government. Governments must obey the law like everyone else.

Judges must be independent and not influenced by anyone. This is so they can make decisions based on the law and that people can trust that the legal system is impartial. Judges must also give reasons for their decisions so they can be reviewed by a higher court. This makes the actions of the court more transparent and accountable.

Changing the law through democratic processes is important. Laws which are out of touch with the public create contempt for the law. Rule of law principles promote the right of citizens to participate in democratic processes by making submissions (writing letters) to have a law changed.

# Access to Justice

It is a core principle of the rule of law that everybody must be treated equally by the law. The rule of law principle of access to justice means that people who need the legal system to resolve a dispute or make a decision about whether they have broken the law can go before a court of law and receive a legal remedy.

The Australian legal system is adversarial. This means that the parties to a case present evidence and argue their position before a judge who makes a decision based on the law and evidence. For this to be fair the parties usually engage a lawyer who can represent them in court.

The High Court has decided that in certain circumstances, if people are unable to afford legal representation in serious cases, they should be able to receive legal aid or their trial cannot proceed. The case of Mr Dietrich on page 7 explains the High Court's view on legal representation in a serious criminal trial.

One of the criticisms of the legal system is that it is too expensive and that cases can take a long time to resolve. Sometimes this can result in people not being able to access the legal system to resolve their dispute and can result

in ordinary people who cannot get Legal Aid having very large legal bills. Because of this many Australian's have started representing themselves in court. These people are called self-represented litigants ( SRLs). Vu Ho and the case involving his sheep Baa is an example of a SRL going to the Victorian Court of Appeal. See page 6 for more on this case.

Many lawyers provide their time for free to assist people who have important cases as they believe in access to justice. This is called working 'pro bono'. Some legal firms allocate time and lawyers for pro bono cases because they see this as part of their responsibility to the community. This can mean working for Community Legal Centres and assisting disadvantaged people when they come into contact with the legal system. An example of lawyers doing pro bono work is the Mabo native title case. See page 5 for details on this case.



# Pro bono

## Mabo and Others v Queensland (No.2) (1992) 175 CLR1

In 1982 Eddie (Koki) Mabo and five other Meriam people from Murray Island in the Torres Strait started a legal case to seek recognition of native title for the Meriam people of Murray Island. This case is an example of the rule of law principles of equality of treatment before the law and independence of the judiciary and the legal profession.

The High Court decided that the original legal doctrine from the time of colonisation, terra nullius was not valid. Terra nullius meant that the British believed the land (of Australia) belonged to no-one at the time of colonisation and therefore the Meriam people could not 'own' their land.

The High Court recognised that Indigenous people could have continued ownership of their land after colonisation in certain cases. This principle is called native title. Unfortunately Mr Mabo did not live to see the success of his case, he died six months before the High Court judgment was delivered. The case was very controversial at the time because farmers were concerned that they may lose their land to Indigenous people.

Two barristers, Mr Ron Castan and Dr Bryan Keon-Cohen gave 10 years of their time for free to assist Mr Mabo in his case because they thought it was very important for the Indigenous people of Australia.

Dr Keon-Cohen was the junior barrister on the case and describes what happened when he phoned Murray Island to tell the people of their success in the High Court.

" A lady answered the phone, I broke the news to her, she screamed and yelled and threw the phone away and disappeared down the street yelling the news to the community", ... "These are very exciting moments"

Michael Gordon, Mabo's Legacy, The Age, 2/6/2013.

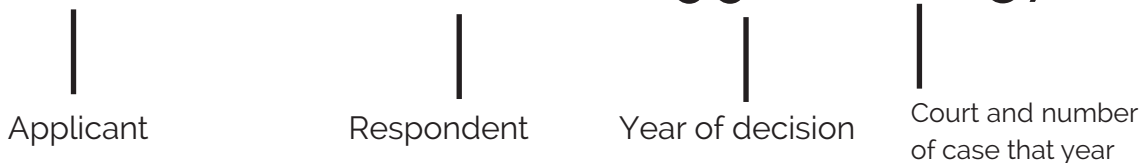
Dr Keon-Cohen was awarded the Order of Australia in 2012 for services to the law, and the legal profession, the advancement of social justice and the protection of human rights.

The Mabo case led to the Native Title Act 1993 and other laws that enshrined native title in Australian law. The High Court has continued to make decisions that reinforce native title rights.

## What is a Legal Citation?

How to cite a legal case:

Dietrich v The Queen [1992] HCA 57



A legal citation is the way that legal cases are referred to. It allows people to understand who the parties are in the case, what year the judgment was delivered and in which court.

Watch our video on Understanding Legal Citations on YouTube by scanning the QR code.

<http://bit.ly/14TZnKL>

# Ho v Greater Dandenong City Council [2013] VSCA 168 (27 June 2013)

Mr Vu Ho is a Vietnamese refugee who works as a mechanic and lives on the outskirts of Melbourne in the suburb of Springvale. Mr Ho and his son have a pet sheep called Dolly (the family calls her Baa). The family raised her from a lamb, and she is now 16 years old. Baa is a much loved part of the family, is hand fed and taken for rides in the family car. Mr Ho's neighbours view Baa as being like a family dog.

Mr Ho's case began when a Greater Dandenong Council ranger told him that he had to get rid of Baa because the laws that govern local councils do not allow anyone to keep 'livestock' on land that is less than 1/2 hectare (5000 sq. metres) in size. Livestock is defined as "any animal of any species...other than a dog or cat"

Mr Ho applied for a permit to keep Baa but was not able to get one because the Council did not agree that a sheep can be a pet.

Mr Ho took the Council to court.

His first case against the Council in the Supreme Court of Victoria challenged the interpretation of two laws that gave the Council the power to make and enforce laws about animals.

He lost the case and was ordered to pay the Council's costs of around \$100, 000. He appealed to the Victorian Court of Appeal and represented himself before the court as a SRL. Justice Gummow and the other two justices said his argument "clearly presented" but denied his appeal. Their reasons stated that by not allowing someone with a small piece of land to keep livestock the Council was making sure that the welfare of animals and people who live in the area was taken care of, and that the Council had the power to make and enforce these laws.

Although Mr Ho lost his appeal he received access to justice having two hearings in the Victorian Supreme Court and the Victorian Supreme Courts of Appeal.

The Magna Carta - 1225CE, Clause 40:

'To no one will we sell, to no one deny or delay right or justice.'

The Magna Carta stated, almost 800 years ago, that a person has the right to access justice, regardless of their status in society. This principle is especially important today in criminal cases where a person can be imprisoned for a serious crime.

## Questions

1. What does the quote from the Magna Carta mean?
2. What is the presumption of innocence and why is it important?
3. Why is legal representation for the accused important in trials for serious offences?
4. What happens when an accused charged with a serious offence has no legal representation?
5. What is the effect of a trial being 'stayed'?

# Dietrich v The Queen [1982] HCA 57

On 17 December 1986, Olaf Dietrich arrived in Melbourne after a trip to Thailand. He was arrested the next day by the Australian Federal Police, and was alleged to have imported seventy grams of the drug heroin. There was compelling evidence that Dietrich had swallowed small packets of the drug to smuggle them through customs. He claimed in court the drugs had been planted by the Police.

Dietrich was charged in County Court of Victoria on four charges relating to drug trafficking under the *Customs Act 1901 (Cth)*. During the trial he had no legal representation. He had applied for assistance from the Legal Aid Commission of Victoria but they would not represent him unless he agreed to plead guilty to all charges. He then applied to the Supreme Court of Victoria for legal assistance but this request was also denied.

He was convicted in the Victorian County Court of three out of four charges brought against him. Dietrich appealed his convictions to the Supreme Court, but the Court refused to hear his appeal. He appealed to the High Court of Australia.

A majority of judges in the High Court decided that Dietrich had the right to a fair trial, and that the lack of legal representation meant that the original trial was unfair.

The justices also concluded that when an accused, through no fault of their own, does not have legal representation when charged with a serious offence, a judge may order the trial be delayed (stayed) until legal representation is available.

Dietrich later changed his name to Hugo Rich and received a life sentence for the murder of a security guard in 2009.

The Dietrich case established the right to have legal representation when charged with a serious criminal offence. Rule of law principles of fair trial and equality of treatment before the law. This case changed the way Legal Aid works in Australia because poor people charged with a serious criminal offences must be given legal representation or the judge can stop the trial.

## Class Discussion Questions

1. As a class make a list of some of the barriers that ordinary people encounter when they try to access the legal system.
2. Discuss the circumstances that would lead someone like Mr Ho to become a self-represented litigant.
3. Why is pro bono work important in Australia's legal system?
4. What is the role of the High Court and why is it important for access to justice?
5. Do you think taxpayers should pay for legal assistance for people accused of serious crimes?

# Activities

P	B	W	E	C	S	H	I	G	H	P	M
R	A	A	P	O	P	C	O	W	S	R	R
O	C	Y	R	U	E	T	F	A	T	E	E
C	C	N	I	R	C	O	V	C	O	S	P
E	E	N	G	T	I	X	Q	C	H	U	R
E	S	J	H	D	A	S	L	U	V	M	E
D	S	U	T	S	L	O	T	S	Y	P	S
I	P	S	K	I	I	L	L	E	D	T	E
N	A	T	C	Y	N	I	B	D	R	I	N
G	E	I	Z	L	E	C	T	J	F	O	T
S	F	C	A	E	O	I	X	O	G	N	A
X	L	E	G	A	L	T	S	T	A	Y	T
J	T	Z	O	V	U	O	X	O	F	P	I
T	K	O	O	E	B	R	T	H	E	I	O
T	H	I	N	N	O	C	E	N	C	E	N
A	P	P	E	A	L	O	C	R	A	S	Q
L	A	C	Q	U	I	T	T	E	D	M	U
T	R	A	F	F	I	C	K	I	N	G	M

Find the **BOLD** words in the Glossary in the Word Search

## Activity

Join each of the sentences below with **ONE** of the words 'because', 'as', 'with', 'for'.

The judges decided that Mr Dietrich's trial may have been unfair

\_\_\_\_\_

he did not have legal representation

The High Court decided that terra nullius did not apply

\_\_\_\_\_

it granted native title rights to the Meriam people

Pro Bono work is needed

\_\_\_\_\_

the Council's view of his pet sheep Baa

Mr Ho was unhappy

\_\_\_\_\_

access to justice to be available to disadvantaged people



# Glossary

## Access to Justice

That people who need the legal system, to resolve a dispute or make a decision about whether they have broken the law, can go before a court of law and be able to receive a legal decision regardless of their status in society.

## Presumption of Innocence

The prosecution must prove the accused is guilty beyond a reasonable doubt. Until the court finds the person guilty, they are seen as innocent. If an accused is found guilty they can then be referred to as an 'offender'.

## Right to Legal Representation

The High Court has found that a person charged with a serious criminal offence has the right to legal representation if they are unable to pay for it themselves, and that having no representation would lead to an unfair trial.

## Accused

Person accused (but not convicted) of an offence.

## Stay in Proceedings

Stopping the legal process of a trial.

## Solicitor

A lawyer who prepares a brief of evidence and legal arguments to be provided to a barrister who will argue the case in court.

## Barrister

A lawyer who specialises in presenting a case in court to the judge and jury. They question witnesses and evidence, and make opening and closing statements.

## Trafficking

Disposing of (selling) something for money or something else of value.

## Acquitted

When a judge or jury finds the accused person not guilty.

## Special Leave to Appeal to the High Court

For a case to be heard by the High Court a party must seek special leave. A special leave hearing is held where reasons are presented to persuade the court the case is of sufficient interest/importance to be heard.



[www.ruleoflaw.org.au](http://www.ruleoflaw.org.au)

**Still have a question?**

Ask us on Facebook

<http://www.facebook.com/RoLAustralia>

or on Twitter

<http://www.twitter.com/RoLAustralia>