

# CURRENT LEGAL ISSUES

2018 SEMINARS



BAR ASSOCIATION  
OF QUEENSLAND



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# 2018 Seminar Series

The Bar Association of Queensland, the University of Queensland, Queensland University of Technology and the Supreme Court Library Queensland are pleased to announce the Current Legal Issues Seminar Series for 2018.

The seminar series seeks to bring together leading scholars, practitioners and members of the judiciary in Queensland and from abroad to discuss key issues of contemporary significance.

Date	Presenter	Chair	Commentator
Seminar 1: Criminal Evidence – “Whatever Happened to Weissensteiner - the Person and the Principle?”			
22 March	The Hon. Justice Soraya Ryan, <i>Supreme Court of Queensland</i>	The Hon. Justice Walter Sofronoff, <i>President of the Court of Appeal</i>	Professor Jill Hunter, <i>University of New South Wales</i>
Seminar 2: Fiduciary Law - “Prescriptive Fiduciary Duties”			
17 May	Professor Lionel Smith, <i>McGill University Canada</i>	Dominic O’Sullivan QC	The Hon. Justice Derrington, <i>Federal Court of Australia</i>
Seminar 3: Constitutional Law- “Who is Afraid of Proportionality?”			
9 August	Professor Adrienne Stone, <i>University of Melbourne</i>	The Hon. Justice Glenn Martin AM, <i>Supreme Court of Queensland</i>	The Hon. Catherine Holmes, <i>Chief Justice of Queensland</i>
Seminar 4 : “Jury Directions, the Struggle for Simplicity and Clarity”			
20 September	The Hon. Justice Virginia Bell AC, <i>High Court of Australia</i>	The Hon. Justice Roslyn Atkinson AO, <i>Supreme Court of Queensland</i>	Professor Jonathan Clough, <i>Monash University</i>



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22 March - Seminar 1: Criminal Evidence – “Whatever Happened to Weissensteiner - the Person and the Principle?”

Presenter	The Hon. Justice Soraya Ryan, <i>Supreme Court of Queensland</i>
Abstract	<p>Mr Weissensteiner was charged with the murder of a couple with whom he had been sailing, for some time, on their boat. He gave inconsistent accounts of the couple's whereabouts and their bodies were never found. The state of the boat suggested that their departure from it was unplanned. The case against Weissensteiner was wholly circumstantial and he exercised his right to silence before trial and trial. He therefore provided no evidence to displace, counter, or raise a doubt about, the guilty inference the Crown argued was available on the evidence when he was the only one who might have that evidence. Generally, a person accused of a criminal offence has a right to remain silent before trial and at trial and trial judges instruct juries that they may not draw an inference adverse to an accused from their silence. At Weissensteiner's trial, the trial judge directed the jury that they might more safely draw an inference of guilt from the evidence because he did not give evidence of relevant facts which could be perceived to be within his knowledge. He was convicted of the murders of the couple. He appealed against his convictions. In 1993, the High Court, by majority, dismissed the appeal: '... in a criminal trial, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the accused.' In other words, in cases where an inference of guilt is open on the whole of the prosecution case, an accused person's failure to testify about matters peculiarly within their knowledge could make it easier for the jury to be satisfied, beyond a reasonable doubt, of the guilty inference. In the years that followed Weissensteiner, the High Court confined the principle to rare and exceptional cases, but very little was heard about it from the early 2000s onward until it was mentioned by the High Court in <i>R v Baden-Clay</i>.</p> <p>This paper will examine the state of the principle which permits the use of an accused person's silence in proof of their guilt. It will also discuss briefly Mr Weissensteiner himself, who was deported to Austria in 2004.</p>

17 May - Seminar 2: Fiduciary Law - “Prescriptive Fiduciary Duties”

Presenter	Professor Lionel Smith, <i>McGill University Canada</i>
Abstract	<p>It has become an orthodoxy in some quarters that fiduciary duties are only proscriptive, forbidding certain actions, and never prescriptive, requiring positive action. I will argue that this is a misunderstanding. My argument will begin by attempting to explain how this orthodoxy arose, and then by challenging the presuppositions that led to it. I will argue that some of the most important duties of a fiduciary are prescriptive duties. My goal is to develop a more accurate understanding of the fiduciary relationship and its many features.</p>



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# 2018 Seminar Series

## 9 August - Seminar 3: Constitutional Law- "Who is Afraid of Proportionality?"

Presenter	Professor Adrienne Stone, <i>University of Melbourne</i>
Abstract	The Australian High Court in <i>McCloy v NSW</i> adopted 'structured proportionality analysis' as part of Australian constitutional law and, in doing so, it appears to have brought Australian constitutional law at least somewhat more into alignment with global constitutional thinking. Almost immediately, however, the move has attracted controversy both within the Court and with external detractors of proportionality who regard it as ill-suited to the Australian constitutional context. This paper will examine the nature of proportionality, having regard to its roots in Europe and its migration through the rest of the world. Although taking the critiques of proportionality seriously, it will seek to show that proportionality is an acceptable method of analysis in Australian constitutional law. However, it will be argued that proportionality poses some challenges for the courts and for the rule of law that require careful navigation.

## 20 September - Seminar 4 : "Jury Directions, the Struggle for Simplicity and Clarity"

Presenter	The Hon. Justice Virginia Bell AC, <i>High Court of Australia</i>
Abstract	In the past decade the Law Reform Commissions of Queensland, New South Wales and Victoria have addressed references on the content of jury directions in criminal trials. The impetus for these references was the perception that directions that judges are required to give are often excessively long and complex, making it doubtful that they are understood by the intended audience. Allied to this perception, was the concern that the intended audience has ceased to be the jury and has become the appellate court. There is consensus on the desirability of directions that are short and readily comprehensible but there are differing views about how that goal is achieved consistently with ensuring the fair trial of the accused. Victoria alone has addressed the problem by legislation (the <i>Jury Directions Act 2013</i> since repealed and replaced by the <i>Jury Directions Act 2015</i> as recently amended). Whether legislative prescription is the answer remains to be seen. Legislative moulding of the substantive criminal law not uncommonly adds complexity as the directions on consent necessitated under amendments to the <i>Crimes Act 1958</i> (Vic) discussed in <i>R v Getachew</i> (2012) 286 ALR 196 illustrate. On the other hand, the High Court's endeavour to frame simple, clear directions in <i>Clayton v The Queen</i> (2006) 81 ALJR 439 has been criticised as a trap for young players (Eames, <i>Tackling the Complexity of Criminal Trial Directions: What Role for Appellate Courts</i> , (2007) 29 No 2 Aust Bar Review 161).



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# 2018 CLI Series

## Aims:

The series seeks to bring together leading scholars, practitioners and members of the Judiciary in Queensland and from abroad, with a view to:

- providing a forum for the critical analysis and discussion of current legal issues
- bringing to bear upon those issues the different perspectives offered by leading members of the academy, the profession and the judiciary
- forging stronger links between academic and practising lawyers in Queensland

## Time:

Registration: 5.00pm - 5.15pm.

Seminar: 5.15pm - 6.45pm, followed by refreshments.

## Format:

Each seminar will comprise a chair, speaker or co-speaker, and commentator.

The chair will introduce the speakers and commentator. A paper will then be presented by a leading practising or academic lawyer.

## Website:

Details of all seminars, papers, and speaker biographies, are available from the CLI series website: <https://law.uq.edu.au/current-legal-issues-seminars>

## Venue:

The Banco Court, Supreme Court of Queensland, Queen Elizabeth II Courts of Law Complex, 415 George Street, Brisbane.

Seminars will be followed by a drinks reception in the foyer.

## CPD:

The series is accredited for CPD purposes by the Queensland Bar Association, 1.5 CPD points each seminar in the Substantive Law strand.

## Participants:

The series in 2018 is a collaboration between the University of Queensland, the Bar Association of Queensland, Queensland University of Technology and the Supreme Court Library Queensland.

## Registration:

To register online for the seminar, please go to CPD/Events at <https://www.qldbar.asn.au/cpd-events>

For further information please contact the CPD team.

Ground Floor, Inns of Court  
107 North Quay  
Brisbane Qld 4000

E: [cpd@qldbar.asn.au](mailto:cpd@qldbar.asn.au)

P: 07 3238 5100

F: 07 3236 1180