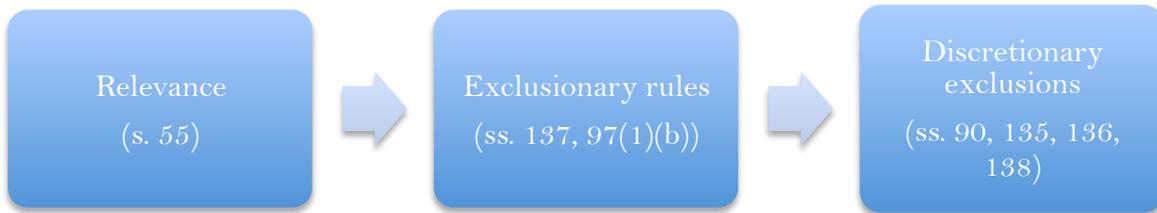


Relevance



Relevance has a *low* threshold

Relevance is not concerned with reliability (*Papakosmas*)

Test for relevance

- Evidence relevant in a proceeding is admissible, evidence not relevant is not admissible ([s.56](#))
- **Test: If evidence were accepted, could it rationally effect (in/directly) assessment of probability of existence of a FII in the proceeding (*Cornwell*) (s. 55)**
 - ‘Accepted’: Assumption made when assessing relevance that evidence is reliable (*Adam*)
 - ‘Rationally affect’: whether evidence could alter probability in a logical sense
 - ‘Fact in issue’: Civil – emerges from pleadings (elements of cause of action/defence); Criminal – elements of criminal charge/defence
 - Other relevant evidence: evidence not ‘irrelevant’ only because it relates to credibility of a W, admissibility of other evidence, or failure to adduce evidence ([s. 55\(2\)](#))
 - Evidence can be provisionally relevant, and received conditionally on assurance of a party that other info will be properly tendered to show relevance of the evidence ([s. 57](#))

Limits of otherwise relevant evidence

- All relevant evidence is admissible, except as excluded by a rule of admissibility or discretion in [s. 56](#)
- *Limited admissibility*: when evidence relevant to many issues, it may be admissible to one, but not another
- *Discretionary limitation*: judge has discretion to admit evidence on a limited basis ([s. 136](#))
- *Jury instructions*: Jury must be instructed for which issue evidence is admissible and that they must disregard it as to other issues
- *Inferences*: if a question arises as to relevance of a document or thing, court may examine it and draw any reasonable inference from it, including an inference as to its authenticity or identity ([s. 58\(1\)](#))

s. 55 Relevant evidence

- (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.
- (2) In particular, evidence is not taken to be irrelevant only because it relates only to:
 - (a) the credibility of a W, or
 - (b) the admissibility of other evidence, or
 - (c) a failure to adduce evidence.

- While this sets out the precondition of admissibility, it does *not* incorporate questions of sufficiency of evidence to sustain a particular conclusion (**BBH**)
- Relevance is not concerned with reliability (**Papakosmos**)

s. 56 Relevant evidence to be admissible

- (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.
- (2) Evidence that is not relevant in the proceeding is not admissible.

- ‘Probative value’: the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue (**UEA** definition)
- Common law equivalent of ‘logical relevance’

s. 57 Provisional relevance

- (1) If the determination of the question whether evidence adduced by a party is relevant depends on the court making another finding (including a finding that the evidence is what the party claims it to be), the court may find that the evidence is relevant:
 - (a) if it is reasonably open to make that finding; or
 - (b) subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make that finding.
- (2) Without limiting subsection (1), if the relevance of evidence of an act done by a person depends on the court making a finding that the person and one or more other persons had, or were acting in furtherance of, a common purpose (whether to effect an unlawful conspiracy or otherwise), the court may use the evidence itself in determining whether the common purpose existed.

s. 55 Judicial analyses

Case	Relevant?	Evidence
<i>Graham v R</i>	Undecided	<ul style="list-style-type: none"> • Whether a 6 year delayed complaint could be relevant in deciding whether complainant fabricated evidence • Evidence: admissibility of the delayed complaint • ‘Unless the making of the complaint can be said to assist the resolution of that question [of K fabricating her evidence], the evidence of complaint is not important.’
<i>Cornwall</i>	Yes	<ul style="list-style-type: none"> • Evidence: def. outside room just before time of death in possession of fully loaded revolver • Relevant as material fact relevant to FII (whether suspect shot the man in the room)
<i>Papakosmas v R</i>	Yes	<ul style="list-style-type: none"> • Evidence: “P raped me” statement made by complainant shortly after sexual assault • Relevant to whether she consented • Logical connection when there is close contemporaneity of statements with a FII, and the statements can be expected if the fact were true

<i>Smith (Mundarra)</i>	No	<ul style="list-style-type: none"> Evidence: 2 police officers recognised Smith in security photographs Not relevant, jurors could make their own comparisons between the photographs and Smith in the dock Police evidence could not rationally affect the jury's assessment
<i>Evans v R, Gummow and Hayne JJ</i>	No (Dissent)	<ul style="list-style-type: none"> Making the appellant dress in balaclava and overalls not relevant, it could not rationally affect the assessment of the identity of the robber Revealed nothing about appellant which was not already apparent to jury from their own observations Gummow and Hayne JJ: Demonstration not relevant Kirby: Demonstration relevant, but unfairly prejudicial (s.137 (exclusion of prejudicial evidence))
<i>Neal</i>	Yes	<ul style="list-style-type: none"> Evidence: Accused's unhappy/sexless marriage Relevant to whether he sexually assaulted a child Evidence was logically connected to motive, but was excluded under s.137 (exclusion of prejudicial evidence)
<i>Burton</i>	No	<ul style="list-style-type: none"> Evidence: Willingness of one person to participate in sexual activity with one person does not connote willingness with another person Irrelevant to any question concerning consent

Relevance and rationalism

- [s. 55](#) is the common law equivalent of 'logical relevance' (must have logical connection to FII)
 - Logical relevance requires evidence have a logical connection to the FII
 - FII emerge from pleadings. In criminal pros., pros. pleadings contain the legal (as defined by substantive law) and factual matters in dispute. Particulars will give greater definition to the factual dispute (Gleeson CJ, *HNL, Goldsmith v Sandilands*)
- Evidence may be logically relevant but fail legal relevance ([s. 135](#)): disadvantages of indicate on balance it is more desirable that it be excluded rather than admitted
- Evidence must be relevant to be admissible

<i>HML (Gleeson CJ)</i>
Unless there is a good reason for not receiving it, evidence that is relevant is admissible. Event that is not relevant, is inadmissible, and there is then no occasion to consider any more particular rule of exclusion. A low threshold applies to the test of relevance
Information may be relevant, and potentially admissible as evidence, where it: <ul style="list-style-type: none"> Bears upon assessment of probability of existence of a FII by assisting in evaluation of other evidence Explains statement or an event that would otherwise appear curious or unlikely Cuts down, or reinforce the plausibility of a W statement Provide a context helpful/necessary for understanding of a narrative

<i>Cornwell</i>
<i>'The question is whether the evidence, if accepted, could rationally affect (directly or indirectly) the assessment by the tribunal of fact, here the jury, of the probability of the existence of a fact in issue in the proceedings.'</i>

Subjectivity, values and factual assumptions

- Logic is fixed. Personal assumptions are based on experience and personal values (*Neal*)

Probative value and unreliability

Papakosmas

Distinction between relevance and probative value in UEA shows that **relevance is not concerned with reliability. Probative value** is defined in the Act as *‘the extent to which the evidence could rationally affect the assessment of the probability of the existence of a FII’*. **Reliability and procedural fairness play no party in testing the relevance of evidence for the purpose of s. 55.**

Burton

Admissibility of evidence as dependent upon trial judge’s assessment of probative value

- Actual probative value to be assigned is the province of the tribunal of fact (jury)
- Provisions that make admissibility of evidence dependent on an assessment by the trial judge (**ss. 97, 98, 101, 103, 135, 137, 138**) **must be concerned with the potential (‘capability’) probative value of the evidence on completion of the trial**, as assessed by the trial judge
- Assessment of probative value must disregard more benign interpretation and focus on interpretation most favourable to party tendering the evidence

IMM

“Probative” value of evidence under UEA

- **Pt 3.1 Threshold question for all evidence: is it relevant? Identify purpose/s for which evidence is tendered**
- Evidence relevant re **s. 55** and **s. 56** is, by definition, “probative”. Evidence that is of only some, even slight, probative value is prima facie admissible, just as it is at common law (*Festa*)
- Relevant evidence is admissible under **s. 56** unless an exclusionary rule operates (**s. 137**) or a discretion to exclude is exercised. Must have “significant probative value” (**s. 97(1)(b)**)
- **s. 97(1)(b)** and **s. 137** require assessment of probative value: “could rationally affect directly or indirectly the assessment of the probability of the existence of a FII” (**s. 55**).
 - **The possible use to which the evidence might be put** (how it might be used), **must be taken at its highest**. Must be read in context of provision to which it is applied. For **97(1)(b)**: is the probative value “significant”?
 - “Significant” probative value is “important” or “of consequence” (Cross on Evidence)
- **s. 137**: weighing of probative value against danger of unfair prejudice. Evidence must be taken at its highest in the effect it could achieve on assessment of the probability of the existence of FII
- Once understood that an assumption as to the jury’s acceptance of the evidence is made, it follows that no question as to credibility of the evidence, or the W giving it, can arise, or the reliability of it. If the jury are taken to accept the evidence, they are taken to accept it completely in proof of the facts stated. **“There can be no disaggregation of reliability and credibility. They are both subsumed into the jury’s acceptance of the evidence.”**

Discretionary exclusions and mandatory ‘discretion’

Burton

The assessment of the potential probative value of the evidence must disregard the more benign interpretation and focus on **the interpretation that is most favourable to the party tendering the evidence**

s. 135 General discretion to exclude evidence

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- be unfairly prejudicial to a party; or
- be misleading or confusing; or
- cause or result in undue waste of time

- Permissive/generalist
- Can be applied by anyone (criminal/civil/pros./defence)
- Broad and demanding test to persuade a court to exclude otherwise probative and admissible evidence
- Court is *not* obliged to exclude evidence, but it must satisfy the test of having its probative value *substantially* outweighed *by the danger* that the evidence *might* be unfairly prejudicial/misleading/confusing/cause undue waste of time

s. 136 General discretion to limit use of evidence

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

- be unfairly prejudicial to a party; or
- be misleading or confusing

- Permissive/generalist

s. 137 Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor (**i.e. only defence can make the application**) if its probative value is outweighed by the danger of unfair prejudice to the def..

- Non-permissive; **mandatory**
- If a def. had to choose between a [s. 135](#) or [s. 137](#) application, it would choose [s. 137](#) as [s. 135](#) has a much higher threshold to prove (must be '*substantially outweighed*').

s. 138 Exclusion of improperly or illegally obtained evidence

- (1) Evidence that was obtained:
- (a) improperly or in contravention of an Australian law, or
 - (b) in consequence of an impropriety or of a contravention of an Australian law,
- is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.
- (2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:
- (a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning, or
 - (b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.
- (3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:
- (a) the probative value of the evidence, and
 - (b) the importance of the evidence in the proceeding, and
 - (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding, and
 - (d) the gravity of the impropriety or contravention, and
 - (e) whether the impropriety or contravention was deliberate or reckless, and
 - (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights, and
 - (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention, and
 - (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

Note : The [International Covenant on Civil and Political Rights](#) is set out in [Schedule 2 to the Human Rights and Equal Opportunity Commission Act 1986 \(Cth\)](#)

- Permissive/generalist

s. 189 The voir dire

- (1) If the determination of a question whether:
 - (a) evidence should be admitted (whether in the exercise of a discretion or not), or
 - (b) evidence can be used against a person, or
 - (c) a W is competent or compellable,depends on the court finding that a particular fact exists, the question whether that fact exists is, for the purposes of this section, a preliminary question.
- (2) If there is a jury, a preliminary question whether:
 - (a) particular evidence is evidence of an admission, or evidence to which section 138 (Discretion to exclude improperly or illegally obtained evidence) applies, or
 - (b) evidence of an admission, or evidence to which section 138 applies, should be admitted,is to be heard and determined in the jury's absence.
- (3) In the hearing of a preliminary question about whether a def.'s admission should be admitted into evidence (whether in the exercise of a discretion or not) in a criminal proceeding, the issue of the admission's truth or untruth is to be disregarded unless the issue is introduced by the def.
- (4) If there is a jury, the jury is not to be present at a hearing to decide any other preliminary question unless the court so orders.
- (5) Without limiting the matters that the court may take into account in deciding whether to make such an order, it is to take into account:
 - (a) whether the evidence to be adduced in the course of that hearing is likely to be prejudicial to the def., and
 - (b) whether the evidence concerned will be adduced in the course of the hearing to decide the preliminary question, and
 - (c) whether the evidence to be adduced in the course of that hearing would be admitted if adduced at another stage of the hearing (other than in another hearing to decide a preliminary question or, in a criminal proceeding, a hearing in relation to sentencing).
- (6) Section 128 (10) does not apply to a hearing to decide a preliminary question.
- (7) In the application of Chapter 3 to a hearing to determine a preliminary question, the facts in issue are taken to include the fact to which the hearing relates.
- (8) If a jury in a proceeding was not present at a hearing to determine a preliminary question, evidence is not to be adduced in the proceeding of evidence given by a W at the hearing unless:
 - (a) it is inconsistent with other evidence given by the W in the proceeding, or
 - (b) the W has died.

Legal relevance: UEA s 135

- Distinguishable from *logical* relevance
 - Legal relevance assumes logical relevance ([s. 55](#)) has been satisfied
 - [s. 135](#) is driven by public policy, not logic
- Requires court to weigh the probative value of evidence, **'the extent to which the evidence could rationally affect the assessment of the probability of the existence of a FII'** ([s. 135](#)) against 3 broad public policy concerns:
 - Unfairly prejudicial ([s. 135\(a\)](#))
 - Misleading/confusing ([s. 135\(b\)](#))
 - Undue waste of time ([s. 135\(c\)](#))

Stephenson (Young CJ, Nelson and Harris JJ)

"... not all evidence which is logically relevant is legally admissible ... its weight is so minimal that it does not serve to add or detract from the probability of the principle issue being established ... insufficiently relevant or too remotely relevant"

Danger of unfair prejudice

- Evidence may evoke sympathy, arouse horror, provoke an instinct to punish, or other reactions which may distract from the logical import of the evidence
 - *"The fact-finder [may] base his decisions on something other than established propositions of the case"* (ALRC)

★ *Dyldam Developments Pty Ltd v Jones*

Assessment of potential probative value of evidence must **disregard the more benign interpretation** and focus on **the interpretation that is most favourable to the party tendering the evidence**

Unfair prejudice arising from procedural considerations: ALRC Report 102

- Unfair prejudice may include a party's inability to XN the maker of a statement admitted under **UEA** hearsay exceptions
- Evidence must be *unfairly* prejudicial – it must have some potential for misuse by the tribunal of fact (not merely because it damages the defence's case or has low probative value)
- Danger of unfair prejudice operates in court procedure:
 - As a consideration of whether the judge should order a demonstration, experiment or inspection under **s. 53(3)(c)**; and
 - As a consideration in determining the extent to which a party may make submissions and 'refer to relevant information' where a trial judge takes judicial notice of matters of common knowledge: **s. 144(4)**.
- Notion of fairness applies specifically to criminal def.s, e.g.
 - Admissibility of admissions having regard to circ.s in which they were made: **s. 90**
 - Holding an identification parade: **s. 114(4)**
 - A judge giving a party leave, permission or direction to proceed in a particular way, the extent to which this would be unfair to a party or to a W: **s. 192(2)(b)** (NB: also applies to Ws)

'Christie discretion': probative value outweighed by danger of unfair prejudice

s. 137 Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor (**i.e. only defence can make the application**) if its probative value is outweighed by the danger of unfair prejudice to the def..

- **Not discretionary**, but does depend on a weighing process
- **Mandates a judge exclude *pros.* evidence if probative value is *outweighed* by danger of unfair prejudice**
- **Applies solely to criminal accused** (don't confuse it with **s. 135** which applies to any party, **s. 137** is a stricter exclusionary mandate applying only to *pros.* evidence. **s. 101(2)** is the strongest protection of an accused: *pros.* coincidence and tendency evidence must have 'significant probative value' (**ss. 97, 98**) and *pros.* bears burden of persuading judge to admit the evidence by showing the probative value *substantially* outweighs any prejudicial effect it may have on def.)

Christie (Lord Moulton)

Source of **s. 137**. If otherwise admissible evidence would probably have a prejudicial influence on the minds of the jury, the true evidential value is distorted

Pfennig

Probative value and prejudicial effect are incommensurables. Value judgment, not a balance of mathematics, requires consideration of fairness and potentially integrity of trial

- In criminal trials, the prejudicial effect of evidence is **not concerned with the cogency of its proof but with the risk that the jury will use the evidence or be affected by it in a way that the law does not permit.**
- The trial judge must make a value judgment, comparing probative strength of the evidence with the degree of risk of an unfair trial if the evidence is admitted – not a mathematical calculation.

★ *Aytugrul*

Unfair prejudice; [s. 137](#)

- Whether claims of unfair prejudice relying on [s. 137](#) could apply where basis of prejudice was the psychological impact of how DNA profile matching was expressed
- [s. 137](#) is not discretionary, although it depends on a weighing process.
- No unfair prejudice: Any jury of 12 is likely to contain at least one juror capable of realising, and demonstrating to the other jurors, that the frequency estimate was the same as the exclusion percentage
- **Reception of evidence which might create unfair prejudice can be lawful if the conduct of the trial is likely to nullify the prejudice.** This happened here (counsel rarely mentioned this evidence). Further, trial judge warned against treating the evidence as ‘definitely’ or ‘necessarily’ establishing the hair came from the appellant.

★ *IMM*

Probative value/unfair prejudice of complaint evidence of history of sexual abuse in sexual assault case

- Complaint evidence tendered to prove the acts charged, high probative value, potentially significant
- Trial judge held the complaint evidence did not create s. 137 prejudice
- Appellant submitted low probative value of the evidence was outweighed by an unfair prejudice bc the jury might use the complaint evidence as tendency evidence to engage in sexual abuse
- Appellant submitted that the evidence was admitted as “context evidence”

Discretion: Limit use of evidence

s. 136 General discretion to limit use of evidence

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing

- Does not relate to exclusion of evidence
- Provides for admitted evidence to have permissible and impermissible uses (commonly used for admissible hearsay evidence)

★ *Papakosmas*

Distinction between relevance and probative value in the UEA shows **that relevance is not concerned with reliability**

- Whether evidence of a complaint could be admitted just for credibility purposes
- Limited use sought by appellant under [s. 136](#) would have put UEA in conformity with common law

Discretion: Exclusion of evidence due to impropriety or illegality

- E.g. Investigative misconduct in acquisition of pros. evidence
- Points in investigation where impropriety commonly arises at all phases where individual’s rights are potentially seriously compromised:
 - Police search (*Kotynia-English*)
 - Detention (*Campbell*)
 - Questioning (*FE*)
 - Arrest (*DPP v Carr*)

***Bunning v Cross* (quoted by Barwick CJ in *Ireland*)**

“Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other ... Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion.”

- Public need to convict criminal offences vs. public interest in protection of individual from unlawful/unfair treatment

The public policy discretion: s. 138

s. 138 Exclusion of improperly or illegally obtained evidence

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 - (a) improperly or in contravention of an Australian law, or
 - (b) in consequence of an impropriety or of a contravention of an Australian law,is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.
- (2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:
 - (a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning, or
 - (b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.
- (3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:
 - (a) the probative value of the evidence, and
 - (b) the importance of the evidence in the proceeding, and
 - (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding, and
 - (d) the gravity of the impropriety or contravention, and
 - (e) whether the impropriety or contravention was deliberate or reckless, and
 - (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights, and
 - (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention, and
 - (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

- Also applies in non-criminal contexts
- Serves important function consistent with accusatorial framework of justice and maintenance of the integrity of the curial and broader justice processes
- BOP on party seeking to adduce illegally or improperly obtained evidence to prove facts relevant to matters weighing in favour of admission and persuading court that the desirability of admitting the evidence outweighs undesirability of admitting evidence obtained in the way in which it was obtained (*Parker v Comptroller of General Customs*)

Marijancevic

s. 138(3)

- Impugned conduct may be characterised by reference to a spectrum of least to most serious

***Grant* (CANADA)**

“The defence must first establish the logical relevance of the evidence. This may be done by demonstrating sufficient connection ... once his threshold is met, the evidence will be admitted unless its prejudicial affects outweigh its probative value”