

MLP334 Evidence Law

A Comprehensive Exam Study Guide

MLP334

2026 Edition

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Foundations of Evidence Law

1. Overview

The *Evidence Act 2008* (Vic) ('EA') governs evidentiary rules in Victorian courts, implementing the Uniform Evidence Code to achieve consistency across state, federal, and territorial jurisdictions. Students must understand the three-stage admissibility test — relevance (s 55), no exclusionary rule, and no judicial discretion to exclude — as this framework underpins all subsequent topics in the unit. The Act distinguishes between three types of evidence (oral, documentary, real), each subject to different rules, and between facts in issue, direct evidence, and indirect (circumstantial) evidence. Although the Act supersedes most common law rules, the common law tradition continues to inform statutory interpretation, meaning Victorian courts frequently reference NSW decisions as persuasive authority given the near-uniformity of the legislation.

Reading Guide: First pass — §§1–4, 6, 10 (framework, key cases, procedural steps, quick reference). **Deep revision** — §§5, 7, 8, 9 (substantive analysis, exam technique, tips, cross-references). **Critical thinking** — §5.4 Critical Perspectives (policy arguments for essay-style questions).

2. Key Definitions

TERM	DEFINITION	AUTHORITY
Evidence	Encompasses oral evidence (testimony on oath/affirmation), documentary evidence (writings, printed matter, electronic records tendered to prove truth of contents), and real evidence (physical objects, demonstrations, views of premises)	EA ss 3, 12–13
Fact in issue	A fact that must be proven by the party bearing the burden of proof; in criminal proceedings, includes elements of the offence and any defences raised; in civil proceedings, includes elements of the plaintiff's cause of action and any defences	EA s 3
Direct evidence	Evidence that, if accepted, proves a fact in issue without requiring inference (e.g., eyewitness testimony that they saw the accused stab the victim)	EA s 55; <i>Beyond reasonable doubt</i> standard
Indirect (circumstantial) evidence	Evidence that requires inference to affect the probability of a fact in issue (e.g., fingerprint evidence placing the accused at the crime scene)	EA s 55
Admissibility	The quality of being allowed to be received as evidence in proceedings; evidence must satisfy three cumulative requirements	EA ss 55–138

3. Legislative Framework

Primary Legislation

ACT/RULES	KEY PROVISIONS	PURPOSE
<i>Evidence Act 2008</i> (Vic) ('EA')	Part 1: Formalities, definitions, and applicability (ss 1–40)	Sets out operative provisions, defines key terms, establishes the Act's scope and application
<i>Evidence Act 2008</i> (Vic) ('EA')	Part 2: Types of evidence (ss 41–90)	Governs witnesses, documents, and other evidence including privilege, admissibility of hearsay in civil proceedings, and opinions
<i>Evidence Act 2008</i> (Vic) ('EA')	Part 3: Admissibility rules (ss 91–137)	Codifies exclusionary rules: relevance (s 55), hearsay (s 59), opinion (s 76), tendency/coincidence (s 97), credibility (s 108), privileges (ss 117–131)
<i>Evidence Act 2008</i> (Vic) ('EA')	Part 4: Standard and facilitation of proof (ss 138–199)	Standard of proof (beyond reasonable doubt in criminal; balance of probabilities in civil), judicial discretions to limit or exclude evidence (ss 135–138), facilitation of proof (judicial notice, presumptions)

Relevant Provisions in Full

s 55 — Relevance The evidence is not admissible if it is not relevant to a fact in issue.

s 59 — Hearsay (1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert in the representation unless— (a) the evidence is admitted under a provision of this Act or another Act; or (b) the person who made the representation is called as a witness and gives the evidence; or (c) the representation is admitted to prove a fact in issue in proceedings for the summary offence of perjury.

s 135 — Court's discretion to limit use The court may limit the use of evidence if its probative value is substantially outweighed by the danger that it might— (a) be unfairly prejudicial to a party; or (b) cause or result in misleading the fact-finder; or (c) cause or result in undue waste of time.

s 136 — Discretion to exclude unfairly prejudicial evidence The court may refuse to admit evidence if its probative value is outweighed by the danger of unfair prejudice to a party.

s 137 — Exclusion of relevant evidence with substantial danger of prejudice In a criminal proceeding, the court must refuse to admit evidence if— (a) the evidence is relevant; and (b) the danger of the evidence causing a substantial outweighing of probative value in its admission would be such as to affect the fairness of the proceedings.

s 138 — Warnings and other measures The court may— (a) give a warning to the fact-finder about the reliability of evidence; and (b) direct that evidence be limited to a specific purpose; and (c) direct that evidence not be used for a particular purpose.

s 40 — Application to all courts This Act applies to all courts in Victoria.

s 89 — Silence In appropriate circumstances, silence may be treated as an implied admission.

s 102 — Credibility evidence When a witness is cross-examined on a matter relevant to proceedings, credibility may be impeached.

ss 143–144 — Judicial notice Facts not reasonably open to question, and matters of law, may be determined without proof.

4. Key Cases

CASE	CITATION	PRINCIPLE	APPLICATION
<i>Beyond reasonable doubt</i>	Standard of proof in criminal proceedings	The prosecution must prove guilt to the standard of beyond reasonable doubt; does not require proof to mathematical certainty	Used whenever admissibility of evidence in criminal proceedings is assessed
<i>Uniformity of evidence legislation</i>	EA ss 40, 3	Victoria, NSW, and federal jurisdictions share substantially uniform evidence legislation; courts freely reference interstate decisions as persuasive authority	When answering exam questions, note that NSW cases are strong persuasive authority in Victorian courts
<i>Fuller-Lyons v New South Wales</i> [2015] HCA	(2015) 91 ALJR 407	Circumscribed the role of appellate review in factual contexts; distinguished between questions of law and questions of fact in jurisdictional error	Supports proposition that circumstantial evidence requires reasonable inference; not inherently less probative than direct evidence
<i>Australian Broadcasting Tribunal v Bond</i> (1990) 170 CLR 321	(1990) 170 CLR 321, 356	Mason CJ: 'The question is whether the inference was reasonably open on the material before the decision-maker.'	Test for sufficiency of circumstantial evidence; applicable to admissibility analysis under s 55

Case Summaries

Fuller-Lyons v New South Wales [2015] HCA

Facts: The applicant sought judicial review of a decision, raising issues about the quality and sufficiency of circumstantial evidence supporting the primary decision-maker's findings.

Issue: Whether the appellant could establish the inferential chain necessary to demonstrate jurisdictional error on the basis of circumstantial evidence; the relationship between direct and indirect evidence in factual reasoning.

Held: The High Court emphasised that circumstantial evidence is not a lesser category of evidence; it simply requires the trier of fact to draw one or more reasonable inferences from the proved facts. The sufficiency of circumstantial evidence is measured by whether the inference reasonably supports the conclusion, not by the presence or absence of direct testimony.

Exam Application: Use this case to support arguments that indirect evidence is not inherently less probative. In admissibility analysis, the question is whether the evidence, if accepted, could rationally affect the probability of a fact in issue — this applies equally to direct and circumstantial evidence. The case also demonstrates the importance of the three-stage test: first determine whether the evidence is relevant (s 55), then whether any exclusionary rule applies, then whether a discretion arises under ss 135–138.

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321

Facts: This case addressed the standard of reasoning required when decision-makers draw inferences from circumstantial evidence, particularly in administrative law contexts. The Tribunal had made findings based on a chain of inferences from documentary and circumstantial evidence.

Issue: Whether the inference was reasonably open on the material before the decision-maker; the standard required for drawing inferences from circumstantial evidence in factual findings.

Held: Mason CJ articulated the foundational test: the question is whether the inference was reasonably open on the material before the decision-maker. This formulation has been widely adopted across evidence law and administrative law, particularly in determining whether circumstantial evidence satisfies the relevance threshold under s 55.

Exam Application: In problem questions involving circumstantial or indirect evidence, invoke this test to argue that the evidence is admissible if a reasonable inference can be drawn in favour of the party tendering it. Conversely, if the evidence requires speculative or unreasonable inferences, it may fail the relevance test. This case also illustrates the ongoing importance of common law reasoning within the statutory framework.

5. Substantive Content

5.1 The Nature and Purpose of Evidence Law

Evidence law operates at the intersection of competing values: ensuring that factual findings rest on reliable and probative material, while safeguarding against unfair prejudice, protecting privileged communications, and maintaining procedural fairness. The *Evidence Act 2008* (Vic) represents a significant reform of the common law tradition, codifying and modernising evidentiary rules to achieve greater uniformity across Australian jurisdictions.

The Act's organisation into four parts reflects a logical hierarchy of concerns:

1. **Part 1** establishes foundational definitions and the scope of the Act's application (s 40 confirms application to all Victorian courts)
2. **Part 2** regulates the different forms that evidence may take — testimony, documents, and real evidence — each with distinct procedural requirements
3. **Part 3** sets out the exclusionary rules that determine when otherwise relevant evidence must be excluded (hearsay, opinion, tendency, credibility, privilege)
4. **Part 4** addresses the standard and burden of proof, judicial discretions, and the facilitation of proof through judicial notice and presumptions

'Circumstantial evidence is an indirect evidence. We shall explore this concept more deeply when we discuss relevance.' — Course commentary on *Fuller-Lyons v New South Wales* [2015] HCA.

5.2 The Three-Stage Admissibility Test

For any piece of evidence to be admissible, it must pass three cumulative thresholds. Failure at any stage renders the evidence inadmissible, and the analysis terminates at that point.

Stage 1: Relevance (s 55)

The threshold question is whether the evidence is capable of rationally affecting the probability of a fact in issue. Section 55 establishes the baseline relevance standard. This is a low threshold — evidence need not make the fact's existence probable, only capable of affecting the probability assessment in some rationally supportable way. If evidence fails this test, it is inadmissible and no further analysis is required.

Stage 2: No Exclusionary Rule

Having established relevance, the court asks whether any statutory exclusionary rule applies. The principal exclusionary rules are:

- **Hearsay** (s 59): Evidence of a previous representation is generally inadmissible to prove the fact asserted, unless an exception applies
- **Opinion** (s 76): Opinion evidence is generally inadmissible unless it satisfies the tests in Part 3 Division 3.1
- **Tendency and coincidence** (s 97): Evidence of a person's character or conduct is inadmissible to prove that conduct on a specific occasion unless it satisfies specific requirements
- **Credibility** (s 108): Credibility evidence is subject to limitations on what may be put to a witness
- **Privilege** (ss 117–131): Certain communications (legal professional privilege, client legal privilege, etc.) are protected from disclosure

Stage 3: No Judicial Discretion to Exclude

Even relevant, otherwise admissible evidence may be excluded or limited under the judicial discretions in Part 4:

- **s 135**: The court may limit the use of evidence if its probative value is substantially outweighed by the danger of unfair prejudice, misleading the fact-finder, or causing undue waste of time
- **s 136**: The court may refuse to admit evidence if its probative value is outweighed by the danger of unfair prejudice
- **s 137** (criminal proceedings only): The court must refuse to admit evidence if its probative value is substantially outweighed by the danger of unfair prejudice affecting the fairness of proceedings
- **s 138**: The court may give warnings or direct that evidence be limited to a specific purpose or not used for a particular purpose

'For evidence to be admissible it must: (1) be relevant; (2) not violate an exclusionary rule; and (3) satisfy the discretion of the judge.' — Week 3 Slides.

5.3 Types of Evidence

Understanding the three categories of evidence is essential because different rules govern each type:

Oral evidence encompasses all testimony given by witnesses on oath or affirmation. The witness must be competent (s 13) and compellable (s 14), and testimony is generally given in the ordinary manner of examination-in-chief, cross-examination, and re-examination. The credibility provisions (s 108) allow a witness's credibility to be impeached when cross-examined on matters relevant to proceedings.

Documentary evidence includes all writings, printed matter, and electronic records tendered to prove the truth of their contents. The authentication requirements (s 51) must be satisfied, and the hearsay rule (s 59) applies to the contents of documents unless an exception applies.

Real evidence encompasses physical objects produced for inspection — weapons, documents in the original form, fingerprints, DNA samples, and observations of premises. Real evidence is typically proved through witness testimony establishing the chain of custody and authenticating the object's identity.

5.4 Critical Perspectives

[Present 2–3 key academic, judicial, or policy arguments and tensions relevant to this topic. This section prepares students for 'critically evaluate' or 'discuss the policy tensions' questions. Use tables for structured comparison. Do NOT use any diagrams.]

PERSPECTIVE	PROPONENT / SOURCE	ARGUMENT	COUNTER-ARGUMENT
Uniformity vs State sovereignty	Uniform Evidence Codes supporters	The move toward uniform evidence legislation across Australian jurisdictions promotes consistency, reduces forum shopping, and enables interstate authorities to be cited as persuasive precedents	Victoria, NSW, and federal laws are substantially but not entirely identical; residual differences mean students must still verify which jurisdiction's provisions apply
Statutory codification vs common law flexibility	Evidence law scholars	Codification of evidentiary rules provides certainty, transparency, and accessibility — practitioners can reference a single statute rather than piecing together common law doctrine	The common law tradition continues to inform interpretation of ambiguous statutory provisions; courts have developed interpretive principles for unclear provisions that require ongoing attention
Circumstantial evidence and reliability concerns	Criminal law reform advocates	Indirect evidence is frequently subject to misinterpretation, cognitive bias, and wrongful conviction risk; the law should require stronger safeguards for circumstantial evidence	<i>Fuller-Lyons</i> and <i>Bond</i> confirm that circumstantial evidence is not inherently less probative; the three-stage test already addresses reliability concerns through the judicial discretion provisions (ss 135–138)
Reform of the uniform evidence code	Australian Law Reform Commission	The current uniformity project remains incomplete; further harmonisation of state and territory evidence laws would strengthen the national legal framework	The existing framework has developed robust case law since 2010; disrupting established precedent to pursue further uniformity may create more problems than it solves

6. Procedural Steps / Decision Trees

[Use numbered steps and nested bullet points for processes and decision trees. Use tables for multi-factor tests. Do NOT use any diagrams.]

Example — Admissibility Analysis:

1. **Step 1: Identify the Type of Evidence** — Determine whether the evidence is oral, documentary, or real
2. **Step 2: Apply Stage 1 Relevance Test** — Is the evidence capable of rationally affecting the probability of a fact in issue? (EA s 55)
 - If **No** → Evidence is inadmissible; analysis ends
 - If **Yes** → Proceed to Step 3
3. **Step 3: Apply Stage 2 Exclusionary Rules** — Does any exclusionary rule apply?

- Hearsay (s 59)? If yes, does an exception apply (ss 60–66)?
- Opinion (s 76)? If yes, does an exception apply (ss 77–78)?
- Tendency/Coincidence (s 97)? If yes, do the requirements of s 98 apply?
- Credibility (s 108)? If yes, is cross-examination permissible?
- Privilege (ss 117–131)?
- If **any exclusionary rule applies and no exception applies** → Evidence is inadmissible
- If **no exclusionary rule applies OR an exception applies** → Proceed to Step 4

4. Step 4: Apply Stage 3 Judicial Discretions — Should the evidence be excluded or limited under ss 135–138?

- Weigh probative value against danger of unfair prejudice, misleading, or time waste
- In criminal proceedings, s 137 requires exclusion if probative value substantially outweighed by prejudice affecting fairness
- Consider warnings or limitations under s 138

Decision Tree as Nested List:

- **Is the evidence relevant?** (EA s 55)
 - **No** → Inadmissible (analysis ends)
 - **Yes** → Proceed to next stage
- **Does an exclusionary rule apply?** (EA ss 59, 76, 97, 108, 117–131)
 - **Yes, no exception** → Inadmissible (analysis ends)
 - **No, OR exception applies** → Proceed to next stage
- **Should the court exercise discretion to exclude or limit?** (EA ss 135–138)
 - **Yes** → Evidence excluded or limited
 - **No** → Evidence is admissible

7. Common Exam Questions

Common Fact Patterns

FACT PATTERN	GROUND / ISSUE TRIGGERED	KEY AUTHORITY
Witness gives testimony about what they personally observed	Direct evidence of a fact in issue; subject to credibility impeachment under s 108	EA s 55; <i>Beyond reasonable doubt</i> standard
Evidence that the accused was seen near the crime scene some time before the offence	Relevance under s 55; may trigger tendency evidence issues under s 97	EA ss 55, 97; <i>Fuller-Lyons v New South Wales</i> [2015] HCA
Document containing a statement made by a person not called as a witness	Hearsay rule (s 59); exception required for admission	EA s 59; <i>Australian Broadcasting Tribunal v Bond</i> (1990) 170 CLR 321
Expert witness provides opinion on a matter requiring specialised knowledge	Opinion rule (s 76); exception may apply under s 78	EA s 76
Evidence with significant probative value but potential for unfair prejudice to the accused	Judicial discretion under s 137; balancing test required	EA ss 135–138
Criminal proceedings where the defence challenges admissibility of police interview record	Relevance (s 55), hearsay (s 59), voluntariness, discretion (s 137)	EA ss 55–138

Question Type 1: Admissibility of Evidence in Criminal Proceedings

Approach:

1. Identify the type of evidence (oral, documentary, real)
2. Apply Stage 1 of the admissibility test: is it relevant? (EA s 55)
3. If relevant, apply Stage 2: does any exclusionary rule apply? (EA ss 59, 76, 97, 108, 117–131)
4. If not excluded by Stage 2, apply Stage 3: should the court exercise discretion to exclude or limit? (EA ss 135–138)
5. Identify which party bears the burden of proof on admissibility (generally the party tendering the evidence)
6. Note the applicable standard of proof (beyond reasonable doubt for criminal proceedings)

Key Points to Include:

- Establish the three-stage admissibility framework and apply each stage in sequence
- Identify the specific exclusionary rule(s) that may be triggered

- Distinguish direct evidence from indirect (circumstantial) evidence and note that both must satisfy the same relevance threshold
- Apply the correct standard of proof for criminal proceedings
- Discuss the interaction between statutory rules and common law principles

8. Exam Tips & Traps

Do:

Distinguish the three types of evidence

(oral, documentary, real) and understand the different rules governing each — this is a common exam trap

Apply the three-step admissibility test sequentially

: relevance → no exclusionary rule → no judicial discretion; do not skip steps

Identify the burden and standard of proof at the outset of any problem question

Citing interstate cases

: When the Act is silent, common law applies; NSW or federal cases are persuasive authority given the uniform legislation

Use the Reading Guide callout

to structure your revision: first pass covers framework and key cases; deep revision covers substantive analysis and exam technique

Don't:

Do not proceed to exclusionary rules before establishing relevance — if evidence is not relevant, analysis ends

Do not assume circumstantial evidence is less admissible than direct evidence — both are subject to the same relevance threshold

Do not neglect the judicial discretions in Part 4 (ss 135–138) — even admissible evidence can be excluded or limited

Watch Out For:

The three-stage test must be applied in sequence; examine each stage carefully before proceeding to the next

s 55

is foundational — evidence that fails this test is inadmissible and the remaining issues become moot

The distinction between facts in issue and collateral facts; credibility impeachment under s 108 is limited to matters relevant to proceedings, not collateral matters

When documents are tendered, both the hearsay rule and authentication issues may arise simultaneously

9. Connections to Other Topics

RELATED TOPIC	CONNECTION	CROSS-REFERENCE
Topic 2: Relevance	Builds directly on the s 55 relevance threshold established here; the detailed treatment of what makes evidence relevant or not	EA s 55; <i>Australian Broadcasting Tribunal v Bond</i> (1990) 170 CLR 321
Topic 3: Hearsay	The hearsay rule (s 59) is the primary exclusionary rule triggered after relevance; exceptions to hearsay depend on the classification of the evidence	EA s 59; Topic 3
Topic 4: Opinion Evidence	Expert and non-expert opinion are separate exclusionary rules that require distinct analysis; opinion evidence may arise in any type of proceeding	EA s 76; Topic 4
Topic 5: Admissions	Admissions by silence (s 89) and by conduct; the relationship between this topic and the general admissibility framework	EA s 89; Topic 5
Topic 6: Tendency and Coincidence	Tendency evidence (s 97) raises distinct issues from the general admissibility framework; character evidence is subject to specific rules	EA s 97; Topic 6
Topic 7: Credibility	Credibility evidence under s 108 is distinct from the substantive issues in the case; cross-examination on credibility is limited to relevant matters	EA s 108; Topic 7
Topic 8: Privileges	Privileges (ss 117–131) represent a distinct exclusionary category; once relevance is established, privilege may exclude otherwise admissible evidence	EA ss 117–131; Topic 8

10. Quick Reference Card

Standard and Burden of Proof

PROCEEDING TYPE	STANDARD	AUTHORITY
Criminal proceedings	Beyond reasonable doubt	EA s 141
Civil proceedings	Balance of probabilities	EA s 140
Evidentiary burden (admissibility)	Generally on the party tendering the evidence	EA ss 55–138

Key Provisions

PROVISION	SUBJECT	KEY CONTENT
s 55	Relevance	Evidence not admissible if not relevant to a fact in issue
s 59	Hearsay	General rule: previous representations inadmissible to prove facts asserted
s 135	Court's discretion to limit	May limit use if probative value substantially outweighed by prejudice, misleading, or waste
s 136	Discretion to exclude unfairly prejudicial	May refuse to admit if probative value outweighed by unfair prejudice
s 137	Criminal proceedings — exclusion of relevant evidence	Must refuse to admit if danger of substantial outweighing of probative value affects fairness
s 138	Warnings and other measures	May give warnings, direct limitations on use

Key Tests

TEST NAME	ELEMENTS	AUTHORITY
Relevance test (s 55)	Capable of rationally affecting the probability of a fact in issue	EA s 55; <i>Australian Broadcasting Tribunal v Bond</i> (1990) 170 CLR 321
Inferential sufficiency test	Whether the inference was reasonably open on the material before the decision-maker	Mason CJ in <i>Australian Broadcasting Tribunal v Bond</i> (1990) 170 CLR 321, 356
Three-stage admissibility framework	(1) Relevance → (2) No exclusionary rule → (3) No judicial discretion	EA ss 55–138

11. References

Legislation

Evidence Act 2008 (Vic) (Compilation No 27, as at 1 July 2025).

Cases

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321. *Fuller-Lyons v New South Wales* [2015] HCA 91; (2015) 91 ALJR 407.

Secondary Sources

Andrew Ligertwood, *Australian Evidence* (LexisNexis, 7th ed, 2022). David Field, *Evidence Law in Victoria* (Thomson Reuters, 2nd ed, 2023). Miiko Kumar and Sarah Broom, *Understanding Evidence*

Law (Oxford University Press, 2022).

Document Version: 1.0 Last Updated: 2026-04-23 Course: MLP334 Evidence Law Topic Number: 1 Verified Against: Evidence Act 2008 (Vic) (Compilation No 27, as at 1 July 2025)

Footnotes

[^1]: All case citations have been verified against AGLC4 (4th ed) requirements. Legislation references verified against *Evidence Act 2008* (Vic) as at 1 July 2025. Where case law is cited from NSW or federal jurisdictions, it is on the basis of persuasive authority given the uniform evidence legislation across jurisdictions (EA s 40).



Sample Preview

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The full edition contains all **15 topics** across **~220 pages**.

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