

MLP713 — Evidence Law and Policy

Deakin University · Juris Doctor

Complete Class Notes

Weeks 1 — 11

Week 1 — Overview of Evidence Law

Required Reading

- Evidence Act 2008 (Vic) ss 9, 140–42, 143, 144, 189
- Feld et al., Chapters 1 & 2
- Odgers, commentary on ss 9, 140–42, 189
- Fuller-Lyons v New South Wales [2015] HCA

1. Unit Overview

1.1 Structure of Teaching Activities

- **Lectures:** 2 hours/week — pre-recorded, knowledge-based; focus on the rules of evidence.
- **Seminars:** 2 hours/week — live-streamed and recorded; discussion-based; application of rules to problem questions. Also introduce recent developments in evidence law.
- **Revision Seminar:** additional 2-hour session provided at end of trimester.
- **Lecture goals:**
 - Primary: examine and understand the rules of evidence in the Evidence Act 2008 (Vic).
 - Secondary: embed the application of those rules in a practical (courtroom) setting.
 - Tertiary: prepare students for assessment in the unit.

1.2 Learning Outcomes (ULOs)

- **ULO1** — Explain the objectives and rationales of evidence law.
- **ULO2** — Critically evaluate the influences that shape the law of evidence.
- **ULO3** — Explain, analyse and critique rules governing admissibility of evidence.
- **ULO4** — Apply rules of evidence to factual scenarios in criminal and civil settings.
- **ULO5** — Prepare written responses on admissibility with emphasis on justification.
- **ULO6** — Critically evaluate how evidence law impacts negotiations outside court.

1.3 Assessment Overview

Assessment	Weight	Word Count / Format	Due Date
Problem-Based Written Assignment	20%	1,000 words	Monday 30 March (Week 5), 8pm
Research Essay	30%	2,000 words	Tuesday 28 April (Week 8), 8pm
Open-Book Examination	50%	2-hour problem-solving exam	Exam period

- **The exam is based exclusively on materials covered in lectures, seminars and provided online.**
- The research essay requires expanding the field of enquiry beyond course materials.

1.4 Reading Materials

- **Prescribed:** *Evidence Act 2008 (Vic)*; Weekly Study Page & Notes; Supplementary readings.
- **Recommended textbooks:**
 - *Bellew et al, Australian Uniform Evidence Law: Principles and Context* (2nd ed, 2022)
 - *Feld et al, Uniform Evidence Law: Principles and Practice* (2nd ed, 2015)
 - *Odgers, Uniform Evidence Law* (20th ed, 2025)
 - *Kumar et al, Uniform Evidence Law: Commentary and Materials* (7th ed, 2023)

2. The Nature of Evidence Law

2.1 What is Evidence Law?

- Evidence law defines the type of information that **fact-finders** (judge or jury) can and cannot receive to resolve factual disputes in civil and criminal proceedings.
- **Procedural, not substantive:** it does not create legal rights or duties — it lays down the process by which substantive legal issues are determined.
- There is always a **gap between events that happen in the street** and what is admissible in the courtroom — illustrated vividly in television drama (e.g. The Wire).
- The main goal of evidence law is to **find the truth**, but various rules moderate how that truth is found.
- The body of law is subject to ongoing **reforms** — we will examine the policy concerns directing past and future reforms throughout the trimester.

2.2 Three Objectives of Evidence Law

- **1. Truth-seeking:** the primary aim is to find the truth about facts in dispute.
- **2. Disciplinary:** to control the conduct of proceedings and parties.
- **3. Protective:** to protect the interests of parties (e.g. privilege, exclusion of unfairly obtained evidence).

2.3 The Adversarial System and Parties

- The **adversarial system** underpins Australian evidence law — each party presents their own case and challenges the other's.
- **Criminal proceedings:** Prosecutor vs Accused.
- **Civil proceedings:** Plaintiff vs Defendant.
- **Rules are stricter in criminal cases** — the stakes (liberty) are significantly higher.
- The **trier of fact / fact-finder:** the jury (or judge sitting alone) decides questions of fact; the judge decides questions of law.
- The process of adducing evidence in court includes:
 - **Oral evidence:** examination in chief → cross-examination → re-examination.
 - **Documents and physical evidence / exhibits.**

2.4 The Voir Dire (s 189 Evidence Act 2008 (Vic))

- **Voir dire** = the process of deciding whether a piece of evidence can be admitted — admissibility is decided by the **judge**, not the jury.
- **KEY: the admissibility of evidence and its weight/importance are two entirely different things.**
- Under **s 189:** a 'preliminary question' arises when the court must find a particular fact before determining whether evidence is admissible, can be used against a person, or whether a witness is competent/compellable.
- If there is a jury, preliminary questions about **admissions** or evidence to which **s 138** (improperly obtained evidence) applies must be heard and determined **in the jury's absence.**

- The jury is not present at any hearing to decide any other preliminary question, unless the court orders otherwise.

2.5 Three Types of Evidence

Type of Evidence	Description	Key Notes
Witness Testimony (Oral / Viva Voce Evidence)	Most common and most problematic type. Based on the perceptions and memory of a fallible human being. You never know exactly what will come out of a witness's mouth, particularly during cross-examination.	Evidence is honest, dishonest, or honest but mistaken. Cross-examination tests reliability. Most rules of evidence deal with witnesses. Polygraphs and brain fingerprinting are not accepted by courts.
Physical Objects / Exhibits (Real Evidence)	Tangible items recovered from a crime/accident scene — e.g. murder weapon, serum samples, fingerprints.	Usually treated as circumstantial evidence. Rarely conclusive alone (e.g. a fingerprint places accused at scene but does not prove guilt — innocent explanation may exist).
Documents	Very common in commercial and fraud litigation. E.g. airline tickets, sales receipts, electronic transaction records, online transactional databases.	Online databases are an increasingly important source of documentary evidence. Fraud/tax cases can involve enormous numbers of documents.

The Importance of Cross-Examination

"Cross-examination is the greatest legal engine ever invented for the discovery of truth." — John Henry Wigmore

"You can do anything with a bayonet except sit on it. A lawyer can do anything with cross-examination if he is skilful enough not to impale his own cause upon it." — Wigmore

- Cross-examination tests not just honesty but accuracy — both fall within the concept of 'reliability'.
- Despite problems with witnesses, witness testimony remains the most important evidence in most cases.

2.6 Direct, Indirect and Circumstantial Evidence

- Evidence may be **directly or indirectly relevant** to the 'fact in issue' to be proved.
- **Indirect evidence** is usually circumstantial — there might be innocent explanations for the existence of such evidence.
- A case can be decided even if all evidence is indirect/circumstantial — **there is no rule requiring direct evidence.**
- Two types of circumstantial cases recognised by the courts:
 - **'Strands in a cable'**: individual strands (pieces of evidence) may be weak alone but together form an unbreakable cable. (**Peacock v R** (1911))

- **'Links of a chain':** each piece of evidence is like a link — the chain is only as strong as its weakest link. (**Shepherd v R** (1990))

2.7 Key Case — Circumstantial Evidence

Case Name	Issue	Key Facts	Held
Fuller-Lyons v New South Wales [2015] HCA	Whether circumstantial (indirect) evidence was sufficient to prove negligence; how courts draw inferences from circumstantial evidence.	Fuller-Lyons, a cognitively impaired minor, was severely injured after falling from a moving train (~100kph). No direct evidence of exactly how he fell. Primary judge found the most probable explanation was that his body had kept the rear doors open and he fell. NSWCA overturned this, holding the primary judge needed to consider all alternative reasonable hypotheses and could not conclude his body was visible.	High Court unanimously allowed the appeal. NSWCA erred. If the primary judge correctly concluded the most reasonable and probable explanation was that Fuller-Lyons was trapped in the doors, that finding remains correct even if 'other possible explanations cannot be excluded'. The Court upheld the inference that part of his body was visible to the station attendant. State vicariously liable.

3. Sources of Evidence Law

3.1 Two Primary Sources

- **1. Common law rules** — the historical foundation of evidence law, developed through case law.
- **2. Legislation** — primarily the Uniform Evidence Acts (UEAs).

3.2 The Uniform Evidence Acts

- The **Evidence Act 2008 (Vic)** — came into effect in Victoria in January 2010 (based on legislation operational in NSW/Federal courts since 1995).
- The UEA scheme **extinguishes most common law rules**, with the goal of uniform evidential rules across state, territorial and federal courts.
- Jurisdictions with Uniform Evidence Acts:
 - *Evidence Act 1995 (NSW)*
 - *Evidence Act 2008 (Vic)*
 - *Evidence Act 2001 (Tas)*
 - *Evidence Act 2011 (ACT)*
 - *Evidence (National Uniform Legislation) Act 2011 (NT)*
- Note: the interpretation of each Act may be affected by other laws of that jurisdiction, e.g. Victoria's *Human Rights and Responsibilities Act 2006*.
- Because the Acts are (almost entirely) uniform, it is acceptable to reference cases from any UEA jurisdiction — Victorian courts regularly cite NSW decisions as authority.

3.3 The Act vs Common Law

- **When an issue is governed by the Act, the Act extinguishes the common law.** The Act prevails.
- However, the Act is based on common law rules and echoes many of them — so common law cases are still consulted to clarify the meaning or application of the Act.
- **When an issue is not governed by the Act, the common law still applies.**

3.4 Section 9 — Savings Provision

s 9(1) Evidence Act 2008 (Vic)

"This Act does not affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment."

- This section preserves the operation of common law/equity where the Act does not expressly override it.
- Note: the Commonwealth *Evidence Act* is drafted differently — see Odgers for the distinction.

3.5 Development of Case Law

- Case law is crucial — cases **clarify the meaning and application of the Act**.
- Cases from NSW, Tasmania, and the Commonwealth are commonly used in Victorian proceedings.
- However, a Victorian court may **refuse to follow** the approach adopted by courts of another state if there is good reason.
- The Act is a **'work in progress'** — there is a rapidly expanding body of Victorian cases dealing with the Evidence Act since 2010.
- Some sections are straightforward; others are extremely complex — e.g. **s 62** (first-hand hearsay) is notoriously poorly drafted, attempting to define a simple concept in unnecessarily complex terms.

4. The Logic and Structure of the Evidence Act

4.1 The Three-Stage Admissibility Test

Every item of evidence (witness testimony, exhibit, or document) must survive **three sequential stages** before it can be admitted:

- **Stage 1 — Relevance:** the evidence must be relevant (Week 4).
- **Stage 2 — Exclusionary Rules:** the evidence must not violate any exclusionary rule (e.g. hearsay, opinion, tendency, credibility — Weeks 5–10).
- **Stage 3 — Judicial Discretion:** the evidence must satisfy the trial judge's discretion (Week 11).

If evidence fails any one stage, it is excluded.



EXAM TIP

1. When answering a problem question, always address all three stages — relevance, exclusionary rules, AND discretion.
2. Do not focus exclusively on a single exclusionary rule and overlook relevance or discretion.
3. If relevance and discretion are not the focus of the question, mention them briefly in passing before analysing the exclusionary rule in detail.
4. A complete answer shows awareness of the full three-stage framework even when one stage is the primary issue.

4.2 Overview of the Act's Structure — Weekly Topics

Week	Topic / Part of Act
1	Standard and facilitation of proof (this week)
2–3	Types of evidence that can be adduced: witnesses, documents, and other evidence
4	Relevance
5	Hearsay
6	Admissions
7	Opinion
8	Tendency and coincidence
9	Credibility and character evidence
10	Privileges
11	Discretions to exclude