

EVIDENCE LAW

The Admissibility Engine

MLP334 · Evidence Act 2008 (Vic) · Uniform Evidence Law · a reasoning-first bench book

How this is organised. These notes are built around the *question you actually ask of a piece of evidence*, not the order of the syllabus. The spine is a six-step sequence (Part 0). Each exclusionary rule is then a self-contained **gate** you can flip straight to — every gate follows the same internal shape:

- **TRIGGER** — does this rule even apply?
- **RULE** — the prohibition and its section.
- **TEST** — the elements you must satisfy.
- **EXCEPTION / WAY IN** — how the evidence still gets used.
- **CASES** — compressed to case → ratio.
- **TRAP** — the mistake that loses marks.

Legend. Grey box = a rule or test. **Green** box = an exception / way in. **Amber** box = a trap or common error. Section numbers are *Evidence Act 2008 (Vic)* unless another Act is named. “JDA” = *Jury Directions Act 2015 (Vic)*.

Syllabus map. Foundations = Topics 1–3 · Hearsay = Topics 4–5 · Opinion & Identification = Topic 6 · Admissions = Topic 7 · Tendency/Coincidence = Topic 8 · Credibility & Character = Topic 9 · Privileges = Topic 10.

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Part 0 · The Master Sequence

Evidence law is procedural, not substantive — but nothing is proved without it. Aim: help the finder of fact (judge or jury) decide what is true, while keeping the trial fair. Run *every* piece of evidence through these six steps, in order. Most problems are just this loop applied to each item.

1

Can it get in the door? (Adducing)

How is it put before the court — witness testimony, a document, or real evidence? **Adducing** ≠ **admissibility**. Getting it in front of the court is a separate question from whether it is allowed to stay.

2

Is it RELEVANT? (ss 55–56)

The gateway. **Relevant** = if accepted, it could rationally affect the probability of a fact in issue. Not relevant → not admissible, full stop.

3

Does an EXCLUSIONARY RULE catch it? (the Gates)

Hearsay · Opinion · Admissions · Tendency/Coincidence · Credibility · Identification · Privilege. Identify the **type** of evidence and the **purpose** it is used for.

4

If caught — is there an EXCEPTION / permitted use?

Each gate has ways in (e.g. hearsay exceptions ss 63–75; lay/expert opinion ss 78–79). Watch **admission vs use** — evidence may be in for one purpose only.

5

Even if admissible — should a DISCRETION exclude/limit it?

The overrides: **s 135** (may exclude), **s 137** (must exclude — criminal), **s 136** (limit use), **ss 138–139** (improperly obtained). Apply LAST.

6

CONCLUDE

Admissible? For what use? With what weight/reliability, and any jury warning (JDA / s 165)?

The five questions to ask of any item

- **What type** of evidence is it?
- **For what purpose** is it tendered — proving the truth of a fact, credibility, notice, context?
- **Is there a rule prohibiting it** (hearsay, opinion, tendency, coincidence, credibility)?
- **Is an exception available?**
- **Any discretionary bar** — and is it relevant, reliable and fair to admit?

Sources & structure of the Act

- **Uniform Evidence Law (UEL)**: Cth & NSW (1995), Tas (2001), Vic (2008), ACT/NT (2011). Modelled on the ALRC bill — *uniform in aim, not in detail*; Victoria has its own amendments.
- **Not a code. s 9** — common law continues unless expressly overridden; **s 11** preserves the court's general power to control proceedings. *Haddara v The Queen* (2014): common-law discretion to exclude unfairly obtained evidence survives in UEL jurisdictions.
- **s 4** — applies to all Victorian proceedings (incl. interlocutory; s 4(2) sentencing). **s 8** — other Acts with specific evidence rules prevail.
- **Four Parts**: Pt 1 background/definitions (Dictionary in Sch 2) · Pt 2 adducing · Pt 3 admissibility (s 56 gateway + exclusionary rules) · Pt 4 proof.

Part 1 · Getting It In The Door (Adducing)

Adduce vs admit. Adducing = the mechanics of putting material before the court (call a witness, tender a document, show an object). An email can be adduced by print-out, copy, or oral testimony. Whether it then stays is admissibility (Part 3+). **Voire dire (s 189):** if admissibility is disputed, a hearing in the jury's absence decides it.

Who adduces? Criminal — prosecutor or accused (prosecutor's duty to put all evidence fairly bearing on guilt: *Nguyen v The Queen* (2020)). Civil — plaintiff or defendant.

1.1 Witnesses — Competence & Compellability (ss 12–18)

RULE

Competent = may lawfully give evidence. **Compellable** = may be forced to. General rule: everyone is competent (s 12) and a competent person is compellable — unless an exception applies.

Competence (s 13)

- **Incompetent** only if a person cannot understand a question or give an understandable answer, and the incapacity is *insurmountable* (s 13(1)). Burden on the party alleging incompetence.
- **Partial competence (s 13(2)):** assessed question-by-question — a child may recall events but not grasp financial matters.
- **Sworn vs unsworn:** sworn = oath/affirmation (s 21). A competent witness who doesn't understand the obligation to tell the truth may give *unsworn* evidence (s 13(4)); court must give the s 13(5) explanation. *R v GW* (2016): unsworn evidence is not inherently less reliable; no special jury warning needed.

Compellability — the exceptions

Section	Who / what	Effect
s 14	Person with incapacity making evidence too difficult	Not compellable
s 15	Heads of State / Parliament (certain)	Not compellable
s 16	Judges & jurors (as to the proceeding)	Not compellable
s 17	The accused (criminal)	Not competent for the prosecution; not compellable at all. Cannot waive (<i>Kirk v Industrial Court NSW</i> , 2010). In joint trials one accused can't be compelled against another.
s 18	Spouse / de facto / parent / child of accused	May object to giving evidence for the prosecution

Family members (s 18)

- Spouse, de facto, parent or child may **object** to testifying for the prosecution (s 18(2)); the court must ensure they know this right (s 18(7)).
- **Balancing (s 18(6)–(7)):** nature/gravity of offence · importance & availability of the evidence · nature of the relationship · whether confidential matters would be disclosed.
- Only spouse/parent/child qualify — *not* siblings or in-laws. In joint trials an objection may cover one accused but not another. Prosecutor cannot comment on a refusal (s 18(8)).
- *DPP v Fuller* (2023): the witness must receive independent legal advice about the right, must understand it, and must be asked whether they object.

Directions & duties around witnesses

- **Accused's silence (JDA ss 41–42):** judge must direct that the prosecution must prove the case, the accused need not give evidence, silence is not evidence of guilt and the jury must not speculate; no adverse comment permitted.