The Evidence Act 1995 (NSW)

OPEN	Evidence Act 1995 (NSW): Pt 2.1 witnesses (ss 12–46); Pt 2.2 documents (ss 47–51); Pt 2.3 other evidence (ss 52–54); Pt 3.1 relevance (ss 55–58); Pt 3.2 hearsay (ss 59–75); Pt 3.3 opinion (ss 76–80); Pt 3.4 admissions (ss 81–90); Pt 3.6 tendency and coincidence (ss 94–101); Pt 3.7 credibility (ss 101A–108C); Pt 3.8 character (ss 109–112); Pt 3.9 identification (ss 113–116); s 128; Pt 3.11 discretions (ss 135–139); Pt 4.1 proof (ss 140–141); Pts 4.4–4.5 corroboration and warnings (ss 164–165B).
SOURCE	the topic list from the LAWS5013/2016 notes; section headings checked against the Act in force (version from 25 Nov 2022), read 10 Nov 2026.

ROUTER · THE QUESTION INVOLVES → PAGE

Who must prove what, to what standard; a no-case submission	ss 140, 141	**EVID · 1 Proof**
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Exclude it anyway: prejudice; improperly obtained; a warning to the jury	ss 135-138, 164-165B	**EVID · 15 Discretions and warnings**
Which case to cite	the judgments	**EVID · 16- Cases in the exam**

THE ANSWER, IN ORDER (EVERY PAGE)

1	Relevance	"The evidence, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of [fact in issue], because [reason]." (s 55(1))
2	The exclusionary rule	Hearsay, opinion, admissions, tendency or coincidence, credibility, character, identification: which one applies.
3	The exception	The exception that lets it in, with each condition and the fact that meets it.
4	The discretions	ss 135, 136, 137, 138: weigh probative value against the danger.
5	Warnings; venture an answer	Any warning or direction (s 165); then "the evidence is [admissible / not admissible]."

Proof ss 140, 141

USE THIS PAGE WHEN	who must prove it; a civil claim; an allegation of fraud or abuse; the facts are in the other side's knowledge; reasonable doubt explained; a circumstantial case; "no case to answer".
OPEN	Evidence Act s 140 (civil standard); s 141 (criminal standard).
FIRST QUESTION, ALWAYS	civil or criminal, and whose case is it?

RELATED PAGES · CRIMINAL BURDENS (CRIM·1) · RELEVANCE (EVID·6) · WARNINGS (EVID·15).

s 140(1)
balance of probabilities

A civil claim: no direct evidence of when

→ The court must find a party's case proved if satisfied on the balance of probabilities (s 140(1)); probabilities drawn from the circumstances can discharge it without direct evidence; a finding with no evidentiary basis is speculation (Strong [34], [37]–[38]).

Strong · CLA s 5D: the chip on the floor
▸ *a slip, timing unknown*

s 140(2)(c)
gravity of the matters alleged

A serious allegation: fraud, abuse

→ Take into account the cause of action, the subject matter and the gravity of the matters alleged (s 140(2)); "actual persuasion", not "a mere mechanical comparison of probabilities" (Briginshaw at 361); seriousness affects the proof required, not a third standard (at 362–363; Gama via Lim [18]). Not all "residual or reasonable doubts" need be dispelled (Lim, Kirk JA [17]); Briginshaw is "manifest in s 140(2)" ([23]); applied to a civil forfeiture, a "realistic possibility" is not enough (Hitchen, Leeming JA [2]–[4]); both not on the list.

Briginshaw: actual persuasion
▸ *adultery alleged*

common law
evidential burden

The facts are in the other side's knowledge

→ An evidential burden may fall on the party who knows the facts, but the legal burden stays with the party asserting (Apollo via AMC [64]); proving a negative need not be exacting (Apollo via Gwe [85]).

s 141(1)
beyond reasonable doubt

The prosecution's case

→ The prosecution's case only if proved beyond reasonable doubt (s 141(1)); a defendant's case on the balance of probabilities (s 141(2)); the burden rests on the prosecution "from first to last" (May v O'Sullivan at 657).

May v O'Sullivan: the onus never shifts
▸ *a summary charge*

s 141(1)
reasonable doubt

Reasonable doubt explained

→ The jury sets what is reasonable; no explanatory glosses (Green via Dookheea [25]–[26]); fanciful possibilities are excluded; contrasting the civil standard is encouraged (Dookheea [41]).

Green (via Dookheea [25]): the jury sets the standard
▸ *a direction appealed*

s 141(1)
links in a chain

A circumstantial case

→ All the circumstances are weighed together; an indispensable link may need proof beyond reasonable doubt, strands in a cable do not (Shepherd via Hillier [46], [63]); even then the direction is discretionary (via Russell [116]–[117]).

Shepherd (via Hillier [63]): chain or cable
▸ *an inference of guilt*

common law
could lawfully be convicted

"No case to answer"

→ Not whether the defendant ought to be convicted but whether on the evidence as it stands he could lawfully be convicted: a question of law; the onus does not shift (May v O'Sullivan at 658). Evidence taken at its highest and capable of supporting guilt goes to the jury, even if tenuous (Doney via DPP Reference [10], [56]–[57]).

Doney (via DPP Reference [56]): weak evidence still goes to the jury
▸ *a thin Crown case*

DECIDE

Standard of proof

1 Is it a civil proceeding (s 140)?

YES → balance of probabilities, weighing the gravity of the allegation (s 140(2)); actual persuasion (Briginshaw at 361)

NO ↓

2 Is it the prosecution's case (s 141(1))? →

YES beyond reasonable doubt; no glosses (via Dookheea [26])
NO a defendant's case: balance of probabilities (s 141(2))

No case to answer

1 Taken at its highest, could the evidence support a conviction (May v O'Sullivan at 658; Doney via DPP Reference [57])? →

YES the case goes on; the onus does not shift
NO directed acquittal

SAY

The issue is whether party has proved allegation. (s 140) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities, taking into account the gravity of the matters alleged. (s 140(1), (2)(c)) The evidence produces an actual persuasion that fact, because evidence. (Briginshaw at 361) I submit the court should find allegation proved. (s 140(1))

If the allegation is grave and rests on inexact proofs or indirect inferences, it is not proved. (Briginshaw at 362)

MARKS LOST

1. Briginshaw stated as a third standard (at 362–363).
2. "Actual persuasion" cited from the Strong majority: it is Heydon J's dissent quoting Briginshaw.
3. A prima facie case said to shift the onus (May v O'Sullivan at 658).
4. A weak case withdrawn from the jury (via DPP Reference [56]).
5. Every fact in a circumstantial case said to need proof beyond reasonable doubt (via Russell [114]).
6. Reasonable doubt explained to the jury (via Dookheea [26]).
7. An evidential burden treated as shifting the legal burden (via AMC [64]).
8. Dookheea cited at 262 CLR 40: it is 402.
9. Starke J in Briginshaw cited for the principle.

Competence and compellability ss 12–20; CPA s 279

USE THIS PAGE WHEN	a young child; sworn or unsworn; the accused as a Crown witness; the accused's wife objects; a domestic violence charge; the Crown won't call an eyewitness; a mixed interview.
OPEN	Evidence Act ss 12–20; Criminal Procedure Act s 279.
FIRST QUESTION, ALWAYS	can this person give evidence, and can they be made to?

RELATED PAGES · EXAMINATION IN CHIEF (EVID·3) · ADMISSIONS (EVID·14) · WARNINGS (EVID·15).

s 13(1)
capacity to understand a question

A young child; a disability

→ Everyone is competent and compellable (s 12); not competent about a fact without capacity to understand a question about it or give an answer that can be understood, if that cannot be overcome (s 13(1)); presumed competent unless the contrary is proved (s 13(6)) on the balance of probabilities (GW [14]).

GW: two-tier competence
a six-year-old

s 13(3), (5)
obligation to give truthful evidence

Sworn or unsworn?

→ No sworn evidence without capacity to understand the obligation to give truthful evidence (s 13(3)); unsworn only once the court has told the witness all three s 13(5) matters; leaving one out makes the witness incompetent (SH [34]–[35]). No direction that unsworn evidence is less reliable (GW [56]).

SH · s 13(5): the "no pressure" limb omitted
a child under 10

s 17(2)
not competent … for the prosecution

The Crown wants the accused as its witness; the accused stays silent

→ A defendant is not competent for the prosecution (s 17(2)), even by consent (Kirk [51]–[53]); an associated defendant is not compellable unless tried separately (s 17(3)). The judge or a party other than the prosecutor may comment on the accused's silence, but not suggest guilt (s 20(2)).

Kirk · s 17(2): consent no answer
a joint OH&S trial

s 18(2)
may object

The accused's spouse objects

→ A spouse, de facto partner, parent or child may object to giving evidence for the prosecution (s 18(2)); the court makes sure they know of the right (s 18(4)), explaining s 18(6)–(7) if unrepresented, or the ruling is vitiated (Tran [28], [31]; Wilson J dissenting); excused if the likely harm to them or the relationship outweighs the desirability of the evidence (s 18(6)), weighing s 18(7); no prosecution comment (s 18(8)). No marital communications privilege (Glasby [53]). Both not on the list.

Khan (via Glasby [35]) · s 18(6): harm to the relationship
the wife objects

CPA s 279(2)
compellable

A domestic violence or child assault charge

→ s 18 does not apply if the person is compellable under CPA s 279 (s 19(b)): a family member is compellable, for either side, on a domestic violence offence against a family member or a child assault offence on a household child (s 279(2)), unless excused under s 279(4).

common law
material witnesses

The Crown won't call an eyewitness

→ The prosecutor decides; the judge may question, not direct (Apostilides via Kneebone [39]–[40]); call all available material witnesses absent good reason; inconsistency with the Crown case is not enough (Dyers [11]); unreliability needs identifiable factors (Kneebone [49]–[50]).

Kneebone: the mother not called
an eyewitness to the offence

common law
fully and fairly

A mixed record of interview

→ Tender it unless there is good reason, not to force the accused into the witness box (Nguyen [41], [45]); no duty to call every expert (Velevski, Gleeson CJ and Hayne J [47]).

Nguyen: admissions and self-defence
the Crown declines to tender

DECIDE

Can the witness give evidence?

1 Can the person understand a question about the fact and give an answer that can be understood, with help if needed (s 13(1))? Presumed yes (s 13(6)).

NO → not competent on that fact

YES ↓

2 Does the person understand the obligation to give truthful evidence (s 13(3))?

→

YES sworn evidence
NO unsworn, once the court gives all three s 13(5) instructions (SH [35])

Must the witness give evidence for the prosecution?

1 Is the witness the defendant (s 17(2))?

YES → not competent for the prosecution; no waiver (Kirk [51])

NO ↓

2 Is the witness the defendant's spouse, de facto partner, parent or child (s 18(2))?

NO → compellable (s 12(b))

YES ↓

3 Is the charge a domestic violence or child assault offence within CPA s 279 (s 19(b))?

→

YES compellable unless excused (s 279(2), (4))
NO may object; if unrepresented the court explains s 18(6)–(7) (Tran [28]); excused if the harm outweighs the desirability of the evidence (s 18(6), (7))

SAY

The issue is whether witness can be required to give evidence for the prosecution. (s 18) A person who, when required to give evidence, is the spouse, de facto partner, parent or child of a defendant may object to being required to give evidence as a witness for the prosecution. (s 18(2)) Harm would or might be caused to witness or the relationship, and it outweighs the desirability of the evidence, because fact . (s 18(6), (7)) I submit witness must not be required to give the evidence. (s 18(6))

If the charge is a domestic violence or child assault offence within s 279, witness is compellable unless excused. (s 19(b); CPA s 279(2), (4))

MARKS LOST

1. s 18 applied to a domestic violence or child assault charge (s 19(b); CPA s 279).
2. The accused called by the prosecution with consent (Kirk [51]).
3. A direction that unsworn evidence is less reliable (GW [56]).
4. One s 13(5) instruction left out (SH [35]).
5. The presumption of competence forgotten (s 13(6)).
6. The prosecutor commenting on a s 18 objection, the accused's silence or the spouse not being called (ss 18(8), 20(2), (3); DJF [4], not on the list).
7. A witness not called because inconsistent with the Crown case (Dyers [11]).
8. "All available evidence" stated as a general duty: Nettle J disagreed (Nguyen [49]–[50]).
9. Clark Equipment cited for witnesses: it is a Mareva case.