

Ready Reckoner

for

Evidence Act 2008

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DEPARTMENT
OF JUSTICE

Guide to Using the Ready Reckoner

The first column of the guide contains section numbers of the *Evidence Act 2008* ('Act') and the second column contains hyperlinks to corresponding sections of the Act. The third column contains information describing the effect of the section of the Act.

The fourth column contains information pertaining to the corresponding common law and legislative provisions including the *Evidence Act 1958* ('EA 1958') in operation prior to the commencement of the *Evidence Act 2008*.

The final column of the Guide indicates, in broad terms, the extent of the change made to the law by a section of the Act, taking into account, firstly, the extent of the change to the particular aspect of the relevant corresponding law, and secondly, the significance of the change to the law of evidence as a whole. In general:

- **N/A** – means the provision of the Act is concerned with the operation or scope of the Act (or some of its provisions), rather than substantively with the law of evidence.
- **No change** – means there has been no substantive change to the law.
- **Limited** – means that only technical changes to the provision have been made, usually related to organisation and terminology.
- **Moderate** – means that more significant changes to the law have been made, but still mostly related to organisation and terminology.
- **Significant** – means that a substantive change has been made to the law, e.g. not re-enacting a provision, completely re-organising a provision or differences which reflect a change in policy.

Disclaimer

In order to succinctly describe the main effect of the provisions of the *Evidence Act 2008* ('Act'), the author has had to simplify, condense and omit references to some of the conditions, exceptions or qualifications which may apply under those provisions. The reader should not, therefore, rely on this document as an accurate guide to the detailed operation of the Act. The same is true in relation to the descriptions of the corresponding existing common law and legislative provisions.

Ready Reckoner

Section of the Evidence Act 2008 ('Act')	Effect of the section	Corresponding existing law*	Extent of Change	
CHAPTER 1-PRELIMINARY				
PART 1.1-FORMAL MATTERS				
1	Purpose	The purpose of the Act is to make fresh provision for the law of evidence that is uniform with Commonwealth and New South Wales Law	N/A	
2	Commencement	The day the Act comes into operation	N/A	
3	Definitions	Provides that expressions used in the Act have the meanings given to them in the Dictionary, located at the end of the Act	Significant	
3A	Notes	Notes to the sections do not form part of the Act	N/A	
PART 1.2-APPLICATION OF THIS ACT				
4	Courts and proceedings to which Act applies	The Act applies to all proceedings in a Victorian Court	The existing law of evidence applies to all proceedings in a Victorian court	No change
5	Extended application of certain provisions	Cth Act only: Vic Act contains no provision		N/A
6	Territories	Cth Act only: Vic Act contains no provision		N/A
7	Act binds Crown	The Act binds the Crown in right of Victoria	The existing law of evidence binds the Crown	No change
8	Operation of Acts	The Act does not affect the operation of the provisions of any other Act		N/A
9	Application of common law and equity	The Act is not a code; however, the Act in part codifies common law principles. The Act does not affect the operation of a principle or rule of common law or equity in relation to evidence except as the Act provides expressly or by necessary implication		N/A
10	Parliamentary privilege preserved	Parliamentary privilege is preserved	Under parliamentary privilege, members of Parliament cannot be compelled to testify about	No change

Section of the <i>Evidence Act 2008</i> ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
			what happened in Parliament	
11	General powers of a court	The Act preserves the general powers of a court to control the conduct of a proceeding, including abuse of process	A court has power to control the conduct of a proceeding before it, including inherent jurisdiction to stay proceedings on grounds of abuse of process	No change
CHAPTER 2-ADDUCING EVIDENCE				
PART 2.1-WITNESSES				
Division 1-Competence and compellability of witnesses				
12	Competence and compellability	Except as otherwise provided, all persons are competent and compellable to give evidence	EA 1958, ss 22 (witness not incapacitated by crime or interest), and 24 (parties and husbands and wives may be witnesses); and Crimes Act, ss 95(2) (a person can bring proceedings against their husband or wife and is competent to give evidence in such proceedings), 399(1) (accused competent witness in his own defence), 399(2) (spouse or former spouse competent and compellable witness for the defence), and 400(2) (spouse or former spouse competent and compellable witness for the prosecution)	Moderate
13	Competence-lack of capacity	A person with reduced capacity may be incompetent to give sworn evidence, but may be competent to give unsworn evidence	EA 1958, s 23 (competence tests for children and persons with impaired mental functioning) and s 41C (expert may give evidence on these issues)	Moderate
14	Compellability-reduced capacity	A competent witness may not be compellable if it would cause substantial cost or delay to enable them to give evidence	No existing equivalent	Moderate
15	Compellability-Sovereign and others	The sovereign and other heads of state are not compellable, and MPs cannot be compelled to give evidence if this would cause them to miss a sitting of Parliament	The sovereign and other heads of state are not compellable: Cross, [13255]	Limited

Section of the Evidence Act 2008 ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
16	Competence and compellability-judges and jurors	A judge or juror in a proceeding is not competent to give evidence <i>in</i> that proceeding, and a judge in a proceeding is not compellable to give evidence <i>about</i> that proceeding	Judges and jurors can not be compelled to give evidence concerning the cases in which they were acting: Cross, [27200]-[27220]	Limited
17	Competence and compellability-defendants in criminal proceedings	A defendant is not competent to give evidence for the prosecution, and is not compellable to give evidence for or against a co-defendant	Crimes Act 1958, s 400(1) (accused not compellable)	Limited
18	Compellability of spouses and others in criminal proceedings generally	A defendant's spouse, de facto partner, parent or child may object to giving evidence for the prosecution	Crimes Act 1958, s 400(3)-(6) (spouses, parents and children may be exempted from giving evidence on behalf of the prosecution); EA 1958, s 26 (subject to Crimes Act provisions, spouses and former spouses not compellable to give evidence for prosecution)	Significant
19	Compellability of spouses and others in certain criminal proceedings	Cth and NSW Act only: Vic Act contains no provision		N/A
20	Comment on failure to give evidence	Judge may comment on defendant's failure to give evidence, but must not suggest the failure was due to the fact that the defendant was, or believed he or she was, guilty; also regulates comment on failure to give evidence by the defendant's spouse, de facto partner, parent or child	Crimes Act 1958, s 399(3) : judge and prosecutor may not make any comment on accused's failure to testify. The common law rules about the drawing of inferences from a failure to call evidence continue to apply: see <i>Jones v Dunkel</i> (1959) 101 CLR 298 and <i>Dyers v R</i> [2002] HCA 45	Significant
Division 2-Oaths and affirmations				
21	Sworn evidence of witnesses to be on oath or affirmation	A witness giving sworn evidence must either take an oath or make an affirmation before giving evidence	A witness must swear an oath in order to give evidence, subject to some statutory exceptions	Limited
22	Interpreters to act on oath or affirmation	A person must either take an oath or make an affirmation before acting as an interpreter	As a matter of practice, interpreters act on oath or affirmation	Limited
23	Choice of oath or affirmation	A person may choose whether to take an oath or make an affirmation	EA 1958, s 102 (witness may make affirmation instead of taking oath)	Limited

Section of the <i>Evidence Act 2008</i> ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
24	Requirements for oaths	A religious text need not be used in taking an oath, and an oath is effective even if the person taking it did not have a religious belief and did not understand the nature and consequence of the oath	EA 1958, ss 100 (provisions for manner of administration of oath) and 104 (validity of oath not affected by absence of religious belief)	Moderate
24A	Alternative oath	A person may take an oath even if the person's religious or spiritual beliefs do not include a belief in the existence of a god	EA 1958, s 104 (validity of oath not affected by absence of religious belief)	Moderate
25	Rights to make unsworn statements unaffected	Cth Act only: Vic Act contains no provision		N/A
Division 3-General rules about giving evidence				
26	Court's control over questioning of witness	Court may make orders in relation to the way in which witnesses are to be questioned and other matters	Subject to law of evidence and rules of natural justice, a court has limited power to control the questioning of witnesses	Moderate
27	Parties may question witnesses	A party may question any witness except as otherwise provided	Parties are permitted to question witnesses	Limited
28	Order of examination in chief, cross-examination and re-examination	Unless the court orders otherwise, cross-examination takes place after examination in chief, and re-examination after cross-examination by all parties	At common law, the order of examination is examination in chief, cross-examination and re-examination	Limited
29	Manner and form of questioning witnesses and their responses	Court may direct that a witness give evidence in narrative form, and that evidence be given in the form of charts, summaries or other explanatory material	Section 29(4) is equivalent to EA 1958, s 42A (evidence may be given in the form of charts, summaries or other explanatory material); the remainder of the section has no existing equivalent	Significant
30	Interpreters	A witness may give evidence through an interpreter unless the witness can understand and speak English sufficiently	Whether a witness will be permitted to give evidence through an interpreter is in the court's discretion: Cross, [33805]	Moderate

Section of the Evidence Act 2008 ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
31	Deaf and mute witnesses	A deaf witness may be questioned in any appropriate way, and a mute witness may give evidence by any appropriate means	No existing equivalent	Moderate
32	Attempts to revive memory in court	The court may give leave to a witness to refresh their memory from a document made or verified while the events were fresh in the witness' memory, and to read aloud from that document	A witness will be permitted to refresh their memory from a contemporaneous document made or verified by them	Moderate
33	Evidence given by police officers	A police officer may give evidence by reading or being led through their prior written statement	Police officers are, in theory at least, treated the same as any other witness in relation to the use of their notes	Moderate
34	Attempts to revive memory out of court	The court may give directions in respect of the production of documents used to revive memory out of court, and may refuse to admit the witness' evidence if the directions are not complied with	A party may call for the production of a document used by a witness to refresh their memory out of court	Moderate
35	Effect of calling for production of documents	A party is not to be required to tender a document only because the party called for, or inspected it	<i>Walker v Walker</i> [1937] HCA 44: a party calling for the production of a document in the possession of its opponent may be forced to tender it in evidence: ALRC 26 , Volume 1, [290]; Cross, [17240]	Significant
36	Person may be examined without subpoena or other process	A court may order a person present at a proceeding who is compellable to give evidence even if a subpoena or other process has not been served on them	EA 1958, s 11 (persons present in court may be examined without a subpoena)	No change
Division 4-Examination in chief and re-examination				
37	Leading questions	Subject to 5 exceptions, leading questions must not be put in examination in chief or re-examination	In general, leading questions may not be put in examination in chief or re-examination	Limited

Section of the <i>Evidence Act 2008</i> ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
38	Unfavourable witnesses	A party can, with the leave of the court, cross-examine a witness about evidence that is unfavourable to the party, about matters about which the witness is not making a genuine attempt to give evidence, and about prior inconsistent statements	At common law, a hostile witness may be cross-examined by the party who called the witness; see also Evidence Act 1958, s 34 (adverse witness may not be impeached by evidence of bad character, but can be impeached by use of prior inconsistent statement)	Significant
39	Limits on re-examination	Unless the court gives leave, on re-examination a witness may only be questioned about matters arising out of cross-examination	Re-examination is restricted to matters arising out of cross-examination	Limited
Division 5-Cross-examination				
40	Witness called in error	A party is not to cross-examine a witness called in error who has not been questioned about a relevant matter	The opposing party does not have a right to cross-examine a witness called by mistake where the witness has no knowledge of relevant events: ALRC 26 , Volume 1, [298]-[299]	Moderate
41	Improper questions	During cross-examination, the court may disallow an improper question or improper questioning, and must disallow such questions when the witness is a vulnerable witness	EA 1958, ss 39 (prohibition on indecent or scandalous questions), 40 (prohibition on questions intended to insult or annoy) and 41F (certain questions improper when asked of children or of persons with a cognitive impairment)	Significant
42	Leading questions	During cross-examination a party may put a leading question, unless the court disallows it	Leading questions are permitted in cross-examination: ALRC 26 , Volume 1, [302]	Moderate
43	Prior inconsistent statements of witnesses	A witness may be cross-examined about a prior inconsistent statement without full particulars of the statement being put to the witness, but such particulars must be put before the statement can be proved	EA 1958, ss 35 and 36 (prescribes methods for cross-examining witnesses on prior inconsistent statements, and rules determining how and when such statements can be proved)	Limited

Section of the Evidence Act 2008 ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
44	Previous representations of other persons	In general, a party can only ask a witness questions about a previous representation made by another person if that representation has been, or will be, admitted in evidence	<i>The Queen's Case</i> ¹ : a witness can not be asked questions about the content of a document unless it is in evidence	Limited
45	Production of documents	A party must produce a document used in cross-examination if the court so orders or another party so require, and the court may admit the document in evidence	ALRC 26 , Volume 1, [636]; ALRC 38 , [115(f)] and [116(d)]	Moderate
46	Leave to recall witnesses	Adds to the consequences of a breach of the rule in <i>Browne v. Dunn</i> (1893) 6 R. 67, H.L. (while leaving the rule in place) by giving the court power to give leave to a party to recall a witness about a matter on which the witness should have been, but was not, cross-examined	The rule in <i>Browne v. Dunn</i> (1893) 6 R. 67, H.L. requires a party to put to a witness so much of its case as relates to that witness. This rule continues to operate at common law.	Moderate
PART 2.2-DOCUMENTS				
47	Definitions	Definition section: restricts scope of provisions to documents as to the <i>contents</i> of which it is sought to adduce evidence		N/A
48	Proof of contents of documents	A document can be proved by a broad range of methods	Common law "best evidence" rule and EA 1958, ss 46 (effect of copies same as original), 53B-53P (rules in relation to use of copies and reproductions of documents), 55 (business records exception) and 55B (and ss 55C and 55D) (admissibility of statements produced by computers)	Significant
49	Documents in foreign countries	Section 48 does not apply to documents in foreign countries, unless the party seeking to adduce evidence of the document has served a copy of it on the other parties 28 days before	No existing equivalent	Moderate

¹ *Queen Caroline's Case* (1820) 2 Brod & Bing 248; 129 ER 976

Section of the Evidence Act 2008 ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
50	Proof of voluminous or complex documents	The court may allow a party to prove complex and voluminous documentary evidence by means of a summary	EA 1958, s 42B (voluminous or complex evidence may be given in a form that would aid its assessment by the court)	Moderate
51	Original document rule abolished	The common law rules relating to the means of proving the contents of documents are abolished	Common law "best evidence" rule requiring the production of the original of a document	Moderate
PART 2.3-OTHER EVIDENCE				
52	Adducing of other evidence not affected	The Act does not affect the operation of any Australian law or rule of practice that permits evidence to be adduced in ways other than through witnesses or by means of documents		No change
53	Views	A judge may order a demonstration, experiment or inspection	At common law, it is a matter for the court whether to order a view; see also Crimes Act 1958, s 419 (court may order view) and Juries Act 2000 s 45	Moderate
54	Views to be evidence	The court may draw any reasonable inference from what it sees or hears during a demonstration, experiment or inspection	A view is not evidence	Moderate
CHAPTER 3-ADMISSIBILITY OF EVIDENCE				
PART 3.1-RELEVANCE				
55	Relevant evidence	Relevant evidence is evidence that, if it were accepted, could rationally affect the assessment of the probability of the existence of a fact in issue. Evidence not to be taken to be irrelevant only because it only relates to the credibility of a witness; the admissibility of other evidence; or the failure to adduce evidence.	The common law's test of relevance included notions of sufficiency, or "legal" relevance as opposed to "logical" relevance: see <i>R v Stephenson</i> [1976] VR 376. The common law rules about the drawing of inferences from a failure to call evidence are not affected by the Act: see <i>Jones v Dunkel</i> (1959)	Significant

Section of the Evidence Act 2008 ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
			101 CLR 298 and <i>Dyers v R</i> [2002] HCA 45	
56	Relevant evidence to be admissible	Except as otherwise provided, relevant evidence is admissible and irrelevant evidence is inadmissible	Relevant evidence is prima facie admissible; irrelevant evidence is inadmissible	No change
57	Provisional relevance	If a finding of relevance depends on the court making another finding of fact, then the court may find that the evidence is relevant if it is reasonably open to the make the other finding, or subject to further evidence being admitted that would make the other finding reasonably open	ALRC 26 , Volume 1, [646]; ALRC 38 , [123]: where the relevance of evidence depends on some other finding or fact, the evidence can be admitted provisionally	Limited
58	Inferences as to relevance	if a question arises in relation to the evidence of a document or thing, the court may examine and draw any reasonable inference from it, including an inference as to its authenticity or identity	Matters such as the authenticity or identity of a document or thing can not be established solely by examining the document or thing	Moderate
PART 3.2-HEARSAY				
Division 1-The hearsay rule				
59	The hearsay rule-exclusion of hearsay evidence	Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation	The hearsay rule, which extends to "implied assertions": <i>Subramaniam v. Public Prosecutor</i> [1956] W.L.R. 965, Walton v R [1989] HCA 9.	Significant
60	Exception-evidence relevant for a non-hearsay purpose	Evidence admitted for a non-hearsay purpose can then be used for a hearsay purpose	Dual relevance: evidence which is inadmissible for a hearsay purpose remains inadmissible for that purpose even if it is relevant and admissible for a non-hearsay purpose	Significant
61	Exceptions to the hearsay rule dependant on competency	Ensures that the Act's competence requirements apply to evidence admitted in exception to the hearsay rule	No existing equivalent	Moderate
Division 2-"First-hand" hearsay				

Section of the Evidence Act 2008 ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
62	Restriction to "first-hand" hearsay	Restricts scope of Division 2 to "first-hand" hearsay, where person making the previous representation had personal knowledge of the asserted fact		N/A
63	Exception-civil proceedings if maker not available	In civil proceedings, evidence of a previous representation is admissible if the person who made the previous representation is not available to give evidence	No existing equivalent	Significant
64	Exception-civil proceedings if maker available	In civil proceedings, evidence of a previous representation is admissible if the person who made the previous representation gives evidence, or if it would cause undue expense or delay or not be reasonably practicable to call them to give evidence	Closest existing equivalent is EA 1958, s 55(1)(a) (statement contained in a document admissible in civil proceedings if the maker of the statement had personal knowledge of the matters dealt with)	Significant
65	Exception-criminal proceedings if maker not available	Exceptions apply in criminal proceedings where the maker of a previous representation is not available to give evidence, if the representation ...		
	65(2)(a)	... was under a duty to make that representation or to make representations of that kind	Exception for statements by persons now deceased made in the course of a legal duty	Significant
	65(2)(b)	... was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication	Res gestae exception for contemporaneous statements	Moderate
	65(2)(c)	... was made in circumstances that make it highly probable that representation is reliable	No existing equivalent	Significant
	65(2)(d) and (7)	... was against the interests (including the penal interests) of the person who made it, and was made in circumstances that make it likely that the representation is reliable	Exception for statements by persons now deceased made against interest (excluding penal interest)	Significant

Section of the Evidence Act 2008 ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
	65(3)-(6)	... was made in the course of giving evidence in an Australian or overseas proceeding, and the defendant had a reasonable opportunity to cross-examine the person who made the representation about it	EA 1958, s 55AB (depositions admissible at trial if certain conditions are met, including that the deponent is unavailable, and the accused had the opportunity to cross-examine them)	Significant
	65(8)-(9)	... is being adduced by the defendant	No existing equivalent	Significant
66	Exception-criminal proceedings if maker available	In criminal proceedings, evidence of a previous representation is admissible if the person who made the previous representation gives evidence and the representation was made when the evidence were fresh in their memory	No existing equivalent	Significant
66A	Exception-contemporaneous statements about a person's health etc.	Exception for contemporaneous representations made by a person about their health, feelings, sensations, intention, knowledge of state of mind	A person's statements about their contemporaneous state of mind or emotion are admissible as evidence of the existence of that state of mind or emotion: Cross, [37085]	Moderate
67	Notice to be given	The exceptions applying when the maker of the previous representation does not give evidence are only available if the party has given reasonable notice in writing to the other parties of their intention to adduce the evidence	No existing equivalent	Significant
68	Objections to tender of hearsay evidence in civil proceedings if maker available	Procedure allowing party to object when opponent gives notice of their intention to not call the maker of a previous representation to give evidence on the grounds of expense, delay or practicability	No existing equivalent	Significant
Division 3-Other exceptions to the hearsay rule				
69	Exception-business records	Exception for document that forms part of the records belonging to or kept in the course or for the purposes of a business	EA 1958, ss 55 (and ss 55C and 55D) (business records exception, and related provisions) and 58B (exception for books of account)	Moderate
70	Exception-contents of tags, labels and writing	Exception for tags or labels attached to, or writing placed on, an object	No existing equivalent	Significant

Section of the Evidence Act 2008 ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
71	Exception-electronic communications	Exception for representations contained in an electronic communication about the identity of the sender, the date and time of the communication, and the identity of the recipient	The rule against hearsay prevents electronic communications being admitted as evidence that was communication was sent by the person purporting to be the sender etc: ALRC 26 , Volume 1, [711]	Significant
72	Exception-Aboriginal and Torres Strait Islander traditional laws and customs	Exception for representations about traditional laws and customs	No existing equivalent	Significant
73	Exception-reputation as to relationships and age	Exception for evidence of reputation concerning relationships between people, their age, and family history	Exception for pedigree declarations: Cross, [33205]; ALRC 26 , Volume 1, [710]	Moderate
74	Exception-reputation of public or general rights	Exception for evidence of reputation about the existence, nature or extent of a public or general right	Exception for declarations as to public or general rights: Cross, [33150]; ALRC 26 , Volume 1, [710]	Moderate
75	Exception-interlocutory proceedings	Hearsay rule does not apply in interlocutory proceedings if the person adducing it also leads evidence of its source	On an interlocutory application an affidavit may contain a statement of fact based on information and belief if the grounds are set out: Supreme Court Rules, Rule 43.03(2)	Limited
PART 3.3-OPINION				
76	The opinion rule	Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed	In general, the opinion of a person about a fact is not admissible to prove that fact	No change
77	Exception-evidence relevant otherwise than as opinion evidence	Evidence admitted for a non-opinion purpose can then be used for the opinion purpose	Dual relevance: evidence of an opinion which is not admissible for an opinion can not be used for that purpose even if it is relevant and admissible for some other purpose	Significant

Section of the Evidence Act 2008 ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
78	Exception-lay opinions	Exception for an opinion based on what a person saw, heard or otherwise perceived about a matter or event, if the opinion is necessary to obtain an account or understanding of the person's perception of the matter or event	Lay opinion evidence is admissible if it falls within a miscellany of exceptions to the general rule	Moderate
78A	Exception-Aboriginal and Torres Strait Islander traditional laws and customs	Exception for opinions about traditional laws and customs	No existing equivalent	Significant
79	Exception-opinions based on specialised knowledge	Exception for an opinion based on a person's specialised knowledge	The opinion of a witness qualified in a recognised field of expertise is admissible: <i>R v Bonython</i> (1984) 38 SASR 45	Moderate
80	Ultimate issue and common knowledge rules abolished	The ultimate issue and common knowledge rules are abolished	A witness can not give their opinion on a fact which is a matter of common knowledge, or in relation to the ultimate issue in the case	Significant
PART 3.4-ADMISSIONS				
81	Hearsay and opinion rules-exception for admissions and related representations	The hearsay and opinion rules do not apply to admissions (defined in the Dictionary)	Admissions are admissible in exception to the hearsay rule	Limited
82	Exclusion of evidence of admissions that is not first-hand	The hearsay rule does apply to evidence of admissions that is not first-hand	In general, second-hand hearsay evidence of an admission will not be admissible	No change
83	Exclusion of evidence of admissions as against third parties	Evidence of an admission can not be used against a "third party", unless the party consents	Evidence of an admission can not be used against a "third party"	No change
84	Exclusion of admissions influenced by violence and certain other conduct	Evidence of an admission is inadmissible unless the court is satisfied that the admission was not influenced by violent, oppressive, inhuman or degrading conduct, or a threat of conduct of that kind	An admission is only admissible if it was made "voluntarily"	Significant

Section of the <i>Evidence Act 2008</i> ('Act')	Effect of the section	Corresponding existing law*	Extent of Change	
85	Criminal proceedings-reliability of admissions by defendants	An admission made to or in the presence of an investigating official or as a result of an act of a person capable of influencing the decision whether or not to prosecute is inadmissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected	Common law voluntariness rule and EA 1958, s 149 (confession made after promise or threat not inadmissible on that basis unless court satisfied that the inducement was really calculated to cause an untrue admission of guilt to be made)	Significant
86	Exclusion of records of oral questioning	A document recording an oral admission is not admissible unless the defendant has acknowledged that the document is a true record of the admission	Crimes Act 1958, s 464H (in trials for indictable offences, evidence of a confession made to an investigating official is inadmissible unless recorded; these rules are not repealed but continue to operate); McKinney v R [1991] HCA 6.	Moderate
87	Admissions made with authority	A previous representation made by a person is to be taken as admission by a party if the person making the representation had authority to make statements on behalf of the party or the representation was made in the furtherance of a common purpose the person had with the party	The common law recognises a number of situations where one person can make an admission on another person's behalf	Moderate
88	Proof of admissions	The court is to find that a particular person made an admission if it is reasonably open to find that they made the admission	No existing equivalent	Limited
89	Evidence of silence	In a criminal proceeding, evidence unfavourable to a party must not be drawn from evidence that the party or another person failed or refused to answer questions or to respond to a representation put or made by an investigating official	The right to silence: a suspect's refusal to answer an investigator's questions can not be used against him or her	Significant

Section of the <i>Evidence Act 2008</i> ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
90	Discretion to exclude admissions	Discretion to exclude admissions if having regard to the circumstances in which the admission was made, it would be unfair to the defendant to use the evidence	Common law fairness discretion; <i>Swaffield v R</i> (1998) 192 CLR 159, [1998] HCA 1	No change
PART 3.5-EVIDENCE OF JUDGMENTS AND CONVICTIONS				
91	Exclusion of evidence of judgments and convictions	Evidence of a decision or a finding of fact in a proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding	A court's decision in a proceeding is not admissible to prove the existence of a fact that was in issue in the proceeding	No change
92	Exceptions	In a civil proceeding, there is an exception for evidence that a party has been convicted of an offence	<i>Hollington v Hewthorn</i> [1943] KB 587, overturned by EA 1958, s 90 (a finding of guilt in a criminal proceeding can be used in a civil proceeding to prove that the person committed the offence)	Moderate
93	Savings	Preserves existing common law rules relating to defamation, judgment in rem, res judicata and issue estoppel		No change
PART 3.6-TENDENCY AND COINCIDENCE				
94	Application	Part 3.6 does not apply to credibility evidence, in bail or sentencing proceedings, or when a person's character, reputation or tendency is a fact in issue	The similar fact/propensity rule does not apply in all contexts, or to all evidence which reveals the commission of other crimes by the accused	No change
95	Use of evidence for other purposes	Dual relevance: evidence which is not admissible under Part 3.6 to prove a matter can not be used to prove that matter even if it is admissible for another purpose	Dual relevance: evidence which is not admissible for a propensity purpose can not be used for that purpose even if it is relevant and admissible for a non-propensity purpose	No change
96	Failure to act	A reference in Part 3.6 to doing an act includes failing to do an act	Similar fact/propensity evidence can extend to omissions	No change

Section of the Evidence Act 2008 ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
97	The tendency rule	In any proceeding, evidence of the character, reputation, conduct or tendency of a person is not admissible to prove that the person had a tendency to act in a particular way or to have a particular state of mind, unless the party seeking to adduce the evidence gives reasonable written notice, and the evidence has significant probative value	In a criminal proceeding, the prosecution can not use evidence of the accused's propensity to act in a particular way; Pfennig v R [1995] HCA 7; Crimes Act 1958, s 398A (propensity evidence is admissible if the court considers that it is just in all the circumstances to admit the evidence despite any prejudicial effect it may have)	Significant
98	The coincidence rule	In any proceeding, evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, it is improbable that the events occurred coincidentally, unless the party seeking to adduce the evidence gives reasonable written notice, and the evidence has significant probative value	In a criminal proceeding, the prosecution can not rely on similar fact/objective improbability reasoning; Perry v R [1982] HCA 75	Significant
99	Requirements for notices	Notices should be accordance with any applicable regulations or rules of court	The existing law does not impose any notice requirements	Moderate
100	Court may dispense with notice requirements	The court may, on the application of a party, dispense with the notice requirements	The existing law does not impose any notice requirements	Moderate
101	Further restrictions on tendency evidence and coincidence evidence adduced by prosecution	In a criminal proceeding, tendency or coincidence evidence adduced by the prosecution cannot be used against a defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant	In a criminal proceeding, propensity and similar fact evidence are only admissible if it is just to admit the evidence despite its prejudicial effect: Crimes Act 1958, s 398A	Moderate
PART 3.7-CREDIBILITY				
Division 1-Credibility evidence				
101A	Credibility evidence	Defines "credibility evidence" for the purposes of the Act	No existing equivalent	N/A
Division 2-Credibility of witnesses				

Section of the Evidence Act 2008 ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
102	The credibility rule	Credibility evidence about a witness is not admissible	Although nowhere stated clearly, in effect evidence relevant only to the credibility of a witness is not admissible, subject to exceptions below (to which change is also made by the Act)	Moderate
103	Exception-cross-examination as to credibility	The credibility rule does not apply to evidence adduced in cross-examination if the evidence could substantially affect the assessment of the credibility of the witness	Cross-examination as to credit is limited by EA 1958, s 37	Moderate
104	Further protections-cross-examination as to credibility	A defendant in a criminal proceeding must not be cross-examined about a matter that is relevant to the assessment of the defendant's credibility unless the court gives leave	Cross-examination of the accused on potentially prejudicial matters is regulated by Crimes Act 1958, s 399(5)	Moderate
105	Further protections-defendants making unsworn statements	Contains no provision		N/A
106	Exception-rebutting denials by other evidence	If a witness in cross-examination denies a matter, evidence may only be adduced to rebut the denial if the court gives leave, or the matter falls within a list of exceptions, that includes bias, prior convictions and prior inconsistent statements	The common law finality or collateral issues rule, including the rule that allows evidence to be adduced of a witness' lack of veracity (see Cross [19045] and R v BDX [2009] VSCA 28); supplemented by EA 1958, ss 33 (witness may be cross-examined about previous conviction, and if they deny it, the conviction can be proved) and 35 (if witness is cross-examined about prior inconsistent statement, and denies it, the statement may be proved if certain conditions are met).	Significant
107	Exception-application of certain provisions to makers of representations	Contains no provision		N/A

Section of the Evidence Act 2008 ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
108	Exception-re-establishing credibility	The credibility rule does not apply to evidence adduced in re-examination, or to evidence of a prior consistent statement if evidence of a prior inconsistent statement has been admitted, or there has been an allegation of recent fabrication	Prior consistent statements may be adduced when the cross-examiner has made an allegation of "recent invention" or as a "recent complaint" in a sexual offence proceeding	Moderate
Division 3-Credibility of persons who are not witnesses				
108A	Admissibility of evidence of credibility of person who has made a previous representation	If a previous representation has been admitted, and the person who made is not called to give evidence, then credibility evidence about the person is admissible if the evidence could substantially affect the assessment of the person's credibility	Evidence relevant to the credibility of the maker of a hearsay statement is not generally admissible; but see EA 1958, s 55A (where statement given in evidence by virtue of s 55 , and the person who made the statement or supplied the information is not called as a witness, then any evidence which could have been adduced to destroy or support their credibility if they had been called as a witness, can be adduced)	Significant
108B	Further protections-previous representations of an accused who is not a witness	Where the person who made the previous representation referred to in s 108A is a defendant, the credibility evidence is not admissible unless the court gives leave	No existing equivalent	Moderate
Division 4-Persons with specialised knowledge				
108C	Exception-evidence of persons with specialised knowledge	The credibility rules do not apply to evidence given by a person about the credibility of another witness if the person has specialised knowledge, and the evidence is based on that knowledge	With some exceptions, an expert can not give evidence about the credibility of another witness; see <i>Toohey v Metropolitan Police Commissioner</i> [1965] A.C. 595 and Farrell v R [1998] HCA 50	Significant
PART 3.8-CHARACTER				
109	Application	Limits scope of Part 3.8 to criminal proceedings		N/A

Section of the Evidence Act 2008 ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
110	Evidence about character of accused persons	A defendant can lead evidence to prove that they are generally, or in a particular respect, a person of good character, and if they do evidence can be adduced to prove that they are not (generally, or in that respect) a person of good character	A criminal defendant can lead evidence of their good character, and if they do so, the prosecution can lead evidence in rebuttal; see also Crimes Act 1958, ss 395(7) (where accused gives good character evidence the court may permit evidence of a previous conviction to be led) and 399(5)(b) (loss of shield against prejudicial cross-examination when defence leads evidence of good character or makes imputations against character of prosecution witnesses)	Moderate
111	Evidence about character of co-accused	A criminal defendant can lead expert opinion evidence about the character of their co-accused	<i>R v Lowery and King (No 3)</i> [1972] VR 939 and <i>R v Darrington and McGauley</i> [1980] VR 353: a criminal defendant may be permitted to lead expert evidence about their co-accused's character	Moderate
112	Leave required to cross-examine about character of accused or co-accused	The leave of the court must be obtained before a criminal defendant can be cross-examined by the prosecution or a co-defendant about their character	Crimes Act 1958, ss 399(5) and (6) (leave to cross-examine only needed when accused has led evidence of good character or made imputations against character of prosecution witnesses)	Moderate
PART 3.9-IDENTIFICATION EVIDENCE				
113	Application of Part 114. Exclusion of visual identification evidence	Limits scope of Part 3.9 to criminal proceedings		N/A
114	Exclusion of visual identification evidence	If it was reasonable to hold an identification parade, then visual identification evidence is inadmissible unless an identification parade was held	Visual identification evidence can be excluded at the discretion of the judge: Alexander v R [1981] HCA 17; Festa v R [2001] HCA 72	Significant
115	Exclusion of evidence of identification by pictures	Subject to exceptions, picture identification evidence will be inadmissible if the defendant was in custody at the time the pictures were examined, or if the pictures suggest they are pictures of persons in police	Picture identification evidence can be excluded at the discretion of the judge: Alexander v R [1981] HCA 17	Significant

Section of the <i>Evidence Act 2008</i> ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
		custody		
116	Directions to jury	The judge must warn the jury about the need for caution before accepting identification evidence, and about the general and case specific reasons for that need	Judge must warn jury about particular and general dangers of identification evidence: Domican v R [1992] HCA 13	No change
PART 3.10-PRIVILEGES				
Division 1-Client legal privilege				
117	Definitions	Definitions for the purposes of Division 1 of Part 3.10	No existing equivalent	Limited
118	Legal advice	A confidential communication made or confidential document prepared for the dominant purpose of enabling a lawyer to provide legal advice to a client is privileged	Legal professional privilege: a confidential communication made for the dominant purpose of enabling a client to receive legal advice is privileged: Esso Australia Resources Ltd v FCT ²	Limited
119	Litigation	A confidential communication made or confidential document prepared for the dominant purpose of a client being provided with professional legal services relating to existing, anticipated or pending legal proceedings is privileged	Legal professional privilege: a confidential communication made for the dominant purpose of enabling a client to receive legal services in relation to existing or anticipated litigation is privileged: Esso Australia Resources Ltd v FCT ³	Limited
120	Unrepresented parties	A confidential communication between an unrepresented party and another person or the contents of a confidential document prepared for the dominant purpose of preparing for or conducting a legal proceeding is privileged	Privilege for documents relating solely to party's own case: ALRC 26 , Volume 1, [887]	Moderate

² *Esso Australia Resources v Commissioner of Taxation* [1999] HCA 67; 201 CLR 49; 168 ALR 123; 74 ALJR 339

³ *Ibid.*

Section of the Evidence Act 2008 ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
121	Loss of client legal privilege-generally	Division 1 does not prevent the adducing of evidence: relevant to the intentions or competence of a client or party who has died; if were the evidence not adduced the court would be prevented from enforcing an order; or of evidence of a communication or document that affects a right of a person	The section thus narrows <i>R v Bell; Ex parte Lees</i> [1980] HCA 26 while adding two further exceptions to the privilege	Moderate
122	Loss of client legal privilege-consent and related matters	Division 1 does not prevent the adducing of evidence given with the consent of the client, or if the client has acted in a way that is inconsistent with the client or party objecting, including where the client has knowingly and voluntarily disclosed the substance of the evidence to another person	Waiver can be express or implied, or can be imputed on the basis of an inconsistency between the conduct and the maintenance of confidentiality, informed by notions of fairness: <i>Attorney-General (NT) v Maurice</i> [1986] HCA 80; <i>Goldberg v Ng</i> [1995] HCA 39; <i>Mann v Carnell</i> [1999] HCA 66	Significant
123	Loss of client legal privilege-defendants	Division 1 does not prevent a criminal defendant from adducing evidence unless it is evidence of a confidential communication or document of an associated defendant	There is no exception to privilege for documents relevant to prove the innocence of a criminal defendant: <i>Carter v Managing Partner Northmore Hale Davy & Leake</i> [1995] HCA 33	Significant
124	Loss of client legal privilege-joint clients	In civil proceedings, where 2 or more parties have previously jointly retained a lawyer, Division 1 does not prevent one of those parties from adducing evidence of a communication made by any of them to the lawyer	In general, where the parties to proceedings have previously jointly retained a lawyer, they can not use evidence of communications made in the course of that retainer in the subsequent proceedings: <i>ALRC 26</i> , Volume 1, [884]; Cross, [25290]-[25300]	Moderate

Section of the Evidence Act 2008 ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
125	Loss of client legal privilege-misconduct	Division 1 does not prevent the adducing of evidence of a communication made or document prepared in furtherance of the commission of a fraud, an offence, an act that renders a person liable to civil penalty, or a deliberate abuse of a power	Crime/fraud exception to legal professional privilege for communications made in furtherance of an improper purpose: <i>R v Cox and Railton</i> (1884) 14 QBD 153; <i>Attorney-General (NT) v Kearney</i> [1985] HCA 60	Limited
126	Loss of client legal privilege-related communications and documents	If privilege has been lost under ss 121-5 in relation to a communication or document, then Division 1 does not prevent the adducing of evidence of a communication or document if it is reasonably necessary to enable a proper understanding of that communication or document	Implied waiver of "associated materials": <i>AWB Ltd v Cole (No 5)</i> ⁴	Moderate
Division 1A-Professional confidential relationship privilege				
Division 1B-Sexual assault communications privilege				
Division 2-Other privileges				
127	Religious confessions	A member of clergy is entitled to refuse to divulge the fact or contents of a religious confession, unless it was made for a criminal purpose	EA 1958, s 28(1) (clergymen not to disclose confession in any proceeding)	Moderate
128	Privilege in respect of self-incrimination in other proceedings	Where a witness claims the privilege against self-incrimination, the court may, if satisfied that the interests of justice require it, order the witness to give the evidence and provide the witness with a certificate preventing the use of their evidence (and of any evidence obtained as a result of that evidence) against them	Common law privilege against self-incrimination, <i>EPA v Caltex</i> (1993) 178 CLR 477, [1993] HCA 74; and EA 1958, s 29 (limits privilege against self-incrimination to answer that will tend to subject the witness to punishment for treason or an indictable offence); Crimes Act 1958, s 399(4) (no privilege against self-incrimination for accused in relation to the offence charged)	Significant
128A	Privilege in respect of self-incrimination-exception for certain orders etc.	Creates mechanism for determining privilege claims in relation to <i>Mareva</i> and <i>Anton Pillar</i> orders	Common law privilege against self-incrimination as applied in these contexts	Significant

⁴ *AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5)* (with Corrigendum dated 25 October 2006) [2006] FCA 1234

Section of the <i>Evidence Act 2008</i> ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
Division 3-Evidence excluded in the public interest				
129	Exclusion of evidence of reasons for judicial etc. decisions	Evidence of the reasons for decision (other than the published reasons) or deliberations of a judge or arbitrator are not admissible	There is no specific privilege applying to evidence of the reasons for judicial decisions: ALRC 26 , Volume 1, [873]-[876]	
130	Exclusion of evidence of matters of state	Evidence relating to matters of states is inadmissible if the public interest in admitting evidence is outweighed by the public interest in preserving secrecy or confidentiality	Public interest immunity: Sankey v Whitlam [1978] HCA 43	Moderate
131	Exclusion of evidence of settlement negotiations	Communications made and documents prepared in connection with an attempt to negotiate a settlement of the dispute are not admissible	Privilege in aid of settlement/"without prejudice" privilege: Field v Commissioner for Railways (NSW) [1957] HCA 92	Moderate
Division 4-General				
131A	Application of Division to preliminary proceedings of courts	Applies to provisions of Divisions 1 and 3 to pre-trial procedures (ousting common law rules which previously applied: see Esso Australia Resources Ltd v FCT ⁵)	The common law rules of privilege and immunity previously applied to all pre-trial or non-curial proceedings	Significant
132	Court to inform of rights to make applications and objections	Court has obligation to ensure that a party or witness is aware of its rights under Part 3.10	No existing equivalent	Moderate
133	Court may inspect etc. documents	If a question under Part 3.10 arises in relation to a document, the court may inspect the document for the purpose of determining the question	A court has a discretion to inspect a document in order to determine a claim for privilege or immunity	Limited
134	Inadmissibility of evidence that must not be adduced or given	Evidence that must not be adduced because of Part 3.10 is not admissible	The fact that evidence which has been adduced was privileged does not mean that the evidence is inadmissible	Significant

⁵ *Esso Australia Resources v Commissioner of Taxation* [1999] HCA 67; 201 CLR 49; 168 ALR 123; 74 ALJR 339

Section of the <i>Evidence Act 2008</i> ('Act')	Effect of the section	Corresponding existing law*	Extent of Change	
PART 3.11-DISCRETIONARY AND MANDATORY EXCLUSIONS				
135	General discretion to exclude evidence	Court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial; be misleading or confusing; or cause or result in an undue waste of time	A trial judge in a criminal proceeding has a discretion to exclude otherwise admissible evidence on the grounds that it would be unfairly prejudicial to the accused: <i>R v Christie</i> [1914] AC 545; see also EA 1958, s 53R (court may reject evidence of a reproduction if it appears inexpedient in the interests of justice to admit the reproduction)	Significant
136	General discretion to limit use of evidence	Court may limit the use of evidence if there is a danger that a particular use might be unfairly prejudicial or misleading or confusing	At common law there is no discretion to limit the use of admissible evidence	Significant
137	Exclusion of prejudicial evidence in criminal proceedings	In a criminal proceeding, the court must refuse to admit prosecution evidence if its probative value is outweighed by the danger of unfair prejudice to the defendant	A trial judge in a criminal proceeding has a discretion to exclude otherwise admissible evidence on the grounds that it would be unfairly prejudicial to the accused: <i>R v Christie</i> [1914] AC 545	Significant
138	Exclusion of improperly or illegally obtained evidence	Evidence obtained improperly or illegally (or in consequence of an impropriety or illegality) is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability	Illegally or improperly obtained evidence is admissible but may be excluded in exercise of public policy discretion: Bunning v Cross [1978] HCA 22, Ridgeway v R [1995] HCA 66	Significant
139	Cautioning of persons	For the purposes of s 138, a statement made during questioning is taken to have been obtained improperly if the person was not cautioned	In general, a failure to properly caution a suspect will mean that any evidence obtained from the suspect is improperly or illegally obtained for the purposes of the public policy discretion	Moderate
CHAPTER 4-PROOF				
PART 4.1-STANDARD OF PROOF				
140	Civil proceedings-standard of proof	In civil proceedings, the court must find the case of a party proved if it is satisfied on the balance of probabilities, taking into account the nature of the thing to be proved, and the gravity of the matters	The standard of proof in civil proceedings is on the balance of probabilities, but the strength of the evidence necessary to meet this standard may vary according to the nature of what it is	No change

Section of the Evidence Act 2008 ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
		alleged	sought to prove: Briginshaw v Briginshaw [1938] HCA 34; Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd [1992] HCA 66	
141	Criminal proceedings-standard of proof	The court is to find the prosecution case proved if it is satisfied beyond reasonable doubt; and to find the case of a defendant proved if satisfied on the balance of probabilities	The standard of proof that applies to the prosecution case in criminal proceedings is beyond reasonable doubt: Woolmington v DPP [1935] UKHL 1	No change
142	Admissibility of evidence-standard of proof	The standard of proof for facts necessary for determining admissibility is on the balance of probabilities	The standard of proof on a <i>voir dire</i> is on the balance of probabilities	No change
PART 4.2-JUDICIAL NOTICE				
143	Matters of law	Proof is not required about matters of Australian law	A court is entitled to inform itself in any way it sees fit of the state of law in an Australian jurisdiction: see also EA 1958, ss 61 (a document purporting to be a copy of a Royal proclamation is admissible as evidence of the proclamation), 63 (modes of proving proclamations, orders in council, regulations etc), 76 (Acts of UK Parliaments to be judicially noticed), 77 (Acts of Australian Parliaments to be judicially noticed), 83-85 (proof of by-laws)	Limited
144	Matters of common knowledge	Proof is not required about knowledge that is not reasonably open to question and is a matter of common knowledge or is capable of verification by reference to an authoritative document	A court can take judicial notice of facts forming part of common knowledge or which can be verified by reference to an authoritative document	Limited
145	Certain Crown certificates	Preserves principles and rules of common law and equity relating to effect of a Crown certificate with respect to matters of international affairs	A court can take judicial notice of certain matters of State	No change
PART 4.3-FACILITATION OF PROOF				
Division 1-General				

Section of the Evidence Act 2008 ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
146	Evidence produced by processes, machines and other devices	Where a document or thing was produced by a device or process that ordinarily produces a particular outcome, it is presumed that on the occasion in question the process or device produced that outcome	At common law, a party seeking to adduce evidence produced by a machine or other device must give evidence of the accuracy and reliability of the device: ALRC 26 , Volume 1, [494] and [988]; Volume 2, Appendix C, [278]; see also EA 1958, s 55B(2) (conditions for admissibility of statements produced by computers)	Significant
147	Documents produced by processes, machines and other devices in the course of business	Similar presumption to s 146 where the document or thing was part of the records of a business and the device or process was used for the purposes of the business	At common law, a party seeking to adduce evidence of business records produced by a device or process must give evidence of the accuracy and reliability of the device or process: ALRC 26 , Volume 1, [494] and [989]; Volume 2, Appendix C, [278]; see also EA 1958, s 55B(2) (conditions for admissibility of statements produced by computers)	Significant
148	Evidence of certain acts of justices, Australian lawyers and notaries public	Where a document is required to be attested etc by a justice of the peace etc and purports to be so attested etc, it is presumed that it was so attested etc	No existing equivalent	Significant
149	Attestation of documents	Not necessary to adduce the evidence of an attesting witness to prove that the document was attested or signed as it purports to be	EA 1958, ss 57 (instrument that is only valid if attested can be proved in manner in which it could be proved if no attesting witness was alive) and 147 (instrument that does not need to be attested to be valid need not be proved by the attesting witness)	Moderate
150	Seals and signatures	Presumption of validity in relation to the imprint of certain Australian seals	EA 1958, ss 45 (where certified, authenticated, sealed, stamped or signed copy can be given in evidence, no further proof need be given of the sealing, stamping, signing etc), 78 (judicial notice of public seal of any Australasian State), 79 (judicial notice of certain signatures and seals) and 81 (presumption of validity of seal or signature of which judicial notice taken)	Moderate

Section of the <i>Evidence Act 2008</i> ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
151	Seals of bodies established under State law	Cth Act only: Vic Act contains no provision		N/A
152	Documents produced from proper custody	A document more than 20 years old and produced from proper custody is presumed to be that which it purports to be, and to have been validly executed and attested	EA 1958, s 58 (common law presumptions applying to 30 year old documents apply to 20 year old documents)	Moderate
Division 2-Matters of official record				
153	Gazettes and other official documents	A document purporting to be a Government Gazette or to have been printed by a Government Printer or by authority of an Australian Government is presumed to be that which it purports to be	EA 1958, ss 47 (no proof necessary that document purporting to be printed by Government Printer was printed by Government Printer) and 62 (paper purporting to be Government Gazette is prima facie evidence that it is Government Gazette), 63 (modes of proving proclamations, orders in council, regulations etc) and 64 (act notified in Government Gazette is prima facie evidence of act having been duly done)	Moderate
154	Documents published by authority of Parliaments etc.	A document purporting to have been printed by the authority of an Australian Parliament is presumed to be that which it purports to be	EA 1958, s 60 (documents purporting to be copies of the votes and proceedings of any House of any Australasian Parliament admissible as evidence thereof)	Moderate
155	Evidence of official records	Evidence of a Commonwealth record or of a official record of an Australian State or Territory may be adduced by producing a document that purports to be such a record	EA 1958, ss 53A (certified reproductions of certain public documents admissible without further proof) and 63 (modes of proving proclamations, orders in council, regulations etc)	Moderate

Section of the <i>Evidence Act 2008</i> ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
155A	Evidence of Commonwealth documents	Cth Act only: Vic Act contains no provision		N/A
156	Public documents	A document that purports to be a copy of a public document, that is sealed or certified is presumed to be that which it purports to be	EA 1958, s 67 (public documents of Australian State admissible on same basis as their Victorian equivalent would be admissible)	Moderate
157	Public documents relating to court processes	Evidence of a public document that is a judgment or other process of a court may be adduced by producing a document that purports to be a copy of such a public document that is an examined copy, or is sealed or signed by a proper officer of the court	EA 1958, s 49 (judgments and orders of foreign courts, and other legal documents, may be given by an examined copy or by a copy sealed with the seal of the court or a judge of the court)	Limited
158	Evidence of certain public documents	A public document of a State or Territory admissible under the law of that State or Territory is admissible to the same extent and for the same purpose in all courts	EA 1958, ss 65-66 (documents admissible in other Australian States admissible on same basis in Victoria), and 67 (public documents of other Australasian States admissible on the same basis as their Victorian equivalent would be admissible)	Limited
159	Official statistics	A document that purports to be published by the Australian Statistician and to contain statistics analysed by the Australian Statistician is evidence that those statistics were analysed by the Australian Statistician	No existing equivalent	Moderate
Division 3-Matters relating to post and communications				
160	Postal articles	Presumption that a postal article sent by prepaid post to an Australian address was received at that address on the fourth working day after having been posted	No existing equivalent	Significant
161	Electronic communications	Presumptions in relation to the sending and receipt of electronic communications	No existing equivalent	Significant

Section of the <i>Evidence Act 2008</i> ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
162	Lettergrams and telegrams	Presumption that a lettergram or telegram was received 24 hours after it was delivered to a post office for transmission	No existing equivalent	Significant
163	Proof of letters having been sent by Commonwealth agencies	Cth Act only: Vic Act contains no provision		N/A
PART 4.4-CORROBORATION				
164	Corroboration requirements abolished	Abolition of any requirement that evidence be corroborated (except in cases of perjury) and of any rule requiring the giving of a corroboration warning	Common law corroboration requirements; see also EA 1958, s 56 (where corroboration is required, the evidence of a person is not corroborated by evidence of a statement they made that was rendered admissible by EA's documentary evidence provisions)	Significant
PART 4.5-WARNINGS AND INFORMATION				
165	Unreliable evidence	Requirement that judge give a warning about the need for caution in relation to certain specified classes of unreliable evidence, including hearsay, identification evidence, and the evidence of accomplices and prison informers	Mandatory warnings (including corroboration warnings) must be given in relation to a number of different categories of unreliable evidence, including identification evidence, the evidence of accomplices and prison informers; see also Crimes Act 1958, s 61 (prohibition on judge warning jury that complainants in sexual cases are an unreliable class of witness)	Significant
165A	Warnings in relation to children's evidence	Prohibition on certain warnings in proceedings in which evidence is given by a child	EA 1958, s 23(2A) (judge not to warn jury that the law regards persons with impaired mental functioning or children as an unreliable class of witness)	Moderate
165B	Delay in prosecution	If court is satisfied that a criminal defendant has suffered significant forensic disadvantage because of delay, the court must inform the jury of the nature of that disadvantage	Longman v R [1989] HCA 60; and Crimes Act 1958, s 61 (in trial for sexual offence, where delay in making complaint raised, requirement that judge inform the jury that there may be good reasons for delay)	Limited

Section of the <i>Evidence Act 2008</i> ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
PART 4.6-ANCILLARY PROVISIONS				
Division 1-Requests to produce documents or call witnesses				
166	Definition of request	A "request" in Division 1 means a request that a party makes to another party to do one or more of a number of specified things, such as producing or permitting it to examine a document	Processes for discovery and inspection in relation to books of account contained in EA 1958, ss 58C-58J	Significant
167	Requests may be made about certain matters	A party may make a reasonable request in relation to a previous representation, evidence of a conviction, or the authenticity, identity or admissibility of a document or thing	Processes for discovery and inspection in relation to books of account contained in EA 1958, ss 58C-58J	Significant
168	Time limits for making certain requests	Certain requests are subject to time limits	Processes for discovery and inspection in relation to books of account contained in EA 1958, ss 58C-58J	Significant
169	Failure or refusal to comply with requests	If a party fails or refuses without reasonable cause to comply with a request, the court may, inter alia, order the party to comply with the request	Processes for discovery and inspection in relation to books of account contained in EA 1958, ss 58C-58J	Significant
Division 2-Proof of certain matters by affidavits or written statements				
170	Evidence relating to certain matters	Evidence of certain facts (such as the proof of the contents of a document, and certain documentary hearsay exceptions) may be given by a person permitted under s 171 to give such evidence	No existing equivalent	Moderate
171	Persons who may give such evidence	Such evidence may be given by a person who had a position of responsibility in relation to the document or thing, or who is an "authorised person"	No existing equivalent	Moderate
172	Evidence based on knowledge, belief or information	The evidence may include evidence based on knowledge, belief or information	No existing equivalent	Moderate
173	Notification of other parties	A copy of an affidavit or statement under Division 2 must be served on each party a reasonable time before the hearing	No existing equivalent	Moderate

Section of the <i>Evidence Act 2008</i> ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
Division 3-Foreign law				
174	Evidence of foreign law	Evidence of foreign law may be adduced by producing certain official or apparently reliable documents	At common law, in general, foreign law must be proved with expert evidence: Cross, [41005]-[41035]; see also EA 1958, ss 48 (foreign treaties may be proved by copies), 50 (mode of proving Royal proclamations and orders of Privy Council etc) and 76 (Acts of UK Parliaments to be judicially noticed)	Significant
175	Evidence of law reports of foreign countries	Evidence of the unwritten or common law of a foreign country may be adduced by producing law reports	No existing equivalent	Moderate
176	Questions of foreign law to be decided by judge	Questions of foreign law are decided by the judge alone	Questions of foreign law are questions of fact to be decided by the judge	No change
Division 4-Procedures for proving other matters				
177	Certificates of expert evidence	Evidence of a person's opinion may be adduced by tendering a certificate signed by that person which sets out their qualifications and opinion	EA 1958, s 55(8) (in deciding whether or not a person is fit to attend or testify, court may act on medical certificate) and 75A (in hearings of indictable offences before the Magistrates' Court, results of scientific tests etc can be proved by certificate)	Significant
178	Convictions, acquittals and other judicial proceedings	Evidence of convictions, sentences and other court orders may be given by means of a certificate signed by a judge etc of the applicable court	EA 1958, ss 87-89 (methods for proving previous convictions and acquittals, in Victoria and elsewhere)	Moderate
179	Proof of identity of convicted persons- affidavits by members of State or Territory police forces	The identity of a convicted person can be proved by means of an affidavit sworn by a fingerprint expert of a State or Territory	No existing equivalent	Moderate
180	Proof of identity of convicted persons- affidavits by members of	The identity of a convicted person can be proved by means of an affidavit sworn by a fingerprint expert of the Australian Federal Police	No existing equivalent	Moderate

Section of the <i>Evidence Act 2008</i> ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
	Australian Federal Police			
181	Proof of service of statutory notifications, notices, orders and directions	The service, giving or sending of a written notification, notice, order or direction can be proved by an affidavit sworn by the person who served, gave or sent it	No existing equivalent	Moderate
CHAPTER 5-MISCELLANEOUS				
182	Application of certain sections in relation to Commonwealth records	Cth Act only: Vic Act contains no provision		N/A
183	Inferences	Where a question arises under the Act in relation to a document or thing, the court may examine the document or thing and draw any reasonable inferences from it	In general, facts relevant to the admissibility of documents or things can not be established solely by examining the document or thing	Moderate
184	Accused may admit matters and give consents	In a criminal proceeding, if they have received legal advice to do so, a defendant may admit any matters of fact and give any consent that a party in a civil proceeding could	EA 1958, s 149A (accused may make admissions of fact)	Moderate
185	Full faith and credit to be given to documents properly authenticated	Cth Act only: Vic Act contains no provision		N/A
186	Swearing of affidavits	Cth Act only: Vic Act contains no provision		N/A
187	No privilege against self-incrimination for bodies corporate	A corporation can not claim the privilege against self-incrimination	A corporation can not claim the privilege against self-incrimination: EPA v Caltex (1993) 178 CLR 477, [1993] HCA 74	No change
188	Impounding documents	The court may direct that a document that has been tendered or produced is to be impounded	EA 1958, s 146 (where document has been tendered or produced, court may direct that it be impounded)	Limited

Section of the Evidence Act 2008 ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
189	The voir dire	This provision prescribes the manner in which a voir dire is to be held in terms largely consistent with the existing law, but does not deal with the question of whether a voir dire should be held, which continues to be a matter for the common law		Limited
190	Waiver of rules of evidence	If the parties consent, the court may dispense with the application of Division 3-5 of Part 2.1, Parts 2.2 and 2.3, and Parts 3.2 to 3.8 of the Act	EA 1958, s 149B (where accused and prosecution consent, court may give directions, including directions about how a fact may be proved, which are not in accordance with the rules of evidence)	Moderate
191	Agreements as to facts	Where the parties agree, for the purposes of a proceeding, not to dispute a fact, no evidence is needed to prove the fact, and evidence may not be adduced to contradict it	EA 1958, s 149AB (where parties agree, for the purposes of a proceeding, not to dispute a fact, no evidence is needed to prove the fact, and evidence may not be adduced to contradict it)	No change
192	Leave, permission or direction may be given on terms	Where, under the Act, a court may give any leave, permission or direction it may do so on such terms as the court thinks fit, and is to take into account certain specified matters	No existing equivalent: relates to the operation of other provisions of the Act	N/A
192A	Advance rulings and findings	The court may give advance rulings on questions under the Act	Crimes Act 1958, ss 391A (judge may hear and determine question of law before jury is empanelled) and 391B (where accused seeks to have evidence excluded solely by the exercise of discretion, court may hear evidence on behalf of the accused before evidence on behalf of the Crown)	Moderate
193	Additional powers	The section confers additional powers on the court (including rule-making powers) in relation to discovery and inspection, and ordering the disclosure and exchange of evidence	Existing powers in relation to inspection and discovery; see also processes for discovery and inspection in relation to books of account contained in EA 1958, ss 58C-58J	Limited

Section of the <i>Evidence Act 2008</i> ('Act')		Effect of the section	Corresponding existing law*	Extent of Change
194	Witnesses failing to attend proceedings	Where a witness fails to appear, the court may issue a warrant	EA 1958, s 150 (court may issue warrant when person under subpoena or summons does not appear). See also similar powers under Crimes Act 1958 s 415 , and Magistrates Court Act 1989 s 61 .	Moderate
195	Prohibited question not to be published	Without the express permission of a court, a person must not publish a question a court has disallowed under s 41, or for reasons related to Part 3.7 (Credibility)	EA 1958, s 41 (prohibited questions not to be published)	Limited
196	Proceedings for offences	NSW Act only: Vic Act contains no provision		N/A
197	Regulations	Confers regulation-making power	EA 1958, s 152 (power to make regulations with respect to allowances and expenses for witnesses and interpreters, and other matters)	Limited
S1	SCHEDULE 1-Oaths and Affirmations		EA 1958, s 103 (form of oral affirmation)	Limited

Glossary

Glossary of terminology used

<i>Act</i>	<i>Evidence Act 2008</i>
<i>ALRC 26</i>	Australian Law Reform Commission's Interim Report on Evidence (1985)
<i>ALRC 38</i>	Australian Law Reform Commission's Final Report on Evidence (1987)
<i>Anton Piller Order</i>	Order providing the right to search premises and seize evidence without prior warning, refers to the case <i>Anton Piller KG v Manufacturing Processes Ltd</i> [1976] Ch 55
<i>Cross</i>	Heydon, J. D. <i>Cross on Evidence</i> , Butterworths, Sydney, (NB paragraph numbers stay the same between editions)
<i>Cth</i>	Commonwealth
<i>EA 1958</i>	<i>Evidence Act 1958</i>
<i>Estoppel</i>	To stop (Old French)
<i>Judgment in rem</i>	Judgement on a particular subject or subject matter
<i>Mareva order</i>	An injunction used to restrain a defendant from removing assets from the jurisdiction; requirements outlined in <i>Third Chandris Shipping Corp. v. Unimarine S.A.</i> [1979] Q.B. 645 at 668
<i>NSW</i>	New South Wales
<i>Prima facie</i>	On first appearance (Latin)
<i>Res gestae</i>	Deeds done (Latin)
<i>Res judicata</i>	Prior judgement (Latin)
<i>Vic</i>	Victoria(n)
<i>Voir Dire</i>	<i>A preliminary hearing into the admissibility of an item or items of evidence</i>