



Practising Family Law

3RD EDITION

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Practising Family Law

Third Edition

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PREFACE

The practice of family law is under-rated within the legal profession in terms of prestige, complexity, and even remuneration. When Tom Altobelli began teaching aspiring lawyers in 1995, he noticed that this perception was shared among law students. Ever since, he has striven to change that perception by demonstrating the complexity of family law, particularly through its interaction with other areas of law such as equity, bankruptcy and superannuation, to name just a few. There is a great challenge in practising in an area of law which is constantly changing, is always the subject of intense public scrutiny, which impacts on the lives of more people than any other area of law in Australia, and which interfaces with so many other bodies of knowledge, both technical and sociological.

Since the first edition of this work was published in 1999 (*Butterworths Skills Series: Family Law — Theory Meets Practice*) there have been a number of significant changes to the Family Law Act and Rules which have impacted on the practice of family law including:

- establishment of the Federal Magistrates Court of Australia;
- introduction of child support legislation that replaced child maintenance applications as the new method of determining what financial support parents should provide for their children;
- significant amendments to that part of the Family Law Act that deals with parenting issues that commenced in 2006;
- replacement of maintenance agreements in 2000 with binding financial agreements, including provisions for parties to enter into pre-nuptial agreements;
- an entirely new set of rules, forms and procedures for the Family Court of Australia that commenced in 2004;
- amendments to the Family Law Act to provide for Less Adversarial Trial (LAT) for parenting cases under the Family Law Act with the option for parties to consent to financial proceedings also being dealt with under the LAT procedure;
- increased emphasis for parties to attempt resolution of parenting and financial matters before and after proceedings are commenced;

- amendments to the Family Law Act to enable parties to a de facto relationship who are living in referring states and territories, and where the de facto relationship broke down after 1 March 2009, to have financial issues between those parties determined under the Family Law Act rather than state and territory legislation;
- inclusion in 2002 of Pt VIIIB into the Family Law Act, so that a Family Law Court can make orders in respect of superannuation interests that are binding and enforceable against the trustee of a superannuation fund and for clauses to be included in a Financial Agreement that ‘splits’ (divides) a superannuation interest;
- the introduction of a new Pt VIIIAA in 2004 that enables a Family Law Court, in financial proceedings, to make orders and injunctions that are binding on third parties;
- the transfer of bankruptcy proceedings to a Family Law Court where one spouse has become bankrupt for a Family Law Court to then determine the competing interests of the non-bankrupt spouse and the creditors of the bankrupt spouse where proceedings for financial orders between the two spouses were awaiting determination under the Family Law Act;
- the commencement, in 2008, of new courses for law graduates at the College of Law for Certificates, Diplomas and a Masters Degree in Applied Law (Family Law).

Tom has sought to equip law students for practice in a jurisdiction which is principally governed by discretionary principles, and where the playing field (or is it the battleground?) is not always level because of complex factors such as gender, ethnicity, culture, religion and information imbalance. Students have been challenged to confront the realities of the intensely emotional context in which family law is practised and to contemplate whether their own personalities will allow them to cope with the rigours of family law practice.

The first edition of the book was largely based on the skills component of the core subject Family Law which Tom taught at the University of Western Sydney from 1996–1999 and which is relevant and applicable to all lawyers seeking to develop a family law practice. This book deals with particular problems which arise in the family law context; for example, interviewing the emotional client and the client of non-English speaking background. There are many skills covered which are common to other areas of law, particularly the taking of instructions, drafting, case preparation and presentation, advocacy and negotiation. In each case, however, these skills are presented in the context of family law.

Ian is a practising lawyer who spent more than 30 years practising as a barrister, appearing almost entirely in family law matters and, in recent years, as counsel at Swaab Attorneys, Sydney. He is the co-author of *Australian Family Law*, Vol 4, LexisNexis and author of the Family Law section in the *Australian Encyclopaedia of Forms and Precedents*, LexisNexis.

PREFACE

He is a member of Applied Law (Family Law) Committee of the College of Law and a qualified Family Law Mediator and Arbitrator.

The second edition was an updating by Ian of the original 15 chapters written by Tom to take into account changes to and new developments to the material in the chapters that occurred in the decade since the book was first published.

The third edition is a further updating by Ian of the original 15 chapters by Tom with seven new chapters that deal with most of the changes to Family Law and the practice of Family Law since 2000. When presenting papers at the College of Law, New South Wales State Legal Conference and elsewhere, Ian either uses *Practising Family Law* as the text for such presentations or refers to extracts from the book.

This book is not just for aspiring lawyers, but also for lawyers who are new to the practice of family law. It sets out practice-related issues which are not necessarily covered, or are inadequately covered, in other materials. We bring to bear on this book almost seven decades of combined experience in this area of law as well as the benefit of critical reflection, from a very broad spectrum: Tom as an academic and Federal Magistrate, Ian as an advocate and family law practitioner. Tom has also practised at the 'coal face' as a family law practitioner.

We welcome feedback, comments and criticism. We thank all who helped make this book possible: judges and counsel with whom we have worked, countless professional colleagues and clients who have taught us so much, academic colleagues, practitioners and hundreds of students who we have been privileged to teach.

To all aspiring family lawyers — you aspire to a difficult, challenging, but intensely satisfying area of practice. There are rewards too, but they cannot always be measured in financial terms. Practise family law sensibly and sensitively. Boldness is required but discretion more so.

Ian Serisier & Tom Altobelli

Sydney, NSW

December 2011

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CASES

References are to paragraphs

A

Anton Pillar KG Manufacturing
Process Ltd, Re [1976] Ch 55
16.25

B

B v B [2008] FamCAFC 7 6.15

Barro, Re (1983) FLC 91-300
16.43

Bennett, Re (1991) FLC 92-191
....17.20

Black and Kellner (1992) 15 Fam
LR 343 16.3

Blythe & Fanshawe, Re; Ex p
Wells (1982) 10 QBD 2004
2.6, 21.9

Borriello, in the Marriage of (1989)
13 Fam LR 415 17.21

Brandson & Davis & Gilbert (2007)
FLC 93-328 21.12

Bruni v Bruni (2010) ONSC 6568
.... 18.1, 21.11

C

Croll v McRae (1930) 30 SR 137
.... 17.16

G

Garrey & Crosby [2007] FamCA
696 21.12

Giannarelli v Wraith (1988)
165 CLR 543 21.12

H

Hall, in the Marriage of (1979)
5 Fam LR 609; FLC 90-713
12.40

Harrington v Low (1996) 20 Fam
LR 145 17.5

J

Johnson and Johnson (1997)
22 Fam LR 141; FLC 92-764
18.14, 18.18, 21.11

K

K, Re (1994) 17 Fam LR 537;
(1994) FLC 92-461 8.21,
12.40, 18.13, 21.15

Kallinicos v Hunt (2005)
64 NSWLR 561 21.12

Kannis, Re (2003) 30 Fam LR 83;
FLC 93-135 16.3

Kingsley & Kendle [2010] FamCA
598 21.12

L

Lane v The Warden, etc of the
Municipality of Devonport,
12 The Valuer 382 17.26

M

MacGillavray & Mitchell, in the
Marriage of (1998) 23 Fam LR
238 21.12

McMillan & McMillan (2000)
26 Fam LR 653 21.12

MRR v GR (2010) 240 CLR 461;
42 Fam LR 531 8.23

O

Oriolo, Re (1985) 10 Fam LR 665
.... 16.3

P

Poletti, Re (1990) 15 Fam LR 794
.... 16.43

R

Reekei v McKinven, Sessions
Cases, 1921, p 733 17.16

S

Spencer v Commonwealth (1907)
5 CLR 418 17.22

T

Talbot v Talbot (1994) 18 Fam LR
685; (1995) FLC 92-586 16.25

W

Waghorn and Dempster (1979)
5 Fam LR 503 17.20

Walker v Walker (1937) 57 CLR
630 17.14

Weir, Re (1993) 16 Fam LR 154;
FLC 92-338 16.3

Wilson, Re (1989) 13 Fam LR
205; FLC 92-033 16.43

STATUTES

References are to paragraphs

Commonwealth

Child Support (Assessment) Act
1989 1.6, 5.4, 13.1, 14.1, 15.1,
19.1, 19.2, 19.10, 19.11, 19.12,
19.13
Pt 6 19.13
Pt 6A 19.8
Pt 7 5.4, 13.10, 19.10, 19.11
Pt 7, Div 1 5.4, 13.10, 19.11
Pt 7, Div 7 5.4, 8.12, 21.9
s 58 19.12
s 80A 19.13
s 80C(2) 19.14
s 99(2) 14.9
s 106A 5.4, 13.10, 19.10,
19.11
s 107 13.10, 19.10, 19.11
s 112 5.4, 13.10, 19.11
ss 114–120 1.6
s 116 13.10, 19.10
s 117 5.4, 13.10, 19.10,
19.11
s 117(1) 19.5
s 117(2) 19.1, 19.4, 19.5
s 123A 5.4, 13.10, 19.10,
19.11
s 124 19.10
s 125 5.4, 13.10, 19.11
s 129 5.4, 13.10, 19.10,
19.11

s 136 5.4, 13.10, 19.10,
19.11
s 139 5.4, 13.10, 15.2, 19.10,
19.11

Child Support (Assessment)
Regulations 1989 19.1

Child Support (Registration and
Collection) Act 1988 5.4,
13.10, 19.1, 19.2, 19.11

Pt VIIA 19.11
s 111C 19.10

Child Support (Registration and
Collection) Regulations 1988
19.1

Civil Dispute Resolution Act 2011
.... 5.4, 8.12, 13.10, 19.11, 21.9
s 15 13.10, 19.11
s 16 5.4, 13.10, 19.11

Commonwealth of Australia
Constitution Act 1901
Ch III 13.2

Evidence Act 1995 9.14, 11.17,
11.19, 12.52, 17.1, 17.3
Pt 2.1, Div 3 11.19, 17.3
Pt 2.1, Div 4 11.19, 17.3
Pt 2.1, Div 5 11.19, 17.3
Pt 2.2 11.19, 17.3
Pt 2.3 11.19, 17.3
Pts 3.2–3.8 9.2, 9.13, 9.14,
9.16, 11.19
Pt 3.2 9.15, 17.3

Evidence Act 1995 (Cth) – *cont'd*

Pt 3.8 17.3
 s 8 17.14
 s 26 11.19, 17.3
 s 30 11.19, 17.3
 s 35 17.14
 s 36 11.19, 17.3, 17.14
 s 41 11.19, 17.3
 s 50 17.14
 s 55 17.14
 s 55(1) 11.18
 s 57 17.14
 ss 59–64 17.14
 s 59 11.19, 17.14
 s 60 11.19, 17.14
 s 62 17.14
 s 63 17.14
 s 64 17.14
 s 64(2) 17.14
 ss 67–69 17.14
 s 67 17.7, 17.14
 s 68 17.14
 s 69 11.19, 16.41, 17.14
 s 75 17.14
 ss 76–80 17.14
 s 76 17.14
 s 77 11.21, 17.14
 s 78 11.21, 17.14
 s 79 17.14
 s 79(1) 17.25
 s 80 17.14
 s 81 17.14
 s 97 17.14
 s 98 17.14
 s 99 17.14
 s 100 17.14
 ss 102–103 17.14

ss 117–126 17.14, 17.14

s 128 17.14

s 131 5.21, 8.13, 17.5, 17.14

s 131(1) 17.14

s 131(2) 17.5, 17.14

s 135 11.18, 11.19, 17.14

s 136 17.14

s 138 17.14

s 144 17.14

Family Law Act 1975 1.1, 1.2,
 1.4, 1.6, 1.13, 2.2, 2.5, 3.16, 5.1,
 5.2, 5.3, 5.4, 5.6, 5.7, 5.8, 6.2,
 6.3, 6.4, 6.6, 7.2, 7.15, 8.15, 8.33,
 9.1, 10.14, 11.4, 11.5, 11.17,
 12.52, 13.1, 13.8, 13.10, 14.1,
 14.6, 14.10, 15.1, 15.11, 16.2,
 17.1, 17.4, 17.5, 17.7, 17.12,
 17.14, 17.18, 17.25, 19.11, 20.2,
 20.3, 20.4, 20.5, 20.8, 21.4, 21.9,
 21.10

Pt II 5.3

Pt II, Div 2 5.3, 5.6

Pt II, Div 3 5.3, 5.6

Pt II, Div 4 5.3

Pt III 5.6

Pt IIIA 5.3, 6.4

Pt VII 8.12, 14.7

Pt VII, Div 6 15.2

Pt VII, Div 8, Subdiv C 15.2

Pt VII, Div 9 7.10, 15.2

Pt VII, Div 12A 8.6, 9.1, 9.8,
 9.11, 11.2, 11.19, 11.22, 12.52,
 12.55, 12.56, 13.5, 14.8, 17.1

Pt VIII 5.3, 6.3, 20.6, 21.12,
 22.4

Pt VIIIA 6.3, 6.14, 19.14,
 20.8, 20.10

Pt VIIIAA 7.10, 7.11

Pt VIIIB 5.3, 7.11, 8.2,
 20.2, 20.3, 20.5, 20.6, 20.7,
 21.12

Pt VIIIAB, Div 4 6.4, 6.14, 20.7, 20.8, 20.9, 20.10, 20.11, 20.12, 22.4	s 60CA 7.6, 7.16, 11.4, 11.18, 21.4, 21.9
Pt VIIIB 6.9	s 60CC 11.4, 11.18
Pt XI, Div 2 17.7	s 60CE 12.40
s 4 8.12	s 60G 14.7
s 4(1) 7.2, 14.4	s 60I 5.3, 5.8, 8.12
s 4AA(5)(b) 7.11	s 62G 11.40
s 5(3A) 12.40	s 62G(3A) 11.40
s 5(3B) 12.40	s 63C(1) 5.3
s 10B 8.12	s 63C(2) 5.3
s 10H 5.21	s 63DA 3.3, 5.3, 21.5, 21.9
s 11A 12.40	ss 64–65P 1.6
s 11B 12.40	s 65D(2) 7.17
s 12E 3.3, 5.3	s 65DDA 11.4
s 13E 5.3, 5.5, 5.6	s 65F 8.12
s 13H 5.3	s 66E 19.1
s 13H(i) 5.3	s 66Q 15.2
s 13J 5.3	s 67E 15.2
s 34 7.2	s 67ZA 21.14, 21.16
s 34(1) 7.2	s 68L 12.40
s 39 14.4, 14.6	s 69J(1) 14.7
s 39(2) 14.6	s 69N 9.14, 14.7
s 46 14.6, 14.7	s 69N(4) 14.7, 15.2
s 46(1) 14.5, 14.6	s 69ZQ 9.14
s 46(1AA) 14.5	s 69ZT 9.14, 11.19, 17.3, 17.11
s 46(1A) 14.5	s 69ZT(1) 17.3
s 46(1AB) 14.5	s 69ZT(2) 9.14, 17.3, 17.4
s 46(1B) 14.5	s 69ZV 11.19, 17.4, 17.14
s 46(1C) 14.5	s 69ZV(2) 17.4
s 46(2) 14.5	s 69ZX 9.17
s 46(2A) 14.5, 14.6	s 72 11.4
s 46(3) 14.6, 14.7, 15.2	s 74 16.4
s 46(4) 14.5	s 75 1.6, 11.4
s 49(2) 14.4	s 75(2) 10.7, 11.4
s 55A 12.40	s 77 11.4, 15.2
s 60B 11.4	s 77A 11.4
ss 60CA–61E 1.6	s 78 11.4, 16.4

Evidence Act 1995 (Cth) – *cont'd*

- s 79 1.6, 7.10, 10.3, 11.4, 16.2, 16.4
- s 79(2) 7.6, 7.16
- s 79(4) 11.4
- s 79(4)(e) 11.4
- s 79(6) 7.10, 15.2
- s 79(9) 10.3
- s 79A 6.8, 7.9, 7.17, 16.4
- s 79A(1)(a) 16.2, 16.5
- s 80(1)(b) 15.2
- s 80(1)(h) 7.10
- s 83 7.17, 16.4
- s 83(1) 7.10
- s 83(2) 7.17
- s 85A 16.4
- s 87 5.5, 6.2
- s 90AE 22.4
- s 90AF 22.4
- s 90E 6.17
- s 90F 6.17
- s 90J 16.4
- s 90K 16.4
- s 90KA 16.4
- s 90MZF 7.15
- s 90SF 1.6, 11.4
- s 90SF(1) 16.4
- s 90SF(3) 11.4
- s 90SG 11.4
- s 90SH 11.4
- s 90SI 7.10, 7.17, 16.4
- s 90SI(3) 7.17
- s 90SL 11.4, 16.4
- s 90SM 1.6, 7.10, 11.4, 16.4
- s 90SM(3) 7.6, 7.16
- s 90SM(4) 11.4
- s 90SM(4)(e) 11.4

- s 90SM(6) 7.10, 15.2
- s 90SN 7.17, 16.2, 16.4, 16.5
- s 90SS(1)(b) 15.2
- s 90SS(1)(h) 7.10
- s 90UH 6.17
- s 90UI 6.17
- s 90UM 16.4
- s 90UN 16.4
- s 96 14.10
- s 96(1) 14.3, 14.10
- s 96(4) 14.10
- s 98 11.2, 17.2
- s 100 17.4
- s 100A 17.4
- s 101 17.4
- s 102 17.4
- s 102A 17.4
- s 106B 7.10, 7.11, 7.15, 15.21, 16.4, 22.4
- s 114 15.2
- s 114(1) 7.10, 15.17
- s 114(3) 7.10, 15.2
- s 117 2.2, 2.6, 13.9
- s 117(2A) 2.2, 2.3, 13.9
- s 118(1)(c) 7.10
- s 121 17.4
- s 123 5.6, 7.3
- s 125 5.5

Family Law Amendment Rules
2009 (No 1) 10.1, 10.4, 12.35Family Law Regulations 1984
5.2, 5.5

- Pt V 5.5
- reg 67B 5.5
- reg 67C 5.5
- reg 67D 5.5
- reg 67F 5.5
- reg 67F(2)–(3) 5.5

reg 67I 5.5	Pt 22.4 14.10
reg 67O 5.5	r 1.04 8.12, 10.4
Family Law Rules 2004 1.4, 1.7, 1.13, 1.14, 2.6, 4.12, 5.1, 5.8, 7.3, 8.9, 8.20, 9.1, 11.3, 12.13, 12.35, 12.46, 14.10, 15.2, 15.5, 15.6, 15.18, 16.2, 16.5, 16.20, 16.22, 16.26, 16.30, 16.34, 17.1, 17.23, 21.10	r 1.05 8.12, 21.10
Ch 12 1.4, 8.2, 10.1, 10.3, 12.53, 16.11	r 1.05(2) 8.12
Ch 13 8.7, 16.4, 16.11	r 1.08 8.20, 21.10
Ch 14 16.6, 16.25	r 1.12 15.2
Ch 16 1.4, 8.2, 8.6, 9.8, 10.1	r 1.14 15.2
Ch 16A 8.6, 9.8, 12.52	r 4.01 7.3
Ch 17 1.14, 7.17	r 5.4 10.5
Ch 18 8.2	r 6.13(2) 16.4
Ch 19 2.2, 2.4, 2.6, 2.7, 5.6, 8.14, 13.9	r 8.03 21.12
Pt 7 12.23	r 9.01 10.4
Pt 10 7.17	r 10.06 21.10
Pt 10.4 7.3, 7.6	r 10.15A 21.6
Pt 11.2 12.33	r 11.02 8.20, 17.7
Pt 11.2, Div 11.2.2 7.7	r 11.02(1) 17.7
Pt 12 8.9, 16.5	r 11.02(2) 17.7
Pt 13 5.6, 8.7, 8.9, 16.5, 16.6	r 11.07 12.14, 16.26
Pt 13, Div 13.1.2 16.4	r 11.09 16.27
Pt 13.2 16.6, 16.22	r 12.02 8.5, 8.8, 16.4
Pt 13, Div 13.2.1 16.4	r 12.02(g) 5.6, 8.8
Pt 13.3 12.34, 16.20	s 12.03(3) 4.12, 8.9, 10.4, 12.53
Pt 13.4, Div 13.4.1 16.6	r 12.03(4) 8.5, 10.4
Pt 15.2 11.2, 17.2	r 12.04 10.4
Pt 15.3 12.30	rr 12.05–12.07 10.3
Pt 15.5 12.40, 12.45, 17.27	r 12.05 8.5, 10.4, 16.4
Pt 16.2 9.8	r 12.05(5) 8.4
Pt 16.3 8.6	r 12.06 8.5, 10.4
Pt 19.04 8.9	r 12.07 8.4, 8.5, 10.4, 17.5
Pt 19.2 2.6, 21.10	r 12.08 8.5, 10.4
Pt 19.3 1.14	r 12.08(2) 10.4
	r 12.09 8.4, 8.20, 12.53
	r 12.09(2) 10.4
	r 12.10 8.5, 10.4
	r 12.10A 8.5, 10.4, 15.4
	r 12.11(1) 8.5
	r 13 16.22

Family Law Rules 2004 (Cth) –
cont'd

r 13.01 8.7, 16.4, 21.10
r 13.02 8.7
r 13.04 16.4, 21.10
r 13.04(1)(g) 16.46
r 13.07 21.10
r 13.08 12.13, 16.22
r 13.09 16.22
r 13.10 16.22
r 13.11 16.22
r 13.12 16.22, 21.10
r 13.14 12.16, 16.22
r 13.15 21.10
r 13.16 16.22
r 13.20 12.13
r 13.22 12.13
r 13.30 16.24
r 14.04 16.25
r 15.05 11.2
r 15.06 11.2
r 15.07 11.2
r 15.07(2) 11.2
r 15.08 11.2
r 15.09 11.2
r 15.09(3) 11.2
r 15.10 11.2
r 15.11 11.2
r 15.12 11.2
r 15.12(1)(b) 11.3
r 15.14 11.2
r 15.21 15.8, 15.29
r 15.28 16.30
r 15.28(1)(a)(iii) 16.30
r 15.30 16.30, 16.33
r 15.36 16.28
r 15.43 17.25
r 15.55 21.10

r 15.71 17.7
r 15.74 17.7
r 15.75 17.7
r 15.83 17.7
r 15A.05 16.29
r 16.04(2) 8.6
r 16.05 8.6
rr 16.08–16.10 12.56
r 16.08 11.2
r 16.09 11.2, 12.54
r 16.10 12.54
rr 16.11–16.13 12.56
r 16.11 11.2, 12.55
r 16.12 11.2, 12.55
r 16.14 12.56
r 17.02 7.17
r 17.72 17.7
r 19.03 2.6
r 19.04 2.6, 21.9
r 19.04(1) 8.14
r 19.04(2) 8.14
r 19.04(2)(b) 8.14
r 19.10 21.10
r 22.03 14.3
r 24.04 10.4
r 24.05 10.4
Sch 1 5.6, 8.8, 8.12, 16.22
Sch 1, Pt 1 5.6, 8.12
Sch 1, Pt 1, Cll 1(1)–(3) 5.6
Sch 1, Pt 1, Cl 1(1)(a) 5.6
Sch 1, Pt 1, Cl 1(4) 5.6
Sch 1, Pt 1, Cl 1(5) 5.6
Sch 1, Pt 1, Cl 3 5.6
Sch 1, Pt 1, Cl 3(5) 5.6
Sch 1, Pt 1, Cl 3(6) 5.6
Sch 1, Pt 1, Cl 4 5.6
Sch 1, Pt 1, Cl 6 5.6, 8.12

- Sch 1, Pt 2 8.12
- Sch 1, Pt 2, Cl 6 5.6, 8.12
- Sch 3 2.4
- Sch 6 1.14
- Federal Court of Australia
 - Regulations 2004 9.9, 12.46, 12.47, 13.6, 13.9
- Federal Magistrates Act 1999
 - 13.2, 17.25
 - s 3(2) 13.2
 - s 45 10.4, 10.13, 12.12, 12.34, 13.7, 16.4, 16.6, 16.20, 16.22
 - s 51 13.11
 - s 64 11.2, 11.3, 17.1
- Federal Magistrates Court
 - Regulations 2000 13.1
- Federal Magistrates Court Rules
 - 2001 1.7, 1.13, 1.14, 2.4, 2.6, 7.3, 12.1, 12.3, 12.33, 12.34, 12.46, 13.1, 13.11, 15.4, 15.5, 16.2, 16.5, 16.30, 16.32, 17.24, 21.10
 - Ch 1 5.6, 13.4, 13.9, 21.10
 - Ch 2 5.6, 13.4, 13.6, 21.10
 - Pts 1–21 5.6
 - Pt 1 13.10
 - Pt 4 8.1
 - Pt 5 15.2
 - Pt 6 12.23
 - Pt 7, Div 7.1 7.7
 - Pt 7, Div 7.2 7.7
 - Pt 13, Div 13.2 7.3, 7.6
 - Pt 13, Div 13.3 16.4
 - Pt 14 10.4, 10.13, 12.12, 16.4
 - Pt 14, Div 14.2 16.6
 - Pt 15, Div 15.05 12.33
 - Pt 15, Div 15.2 10.10, 12.45, 17.27
- Pt 15, Div 15.3 12.30
- Pt 15, Div 15.4 11.2, 11.3, 17.2
- Pt 15, Div 15.5 17.27
- Pt 21 2.4
- Pts 22–25B 5.6
- Pt 24 16.4, 16.5, 16.11
- r 1.05 15.2
- r 1.06 15.2
- r 2.03 16.4
- r 10.01 8.1
- r 14.01 12.34, 16.6, 16.20
- r 14.02 12.34
- r 14.09 12.16
- r 15.06A 17.25
- r 15.08(2) 10.10
- r 15.3(3) 16.27
- r 15.14(3) 16.30
- r 15.15 10.4, 15.8, 16.32
- r 15.16 16.30
- r 15.21 16.23
- r 15.23 16.28
- r 15.28 11.3
- r 15.31 16.26
- r 16.04(1)(a)(iv) 16.32
- r 16.05 7.17
- r 21.07 21.10
- r 24.03 16.4, 21.10
- r 24.03(1)(g) 16.46
- r 24.04 16.4
- r 24.05 16.4
- Sch 1 2.4, 13.9
- Sch 2 13.1
- Sch 3 7.3
- Foreign Evidence Act 1994
 - 17.7
- Personal Property Securities Act
 - 2009 16.19, 22.1, 22.4