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# Australian Law Journal

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## ARTICLES

### RESTRICTING LITIGIOUSNESS

**Hon Justice Kenneth Hayne AC**

In 2002, the Australian federal government commissioned the Ipp Report on negligence. Against that background, this article considers how litigiousness could be restricted. It discusses the role of the courts in limiting litigation and the role that the predictability of the outcome of litigation plays in doing that. It considers some aspects of recent developments in the law of negligence and suggests four frameworks within which further developments may be considered: incremental development, unifying principle, intuitive or popular response, or recognition of separate, competing values. .... 381

### COMMENTARY ON “RESTRICTING LITIGIOUSNESS”

**G A A Nettle**

This article was written as a brief commentary upon Justice Hayne’s paper “Restricting litigiousness”. It was intended to provide a response to the two principal issues essayed in the paper: the utility of duty in the law of negligence and the principles which inform it. The burden of the article is that it is desirable if not essential to persist with the concept of duty and that the informing principles of the concept rest in the recognition of what is fair just and reasonable. .... 389

### APPLICATION OF THE LEX MERCATORIA IN INTERNATIONAL COMMERCIAL ARBITRATION

**Michael Pryles**

An international contract may not be governed by a national legal system but by reference to international principles described as the “lex mercatoria”. Opinion varies as to what constitutes the lex mercatoria or general principles of international commercial law, and, if such law exists, what its sources are. Some writers have attempted to codify the lex mercatoria, while others consider that it is better thought of as a process of ascertaining the principles applicable when a particular issue arises. The notion of lex mercatoria has triggered criticism and support. But notwithstanding the occasional denial of its existence, the growing use of some form of the lex mercatoria, whether as a process or code, cannot be denied. .... 396

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5. Austin, n 4, p 56.

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7. Sheehy et al, n 6 at 221.

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