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***(articles included in this part are linked to the LexisNexis platform)***

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### Articles


Mandatory and quasi-mandatory mediation
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Over the last 30 years, mediation has become an important weapon in the case flow management regimes of courts in Australia and elsewhere, and an important element in the courts' attempts both to promote the efficient and economic disposition of litigation and to improve access to justice. This article seeks to trace the introduction of court-sponsored mediation in superior courts in Australia and the evolution of mediation from a purely voluntary process to a step in proceedings which is compulsory or quasi-compulsory. The article also outlines the forms of compulsory and quasi-compulsory mediation in Australia. In addition, the article seeks to set out the manner in which superior courts in Australia exercise their statutory discretion to compel mediation, and the competing arguments for and against mandatory and quasi-mandatory mediation.

Abuse of process: Losing the opportunity to litigate — A court system under pressure
— *C P Shanahan* 246

The High Court has recently examined the legal principles underpinning the grant of a permanent stay of proceedings for abuse of process in two cases, one civil and one criminal. *UBS AG v Tyne* and *Strickland v Director of Public Prosecutions (Cth)* have identified interesting and somewhat different approaches within the Court as to how such abuses are to be identified. Taken together these decisions represent the most broad-ranging review of these principles in the last 20 years, and offer a unique insight into the development of the law in this area in circumstances where the court system is under increasing pressure to deal with cost and delay.

Antipodean vivisection? Recent analysis of 'ownership' of sperm, body parts, and other *disiecta membra*
— *Lee Aitken* 266

The rapid advance of medical technology has made possible the removal of sperm and ova, urgently beseeched by a traumatised partner, from the dying or the dead, for purposes of artificial insemination. Yet, the legal underpinning of the 'ownership' of such material depends on *Doodeward v Spence*, an ageing High Court decision ripe for review. At a general level, the entitlement at common law to possess and use such material (in the absence of a statutory authority to do so) remains obscure. This article looks at various aspects of the right of 'ownership' to body parts and material as approached in the common law and civilian systems.

Does the s 26 contextual truth defence have any practical utility in light of the authorities?
— *Parisa Hart* 284

This article considers the defence of contextual truth by comparing the applications of s 16 of the Defamation Act 1974 (NSW) and s 26 of the Defamation Act 2005 (NSW). The article indicates that the wording of s 26 has given rise to difficulties of construction and consequently its application. Therefore, it is arguable that s 26 does not meet its objective which is 'precluding plaintiffs from taking relatively minor imputations out of their context within a substantially true publication'.

Matters arising: The interaction between cross-vesting and bankruptcy legislation
— *Patrick Hall* 300

The introduction of the Law and Justice Legislation Amendment Act 1997 (Cth) has rendered the interaction between the Bankruptcy Act 1966 (Cth) and the Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) to be disharmonious. The expanded definition of 'special federal matter' which came with the amendment, occurred without due consideration. This change has hindered the proper administration of justice by requiring the transfer of matters from state courts to the Federal Court of Australia or Federal Circuit Court on an increasingly frequent basis. This article argues that the extent of the application of the current regime is yet to be defined and should be the subject of reform either through statutory amendment or through a change in judicial attitude to the provisions.

Equitable damages and mitigation of loss
— *Christopher Chiam* 316

This article considers whether the requirement that a plaintiff ought to mitigate their loss is relevant to an award of equitable damages. The existing case law makes clear that it is not an automatic defence as it is at common law, but rather is a discretionary principle that the court will consider when making an award of equitable damages. However, the authorities have largely borrowed the principle from the common law without analysing how it might differ in the equitable context. I argue that there are a number of substantial differences between common law and equitable damages that require the principle to operate differently in equity. These differences alter when a party should begin mitigating its loss, and what steps they should be reasonably required to take. The conclusion of this article summarises the relevant principles.