



Victorian Government  
Website Management Framework

# Managing legal risks online – a guide for Victorian government websites

## Guideline

This guideline provides general advice on identifying and managing legal risks within an online environment.

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## Chapter One – Overview

This Whole of Victorian Government (WoVG) guideline is designed to assist those who have responsibility for designing, developing and operating Victorian Government websites to manage the relevant legal and regulatory issues.

The focus is on the delivery of websites by the public sector. It is intended to deal with practical issues, to describe and explain the legal and regulatory terrain and frameworks, and to set out the techniques that should be used to address and manage concerns.

The information technology landscape has changed dramatically over the last decade and although this manual attempts to look into the future, invariably the development of law may not be able to keep abreast of information technology. Readers should consider this fact within the context of their own website and assess the legal and regulatory environment independently if necessary. Critically, it should be noted that this guideline is not designed to provide definitive legal advice and further advice should be sought to take into account specific circumstances.

Finally, those engaged in website design, development and management should also be aware of their compliance obligations with regard to whole of Victorian Government (WoVG) policies, standards and guidelines, particularly those within the Website Management Framework (WMF).

### 1.1 Derivation

- WoVG Legal Compliance Standard (WEB/STD/03).

## Chapter Two – Orientation

This guideline has been divided into a number of different areas:

1. **Laws that define the protection the law gives to both content and services.** These primarily consist of intellectual property laws. This includes copyright, trademarks and patents.
2. **Laws that affect the use of the internet for commercial or government purposes.** These are laws that provide that electronic transactions are equally as valid as written or paper-based transactions, subject to certain conditions.
3. Laws that affect the use and communication of content and services. These consist of laws that:
  - regulate the use of content and services irrespective of their ownership;
  - relate to censorship, such as internet content regulation or censorship;
  - relate to privacy and data protection; and
  - afford consumer protection initiatives and accessibility.
4. **Laws that regulate the claims made by or about web-based content and services.** This includes laws that prohibit misleading or deceptive conduct in trade and commerce or which establish liability for the provision of negligent advice or information, defamation and passing off.
5. Laws that apply to particular internet techniques, facilities and tools such as the use of hyperlinks.
6. **Laws that can be used to manage risk.** Various laws can impose liability on the operators of a website, including laws relating to negligent statements and laws that prohibit misleading and deceptive conduct. Liability can also occur where other laws referred to in this section are broken, such as liability for infringement of intellectual property laws or breaches of privacy. There are techniques for managing and minimising those risks.



## Chapter Three – The legal and regulatory landscape: intellectual property

### Checklist:

1. Are you using:
  - content, graphics or artwork created by someone else?
  - trademarks of a third party?

### 3.1 Intellectual property and related rights

Intellectual property consists of a number of categories of rights. These are:

- Copyright;
- Trademarks;
- Patents;
- Confidential information;
- Designs;
- Plant Breeder's Rights; and
- Circuit layouts.

Each of these categories of rights is almost entirely governed by statute law, the one exception being confidential information. As this guideline focuses on the online legal and regulatory environment, the main emphasis of this section is on copyright, trademarks and patents. Copyright, in particular, is the most common intellectual property owned and used by government agencies and is the material that makes up the content used in and communicated over the internet.

This section also briefly covers domain names and domain name dispute resolution. Although domain names do not fall within normal definitions of intellectual property, they have an equivalent value and, like a trade mark, are distinctive of the organisations to which they are assigned.

Australia's intellectual property laws are complex. The overview presented in this and the next chapter is intended to provide a general background and guide to the main areas of intellectual property that apply to online activities and to give an overview of the intellectual property framework. However, where any doubts exist about an intellectual property issue, seek specialised advice.

### 3.2 Copyright

**Key Legislation:** Copyright Act 1968

**Summary:** Copyright is a bundle of rights, the most commonly known of which is the right to prevent the copying of works and other subject matter such as films, drawings, etc. Copyright is the exclusive right to produce the physical form in which ideas, information and other data is expressed.

Copyright rights are automatic – they do not require registration. Copyright gives owners exclusive rights to license third parties to copy, communicate, publish or make an adaptation of the work.

Copyright should be distinguished from the ownership of a physical object that holds copyright material. For example, when a music CD is purchased, the purchaser owns the CD but does not own any of the copyright in the musical recordings. As another example, the purchaser of a computer program on a CD owns the CD or media on which the program is stored but is restricted by the licence terms as to how they can use the actual software on the disc.

Copyright protection applies to **works** and **subject matter other than works**.

Copyright **works** consist of:

1. literary works – this includes written material such as computer programs, some databases and tables;
2. musical works – this category applies to the musical composition itself, not a recording of it;



3. artistic works – this includes paintings, drawings, maps, plans, photographs, sculptures and will usually apply to any graphical image used on the web; and
4. dramatic works – such as plays.

**Subject matter other than works** to which copyright applies are:

1. cinematograph films – including videos, animations in the form of moving images and the moving images generated by some computer programs;
2. sound recordings – being the recorded performance of a musical work;
3. broadcasts – such as radio and television broadcasts; and
4. published editions – such as the typesetting or layout of a publication (which is separate from the copyright associated with the publication itself).

The labels applied to categories of content in the online environment are not the same as those used in the Copyright Act. For example, ‘text’ can usually be equated with a literary work; an ‘image’ or a ‘graphic’ is usually an artistic work; ‘audio’ is usually a sound recording that embodies an underlying musical work.

While copyright protects the expression or form of an idea, it does not protect the idea itself. Therefore it would not be a breach of copyright to stage a play or develop a television series about a police station in the country (the idea behind *Blue Heelers*) but it would be breach of copyright if a substantial part of the expression of the *Blue Heelers*’ idea were taken – for example, scenes from the series. What is ‘substantial’ depends on the facts of the case but the test (with a few exceptions) is qualitative, not quantitative.

Copyright subsists in original works and other subject matter. The concept of originality in copyright law does not connote novelty or uniqueness – the originality test is generally satisfied where the material in question is not copied.

### 3.2.1 What rights of the copyright owner does copyright protect?

The rights granted to a copyright owner vary depending on the nature of the copyright work or other subject matter.

For **literary, musical and dramatic works**, copyright is the exclusive right to:

- reproduce the work in a material form;
- publish the work;
- perform the work in public;
- communicate the work to the public; and
- adapt the work.

In addition, the owner of copyright in a computer program (which is classified as a literary work in the Copyright Act) is granted an exclusive right to control or prohibit commercial rental arrangements of the program.

The rights conferred on **artistic** works are not as extensive – they consist of the exclusive right of reproduction, publication and communication to the public.

For other copyright subject matter, the rights conferred by copyright are set out below.

For **sound recordings**, copyright is the exclusive right to:

- make a copy of the sound recording;
- cause the sound recording to be heard in public;
- communicate the sound recording to the public; and
- enter into a commercial rental arrangement in respect of the sound recording.

For **cinematograph films**, copyright is the exclusive right to:

- make a copy of the film;
- cause the film to be seen or heard in public; and



- communicate the film to the public.

For **television and sound broadcasts**, copyright is the exclusive right to:

- make a film of the television broadcast;
- make a sound recording of the broadcast; and
- re-broadcast or communicate the television or sound broadcast to the public otherwise than by broadcasting it.

However, please note the availability of defences under the Copyright Act, which are discussed later in this chapter at 3.2.5.

### 3.2.2 How is copyright protection obtained?

In Australia, copyright protection arises automatically on the creation of a copyright work or other subject matter. There is no system of registration and no fees need to be paid. Although it is common to see the © symbol together with a nominated year and the name of the claimed copyright owner on books, software, CDs and other copyright items, it is not necessary to attach this notation to copyright material in order to claim or receive copyright protection. However, this is the convention for notifying the existence of copyright and the identity of the copyright owner to the public and it is good practice to include such a notation on a copyright work, including the home page of a website.

A good example of a copyright notice for a publication is set out in Attachment 2.

It is also good practice to make a note or to keep some record or evidence of when copyright material is created, particularly if the copyright material is to be submitted to a third party for assessment or as part of an application. Many copyright disputes occur where copyright material is submitted on an unsolicited basis to a book or music publisher and rejected, but some time later it is alleged that the unsolicited material has been copied into another person's work. For government agencies, the best way to deal with this issue is to ensure that the permission of the copyright owner is obtained before any material is used in a website.

### 3.2.3 How long does copyright last?

For literary works, dramatic works, music and artistic works which were still in copyright on, or created on or after, 1 January 2005, copyright lasts for the life of the creator plus 70 years. However, for certain literary works, dramatic works and music the copyright only lasts for 70 years after first publication. This includes works first published anonymously or after the creator's death, recorded sounds, and films made since 1 May 1969.

For literary works, dramatic works, music and artistic works which were not in copyright on 1 January 2005, copyright lasts for the life of the creator plus 50 years.

When copyright expires, the relevant materials are said to be 'in the public domain'. Materials in the public domain may be reproduced without permission.

### 3.2.4 Infringement of copyright

A primary infringement of copyright occurs where a 'substantial' (important, essential or distinctive) reproduction of copyright material is made without the permission of the copyright owner or by exercising any of the rights of the copyright owner in respect of a substantial part of copyright material. Infringement also occurs where an infringing copy is imported, sold, leased, exhibited or distributed.

The test used to determine whether a substantial reproduction has occurred is qualitative, not quantitative. This means that there is no fixed amount of a copyright work that can be copied without an infringement occurring, except in the limited context of the fair dealing defence, where the so-called '10% rule' may apply in very limited circumstances (see section 3.2.5 - Defences). As a general guide, if the original work can be identified from the copy, an infringement has taken place.

Copyright can also be infringed where a person authorises another to exercise the copyright owner's exclusive rights. These 'authorisation' or 'secondary' infringements of copyright occur where, for



example, a university provides a photocopier to students knowing that it was likely to be used for copyright infringement.

In determining whether an authorisation infringement has occurred, the matters that should be considered include:

- the extent of the person's power to prevent the infringing act;
- the nature of the relationship between the person alleged to have authorised the infringement and the infringer; and
- whether reasonable steps were taken to prevent or avoid the infringement.

### 3.2.5 Defences

The Copyright Act provides a number of defences to infringement claims. It also confers certain statutory licences where the permission of the copyright owner to use a work is dispensed with in certain circumstances, provided the person who uses the copyright owner's work pays an equitable royalty.

#### Fair dealing

Fair dealing is a defence found in the Copyright Act to allow for limited copying of copyright works done for legitimate reporting, review and research purposes. It is not a general-purpose defence and should not form the basis of ignoring a copyright owner's rights. These rights must be recognised and respected at all times consistent with the principles of copyright already discussed in the sections above.

##### (a) Fair dealing for criticism or review

Copyright materials can be used without permission for the purpose of criticism or review if the use is 'fair' and a sufficient acknowledgement (that is, identification of the item's title and author) is made.

For this exception to apply, a person's criticism or review must be genuine. If the use is primarily for other purposes (for example, to make profit or divert consumers away from competition), the fact that there is some criticism or review is irrelevant and the exception will not apply.

##### (b) Fair dealing for reporting news

Copyright materials can be used without permission if the use is 'fair' and for the purpose of or associated with the reporting of news:

- in a newspaper or magazine or similar periodical (and a sufficient acknowledgement of the item is made); or
- by means of a communication to the public or in a film.

For this exception to apply, the item must genuinely report or comment on news including recent events and information previously not known to the public. If the primary purpose of the item is to entertain, the presence of newsworthy issues will most likely be irrelevant and the exception will not apply.

The Act does not state particular factors to be considered in determining whether a use is 'fair', however, the following factors may provide guidance:

- how the interests of the copyright owner are affected;
- whether the copyright owner and reporter are in competition; and
- the extent of the use and whether the copyright materials have been dealt with for some other purpose.

##### (c) Fair dealing for parody or satire

Copyright materials can be used without permission if the use is 'fair' and for the purpose of parody or satire.

This exception is relatively new in the Act and it is unclear how it will be applied by the film and television industry and the courts.



The words 'parody' and 'satire' are not defined in the Copyright Act but are defined in the Macquarie Dictionary as follows:

- 'parody' means '1. a humorous or satirical imitation of a serious piece of literature or writing. 2. the kind of literary composition represented by such imitations... 4. a poor imitation; a travesty'; and
- 'satire' means 'the use of irony, sarcasm, ridicule, etc., in exposing, denouncing, or deriding vice, folly, etc'.

In determining whether the use is 'fair', the following factors may be considered:

- the amount of copyright material used;
- the context in which the parody or satire is used; and
- whether or not the copyright owner generally licenses such uses.

#### (d) Fair dealing for research or study

Copyright materials can be used without permission if the use is 'fair' and for research or study. For example, film makers can copy historical information for the purpose of research before making a film.

The Federal Court of Australia has held that the words 'research' and 'study' are intended to have their Macquarie Dictionary meanings:

- 'research' means the 'diligent and systematic inquiry or investigation into a subject in order to discover facts or principles'; and
- 'study' means '1. Application of the mind to the acquisition of knowledge, as by reading, investigation or reflection. 2. The cultivation of a particular branch of learning, science, or art... 3. A particular course of effort to acquire knowledge... 5. A thorough examination and analysis of a particular subject'.

Under this exception, the use will be 'fair':

- in the case of a literary work, dramatic work or music (or an adaptation of such a work) that is contained in a published edition of at least 10 pages – if no more than 10% of the number of pages is copied (or one chapter, if the work is divided into chapters);
- in the case of a literary work or dramatic work published in electronic form (or an adaptation of such a literary work or dramatic work published in electronic form) – if no more than 10% of the number of words in the work or adaptation is copied (or one chapter, if the work or adaptation is divided into chapters); and
- in the case of a literary work, dramatic work or music (or an adaptation of such a work) contained in an article in a periodical publication such as a magazine – if only one article is copied (or more than one article if the articles are related to the same research or course of study).

For all other types of copyright materials, the following factors should be considered (as set out in the Act) in determining whether the use is 'fair':

- the purpose and character of the use;
- the nature of the copyright materials;
- the possibility of obtaining the copyright materials within a reasonable time at an ordinary commercial price;
- the effect of the use on the potential market for, or value of, the copyright materials; and
- where only parts of the copyright materials are copied, the amount and substantiality of the parts copied.

#### (e) Filming in public

The following copyright materials can be included in a film or television program without permission:

- a sculpture or a work of artistic craftsmanship situated in a public place, otherwise than temporarily (for example, a statue in a park);
- a building or model of a building; and



- an artistic work if its inclusion is only incidental to the principal matters represented in the film (for example, a painting in the background of a scene filmed at an art gallery).

### **Crown use**

The Crown is also given a conditional right to use copyright material: there will be no infringement where any otherwise infringing act is done 'for the services of' the Commonwealth or State. This defence is discussed further in section 4.1 below, under the heading 'Crown Use of Copyrighted Materials'.

### **3.2.6 Moral rights**

**Summary:** Moral rights are the personal rights of creators of literary works, dramatic works, music and artistic works to be identified as the author, not be falsely attributed to or not have their work treated in a derogatory manner.

A moral right differs from copyright in that copyright is a property right whereas a moral right is a personal right vested in the author or creator of copyright material. The Copyright Act confers three categories of moral rights:

- an attribution right, being the right of an author to be clearly and prominently identified as the author of a work;
- a right to prevent false attribution of authorship, being a right to prevent another person from falsely claiming authorship of copyright material; and
- an integrity right, being the right of an author to object to the derogatory treatment of his or her work if it would prejudice his or her honour or reputation.

Moral rights apply to literary, dramatic, musical and artistic works and to films but not to sound recordings, broadcasts or published editions of works. The rights of attribution and false attribution in relation to all works - and the right of integrity in relation to all works except films - last for the same period as copyright protection (the creator's life plus 70 years). For films, each creator's right of integrity lasts only for that creator's lifetime.

Moral rights are conferred on individuals only. Thus a composer, author or playwright is granted moral rights. For films, moral rights are given to the 'authors' of the film – the principal producer, director and screenwriter – but only if they are individuals. For example, if the principal producer is a corporate entity, it receives no moral rights but the film's principal director and screenwriter do receive moral rights.

A moral right cannot be assigned. However, the owner of a moral right is permitted to consent to breaches of his or her moral rights.

For works created in an employment relationship, the author may give consent to the employer (covering all acts or omissions) for all works made or to be made in the course of the employment relationship. The consent can cover acts or omissions before or after the consent is given.

For all copyright works other than films the consent must:

- be written;
- be genuinely given by the author or his or her representative; and
- cover the specific acts or omissions, or classes of acts or omissions, to which it applies and the specific works to which it applies.

### **3.2.7 How to obtain copyright**

If you are engaging third parties to produce or create works you should ensure there is a written agreement which includes a term providing the Victorian Government the right to use it in the future. You may also be able to request an exemption from Victorian Government policy where you think it would be better that Victorian Government own the developed intellectual property.



In most cases, intellectual property rights will be rightfully owned by the creator. However, you should still request the creator provide a warranty stating that the works created by them are original and will not infringe the rights of any other third party. This should be reinforced by an indemnity to protect the Victorian Government from any legal claims by third parties alleging their intellectual property rights have been infringed by the engaged party's works.

### 3.3 Trade marks

**Key legislation:** Trade Marks Act 1995

**Summary:** Trademarks can be devices, brands, headings, labels, tickets, names, signatories, words, letters, numerals or any combination of these which are used, or proposed to be used, to distinguish the goods and services of one trader from those of another.

Trade marks may be registered with IP Australia.

The owner of a registered trade mark has the exclusive right to use the trade mark in relation to the specific goods or services in respect of which it is registered. There are 42 different categories of goods or services in respect of which a trade mark may be registered and registration is only granted in respect of the categories for which the trade mark is, or is intended to be, used.

The Trade Marks Act also permits the registration of certification marks. A certification mark is used when the trade mark owner wishes to permit others to use the certification mark to signify that their goods or services comply with certain standards signified by the certification mark. For example, 'Trust-e' is a certification mark that appears on a number of websites, in particular US sites. The Trust-e mark is licensed for use by sites that subscribe to and comply with certain privacy safeguards and standards as determined by the owner of the Trust-e mark.

The trade mark owner may assign or license a trade mark. In addition, trademarks may be registered in other jurisdictions.

### 3.4 Patents

**Key legislation:** Patents Act 1992.

**Summary:** A patent is a right granted for any device, substance, method or process which is new, inventive and useful. Patents require a formal application to a Commonwealth organisation (IP Australia) and are subject to an approval and registration process. Once granted, patents are legally enforceable and give the owner the exclusive right to commercially exploit the invention for the life of the patent.

A patent can be granted for inventions that are useful and novel. To be patentable, an invention cannot have been 'obvious' to other skilled people in the relevant area – this is a measure of the creator's inventiveness. A patentable invention can be an improvement to an existing product or service or can be a totally new product or service.

There are two types of patent: standard patents and innovation patents. A standard patent must have an 'inventive step' whereas an innovation patent must have an 'innovative step'.

#### 3.4.1 Obtaining patent protection

To obtain an Australian patent, a patent application is lodged with IP Australia. A patent specification summarises the invention and the invent step that is claimed must accompany the application. The date of filing of the provisional patent specification is known as the priority date.

In order to obtain a patent, the claimed invention must pass a two-part test.

- First, the invention must contain an inventive step. (Innovation patents only require an 'innovative step', the meaning of which has only been considered in a very limited number of cases.) This means that the inventive step would not be obvious to a person skilled in the



- relevant field and that it is more than a logical improvement over the status quo in the relevant field.
- Second, the invention must be new or novel and not have been done before. It is important to note that it is not uncommon for an inventor to inadvertently lose his or her ability to claim that an invention is novel through some form of disclosure. Novelty is lost where there is secret use of the invention (except for the purposes of very limited testing) or if any disclosure of it is made unless the person to whom the disclosure is made is bound by confidentiality obligations. A fatal disclosure can occur when the invention is demonstrated, discussed or is offered for sale or license before a patent application is made.

### 3.5 Domain names

Domain names can be registered under a range of different top-level domains. New top-level domains continue to emerge, with a new one, .tel, announced as recently as May 2009. The Website Management Framework (WMF) Domain Names and Allocation standard requires that Victorian Government websites must have a .vic.gov.au domain or otherwise apply for an exemption to use another top level domain. This standard also prescribes adherence to Federal Government policies and guidelines for the use of .gov.au domains.

Registrants do not 'own' domain names but instead hold a licence to use the domain name for a specified period of time. Domain names can be transferred to another eligible entity for any reason. However, newly registered domain names cannot be transferred within the first six months after registration.

Cybersquatting is the act of registering a domain name in bad faith (without having a legitimate right or interest in it) with the intention of selling it to a person who has a legitimate interest in the name, or otherwise profiting from the goodwill attached to it. When a cybersquatter has already registered your agency name as a domain name you may be able to utilise:

- the [Uniform Dispute Resolution Policy](#) (UDRP) if the relevant name has been registered in a .com, .net or .org subdomain;
- the [auDA Dispute Resolution Policy](#) (auDRP) if the relevant name has been registered in a .com.au, .net.au, .asn.au etc subdomain; or
- litigation in courts.

Cybersquatting does not apply to .vic.gov.au domains, which are controlled by the Victorian Government.

### 3.6 Designs

**Key legislation:** Designs Act

**Summary:** A design comprises the visual appearance of a product or article— for example the shape, pattern or ornamentation.

To be registrable, a design must be 'new and distinctive'. A registered design provides the owner with the exclusive right to use, license or sell that registered design. Registration also stops others from copying the visual appearance of a manufactured product – for example, a folding chair or a Dunlop tyre.

## Chapter four – Intellectual property ownership

### 4.1 Copyright ownership

**Checklist:**

2. Did you use or incorporate any content or material owned by third parties (e.g. text, photographs, artwork) on the website?



3. If yes, did you obtain and receive permission or an assignment of copyright from that third party to use the material?
4. Did that permission extend to digital and online use?
5. Has the use of third party content been attributed properly?

The basic rule is that the author of a copyright work is the owner of the copyright. However, where the author creates a work under an employment agreement, the employer is the owner of copyright. Thus, the copyright in works originated by employees of public sector organisations as part of their employment is owned by the public sector organisation that employs them. It is important to note that consultants are not employees. Therefore, the issue of copyright ownership must be addressed in the consultancy agreement – preferably including an assignment of the rights to works.

One exception to these general rules are commissioned photographs taken for private and domestic purposes and portraits; in which case the person who commissions the work is the copyright owner. It should be noted that if the person who commissions the photograph or portrait makes known to the author the purpose for which the work is required, the author has a limited right to restrict the use of the copyright work for purposes other than the disclosed purpose. The second exception is journalists' copyright. A journalist, despite having created a work under an employment agreement with a newspaper, controls the right to include the work in a book or in a paper version of his or her employer's publication.

It is important to note that all of these general rules and exceptions are subject to any agreement to the contrary.

For subject matter other than works, copyright is owned as follows:

**Sound recordings and films** – the maker of the sound recording or film owns the copyright, except where a person makes an agreement with another to make the sound recording or film, in which case the first person owns the copyright.

**Television and sound broadcasts** – the maker of the broadcast owns the copyright.

**Published editions of works** – the publisher owns the copyright in the published edition.

#### 4.1.1 Crown copyright

##### Checklist:

The Victorian Government owns copyright in a work if the work is:

6. created, or first published, by the government, or under their direction or control, unless the government has agreed otherwise;
7. made by government employees as part of their job; or
8. created by independent contractors or consultants, if the contract of services provides for government services and that contract doesn't provide for a different ownership arrangement (for example, through terms stating that the contractor or consultant owns copyright).

Under sections 176–178 of the Copyright Act 1968 (Cth), the Crown owns copyright in works and other subject matter made by or under its direction, or that is first published by the Crown or under its direction (unless a relevant agreement provides otherwise). As a starting point, these provisions can be said to apply to all departments of the Commonwealth, States and Territories. This does not mean, however, that copyright in materials created by a department will be owned by that department – instead, the property is owned by the Crown (Commonwealth, State or Territory) of which the department forms a part.

Where copyright is attained, it will last 50 years from the material's creation or first publication, rather than the usual 70 years. Material is taken to be 'first published' when it is first made available to the public.



Despite this, a recent report of the Australian Law Reform Commission (ALRC) has recommended that the Crown lose its 'unique' position with respect to copyright, with particular reference to the section of the Act that allows the Crown to obtain copyright in materials first published by it.

In light of the uncertainties surrounding the interpretation of the statute and possible legislative reform, it is advisable that copyright issues are dealt with explicitly in contractual agreements entered into by government bodies.

### **Crown use of copyrighted materials**

Under section 183 of the Copyright Act, the Crown (or any person authorised in writing by it) will avoid liability for copyright infringement where the acts that would normally constitute infringement are done 'for the services of the Commonwealth or State'.

With respect to uses that can be considered 'for the services of' the Crown, the Australian Copyright Council indicates that these may include services provided by, as well as used by, government. It also highlights that all uses made by a body will not automatically be exempted just because that body is regulated by section 183.

With respect to the meaning of a 'body' under section 183, the starting point is that all departments of the Commonwealth, states and territories would be considered to be a 'body' under section 183. Under section 183(11) the Copyright Act specifies that acts comprised in the copyright and done 'for the educational purposes of an educational institution of, or under the control of, the Commonwealth, a State or the Northern Territory' do not receive specific protection. In some circumstances, statutory authorities with their own boards have not been considered as a 'body' by the courts under section 183.

It should be noted that the Crown's right to use copyrighted materials is conditional, to the extent that notice must be given to the copyright owner and terms for the exercise of the Crown's rights must be agreed.

## **4.2 Trademark ownership**

The owner of a registered trade mark is the person or entity registered with IP Australia as its owner. Normally, the owner of a registered trade mark is the organisation to whose products or services the trade mark is related. A search of the trade mark register will identify the owner of a trade mark.

## **4.3 Patent ownership**

The general rule is that the creator of the subject matter of the patent is entitled to be registered as its owner. As is the case with copyright, if the creator of the patent subject matter did so in the course of his or her employment, the owner of the patent is the employer. These rules are subject to any contrary agreement. The owner of a patent can be ascertained by searching the register.

## **4.4 Transfer and licensing**

If intellectual property owned or controlled by a third party is required for use in a Victorian Government website, it is necessary to acquire the right to use it. Intellectual property rights can be acquired by either:

- assignment – the transfer of ownership in part; or
- license – the grant of a right to use part or all of the intellectual property.

Transfer and licensing of intellectual property can be an extremely complex activity. If the rights obtained are insufficient for their proposed use on a website, there is a risk of a claim for infringement and possible liability for damages. Accordingly, legal advice should be sought and obtained in relation to licensing issues. The general rule, however, is to ensure that the rights that are acquired cover the uses that will be required of or permitted by the website in which they are embodied. For example, if the website permits users to download material for private, non-commercial purposes, the website must have permission from the copyright owner to facilitate this activity.



For all material included on a Victorian government website, the express written permission of the owner of the intellectual property rights in the material must be obtained and documented. Intellectual property rights, particularly copyright, can be licensed in a variety of ways, including:

- by geographic restriction (a right to exercise some or all of the copyright owners rights in a particular location);
- by reference to a purpose or application (the right to use material on a particular website or for a particular purpose);
- by time (the permission expires at the end of a specified period of time); or
- by reference to particular rights (the right to communicate material to the public but not to broadcast it or reproduce it) or a combination of each of these.

In negotiating a licence, care should be taken to ensure that the rights obtained cover all potential uses.

## Chapter five – Electronic transactions

### Checklist:

9. Can your means for providing electronic signatures be considered objectively reliable?
10. If using a (click-wrap) contract, do you:
  - clearly indicate whether you intend to be bound upon acceptance of terms by the other party?
  - bring all terms sufficiently to the attention of the other contracting party?
  - provide means by which the other party can clearly indicate acceptance of the terms?
11. If using an automated message system (AMS), do you:
  - make it clear to the other contracting party that they are agreeing to transact via AMS?
  - give the other party an opportunity to withdraw any erroneous information entered at a point before the contract is formed?
12. If time and place of contract formation is important to you, do you make it clear in the terms of the contract when and where formation is intended to occur?
13. Have you adopted security measures protecting against identity fraud?

Electronic transactions on the internet have become an increasingly popular way for individuals and business to buy and sell goods and services. Under the Electronic Transactions Act (Vic) 2000 (the 'ETA'), electronic transactions are as legally valid as paper-based transactions if the transacting parties consent.

The major purpose of the Victorian ETA and equivalent federal and state legislation (together the 'ETAs') is to enable people to use electronic communications in the course of business operations and in satisfying their legal obligations. Like its federal counterpart, the Victorian ETA allows transactions which have occurred through electronic communication to be considered valid. The effect of this is that, where law requires a person to give information in writing, they will generally be considered to have satisfied this requirement if they have given the information electronically (and the recipient has consented to the information being given in this way).

### 5.1 Electronic signatures

In certain circumstances, and where the other party consents, the Victorian ETA allows electronic signatures to have the legal effect of a written signature. Any electronic data carrying the intent of a written signature qualifies as an electronic signature.

Currently, electronic signatures are valid if there are means used to identify the signatory and their acceptance of information communicated to them, and the way in which the signature was collected was as reliable as was appropriate in the circumstances. This is problematic as it potentially allows bad faith parties to have a contract invalidated where the way in which the signature was collected was not objectively reliable (even if both parties intended to enter into the contract at the time).



With a view to avoiding this problem, the Federal Attorney-General has proposed that the electronic signatures provision in the state and federal ETAs be amended. However until this recommendation is adopted, website operators should ensure that the means by which electronic signatures are gathered may be considered objectively reliable. There is little precedent on what might be considered 'objectively reliable' in differing circumstances, however the general principle is that the reliability of the method must be appropriate for the purposes for which the signature is obtained. Where doubt exists, industry standards can provide guidance.

## 5.2 Automated message systems

It has been established that automated message systems (AMSs) can validly make and accept contractual offers. Contracts may therefore be formed by a natural person and an AMS, or even wholly without human intervention.

Website operators using an AMS can seek to ensure the enforceability of contracts entered into by making it clear to the other contracting party that they are consenting to entering into a contract using an AMS. They should also give the other contracting party an opportunity to withdraw any erroneous information entered before the contract is formed, as in some cases the inclusion of incorrect information in the contract will lead to it being invalidated. Although the federal Attorney-General has also made a recommendation that contracting via an AMS should be recognised as valid in the state and federal ETAs, precautions should be taken until this recommendation is adopted.

## 5.3 Timing and place of contract formation

Issues surrounding the timing and place of contract formation via the internet have also been considered by the federal Attorney-General, following the UN's 2005 Convention on the Use of Electronic Communications in International Contracts. Currently, the state and federal ETAs leave some of these issues unclear, and it is proposed that the Acts are amended to provide greater certainty.

In the meantime, online operators – and particularly those using click-wrap contracts – should make it clear whether or not they intend to be bound upon acceptance of their terms by the other party. This would necessarily resolve some questions about the timing of contract formation.

In the absence of an express indication to the contrary, it will be assumed that an electronic contract is formed upon receipt of acceptance of terms. Under the Act, receipt is taken to have occurred when the relevant communication enters an information system - for example, an email system - designated by the addressee for that purpose. If no such system is designated the electronic communication is taken to have been received when it comes to the attention of the addressee.

Equally, the place of formation will be taken as the place of business of the recipient. If parties wish to avoid this, they should include an express forum selection clause that specifies otherwise. For Victorian Government contracts, this should clearly state that the contract is governed by the laws of Victoria. See Attachment 2 for a typical clause designed to achieve this purpose.

## 5.4 Identity and security

The ETA provides that the purported originator of a communication is only bound by that communication if they did in fact send it, or if it was sent with their authority. The parties to a transaction are free to prove otherwise. In addition, there are some exceptions for cases in which people pretend to act with the communicator's authority when they do not in fact have approval to do so.

In law, where elaborate security measures such as encryption are used, these are assumed to be reliable. In these cases it is likely that any agreement entered into will have to be respected, unless the recipient of a fraudulent communication was doubtful of its integrity but chose to ignore their suspicions. For these and other reasons, the use of security mechanisms will assist operators in binding other contracting parties, even where communications were not sent by them or with their authority.



## Chapter six – Laws covering use and communication of content and services

### 6.1 Regulation of online content

The regulation of online content is governed by a system of regulation similar to that of free-to-air commercial broadcasting. Internet hosts follow a code developed by industry. If the code (developed by the Internet Industry Association ) is breached, then the Australian Communications and Media Authority (ACMA) , in response to a complaint or by its own initiative, may take action. If the ACMA finds a breach of a code or of the Broadcasting Services Act 1992 (BSA) it may issue a ‘take down notice’ to the host.

Additionally, if content is of a nature that would warrant criminal action (such as the hosting of child pornography) then a matter may be referred by the ACMA, or by any person, to the relevant law enforcement agency. Criminal charges and penalties are imposed and governed by law enforcement agencies and are distinct from the system of co-regulation developed by the Internet Industry Association and ACMA.

### 6.2 Censorship and content regulation

#### Checklist:

14. Consider the content of any website material and whether it requires any classification.

In Australia, internet content is regulated under the Broadcasting Services Act 1992, specifically, through the Broadcasting Services Amendment (Online Services) Act 1999 (the Online Services Act). The relevant regulatory authority is the ACMA.

The Online Services Act is designed to achieve three objectives, to:

- restrict access to certain internet content that is likely to cause offence to a reasonable adult;
- provide a means for dealing with complaints about certain internet content; and
- protect children from being exposed to internet content that is unsuitable for them.

The Broadcasting Services Act 1992 provides for the regulation of content services delivered over convergent devices, including broadband and mobile handsets and live or streamed content over the internet. It contains provisions governing both ‘prohibited content’ and ‘potential prohibited content’.

‘Prohibited content’ is content:

- that has been classified RC or X 18+;
- that has been classified as R18+ where access to the content is not subject to a restricted access system;
- that has been classified as MA15+ where:
- access to the content is not subject to a restricted access system;
- the content does not consist of text and/or one or more still visual images; and
- the content is provided by a commercial service (other than a news or current affairs service); and
- that has been classified as MA15+ where access to the content is not subject to a restricted access system and the content is provided by a mobile premium service.

Where content consists of an ‘eligible electronic publication’ - meaning an electronic version of a written or audio publication that is or was available to the public in print – it will be ‘prohibited’ if it has been classified as RC, category 1 or 2 restricted.

Content is ‘potential prohibited content’ if there is a substantial likelihood that it would be ‘prohibited content’ were it to be classified.



The Restricted Access Systems Declaration 2007 (RAS Declaration) released by ACMA imposes an obligation on hosting service providers, live content service providers, links service providers and commercial content service providers who provide a content service that has an Australian connection, to have in place a restricted access system for content (excluding 'eligible electronic publications') that is:

- MA15+ content that is provided by means of a content service which operates on a commercial basis; or
- R 18+ content.

The RAS Declaration specifies the minimum requirements of an access-control system for MA15+ content that is provided on a commercial basis, and R18+ content. Different requirements exist for the different classification levels.

## 6.3 Privacy

Lack of adequate privacy protection may be a reason why individuals provide deliberately incorrect information when using online services, or why they choose not to use online services at all.

Privacy embraces a number of concepts. These include the expectation that:

- information collected about an individual - such as medical or psychiatric history, religious or political affiliations - is kept private;
- a person's communications will be private; and
- information a person provides to an organisation about him or herself will not be passed on to a third party.

### 6.3.1 Privacy law in Australia: the legislative regime

Australia's federal privacy legislation, the Privacy Act 1988, initially applied only to the federal public sector, consumer credit reporting and certain tax details. It has since been amended to impose privacy obligations on certain private organisations. Although placing emphasis on the so-called 'National Privacy Principles' contained in its Schedule 3, the Privacy Act does allow organisations to be bound by their own industry-specific codes where approved.

The expansion of protection under the federal Privacy Act was largely driven by the development of online services, and was designed to increase the level of confidence and trust in new online initiatives.

In Victoria the Information Privacy Act (IPA) broadly governs the activities of the public sector, and therefore the privacy practices of Victorian government websites. Examples of 'organisations' covered by the IPA include Ministers, public sector agencies, Councils, courts and tribunals, and the Victorian police force.

In as much as private organisations are covered by the IPA, they must:

- first, be in an outsourcing relationship with an organisation covered by the Act; and
- second, have contracted to be bound by the Act's 'Information Privacy Principles' - or an applicable code of practice – in the same way that the outsourcing organisation would have been bound if it had been acting.

If these two conditions apply, and the organisation can show the relevant information privacy principle or code of practice is capable of being enforced against the contractor under the Act, the private organisation (contractor) will be held responsible for a privacy breach alongside the organisation.

It follows that all Victorian public sector organisations which outsource activities that involve the use of personal information should include binding contractual provisions for the service provider. These provisions should set out that the service provider will observe the same privacy obligations as those that the outsourcing organisation must observe and steps should be taken to ensure that such contractual provisions are enforceable.



The ten Information Privacy Principles (IPPs) that organisations are bound to respect under the IPA are directed at promoting awareness and implementation of good personal information handling practices. In brief, they are as follows :

**Data collection**

An organisation must not collect personal information unless the information is necessary for one or more of its functions or activities.

**Use and disclosure**

An organisation must not use or disclose personal information about an individual for a purpose (the secondary purpose) other than the primary purpose of collection unless special defined circumstances apply.

**Data quality**

An organisation must take reasonable steps to make sure that the personal information it collects, uses or discloses is accurate, complete and up to date.

**Data security**

An organisation must take reasonable steps to protect the personal information it holds from misuse and loss and from unauthorised access, modification or disclosure.

**Openness**

An organisation must set out in a document clearly expressed policies on its management of personal information and must make the document available to anyone who asks for it.

**Access and correction**

If an organisation holds personal information about an individual, it must provide the individual with access to the information on request of the individual unless specific defined circumstances apply.

**Identifiers**

An organisation must not assign unique identifiers to individuals unless the assignment of unique identifiers is necessary to enable the organisation to carry out any of its functions efficiently.

**Anonymity**

Wherever it is lawful and practicable, individuals must have the option of not identifying themselves when entering into transactions with an organisation.

**Transborder data flows**

An organisation may transfer personal information about an individual to someone (other than the organisation or the individual) who is outside Victoria only if the organisation reasonably believes that the recipient of the information is subject to a law or binding scheme or contract that upholds principles for the fair handling of personal information substantially similar to these IPPs or if the individual consents.

**Sensitive information**

An organisation will limit the collection of highly sensitive information about individuals.

The IPPs must not be contravened by regulated organisations in respect of personal information collected, held, managed, used, disclosed or transferred by them. Failure to comply may result in a complaint to the Privacy Commissioner which, if proved, can lead to the making of various orders to protect privacy or remedy the breach, including the granting of compensation.



## Codes of practice

The IPA permits organisations to discharge their statutory privacy obligations by complying with a code of practice that binds the organisation. Codes of Practice are designed to provide the legislation with flexibility by permitting the modification of one or more of the IPPs in relation to their application to an organisation, but only where the modification is at least as stringent as the standards set out in the relevant IPP. Codes of practice are approved by the Privacy Commissioner and, when approved, govern the privacy practices and procedures of the organisation in place of the IPPs. The Privacy Commissioner is required to keep a register of codes of practice.

## Complaints

Individuals are given the right to complain to the Privacy Commissioner about acts or practices that may constitute an interference with the privacy of that individual. In dealing with complaints, the emphasis of the legislation is on conciliation before the Privacy Commissioner. Conciliation agreements can be registered with the Victorian Civil and Administrative Tribunal (VCAT) and enforced through VCAT. If conciliation before the Privacy Commissioner fails, the complaint may be referred to VCAT and heard and determined by it. VCAT has a range of powers available to it in the event that it finds that part or all of a complaint has been proved. These include the power to make various orders, including orders to refrain from action, orders to adopt correctional courses of conduct, and orders to pay compensation or costs.

The Privacy Commissioner is also able to serve a compliance notice on an organisation if he or she is satisfied that the organisation has committed an act, or engaged in a practice, in contravention of an IPP or code of practice.

## The overlap between freedom of information and privacy

There is an inevitable tension between freedom of information legislation - which is designed to ensure that information held by the public sector is made widely available - and privacy, which attempts to give an individual more control over his or her personal information. To a certain extent, the IPA attempts to resolve the conflict between the free flow of information and privacy.

Under section 6 of the IPA, where there is a conflict between the provisions of the IPA and any other Act, such as the Freedom of Information Act 1982 (FOI Act), the provisions of the other Act prevail over those of the IPA. The IPA does not confer any statutory right of access to one's personal information—the only statutory right of access to information held by Victorian government agencies is given by the FOI Act. However, as each public sector organisation will be required to comply with the IPPs, part of that compliance will necessarily involve establishing mechanisms through which individuals can potentially access their personal information outside the FOI regime. The online environment offers a number of ways of accomplishing this objective, such as through online enquiries.

## 6.4 Consumer protection responsibilities

The OECD's Guidelines for Consumer Protection in the Context of Electronic Commerce (1999) are referred to by the Australian Competition and Consumer Commission (ACCC).

The substantive issues identified by the Guidelines are:

- The provision of adequate information;
- Payment;
- Dispute resolution and redress;
- Jurisdiction; and
- Privacy

**The provision of information:** As online relationships take place without any physical contact, it is necessary to provide explicit information that a consumer would otherwise be able to obtain through the physical sales environment or through physical proximity to the service provider. Information needs to be provided about the identity and physical location of the service provider, including a street address and phone numbers. Sufficient information about the goods or services and the transaction should also



be provided. In providing such information, the supplier should be wary not to make any representations that could be considered misleading, deceptive, fraudulent or unfair.

**Payment:** Although most online services to which this guide applies will be free services, wherever some form of e-commerce mechanism is provided (e.g., bill payment), the provision of a secure payment system is essential. Online payment usually means the use of credit cards. Using credit cards over the internet involves a number of risks including:

- interception of credit card details en route to the service provider;
- improper use of credit card details by the service provider; and
- credit card details being improperly obtained from the service provider.

Details of the measures that are taken to minimise these risks should be made available to clients.

**Dispute resolution and redress:** As many online relationships cross national or international borders, the normal dispute resolution mechanisms to which consumers have access are not effective. Where a dispute arises and the parties are located in Australia, existing dispute resolution mechanisms, such as Australian courts, tribunals or regulatory bodies, may be effective. Where one or more parties are not located in Australia, there is no effective international online dispute resolution mechanism available. In the absence of such a mechanism, it is suggested that a dispute resolution mechanism is proposed as part of the rules that are stated for the online service, even if the mechanism is one that is located within Australia.

**Jurisdiction:** Internet transactions that cross territorial borders give rise to two main jurisdictional issues. First, what law applies to the transaction? Second, what is the appropriate forum for the resolution of disputes?

For Victorian government websites, the law that applies to any transaction should be stated as Victorian law in the site terms and conditions. In addition, the parties should agree (through the site terms and conditions) that the parties submit to the non-exclusive jurisdiction of the courts of Victoria for resolution of any disputes – see Attachment 2 for a model clause that achieves this.

**Privacy:** Privacy issues are dealt with earlier in this section.

## 6.5 Accessibility

### Checklist:

Are visitors who face accessibility challenges able to navigate the site? Does the website:

15. have clearly readable text?
16. use plain and simple language to ensure content is comprehensible?
17. provide equivalents to audio and visual content?
18. make it easy to navigate, including for people with different types of hardware?

Under the Disability Discrimination Act 1992 (Cth), government agencies are required to ensure that online services are accessible to people with disabilities. It is Victorian government policy that websites should be designed so as to promote equal access for people with disabilities, as well as people using older technology and people in remote and regional areas.

Website designers should consider:

- those who cannot see, hear or move, or cannot process certain types of information easily;
- those who cannot use a keyboard or a mouse;
- those for whom viewing images may be difficult (e.g. due to a slow internet connection); and
- those who are reading the website in a second language.

All Victorian government websites must comply with the WoVG Accessibility Standard. At time of writing, this standard requires all government websites to conform to 'Level A' of the W3C Web Content



Accessibility Guidelines (WCAG) version 1.0, and to 'Level AA' or 'Level AAA' where the website's audience require further accessibility measures. From August 2010, all government websites will be required to conform to Level AA of WCAG version 1.0 and Level AAA where the website's audience requires further accessibility measures. Further changes to the Accessibility standard are imminent.

Compliance may, for example, require alteration of colour schemes, provision of clear and consistent means of navigation, and features that allow interaction without use of a specific device. For further information on implementing accessible websites, see the Guidelines, toolkits and references section of the Accessibility standard.

## 6.6 Email marketing and spam

### Checklist:

19. Ensure electronic commercial messages are not sent without the recipient's consent.
20. Ensure that any electronic commercial messages sent identifies the sender clearly and has a working 'unsubscribe' function.
21. Do not use email addresses that have been 'harvested'.

### Key legislation: Spam Act 2003 (Cth)

Spam is unsolicited commercial electronic messaging sent by any number of applications such as email, SMS, MMS and instant messaging (IM). Spam can be difficult to identify at times, but generally if the sender is unknown to the user and the content is commercial in nature, it is probably spam. For example, an email containing an offer of a commercial transaction, or directing the addressee to a location where a commercial transaction can take place sent without the prior consent of the addressee would be considered spam.

In summary, there are three essential rules when sending commercial electronic messages. To avoid breaching the Spam Act, commercial electronic messages must:

- be sent only with the addressee's consent;
- include clear and accurate identification of the sender; and
- include a functional unsubscribe facility.

### 6.6.1 How do I obtain consent?

Consent is expressly obtained where the addressee has subscribed to your electronic advertising mailing list; deliberately ticked a box consenting to receive messages from you; or specifically requested such material from you. It is also possible to send marketing emails where there is inferred consent. You may have inferred consent if:

- you have an existing relationship with a customer who has previously provided their address to you;
- a customer has provided their electronic address to you in the expectation they will receive follow-up communication; or
- you have been handed a business card containing an electronic address.

When assuming inferred consent be particularly careful to provide an easy means for the user to unsubscribe/remove themselves from your messaging. You have only assumed they wish to receive messages from you and this may not be the case.

You can obtain consent by seeking confirmation from the addressee that you can send commercial messages to them. Such confirmation could be obtained by using the 'double opt in' process (also referred to as a 'closed loop confirmation') so that you can validate consent and provide evidence of it.

Double opt-in requires the customer to acknowledge that they wish to receive messaging from you in two steps. In the first step they send you a message – or fill out on an online form, or some other mechanism - requesting subscription to your mailing list. On receipt of the request, you reply to their provided address requesting confirmation that messages should be sent there in the future. In addition, you should also advise the addressee that their address will only be added to the contact list if they



send a positive confirmation within 14 days. The user's second step is to confirm your response, affirming that they wish to receive messages at the specified address. If you receive a positive confirmation, you may add the address and if there is a negative response or no response then the address should not be added to your contact list.

## Chapter Seven – Misleading and deceptive conduct, negligent misrepresentation, defamation and passing off

### 7.1 Misleading and deceptive conduct

#### Checklist:

22. Examine statements and representations to ensure they are not misleading or deceptive.
23. Consider qualifying any statements or provide supporting evidence.

**Key legislation:** Trade Practices Act (Commonwealth); Fair Trading Act (Victoria).

Section 52 of the Trade Practices Act (Commonwealth), Section 11 of the Fair Trading Act (Victoria) and other similar state legislation prohibit corporations - and, in the case of the state legislation, individuals - from engaging in conduct in trade and commerce that is misleading or deceptive or is likely to mislead or deceive. Conduct includes making statements.

Liability for misleading or deceptive conduct is strict, that is, there does not have to be any intention to mislead or deceive. It is the effect of the conduct, not the reason for it that is reviewed by the Court. Therefore, it is not a defence to argue that one is merely a channel and that the content was provided by another agency.

Under these acts, not only can damages be awarded and publication restrained but also the offending party may be ordered to publish retractions and otherwise correct misstatements.

It is not possible to contract out of liability for misleading or deceptive conduct although it may be possible to limit liability to certain specified outcomes in some circumstances. Because of this, the risk of misleading or deceptive conduct claims is better managed through warnings and recommendations that independent advice be sought, than disclaimers.

### 7.2 Negligent misrepresentation

So far Australian courts have provided little guidance on how the law of negligence applies in the online environment. Consequently, the analysis that follows is primarily based on the principles courts have used when dealing with non-internet based relationships and transactions or on decisions that have been made in other jurisdictions.

The tort of negligent misrepresentation is much narrower in compass than claims for damages arising out of misleading or deceptive conduct.

To succeed in a claim for misrepresentation, it is necessary to prove that:

- the offending party owed the plaintiff a duty of care;
- there has been a breach of duty of care, i.e. negligence; and
- the plaintiff has suffered loss and damage that is not too remote, arising out of that loss and damage.

Proving a duty of care is necessarily more difficult in cases of misrepresentation than in other cases of claimed negligence, however a plaintiff could attempt to argue that the author and supplier of the impugned information, as well as the operator of the website on which it appeared, owed them a duty of care.



Reliance is a very important element in establishing a duty of care owed by the defendant to the plaintiff. It must be shown that the plaintiff relied on the statement made by the defendant. For a duty of care to exist it must also be shown that the defendant in express or implied terms undertook the responsibility of exercising reasonable care when making the relevant statement, and that the defendant knew their advice was likely to be acted upon without the making of further enquiries.

Operators of government websites which purport to provide comprehensive information about regulatory matters should be wary of these indicators. For example it may be useful for operators to include a website term advising viewers to seek independent advice before acting on particular statements contained in the website.

Having said this, claims of negligent misrepresentation are generally claims for pure economic loss (i.e. no personal or property damage has occurred) and therefore the trend is to limit the duty of care. In addition, the broad and indeterminate nature of liability to which people would potentially be exposed for misstatements on the internet means courts are likely to be cautious in finding a duty of care in this context. Where negligent misstatement results in personal injury or property damage, the duty of care will be much more broadly defined and, indeed, the claim may be treated as a species of product liability. An example of this would be a recipe that has been posted on a website but by reason of a mistake in ingredients or procedure described, the resulting product causes injury.

It is possible to contract out of claims in negligence through disclaimers. However, because of judicial dislike of disclaimers, very little reliance should be placed on the effectiveness of disclaimers in the case of personal injury or property damage. Expanded disclaimers may be effective depending upon what they say and the nature of any defect.

### 7.2.1 Green and carbon 'claims'

As the 'green' industry develops, businesses are examining their carbon footprint and trying to minimise and offset their emissions in order to stay competitive in the market and appear attractive to consumers who are now aware of the implications of climate change.

It is often difficult for consumers and businesses to know what they are really getting when they purchase carbon offsets or carbon neutral products or services. The confusion is caused by the growth in the use of such claims, the varied methodology of assessment of reductions or neutrality of carbon emissions and often a lack of adequate information about the carbon offset associated with a product or service.

The penalties for misleading consumers are serious. Therefore it is important for anyone making carbon-related claims to:

- consider your audience - not all will be educated, particularly as to the meaning of technical and scientific environmental statements, so use plain language which the average consumer in your target audience would understand;
- make any claim clear and unambiguous to avoid confusing your audience and avoid broad or unqualified claims as they can be problematic;
- remember that misleading conduct includes silence or half-truths and predictions can also be considered misleading if they are not based on reasonable grounds;
- if your agency name implies green credentials ensure they are accurate as business names can be considered misleading and deceptive;
- ensure your goods comply with any description that is provided in advertising or labelling or any representation made by way of a picture;
- be specific about what the claimed benefit refers to, for example packaging or content; and
- do not falsely claim that goods or services have capabilities, effects or benefits that they do not have or that cannot be substantiated.

The Australian Competition & Consumer Commission (ACCC) publishes useful guidelines in relation to these claims.



### 7.3 Defamation

#### Checklist:

24. Consider the effect of any statement that may affect the reputation of third parties.

A statement is defamatory if it has the tendency to expose a person to hatred, ridicule or contempt; lower them in the estimation of a section of ordinary members of the community; or cause them to be shunned or avoided. A website is a vehicle through which statements can be made and published widely, particularly through applications such as forums and news feeds. Therefore website content is one of the means by which people risk attracting liability for defamation.

The law of defamation is concerned with providing redress to those whose reputation is damaged through the publication of defamatory material. In Victoria, it is constituted by case law and the Defamation Act 2005 (Vic). The other states have legislation that is very similar to the Victorian Act.

Any publisher of defamatory material may be liable for defamation, and may therefore have to compensate the plaintiff for their loss. The Court does not look at the publisher's (potentially non-malicious) intentions, but rather focuses on the effect of the offending statement(s). Having said this, the sum of damages awarded may be increased where the publisher of the defamatory material did not act with good faith.

Note that it is not just the original author of material who may be found liable for defamation - it is not a defence to argue that one is merely a conduit and that another party was the content provider. This principle applies equally to internet publishers.

Here, however, the position varies somewhat where the reproduction of the offending statement(s) is by a party that can qualify as a 'host' or 'provider' of material (i.e. where that party has no editorial control over the content or publication of the material). In these cases the Defamation Act provides protection where the host neither knew nor ought reasonably to have known that the material was defamatory and that lack of knowledge was not due to their negligence.

### 7.4 Passing off

Passing off occurs where a person falsely represents that their business is somehow connected with that of another person and this misrepresentation is likely to damage that other business' reputation or goodwill.

To succeed in a claim of passing off, it is necessary to show that:

- the plaintiff has goodwill or reputation in the name or get-up in issue;
- in using the name or get-up, the defendant is misrepresenting an affiliation to, or endorsement by, the plaintiff respecting the defendant or the defendant's goods; and
- damage will be incurred to the value of the plaintiff's name and reputation by reason of the passing off.

In legal terms, 'get-up' refers to the general appearance of the product when it is put on the market. This is comprised by elements such as the shape, size, and colouring of its container or packaging.

## Chapter eight – Hyperlinks and searching

### 8.1 Hyperlinks

#### Checklist:

25. Examine the website for use of hyperlinks.

The types of hyperlinks that may potentially create legal risks are:

- deep links;



- frames; and
- inline image links (used to display images or graphics contained on a third party server on your own website).

The use of links to other sites can also be problematic. Even a standard, obvious hyperlink may infringe the terms of use for the other site, so any relevant policies on the other site should always be checked. It would also be sensible to have a policy on your site to prevent unwanted links. However, problems may arise:

- when the link is a direct link to a page within the other site, rather than the homepage; or
- where a linked page is framed on your site in a way that disguises the origin of the linked page.

Such links may attract liability under the Trade Practices Act 1975, if the user alleges that the content on the linked site is your content or is endorsed by you. It is prudent, therefore, to link to the homepage of an alternative site, and/or make users aware that the content there is not yours or necessarily endorsed by you.

### 8.1.1 Frames

Frames can be used in such a way as to present content from one website as if it is the content of another website. It follows that framing is a relatively high risk activity because it readily gives rise to a perception of there being some sort of connection, endorsement or sponsorship involved in the relationship. It is not appropriate for Victorian government websites to permit their content to be linked through the use of frames in circumstances where users could be misled into believing that the Victorian Government content was content provided by another site. Equally, it is generally inadvisable for Victorian government websites to frame material obtained from others in the absence of a negotiated framing agreement that establishes the rules under which framing is to take place.

## 8.2 Optimisation of search engine results

Some search engines sell advertising which is linked to the keywords users type into the search engine search fields. In this process, the advertiser pays the search engine a fee, nominating certain keywords that apply to their business. When a search engine user searches using any of those keywords, links to advertisers who have 'bought' that keyword will be favourably positioned among the search results or as a banner advertisement on the search results page. Where these advertisements appear as banners they are known as 'sponsored links'. Sponsored links usually appear on the top or right hand side of the page and will contain the keyword in bold.

The main legal issues associated with keyword sales arise if a company or person purchases the name of a competitor, name or a trade mark they do not own as opposed to generic terms. By doing this the purchaser is able to craft links that appear to represent the genuine owner of the name or trade mark but instead direct users to the purchaser's website. In searching for one business and being directed to another, a person may erroneously be led to thinking that website they visit is in some way affiliated with the true owner they were searching for. If the user then decides to deal with the competitor, the original business searched for incurs direct financial loss. This could also occur with government department names and other statutory bodies.

This may attract liability under the Trade Marks Act 1995 (Cth) for the possible infringement of a registered trade mark, the tort of passing off and the Trade Practices Act 1974 (Cth) for possible misleading or deceptive conduct.

## Chapter nine – Liability and risk management

### Checklist:

26. Consider using disclaimers, notices or terms and conditions where appropriate.



27. Avoid infringement of third party IP rights.
28. Ensure all agreements and contracts deal with IP rights.
29. Obtain expert advice where enforcing IP rights.
30. Check that the Victorian Government owns the rights in all material used.

## 9.1 Managing risk

Developing and operating websites can expose public sector organisations to serious potential liability. A public sector organisation needs to manage these activities in a manner that does not expose it or other public sector organisations to unnecessary or excessive risk.

Managing legal risks involves identifying and analysing potential risks, planning how to respond and how to control and monitor them.

Risk identification and analysis involves:

- identifying the sources or types of risk;
- defining whether a risk is necessary or unnecessary;
- assessing the probability of risk occurring;
- assessing whether the risk will have a high or low impact; and
- understanding whether the risk can or cannot be managed.

There are a number of techniques that can be used to assist in identifying and analysing risk. In general terms, these can be divided into qualitative and quantitative techniques. Quantitative techniques involve the use of sophisticated modelling and analysis tools that are beyond the scope of this guide. However, qualitative techniques of risk analysis are an extremely effective way in which to define and isolate the legal risks that apply to government websites. Qualitative techniques involve:

- looking at experiences in similar or comparable projects;
- analysing the risks that have arisen in the past;
- using checklists; and
- brainstorming.

The level of risk to which each government website is exposed depends on the activities it carries out. For example, the level of risk for a site that provides information and advice about health and medical issues may exceed the level of risk for a site that provides information about locations that tourists to Victoria might find of interest. The types of risk that are involved with ecommerce or interactive facilities are different from those where the site is static. It follows that the risk associated with any individual government website will not be the same as for another government website.

Each website should undertake an assessment of the legal risks to which it is exposed before going live and as a regular maintenance exercise while the site continues to operate. In a general guide such as this it is impossible (and inappropriate) to define and assess all of the risks that can arise in the process of developing and operating a website. However, it is possible to outline the most commonly encountered risks and liabilities and to suggest possible courses of action to manage them. These are set out in Attachment 1.

## 9.2 Legal tools for risk management

### 9.2.1 Preliminary

Just as the law establishes categories of legal liability, it also provides some techniques that permit liability to be managed and minimised. However, it is important to note that while these techniques are useful for managing risk and any associated liability, risk and liability cannot be entirely eliminated. The most effective technique for minimising risk is professional and thorough website management. Relying on disclaimers and other terms and conditions should not be considered as a substitute for poor website design or management practices. Thus, the following discussion of the techniques that can be used to minimise risk is simply one aspect of proper website management and should not be regarded as a 'one size fits all' solution.



### 9.2.2 Site terms and conditions

Each website should set out the terms and conditions on which the content and services it offers are provided to users. These terms and conditions should, at the least, be available from the site's home page accompanied by a statement that content and services provided are subject to them. The content of the terms and conditions should cover all aspects of the scope and operation of the site. The following are some of the matters that should be considered. An example of site terms and conditions is set out in Attachment 2.

### 9.2.3 Disclaimers

The most commonly used risk management tool is the disclaimer, sometimes used in conjunction with Terms and Conditions.

In the online environment, a 'disclaimer' is a written statement that attempts to avoid or disclaim liability that could otherwise arise by operation of law or to limit or 'cap' liability to a maximum amount.

Disclaimers may be difficult to enforce. However, if used, they must be easily accessible, written in clear, plain English and clearly brought to the attention of the users.

The draft agreement set out in Attachment 2 is designed to operate upon entry to the site, but is not a 'click-wrap' contract. The risk with terms and conditions of the type set out in the draft agreement is that at law they will only be regarded as adhering where it can be shown that the other party has had an opportunity to consider the terms and conditions. Where they are merely offered an opportunity through an optional link, this can be difficult to prove. In contrast, click-wrap contracts must be navigated past and it becomes more difficult for the other party to deny that it had been offered the opportunity to review terms and conditions prior to acceptance.

### 9.2.4 Contract formation

In applying the law of contract, the same key elements of contract formation are required for online contracts as for written or oral contracts, such as offer, acceptance and consideration. The application of statutorily implied terms such as for merchantable quality and clear title also apply. In the context of online transactions a key issue relates to the incorporation of terms through click-wrap contracts.

#### **Click wrap contracts**

The term 'click-wrap' is an extension of the 'shrink-wrap' contract which was so named as it related to the terms and conditions accepted by a consumer when they removed the plastic wrapped around boxes of software. The term 'click' relates to the fact that terms are incorporated into the contract between a computer user and the operator of a website when the user clicks on a specific field or link.

A defining feature of a click-wrap contract is the fact that a user is not able to view or otherwise engage with a website unless they click on the defined field or link. This is distinguished from a 'browse-wrap' contract, where the user is granted immediate access to a website and terms and conditions are made available to view at a disclosed location on the site.

### 9.2.5 Providing information and advice

A person who holds him or herself out as having particular skill or expertise and who provides advice or information must do so with due care, skill and diligence. Just as a professional adviser must bring to his or her task the competence and skill usual amongst persons practising in that profession, a website that holds itself out as providing advice or information about a particular subject must observe a similar standard of care. The obligation is to take reasonable care.

The duty to take reasonable care only arises where it is reasonable for the recipient of the advice or information given by the adviser to rely on it. Clearly the duty exists where there is a contractual relationship between an adviser and his or her client. Thus, where online advice or information is provided for a fee, the adviser's duty to take reasonable care applies and the standards that must be observed are at least the equal of those that apply where the services are provided in an offline environment.



The position is less clear where the sole basis of the relationship between the site and a user is that of a website where information is provided. Frequently, the provider of an information-only service will have no idea whether a person has visited the site and has no control over the way in which the site is used or navigated by anyone who browses it. As such, the relationship between the service provider and browser is little different from the relationship between the author of a book, newsletter or pamphlet and its reader. In such cases, it becomes more and more unlikely that the user of the service could establish the necessary proximity that will give rise to a duty to take reasonable care. Liability for the provision of negligent information or advice will not arise unless:

- the service provider claims special expertise or knowledge;
- it is reasonable for the user of the service to act on the information or advice without further inquiry; and
- it is reasonable for the user of the service to act on the advice or information for the purpose for which the advice or information was used.

The duty of care that can arise in these circumstances can be disclaimed but it is possible that even where a disclaimer is used it may be ineffective where it is reasonable to rely on the advice or information despite the disclaimer. This could often be the position where a government website provides information or advice.

### **9.3 Other matters that should be included in website terms and conditions**

The term 'disclaimer' also covers words which provide a warning or statement about other terms and conditions applicable to the website. Depending on the nature of the service, these other matters can include:

- a statement that any information provided is general and is not intended to constitute professional advice;
- a recommendation that the user seek professional advice from a qualified professional before acting on the information that is provided;
- a statement of the limitations on the level of information or advice that can be provided via a website and the need to seek in-person assistance;
- a warning that while information has been formulated with all due care, no warranty or representation is given that the information is free from errors or omission, or that it is definitive;
- a warning that information changes frequently and that changes in other circumstances after the time of posting the information may impact on the accuracy of the information;
- a statement that limits liability arising from the use of any information contained on the site to the maximum extent permitted by law;
- a statement disclaiming responsibility for the accuracy of links or references to outside information; and
- identification of the jurisdiction to which information or advice applies.

Online information-only services must ensure that users of the service are not encouraged to use or rely on information that is provided without checking with the service provider or some other reputable source. Apart from using disclaimers, the steps that can be taken to achieve this objective include:

- taking care to ensure that information is not written in a way that could be taken to constitute a representation that the information is definitive in all circumstances;
- making the currency of information unambiguously clear. Information that is incomplete or out of date should be promptly removed from a website or updated;
- presenting information in a manner that is clear and unambiguous having regard to the nature of the audience at which the information is targeted; and
- encouraging users to check information from a number of sources before acting on it.

### **9.4 Copyright notices**

**Checklist:**



31. Has an appropriate copyright notice been used? (See Attachment 2 for a model clause that can be used as a starting point.)

Websites should provide a copyright statement governing the use of materials found on the website. Two example copyright statements are provided in Attachment 2. The first prohibits use of any sort. The second allows use on the assumption that it is not subject to third party rights and on the proviso that ownership of copyright is attributed correctly.

Copyright notices should cover what can be done with the material used on the site, e.g. can the material be copied and, if so, whether the right to copy should be limited to non-commercial use.

Copyright in individual pieces of material used on a government site may be owned by the government or may be owned by a third party and used under licence. Where material is used under licence, the terms of the licence must be complied with, including any requirements regarding acknowledgement and moral rights.

Issues that need to be considered in selecting a copyright notice include:

- whether reproduction and dissemination should be limited to personal use only;
- if reproduction and dissemination does extend to non-personal use, whether that use should be limited to non-profit organisations or other specific groups;
- whether prohibitions on reproduction and dissemination should be limited to the whole of the document (although, in practice, this may be difficult to control as it is not a breach of copyright to print less than a substantial part of the copyright material);
- in the case of an interactive site, the ownership of copyright in user contributions and the obtaining of suitable licences; and
- whether any of the material is subject to third party copyright. If it is, it becomes necessary to distinguish between copyright in the website as a whole (which is a compilation of material) and copyright in the individual pieces of material that are included in the website.

## 9.5 Trademarks

### Checklist:

32. Conduct a trademark search to check if the material in question is registered.
33. Obtain the trademark owner's permission to use the trademark.

Government websites should only use the logos of other sites with the permission of the operator of that site. For example, if a trade mark logo is used to create a link to another site the trade mark owner's permission must be obtained first.

Further, in assessing sites as link destinations, government websites should do due diligence to ensure that where logo links are used from that website, the relevant permissions have been obtained.

Trademarks should only be used by permission and only in accordance with the terms of that permission which may or may not require the use of a trade mark notifier e.g. the ® symbol.

Where government trademarks are used, then consideration should be given to using notifiers also. Although it is not necessary to use notifiers under Australian law, it is prudent to do so. Also, in some overseas jurisdictions, notifiers may be required to ensure protection.

The ® symbol is used to denote a registered trade mark, e.g. Penny's cakes®.

The ™ symbol is used to denote an unregistered trade mark, e.g. Penny's clothing™.

Where a trade mark is used, the website should include a statement identifying the owner of the trade mark or advising that trademarks that have been referred to are the property of their respective owners. Where the trade mark is used by permission (that is under licence) then this should be stated so as to give notice to third parties that ownership over the trade mark is claimed by the licensor.



## 9.6 Software downloads

### Checklist:

34. Ensure that the Victorian Government has a licence to allow website visitors to download software.
35. Use click-wrap contracts to disclaim liability for users' download and use of any software.

Government websites should advise users of the risk in downloading either customised downloads (that is, Government materials/publications in PDF or other downloadable formats) or proprietary software. This warning should form part of the website's overall terms and conditions or be implemented as a press button 'licence' or 'click-wrap' that must be acknowledged before the download occurs.

In the case of customised downloads, the notice should also include a licence from the government organisation responsible for the website (who would probably also be responsible for controlling the copyright) to use the materials in the download for defined uses, purposes or for a specified time.

The notice should make it clear that:

- while the website has made every effort to ensure that the information provided in the download is free from error, the website does not warrant the accuracy, adequacy or completeness of the information;
- that material was prepared for download by users and while the website has attempted to ensure that the download is not corrupted or tainted by viruses, the website gives no warranty and accepts no responsibility for the integrity of the download; and
- that the software is provided 'as is' and no warranties are given in respect of it, including no warranties as to its fitness for purpose or merchantability.

For proprietary software, the notice should contain a statement to the effect that unless otherwise indicated, software downloads available via links from the website are third party products. Further, the statement should explain that these products are almost invariably subject to a license agreement between the user and the third party product owner. The website should also state that to the extent permitted by law the website accepts no liability or responsibility in respect of the third party products and provides no warranty in respect of it.

## 9.7 Hyperlinks

### Checklist:

To minimise problems with hyperlinks:

36. Only use links if they are expressly permitted by the website being linked to.
37. Comply with any hyperlinking policy of linked websites.
38. Consider linking to a website's homepage.

It is recommended that permission is always sought to link to another site unless the linked website itself provides that permission as part of its overall terms and conditions. Where that occurs, the terms and conditions should be scrutinised carefully. Website operators may prefer to negotiate their own terms or introduce a link agreement of their own.

## 9.8 Deep linking

Deep linking is the practice of creating links to web pages other than a home page, e.g. creating a link to [www.abc.vic.gov.au/pages/abc.html](http://www.abc.vic.gov.au/pages/abc.html).

The primary risk associated with deep linking is that deep links bypass the home page of a website and thus usually bypass the notice that alerts users to the terms and conditions that govern the use of the site. Deep linking should not be used without the permission of the operator of the website in question. Often permission to deep link and the terms on which deep links are permitted are set out in a site's general terms and conditions. If those terms are suitable, deep linking can be carried out in conformity with them. If not, a suitable agreement will need to be negotiated.



## 9.9 Using frames

Displaying another website's content in a frame should never be undertaken or permitted without either express agreement or clear permission to frame being given at the relevant Website.

The likelihood of liability from negligent misrepresentation or misleading or deceptive conduct is much higher in the case of framing. This is because framing content gives rise to a much greater perception of there being some sort of endorsement or sponsorship involved and brings material more insistently to the attention of users.

If framing another website's content, special care must be taken where the material to be framed is likely to be changed without notice. This issue becomes particularly acute where material is real-time.

The government's policy on linking should reflect government practice respecting procurement, sponsorships and endorsements. They should also address the reasons why framing may be considered appropriate in the State website. It may be that rather than framing, video clips or specific material could be downloaded by permission from one website to another which may be safer than attempting to frame parts of that website.

## 9.10 Privacy

Every government website should include its privacy policy as part of its terms and conditions or as a separate statement in an accessible part of its homepage. The privacy policy should conform to the requirements of the Information Privacy Act 2000, in particular the Information Privacy Principles.

# Chapter 10 – Web 2.0

### Checklist:

39. Terms of Use – review terms of use for each application.
40. Copyright – check ownership of material and obtain appropriate clearances if necessary.
41. Privacy – treat private information in accordance with privacy policies.
42. Defamation – consider whether material may injure a third party's reputation.
43. Breach of confidence – ensure that any information disclosed is not considered confidential or secret.

Web 2.0 is the term used to describe technology that allows consumers to read, receive, create and share content online. Web 2.0 applications include wikis, blogs, social networking and content hosting services.

Blogs, or web logs, provide commentary or information about various issues. Social networking allows an individual to create a profile for themselves on a service and share that profile with other users e.g. Facebook and MySpace. Content hosting services, such as YouTube (videos) and Flickr (photos) allow users to upload content that they have created for others to view.

The risks common to Web 2.0 applications are likely to be copyright, privacy, objectionable content and defamation. In particular, the following issues should be considered when using Web 2.0 applications.

## 10.1 Copyright

Whilst a user may retain all copyright in content submitted to an application, it is likely that submission would result in an automatic grant of a licence to the application. For example, users grant to YouTube a non-exclusive licence to reproduce, distribute, prepare derivative works of, display and perform the submission. This licence does not terminate if the submission is removed but only after a 'commercially reasonable time'. Accordingly, users should be aware that a submission of content may also be coupled with a broad licence to use that material.



## 10.2 Terms of use

If using a service that is hosted on an external site, such as Facebook, the Victorian Government will be subject to the terms and conditions of that particular site. The terms of use would ordinarily limit the application provider's liability, place responsibility on the user for uploaded content and provide the application provider with the ability to remove content at its discretion. The terms of use are usually one-sided in favour of the application provider and must be accepted if the application is to be used. It is also important to remember that general law principles will also apply.

Common provisions will generally include provisions relating to the areas set out below. Other matters may be set out in the terms of use (TOU) and they will need to be reviewed on a case by case basis.

- **Fees and charges.** The terms of use will specify if there are any fees or charges incurred in the use of the platform or service. Please ensure that you check if fees are incurred before commencing use and of any other charges or royalties which may be applied to the use of such service. You may also need to ascertain whether certain taxes (such as GST or VAT) are payable.
- **Indemnities and limitation of liability.** The TOU will usually limit the platform provider's liability for any loss or damage suffered by a platform user as a result of the user's participation on the platform and place all responsibility for user-uploaded content on the platform user. The platform provider will also be indemnified against any loss or damage arising from the use of the platform.
- **Warranties.** The platform provider would also obtain a warranty from users that all uploaded materials do not infringe the legal rights of any third party. Accordingly, platform users must obtain appropriate clearances (including copyright and moral rights) for all materials which are uploaded or submitted to the platform. It is important to note that if copyright material is uploaded and the appropriate clearances have not been provided, then the Victorian Government may be liable for copyright infringement and is at risk of an action for copyright infringement.
- **Removal of content and termination of account.** The TOU will allow the platform provider to remove any content (whether uploaded or not) at its discretion (including any material that may violate its policies) and also allow the platform provider to terminate a user's account without notice and without reason.
- **Jurisdiction.** Most platforms are owned by US companies and located in the USA. Consequently, it would be generally expected that the governing law is a state of the United States of America and that any court disputes would be expected to be conducted in US courts. It should be noted that if a government organisation was to be sued in a foreign jurisdiction, it is likely that foreign sovereign immunity would arise and that the organisation would be generally immune from the jurisdiction of the courts of another sovereign state. However, this is a complex matter and you should seek legal advice immediately if legal proceedings are threatened or are commenced.
- **Changes to terms of use.** The platform provider would be able to amend its terms of use (or any other policy) at its sole discretion without notice at any time and these changes would become binding upon the amended terms being posted onto the platform. It is questionable whether a platform provider is able to effectively change the terms of use in this matter but it is prudent for users to regularly review platform terms of use and review any changes and consider if they are acceptable.

The Terms of Use will change constantly so advice should be obtained regarding the use of any particular application from time to time.

## 10.3 Minors

Given that many users of social networking applications may be under 18 years, attention should be paid to the implementation and effectiveness of safety and privacy measures. These may include:

- displaying safety messages prominently in clear and accessible language;
- providing tools which enable users to protect their privacy e.g. specifying what information is private or public;



- providing the option to hide, restrict access to, and edit their information;
- obtaining informed consent to the display of personal information; and
- providing instructions on how to make a complaint and how these complaints will be investigated.

Finally, where minors have access to applications consideration should be given to making the website compliant with the [Australian Association of National Advertisers Code for Advertising & Marketing to Children](#).

The Broadcasting Services Act does not explicitly indicate the minimum age at which consent may lawfully be given. After undertaking an analysis of children's development, the Australian Law Reform Commission (ALRC) recommended that the age of 15 be set as the age of consent under the Act. The Privacy Commissioner's 2001 Guidelines provide that an organisation must assess the capacity of a young person to give consent on an individual basis. It stressed that organisations should be looking to whether the child 'has sufficient understanding and maturity to understand what is being proposed'.

The Australian Guidelines for Electronic Commerce advises businesses to take reasonable steps to establish whether a consumer is less than 16 years of age before requesting their personal information. This also conforms to the age set in the [OECD's Guidelines on the Protection of Privacy and Transborder Data Flows of Personal Data \(1980\)](#).

#### 10.4 Risks caused by third parties

The State Government may be at risk of copyright infringement if they have 'authorised' the infringement. The question as to whether infringement has been 'authorised' usually involves an assessment as to the level of control exercised over a particular website.

In late 2007, a number of major media and internet companies endorsed a set of principles known as the 'Principles for User Generated Content Services' (UGC Principles). The Victorian Principle provides a safe harbour from copyright infringement proceedings to sites that implement prescribed measures to prevent the uploading of infringing content by their users. These principles will not provide a defence to an infringement claim but can be applied as a matter of good practice. Some of the practical steps include:

- clearly displaying a prohibition against the uploading of infringing material and including such a prohibition within their terms of use;
- the use of filtering software to identify pre-existing and newly uploaded infringing content;
- blocking or removing any user-posted links to websites which are clearly dedicated to disseminating infringing copyright content; and
- including and enforcing a 'repeat infringe' user termination policy.

#### 10.5 File sharing

Operators of image and video hosting and file sharing sites should be wary of cases in which they may be found liable for content uploaded by users.

The experience of music file sharing sites in Australia has confirmed that operators cannot always escape responsibility for copyright infringement. One way to avoid liability for having 'authorised' copyright infringement under the Copyright Act 1968 (Cth) is to take 'reasonable steps' to prevent it.

These might include:

- prohibiting the uploading of infringing material in the site's terms of use;
- prominently warning users that uploading content affirms that the uploading complies with the site's terms of use;
- removing links to sites that are known to allow access to infringing material; and
- removing infringing material promptly upon notice of infringement.



## 10.6 Internet discussion sites/forums/user comments

Particular care should be taken to avoid defamatory conduct. As discussed in the Defamation section of this guideline, hosts with no editorial control over content may be able to escape liability for defamation under the Defamation Act 2005 (Vic). However lack of knowledge as to the defamatory nature of content is essential to the availability of the defence, therefore it is advisable that material be removed promptly when potentially defamatory statements are highlighted to the host or provider.

### 10.6.1 Advice about financial products

The Australian Securities and Investments Commission (ASIC) recently released a Consultation Paper (104) setting out proposals on the regulations of internet discussion sites. Under the proposals, an operator of an internet discussion site will need to be licensed if it provides advice about financial products. The meaning of financial product advice could include informal commentary about financial products. There are exemptions and further advice should be sought where financial product advice is being provided.

## 10.7 Virtual worlds

Virtual worlds are computer-simulated 3-dimensional multiplayer online games in which users participate via avatars, and which feature 'worlds' populated by real-world organisations such as business and academic institutions.

Currently, there are no legal decisions and only minimal academic commentary regarding the applicable law in virtual worlds. Thus the current state of the law in relation to virtual worlds is nebulous.

As more people begin to entwine their real and virtual lives, questions arise about the reasonable legal expectations of 'residents' in virtual worlds. Whether these expectations exactly match the operation of law in real life is arguable both ways.

On one hand, the rationale for creating a virtual life is to escape the realities of the real world including the governance by legal principles. On the other hand, communicating and transacting with other residents in virtual worlds is comparable to communicating and transacting through emails, instant messaging, faxes, telephones and telegraphs etc. Thus virtual worlds only represent a change in technology and the method of communication. It doesn't change the fact that there is communication which may require legal interference from time to time. It may be that the answer lies somewhere in between these two points of view i.e. some aspects of the virtual world could require the application of strict legal principles whilst other aspects could demand a flexible and lenient approach.

For example, despite a demonstrated market value for virtual items such as virtual clothing, virtual real estate and other virtual assets possessed by a user's characters on Second Life, currently a popular virtual world, its terms of use agreement denies virtual property rights to users. Similarly, there are many signs within virtual world communities which could potentially function as a trade mark – such as an avatar's name, graphical experience, the name of an association and the signs associated with a virtual world business. However, there are a number of problems of enforcing a trade mark under Australian Law, such as establishing jurisdiction.

## References and toolkits

Victorian Government standards:

- <http://www.enterprisesolutions.vic.gov.au>



## Further information

For further information regarding this standard, please contact the Department of State Development and Business Innovation, at [enterprisesolutions@dpc.vic.gov.au](mailto:enterprisesolutions@dpc.vic.gov.au)

## Glossary

Term	Meaning
<b>Accessibility</b>	The level to which websites and website content can be accessed by users with a disability, older technology or impeded infrastructure.
<b>Blog</b>	A standalone website, or part of an existing website, devoted to the singular purpose of displaying articles / posts, often in a journal-like format. Blog posts are often text-heavy, but can contain images, audio and / or video.
<b>Deep linking</b>	Deep linking is the practice of creating links to web pages other than a home page, e.g. creating a link to <a href="http://www.abc.vic.gov.au/pages/abc.html">www.abc.vic.gov.au/pages/abc.html</a> .
<b>Frames</b>	The HTML frame element allows web pages to be split into multiple viewports (frames), each capable of displaying a separate HTML document.
<b>Inline linking</b>	Inline linking is the practice of creating links to objects on remote websites, commonly to display an image from one website on another.
<b>Spam</b>	Spam is the abuse of electronic messaging systems to send unsolicited bulk messages. Spam types include email spam, instant messaging spam, Usenet newsgroup spam, web search engine spam, spam in blogs, wiki spam, online classified ads spam, mobile phone messaging spam, internet forum spam, junk fax transmissions, social networking spam, and file sharing network spam. <sup>1</sup>
<b>Top level domain</b>	A top level domain is the highest level domain in the domain name hierarchy. Within a fully formed domain name, top level domains form the final part of the name, for example in <a href="http://www.dsdbi.vic.gov.au">www.dsdbi.vic.gov.au</a> 'au' is the top level domain.
<b>Web 2.0</b>	In general terms, web 2.0 refers to websites and/or web applications that facilitate user interaction (and user-to-user interaction), content creation and sharing and the dynamic (non-static) presentation of content.
<b>WCAG</b>	Web Content Accessibility Guidelines. Guidelines published by the W3C Web Accessibility Initiative to provide direction on making websites accessible to a broad range of users regardless of their disability or access method e.g. limited device. <sup>2</sup>
<b>Wiki</b>	A collaborative website that allows users to create, edit and organise content collectively.

<sup>1</sup> Adapted from the Wikipedia entry for Spam ([en.wikipedia.org/wiki/Spam\\_\(electronic\)](http://en.wikipedia.org/wiki/Spam_(electronic))). Accessed 20 October 2009.

<sup>2</sup> Adapted from the Wikipedia entry for WCAG ([en.wikipedia.org/wiki/WCAG](http://en.wikipedia.org/wiki/WCAG)). Accessed 18 February 2010.



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WMF Website Management Framework – a whole of Victorian Government framework, coordinated by the Department of Treasury and Finance (Government Services Division) to provide a standardised approach to the management of government websites.

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## Version history

Version	Date Issued	Trim Ref	Details
1.0	May 2001		Published by Multimedia Victoria, Department of State and Regional Development.
2.0	October 2010		Updated and republished by Government Services Division, Department of Treasury and Finance. Chapter 10 added to address the impact of Web 2.0.
2.1	February 2014		Updated branding

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## Attachment 1 – Methods of risk management

Activity	Risk types	Factors affecting risk	Suggested legal tools
Display of information	<ul style="list-style-type: none"> <li>Misrepresentation</li> <li>Copyright/ trade mark breach</li> <li>Defamation</li> <li>Passing off</li> <li>Virus propagation</li> <li>Damage to data/ hacking</li> </ul>	<ul style="list-style-type: none"> <li>Importance of information accuracy and currency</li> <li>Sensitivity of information (e.g. health, legal)</li> <li>Source(s) of information</li> <li>References to authorities etc</li> </ul>	<ul style="list-style-type: none"> <li>Disclaimer (content)</li> <li>Copyright notice</li> <li>Site terms and conditions</li> </ul>
Display of links: <ul style="list-style-type: none"> <li>To homepage</li> <li>Deeplinking</li> <li>Framing</li> </ul>	<ul style="list-style-type: none"> <li>Potential liability for all of the above in relation to the linked site</li> <li>Offensive content</li> <li>Adverse public perception of Govt</li> </ul>	<ul style="list-style-type: none"> <li>Level of knowledge regarding site and operator</li> <li>Association/ integration of content</li> </ul>	<ul style="list-style-type: none"> <li>Disclaimer (third party operator)</li> <li>Disclaimer (content)</li> <li>Notice (exit site)</li> </ul>
Links to: <ul style="list-style-type: none"> <li>Other Govt sites</li> <li>NGOs</li> <li>Commercial 3Ps</li> </ul>	<ul style="list-style-type: none"> <li>Anti-competitive conduct</li> <li>Adverse public perception</li> </ul>	<ul style="list-style-type: none"> <li>Level of assurance of standard of site and operator</li> </ul>	<ul style="list-style-type: none"> <li>Disclaimer (links from Govt)</li> <li>Due diligence checks</li> <li>Independent certification of site and operator</li> <li>Application process</li> </ul>
Links from external parties	<ul style="list-style-type: none"> <li>Adverse public perception</li> <li>Misleading conduct</li> </ul>	<ul style="list-style-type: none"> <li>Ease of locating and assessing site and operator</li> </ul>	<ul style="list-style-type: none"> <li>Disclaimer (links to Govt)</li> <li>Contract (linking)</li> </ul>
Display of particular information (e.g. access restrictions apply)	<ul style="list-style-type: none"> <li>Fraud/ unauthorised access</li> <li>Defamation</li> </ul>	<ul style="list-style-type: none"> <li>Level of access control security</li> <li>Accuracy, currency and importance of information</li> </ul>	<ul style="list-style-type: none"> <li>Disclaimer (content)</li> <li>Authentication mechanism</li> </ul>
Display of information from	<ul style="list-style-type: none"> <li>Copyright</li> <li>Misrepresentation</li> </ul>	<ul style="list-style-type: none"> <li>Degree of integration of</li> </ul>	<ul style="list-style-type: none"> <li>Copyright notice</li> <li>Disclaimer (content)</li> </ul>



multiple sources	<ul style="list-style-type: none"> <li>• Adverse public perception</li> </ul>	<ul style="list-style-type: none"> <li>• Level of IT security re authoring</li> </ul>	
Display of user input (e.g. noticeboards)	<ul style="list-style-type: none"> <li>• Privacy</li> <li>• Offensive/ inappropriate content</li> <li>• Defamation</li> <li>• Misrepresentation</li> <li>• Computer crimes</li> </ul>	<ul style="list-style-type: none"> <li>• Collection/ handling of personal information</li> <li>• Degree of moderation or editorial control exerted</li> <li>• Level of IT security to prevent access and alteration</li> </ul>	<ul style="list-style-type: none"> <li>• Privacy notice/ policy</li> <li>• Disclaimer (content)</li> <li>• Contract (online)</li> <li>• Inappropriate content notice</li> <li>• Rules for participation</li> </ul>
Collection of user input (e.g. discussion groups, registration, agents)	<ul style="list-style-type: none"> <li>• Impersonation/ fraud</li> <li>• Privacy</li> <li>• Copyright</li> <li>• Public perception of Govt</li> </ul>	<ul style="list-style-type: none"> <li>• Level of IT access control</li> <li>• Methods of handling personal or confidential information</li> <li>• Policy re input data</li> </ul>	<ul style="list-style-type: none"> <li>• Privacy notice/ policy</li> <li>• Authentication mechanism</li> <li>• Inappropriate content notice</li> <li>• Copyright notice</li> <li>• Contract (online)</li> </ul>
Supply of Government products (e.g. online licences)	<ul style="list-style-type: none"> <li>• Fraud</li> <li>• Breach of confidence</li> <li>• Privacy</li> </ul>	<ul style="list-style-type: none"> <li>• Level of end to end IT security</li> <li>• Authentication required</li> <li>• Value of information</li> </ul>	<ul style="list-style-type: none"> <li>• Contract</li> <li>• Authentication mechanism</li> <li>• Privacy policy/ notice</li> </ul>
Supply of non-Government products (e.g. software downloads)	<ul style="list-style-type: none"> <li>• Copyright/ IP breach</li> <li>• Misrepresentation</li> </ul>	<ul style="list-style-type: none"> <li>• License restrictions</li> <li>• Policy re dissemination</li> </ul>	<ul style="list-style-type: none"> <li>• Contract (online)</li> <li>• Copyright etc notice</li> </ul>

**DRAFT ONLY**



## Attachment 2 – Standard terms and conditions for websites and useful model clauses

### 1. Standard copyright disclaimers

Below is a clause that can be used to indicate Victorian Government copyright in websites and documents, which prohibits copying of any sort. You should change the year and contact details to suit your needs.

© The State of Victoria 2010

Copyright in this publication is reserved to the Crown in right of the State of Victoria. Other than for the purposes of and subject to the conditions prescribed under the Copyright Act, no part of it may in any form or by any means (electronic, mechanical, microcopying, photocopying, recording or otherwise) be reproduced, stored in a retrieval system or transmitted without prior written permission. Inquiries should be addressed to:

[insert name]

Government of Victoria  
Melbourne

If you would like to give users the right to use information posted on the website, this alternative form of wording can be used:

© The State of Victoria 2010

Copyright in this publication is reserved to the Crown in right of the State of Victoria. You may copy, distribute, display, download or otherwise freely deal with this work for any purpose, provided that you attribute the State Government of Victoria as the owner of copyright in this work. Inquiries should be addressed to:

[insert name]

Government of Victoria  
Melbourne

Please note that this disclaimer allows use on the assumption that the material is not subject to third party rights.

### 2. Model clause for timing and place of contract formation (Section 5.3)

The laws of Victoria govern this agreement. The parties submit to the non-exclusive jurisdiction of the courts of Victoria and any courts competent to hear appeals from those courts.

### 3. Terms and conditions

#### About this website

The Victorian Government is committed to the accessibility and exchange of information and the processes of public consultation and debate. The challenge for Victoria, and all Governments, is to ensure that we keep pace with change and ensure that all people have access to the benefits presented by the Internet. In Victoria, the State Government's electronic service delivery program is integrated into general government policy. The message is: the Internet is for everyone. This website and any linked websites are presented to you in the context of this approach.



This website is operated by [insert name]

Your use of this website, including any of the content or materials on it is governed by these terms and conditions. In addition to these terms, there may also be additional terms that govern your use of or access to specific parts or sections of this website in which case those specific terms will apply to your activities at those locations in addition to these terms.

Your use of this site signifies your acknowledgement and acceptance of these terms and conditions.

### **Copyright and trade marks**

Copyright in this website is owned by [insert name].

In addition, copyright in the material included on this website is either owned by or licensed to [insert name].

Material on this website may be reproduced for private, non-commercial or in-house use provided that this site is acknowledged as the source of the material and the material is not altered. Material on this site may also be dealt with in conformity with the provisions of the Copyright Act 1968 and, where specific terms of use apply to material, in conformity with those terms. Otherwise, no material on this site may be reproduced, adapted, broadcast, performed in public or communicated to the public unless we have granted consent.

Trademarks used in this website are the property of their respective owners.

### **Limitation of liability**

To the maximum extent permitted by law, the Victorian Government will not be liable to you for any loss, damage, claims, liabilities, expenses (including without limitation legal costs and settlement costs) whatsoever arising out of or attributable to any content, services or other material on this website whether in contract, tort (including negligence), statute or otherwise.

If the law implies any condition or warranty liability for breach of which cannot be excluded, our liability is limited, at our exclusive option to:

- the supply of the goods and services again;
- the repair of the goods; or
- the payment of the cost of having the goods or services resupplied or repaired.

### **Warranties**

We make every effort to ensure that all material on this website is free from error. However, we do not warrant the accuracy, adequacy or completeness of any material on this website. All information is subject to change without notice. Before relying on or acting on material in this website you should seek independent advice. We do not guarantee that material on this site or any linked site will be free from viruses or that access to this site will be uninterrupted.

### **Privacy**

In conformity with Victorian Government Privacy policy, this site endorses and supports fair information privacy handling practices. The privacy practices of this site are governed by the Victorian Information Privacy Act 2000, which establishes Information Privacy Principles to which this site is subject and provides for complaints and penalties for interfering with personal privacy through the Privacy Commissioner.

This site does not collect, use or disclose personal information except that which you provide freely through online forms. Any information provided by you will only be used in accordance with your consent and for the purpose for which you provided the information except in exceptional circumstances where authorised by law.



Visitor logs are used on this site for statistical purposes only and include your server's address, top-level domain name, date and time of visit, pages downloaded and browser used. No attempt is made to identify users or their browsing activity. This information is only used to update and improve this site.

This site does not use cookies.

## Framing

The information contained in this website is not to be displayed within frames or in any format other than in full screen format unless permission has been obtained from [\[insert contact details\]](#). No liability is accepted for any information or services which may appear in any other format.

## Links from this website

This website includes links to other websites operated by other government bodies, non-government organisations and individuals.

These linked sites will have their own terms and conditions of use and you should familiarise yourself with these. Linked websites are provided as part of the government's commitment to online initiatives. Neither this site nor the Victorian government makes any warranty or representation about any linked sites nor can any responsibility or liability be accepted for any loss or damage which may arise as a result of accessing or using any material which may appear at a linked site.

Links to other websites are provided for your assistance but do not constitute an endorsement or sponsorship of the practices, views or information contained at any linked site. In the same manner, the absence of a link from this website to any other website should not be treated as an absence of endorsement or support for the operator or content of that website.

Linked websites were chosen through a transparent process [\[insert link to details of that process and any linking guidelines\]](#). If you wish to request a link from this website to your website, you should contact [\[details\]](#). Any comments about linked websites should be sent to [\[details\]](#).

## Links to this website

As a general principle, the Victorian Government encourages links to its websites however it reserves the right to bar links in the event that they are provided in a manner which is incompatible with the workings of a democratic, diverse and tolerant community or if it considers, at its absolute discretion, that any link is inappropriate.

## Downloading

Where this website includes customised downloads, the following licence applies: [\[insert licence details\]](#).

This material is provided without charge. Although we have made every reasonable effort to ensure that the material provided in the download is complete, current, reliable, free from error and virus contamination, the download is provided as-is to be used at your own risk. We do not warrant or make any representation about the accuracy, adequacy or completeness of the information or whether the download has been corrupted or tainted by viruses. We do, however, welcome feedback from you about the material we make available for download.

## Attachment 3 – Content checklist

The content used in websites typically takes the form of text, graphics, audio and video. In terms of copyright, these categories correspond to literary works, artistic works, musical works and sound recordings and cinematograph films respectively. The Copyright Act applies different ownership principles to each of these categories, depending on whether the content is a 'work' (i.e. a literary,



artistic, dramatic or musical work) or 'subject matter other than works' (i.e. sound recordings, cinematograph films, television broadcasts).

All works are owned by the author, for example all literary works such as text are owned by the author of the text. All sound recordings are owned by the person that makes it, again being the author, and all cinematograph films are owned by the production company that produces the film.

Content used in Victorian Government websites is either created by a government department or by a third party.

For content that has been created by or on behalf of a government department or agency:

- Was the content created by an employee of a department? If so, copyright in the content vests in the government and it can be used without restriction.
- If the content was created by anyone other than a government employee, such as a consultant or contractor, and unless the requirements for Crown copyright are satisfied, copyright in the content is owned by the consultant or contractor and not the government. Check the terms of engagement of the consultant or contractor to ascertain what has been agreed about copyright.
- If there is nothing in the terms of engagement about copyright, it will be necessary to negotiate permission to use the text for the purpose required.

Where pre-existing text is to be used, permission to use the text must be negotiated with the copyright owner. This will usually take the form of a licence agreement where a fee is paid for the use of the text. A licence agreement does not invariably need to be a formal document – it can be as simple as a letter of agreement – but where significant sums of money are involved, a formal agreement is desirable.

The licence agreement should cover these issues at a minimum:

- Whether the licence is exclusive or non-exclusive. Can the rights granted be sub-licensed?
- The period of the licence – does the licence last for a set period of time or is it a perpetual licence that lasts for the duration of the copyright?
- What territory does the licence cover?
- What rights are granted? The licence should specify that it is granted for the purpose of including the text in a website and thus should include the right to reproduce the text for that purpose and to communicate it to members of the public.
- There should be a warranty that the licensor is entitled to grant the licence.
- The licence fee and how it is to be paid.

### 3.1 Moral rights

Care must be taken to ensure that moral rights are respected. In particular, where text, graphics (including photographs) and films are concerned, the author's right of attribution must be respected.

## Attachment 4 – One-way linking agreement (short form)

**Note: this agreement does not permit the use of any State logo or trade mark in constructing a link.**

On the terms set out in this agreement [Name of State body] grants to [insert name, address and ABN if applicable] a non-assignable, non-transferable, non-exclusive licence to link to the [insert name of State body] website.

1. [Name of State body] may terminate this licence without prior notice for any reason or for no reason.
2. You must not link to the [insert name of State body] website in any manner that suggests sponsorship of, affiliation with or endorsement by [insert name of State body].
3. Any link must be to the homepage of the [insert name of State body] website. Nothing in this licence permits deeplinking or framing.



4. You will observe and comply with any policies relevant to this licence notified to you by [Name of State body].
5. To the extent permitted by law [Name of State body] excludes all conditions and warranties, express or implied in respect of this licence.
6. [Name of State body] to the extent permitted by law will under no circumstances be liable for any damages, whether direct, indirect, punitive, special, consequential or loss of profits that are directly or indirectly related to any link established under this licence or of any failure, for any reason whatsoever, of the [insert name of State body] website.
7. You acknowledge that [Name of State body] is not responsible for and has no control over content that is contained on any resource outside of the [insert name of State body] website. As a convenience, the [insert name of State body] website may provide links to resources that are not under the control of [insert name of State body]. [insert name of State body] makes no representations or warranties as to the quality, fitness, suitability, functionality, accuracy or legality of any site linked to the [insert name of State body] website or any content or other matter contained in such a site.
8. [insert name of State body]'s maximum liability under this licence is limited to [insert]
9. Nothing in this licence permits the use of any [insert name of State body] logo, device, trade mark or brand or constitutes the licence of any intellectual property right.