



**Queensland University of Technology**  
Brisbane Australia

This is the author's version of a work that was submitted/accepted for publication in the following source:

**Foong, Cheryl** (2010) Open content licensing of public sector information and the risk of tortious liability for Australian Governments. *eLaw Journal*, 17(2).

This file was downloaded from: <http://eprints.qut.edu.au/42572/>

**© Copyright 2010 Cheryl Foong**

**Notice:** *Changes introduced as a result of publishing processes such as copy-editing and formatting may not be reflected in this document. For a definitive version of this work, please refer to the published source:*

## Open Content Licensing of Public Sector Information and the Risk of Tortious Liability for Australian Governments

Cheryl Foong\*

There has been an increasing interest by governments worldwide in the potential benefits of open access to public sector information (PSI). However, an important question remains: can a government incur tortious liability for incorrect information released online under an open content licence? This paper argues that the release of PSI online for free under an open content licence, specifically a Creative Commons licence, is within the bounds of an acceptable level of risk to government, especially where users are informed of the limitations of the data and appropriate information management policies and principles are in place to ensure accountability for data quality and accuracy.

### 1 Introduction

There has been an increasing interest by governments worldwide in the potential uses of public sector information (PSI).<sup>1</sup> An example of advancement in this area is the US government's launch of the data.gov portal in May 2009 as part of the Obama administration's Open Government Initiative.<sup>2</sup> The aim of providing the portal was to increase the ability of the public to find, download, and use datasets generated and held by the US Federal Government.<sup>3</sup> Similarly, the UK government launched the beta version of its data.gov.uk portal in January 2010, providing a single access point to over 2,500 central government datasets available for free re-use.<sup>4</sup> The Australian government is moving in a similar direction by initiating the Government 2.0 Taskforce, with the intent of increasing the openness of government by making public sector information more widely available to promote transparency, innovation and value adding to government information.<sup>5</sup> The Federal Government in its response to the Government 2.0 Taskforce final report supported the use of the Creative Commons Attribution licence as the default licence for PSI,<sup>6</sup> and formally endorsed this approach in its *Statement of IP Principles for Australian Government Agencies* update of 1 October 2010.<sup>7</sup>

---

\*LLB (Hons I) Queensland University of Technology, School of Law. The author would like to thank Neale Hooper, Professor Anne Fitzgerald and Professor Brian Fitzgerald for helpful comments and guidance in developing this paper. Responsibility for any errors or omissions remains the author's alone.

<sup>1</sup> Anne M Fitzgerald and Neale Hooper, *A Review of the Literature on the Legal Aspects of Open Access Policy, Practices and Licensing in Australia and Selected Jurisdictions* (24 June 2009), <<http://www.aupsi.org/publications/reports.jsp>> .

<sup>2</sup> <<http://www.data.gov>> at (24 June 2009).

<sup>3</sup> About Data.gov <<http://www.data.gov/about>> (24 June 2009).

<sup>4</sup> Office of Public Sector Information (OSPI), (UK) *Licensing and data.gov.uk launch*, PerSpectIves blog, (21 January 2010).

<sup>5</sup> Department of Health and Aged Care (Cth), *The Government 2.0 Taskforce final report, Engage: Getting on with Government 2.0*. (Commonwealth of Australia C 2001).

<sup>6</sup> Department of Finance and Deregulation, Communications and Public Affairs (Cth), *Government Response to the Report of the Government 2.0 Taskforce* (22 December 2009) Commonwealth of Australia at <<http://www.finance.gov.au/publications/govresponse20report/doc/Government-Response-to-Gov-2-0-Report.pdf>>.

<sup>7</sup> Attorney-General's Department (Cth) *Australian Government, Statement of IP Principles for Australian Government Agencies* (6 October 2010) Achieving a Just and Secure Society <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright\\_CommonwealthCopyrightAdministration\\_StatementofIPPrinciplesforAustralianGovernmentAgencies](http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright_CommonwealthCopyrightAdministration_StatementofIPPrinciplesforAustralianGovernmentAgencies)>. See also Australian Information Commissioner *Towards an Australian Government Information Policy – Issues Paper 1* (1 November 2010) Australian Government, Office of the Australian Information Commissioner <<http://www.oaic.gov.au/publications/papers.html>>.

Whilst the issue of access to and reuse of PSI in Australia has been considered by various government agencies and in reports commissioned by governments, there has been no comprehensive statement of policy, principle or practice relating to the publication of PSI under open access regimes by any tier of Australian government.<sup>8</sup> An important legal aspect that has neither been fully canvassed in these reports nor tested in the courts is: can governments<sup>9</sup> incur tortious liability for incorrect or inaccurate information released online under an open content licence.<sup>10</sup> It is imperative that we address this question, because a heightened risk of tortious liability for information released could put a drag on innovation in this area.<sup>11</sup>

In order to fully understand the potential pitfalls and risks in releasing PSI online, this paper will attempt to apply conventional negligence principles and defences to this, yet to be, adjudicated situation. In doing so, it will consider the relevance of certain factors including that the information has come from government, is for the benefit of the public, is being provided for free, and the presence of a disclaimer and appropriate information management policies.<sup>12</sup> This paper concludes that the release of public sector information online under an open content licence is within the bounds of an acceptable level of risk to government, especially where appropriate information management policies and principles are in place to ensure accountability for its quality and accuracy.

---

<sup>8</sup> Anne M Fitzgerald, *Policies and Principles on Access To and Reuse of Public Sector Information: a review of the literature in Australia and selected jurisdictions* (School of Law, Queensland University of Technology, 2009) 10, <See also Department of Business and Innovation (Vic) *Whole of Victorian Government Response to the Final Report of the Economic Development and Infrastructure Committee's Inquiry into Improving Access to Victorian Public Sector Information and Data*, (9 December 2010) State Government Victoria <<http://www.diird.vic.gov.au/diird-projects/access-to-public-sector-information>>.

<sup>9</sup> For the purposes of this paper, the terms 'government' or 'governments' include state, territory and federal governments, and public authorities and agencies.

<sup>10</sup> See for example, Economic Development and Infrastructure Committee, Parliament of Victoria, *Inquiry into Improving Access to Victorian Public Sector Information and Data (Final report)* (21 June 2010) Parliament of Victoria <[http://www.parliament.vic.gov.au/edic/inquiries/access\\_to\\_PSI/final\\_report.html](http://www.parliament.vic.gov.au/edic/inquiries/access_to_PSI/final_report.html)> where the Committee stated that:

Wider provision of PSI by the Victorian Government will likely result in instances where errors in information or data, or unintended disclosure, leads to non-government users of PSI or third parties considering legal action against the Government. ...

For most, if not all, of the PSI released by the Victorian Government ..., liability will most likely arise through accusations of negligence in the provision of information.

The Committee anticipated that:

provided sufficient disclaimers accompany the release of PSI, opportunities for Government to incur legal liability will be limited. ...

However, it is critical that the Victorian Government seek clarity on this issue...

See also Department of Business and Innovation *Whole of Victorian Government Response to the Final Report of the Economic Development and Infrastructure Committee's Inquiry into Improving Access to Victorian Public Sector Information and Data*, (9 December 2010) State Government Victoria <<http://www.diird.vic.gov.au/diird-projects/access-to-public-sector-information>> .

<sup>11</sup> Gideon Parchomovsky and Alex Stein, 'Torts and Innovation' (2008) *Michigan Law Review* 107, 285, 288; <See also Pamela Samuelson, 'What Effects Do Legal Rules Have on Service Innovation?' in C.A. Kieliszewski & J. Spohrer, (eds.), *Handbook of Service Science*, (Springer, 2009); UC Berkeley *Public Law Research Paper No. 1421946* SSRN: <<http://ssrn.com/abstract=1421946>>(18 June 2009).

<sup>12</sup> This paper will be limiting its discussion to this specific context of free and open access. For a discussion of potential liability for information released through other means (e.g. formal requests for information at a fee), see S Christensen, B Duncan & A Stickley, 'Shifting Paradigms of Government Liability for Inaccurate Information' (2008) 15(2) *eLaw - Murdoch University Electronic Journal of Law* <<https://elaw.murdoch.edu.au/archives/index.html>> (1 November 2010).

## 2 Copyright in Public Sector Information

Public Sector Information (PSI) means a vast range of documents, databases and other information compiled or produced by governments.<sup>13</sup> For example, it includes geographical information (such as meteorological information, spatial and mapping information, mining exploration data and road safety information), public health information, economic and trade statistics, and parliamentary reports.<sup>14</sup> In Australia, it was held in *Desktop Marketing v Telstra*<sup>15</sup> that an “industrial collection” may satisfy the originality requirement to sustain copyright, despite minimal intellectual input.<sup>16</sup> Although raw facts and information as such is not capable of being protected by copyright, once it is selected and arranged, the resulting work could be protected as a compilation within the literary works category in Part III of the *Copyright Act 1968* (Cth).<sup>17</sup>

As copyright owners, governments have the exclusive right to copy and to communicate the work to the public.<sup>18</sup> “Communicate” is defined as to ‘make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance of otherwise) a work or other subject matter’.<sup>19</sup> Thus, governments hold the right to control the electronic transmission of PSI as well as making it available to the public online via an intranet, the internet or other computer networks.<sup>20</sup>

Unfortunately, governments have often sought to control the right to access and use information under restrictive licensing arrangements.<sup>21</sup> Whilst governments sit on the acres of information generated and gathered yearly by governmental bodies, there has been increasing demand for open access<sup>22</sup> to this useful resource.<sup>23</sup> Only recently has the

<sup>13</sup> Note that this refers to information owned/created by government, and not third party information.

<sup>14</sup> B Fitzgerald et al, *Internet and E-Commerce Law: Technology, Law and Policy* (Lawbook, Sydney, 2007) 260-261.

<sup>15</sup> *Desktop Marketing v Telstra* (2002) 119 FCR 491.

<sup>16</sup> See further dicta by the High Court in *Ice TV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14 [187]-[188] (Gummow, Hayne and Heydon JJ) which casts some doubt on the low originality requirement in *Desktop Marketing v Telstra*. See also *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* [2010] FCA 44, in which Gordon J held at [5] that copyright did not subsist in Telstra’s Yellow Pages and White Pages directories because the computer generated compilation had failed the authorship requirement. This case is currently on appeal.

<sup>17</sup> The definition of ‘literary work’ includes ‘a table, or compilation, expressed in words, figures or symbols’. *Copyright Act 1968* (Cth), s 10(1); Above n 14, 172.

<sup>18</sup> *Copyright Act 1968* (Cth), s 31(1)(a)(i) and (1)(a)(iv).

<sup>19</sup> *Copyright Act 1968* (Cth), s 10(1).

<sup>20</sup> B Fitzgerald et al, above n 14, 164.

<sup>21</sup> D Bushell-Embling. ‘Private Eyes on Public Data’ *The Sydney Morning Herald* (Sydney), 25 September 2007 <<http://www.smh.com.au/news/technology/private-eyes-on-public-data/2007/09/24/1190486224755.html?page=fullpage>> (26 June 2009).

<sup>22</sup> Open Access is a term generally understood as the making available of material with no or little legal restrictions imposed on the access and use of that material. The term is most commonly used in relation to publicly funded research material such as journal articles (see, for example, OAK Law Project: Open Access to Knowledge at <<http://www.oaklaw.qut.edu.au/>> and ‘Open Access’ on Wikipedia’ <[http://en.wikipedia.org/wiki/Open\\_access\\_\(publishing\)](http://en.wikipedia.org/wiki/Open_access_(publishing))> (10 June 2011) but is increasingly applied to research data and other forms of information including PSI.

<sup>23</sup> Economic Development and Infrastructure Committee, Parliament of Victoria, ‘Inquiry into Improving Access to Victorian Public Sector Information and Data: Discussion Paper (2008) 51-55. D Bushell-Embling. ‘Private Eyes on Public Data’, *The Sydney Morning Herald* (Sydney) 25 September 2007 <<http://www.smh.com.au/news/technology/private-eyes-on-public-data/2007/09/24/1190486224755.html?page=fullpage>> M Chillingworth, ‘Guardian Newspaper Campaigns for Free Public Sector Information’ (2006) *Information World Review* 4.

consideration of implementing an open access regime emerged in light of the perceived societal and economic gains.<sup>24</sup> These benefits include:

1. Evidence based policy and decision making which contributes to an informed citizen base, whilst facilitating transparency and accountability within government;
2. improving returns on investments by governments, especially when access to publicly funded research is improved;
3. broadening opportunities for commercial exploitation of research data (specifically, leading to the emergence of successful commercial enterprises that create innovative products from repackaged, processed or amalgamated PSI); and
4. in general, enhancing the potential for innovation and creativity throughout society.<sup>25</sup>

### 3 Open Content Licences

The onset of the digital age and the corresponding improvements in the way in which information is disseminated has led to the development of new licence models that allow others to obtain access to and to reuse copyright protected material with minimal unmediated transactions.<sup>26</sup> These licences, referred to as 'open content' licences, are considered a viable alternative to the existing licensing regimes adopted by governments.<sup>27</sup> Whilst a wide range of open content licensing models has developed in recent years,<sup>28</sup> the most recognised open licensing model is Creative Commons (CC). The standard permissions under the CC licences are the right to copy the work, to distribute it and to communicate it to the public.<sup>29</sup> The CC licences are a more flexible tool by virtue of their 'some rights reserved' terms, allowing copyright holders to grant more extensive rights to the public than under the more traditional 'all rights reserved' model.<sup>30</sup> The CC licences make copyright-protected content more 'active' by enabling it to be reutilised with a

---

<sup>24</sup> Department of Broadband, Communications and the Digital Economy (Cth), *Open Access to Public Sector Information* (6 July 2009) Australian Government, <[http://www.archive.dbcde.gov.au/2009/july/future\\_directions\\_blog/topics/open\\_access](http://www.archive.dbcde.gov.au/2009/july/future_directions_blog/topics/open_access)>; Note that the Australian Bureau of Statistics (ABS) currently provides access to a majority of its statistical data on the ABS website free of charge under the Creative Commons Attribution 2.5 Licence, <<[http://www.abs.gov.au/websitedbs/D3310114.nsf/Home/%C2%A9+Copyright?opendocument?utm\\_id=GB](http://www.abs.gov.au/websitedbs/D3310114.nsf/Home/%C2%A9+Copyright?opendocument?utm_id=GB)>>.

<sup>25</sup> Economic Development and Infrastructure Committee, Parliament of Victoria, *'Inquiry into Improving Access to Victorian Public Sector Information and Data: Discussion Paper'* (July 2008) 7-14; see also Peter Weiss, *Borders in Cyberspace: Conflicting Public Sector Information Policies and their Economic Impact* <[http://www.weather.gov/sp/Borders\\_report.pdf](http://www.weather.gov/sp/Borders_report.pdf)> (February 2002).

<sup>26</sup> Brian Fitzgerald et al, *Creating a Legal Framework for Copyright Management of Open Access Within the Australian Academic and Research Sector* (OAK Law Project, Brisbane, 2006). 10,

<sup>27</sup> Department of Innovation, Industry and Regional Development (DIIRD) (Vic), *Whole of Victorian Government Response to the Final Report of the Economic Development and Infrastructure Committee's Inquiry into Improving Access to Victorian Public Sector Information and Data*, (4 February 2010) <<http://www.diird.vic.gov.au/diird-projects/access-to-public-sector-information>> 21-22 (Recommendation 11 and Recommendation 14).

<sup>28</sup> Ed Barker et al, *The Common Information Environment and Creative Commons*, (10 October 2005) AHRC Research Centre of Studies in Intellectual Property and Law <<http://www.era.lib.ed.ac.uk/handle/1842/2244>>

<sup>29</sup> See for example, *the Creative Commons Attribution 3.0 Australia licence*, available at <<http://creativecommons.org/licenses/by/3.0/au/>> (17 July 2009).

<sup>30</sup> M van Eechoud & B van der Wal, 'Creative Commons Licensing for Public Sector Information: Opportunities and Pitfalls', January 2008, *Institute of Information Law* (University of Amsterdam) 34, <[www.ivir.nl/publications/eechoud/CC\\_PublicSectorInformation\\_report\\_v3.pdf](http://www.ivir.nl/publications/eechoud/CC_PublicSectorInformation_report_v3.pdf)> (8 February 2009). See also generally, A Fitzgerald and B Fitzgerald, *Intellectual Property: In Principle* (Lawbook, Sydney, 2004) 455.

minimum of transactional effort.<sup>31</sup> Using these simple legal tools, combined with the vast digital landscape that we increasingly inhabit,<sup>32</sup> the free-flow of information is greatly enhanced.

The significant proliferation of open content licence usage ‘in a manner and at a pace that few could have imagined just a few years ago’ in modern society has recently been recognised by the most senior specialist intellectual property court in the United States in *Jacobsen v Katzer & Kamind Associates Inc.*<sup>33</sup> Importantly, the Court of Appeals for the Federal Circuit acknowledged the economic and social value of an open access model, stating: ‘There are substantial benefits, including economic benefits, to the creation and distribution of copyrighted works under public licenses that range far beyond traditional license royalties.’<sup>34</sup>

Although the use of open content licences brings significant benefits to the community and the economy, there still remains a practical reality which may arise if a government chooses to release its information under open content licences: what if the information is incorrect and, as a result, causes loss or damage to citizens or businesses? Will the government be liable for such loss?

#### 4 Liability for incorrect Public Sector Information

In Australia, a person may be liable in negligence to another for the provision of incorrect information or advice (i.e. a negligent misstatement) where there exists a ‘special relationship’ between the parties.<sup>35</sup> However, despite speculation on liability for incorrect data,<sup>36</sup> there do not appear to have been any authoritative decisions on whether a government which releases its public sector information online to the public under an open content licence is in a “special relationship” with the user of the information, and accordingly, whether the government may be held tortiously liable. As Lord Macmillan stated in *Donoghue v Stevenson*:

The grounds of action may be as various and manifold as human errancy, and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. **The categories of negligence are never closed ...**<sup>37</sup> [emphasis added]

Hence, this paper will proceed in its attempt to apply the elements of negligence and the additional requirements peculiar to negligent misstatements to this novel situation.

#### 5 Tortious Liability

For the tort of negligence to be established, the user of the information must prove that:

- the government owed a duty of care to the user;

---

<sup>31</sup> B Fitzgerald et al, above n 14, 259.

<sup>32</sup> B Fitzgerald and I Oi, ‘Free Culture: Cultivating the Creative Commons’ (2004) 9(2) *Media and Arts Law Review* 137.

<sup>33</sup> *Jacobsen v Katzer & Kamind Associates Inc.* 2008 U.S. App. LEXIS 17161 (Fed. Cir. 2008) 6-7.

<sup>34</sup> *Ibid* 8.

<sup>35</sup> *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1995) 188 CLR 241, 260 per Toohey and Gaudron JJ.

<sup>36</sup> D Rowland & E Macdonald, *Information Technology Law*, (Cavendish Publishing, London, 3<sup>rd</sup> ed, 2005) 213.

<sup>37</sup> *Donoghue v Stevenson* [1932] AC 562, 619; cited in *Hedley Byrne v Heller* [1963] 2 All ER 575, 595.

- the government breached the standard of care appropriate to that duty of care; and
- damage to the user was caused by the government's breach of the duty (where that damage is not regarded as too remote in law).<sup>38</sup>

The main areas of contention arising from these three elements, which will be discussed in turn, are:

1. whether a duty of care exists;
2. the standard of care applicable to the government if a duty is found to exist;
3. whether reliance on the information was reasonable to establish a causative link between the release of the information and the loss suffered; and

Following these in part 5.4 of this article, the impact of disclaimers on the duty of care is assessed.

### 5.1 A Duty of Care

In general, a person is under a duty to take reasonable care to avoid causing harm to others, in circumstances where Lord Atkin's neighbour principle, as expounded in *Donoghue v Stevenson*, applies:

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question . . .<sup>39</sup>

However, where a defendant provides advice or makes information available, a 'special relationship', in addition to the requirement of reasonable foreseeability from the general principle expressed in *Donoghue v Stevenson*,<sup>40</sup> is essential to ensure that the imposition of liability on the defendant is justifiable. This is because damage flows, not immediately from the defendant's act in disclosing the information or advice, but from the plaintiff's reliance on the information or advice and his action or inaction which produces consequential loss.<sup>41</sup> In other words, it is the actions of the plaintiff, not within the control of the defendant, which links the information or advice to the loss.

The features of this special relationship as expounded by the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*<sup>42</sup> and reiterated by the Australian High Court in *MLC v Evatt*<sup>43</sup> are:

1. The circumstances caused the speaker or a reasonable person in the speaker's position to realize that:
  - a. he/she is being trusted by the recipient to give information which the recipient believes the speaker to possess or to which the recipient believes the speaker to have access to, or

---

<sup>38</sup> *Wyong Shire Council v Shirt* (1979) 146 CLR 40, 44 (Mason J); See further F McGlone and A Stickley, (2005) *Australian Torts Law*103. See also G Cho, *Geographic Information Systems and the Law: Mapping the Legal Frontiers of the Law*, (John Wiley & Sons, West Sussex, 1998) 97.

<sup>39</sup> *Donoghue v Stevenson* [1932] AC 562.

<sup>40</sup> *Donoghue v Stevenson* [1932] AC 562.

<sup>41</sup> *San Sebastian v Minister* (1986) 162 CLR 340, (Gibbs CJ, Mason, Wilson and Dawson JJ).

<sup>42</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, 516 (Lord Devlin).

<sup>43</sup> *MLC v Evatt* (1968) 122 CLR 556, 571 (Barwick CJ).

- b. to give advice, about a matter upon or in respect of which the recipient believes the speaker to possess a capacity or opportunity for judgment,
  - c. in either case the subject matter of the information or advice being of a serious or business nature.
2. The speaker realized or the circumstances are such that the speaker ought to have realized that:
  - a. the recipient intends to act upon the information or advice in respect of his/her property or of himself/herself
  - b. in connection with some matter of business or serious consequence (i.e. an “assumption of responsibility” implied by the law).
3. It is reasonable in all the circumstances for the recipient to seek, or to accept, and to rely upon the utterance of the speaker (i.e. a “reasonable reliance”).
  - a. Factors for judging reasonable reliance are:
    - i. The nature of the subject matter;
    - ii. the occasion of the interchange; and
    - iii. the identity and relative position of the parties as regards knowledge actual or potential and relevant capacity to form or exercise judgment.

The element of trust between the parties has been described as being the heart of the special relationship.<sup>44</sup> It tends to arise out of an unequal position of the parties which the recipient reasonably believes to exist, especially where the recipient believes the speaker to have superior information or greater capacity than the recipient.<sup>45</sup> Further, the special relationship does not arise unless it is reasonable for the recipient to act on that information or advice, without further inquiry, for the purpose for which it is used.<sup>46</sup>

### 5.1.1 Liability in the Government Context: Open Content Licensing

The ‘incremental approach’ to the law of torts (i.e. the development of the law of torts incrementally through novel cases by reference to analogous cases) has been favoured by the majority of the High Court.<sup>47</sup> Accordingly, we may draw on the principles as discussed in relation to negligent misstatements (which apply equally to advice and information)<sup>48</sup> and attempt to apply them to the dissemination by government of PSI online under open content licences.

The argument that physical injury and damage is direct and obvious, whereas with information or advice no loss results unless the hearer relies and acts upon the information or advice (the loss and damage in a real sense directly arising out of the hearer’s actions) was rejected by Barwick CJ in *MLC v Evatt*.<sup>49</sup> As Lord Devlin reasoned in *Hedley Byrne v Heller*:<sup>50</sup> ‘A grave defect there would be in the common law if recovery permitted in the

---

<sup>44</sup> *MLC v Evatt* (1968) 122 CLR 556, 571 (Barwick CJ).

<sup>45</sup> *Ibid* (nonetheless His Honour admitted that inequality was not essential for the special relationship to exist).

<sup>46</sup> *Shaddock v Parramatta* (1980) 150 CLR 225, 231; *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 142 ALR 750, 768.

<sup>47</sup> *Sullivan v Moody* [2001] Australian Torts Reports ¶81-622; *Thompson v Connon* [2001] HCA 59, 49, 53 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Pyrenees Shire Council, Crimmins v Stevedoring Industry Finance Committee* (1999) Australian Torts Reports ¶81-532 (McHugh J).

<sup>48</sup> *MLC v Evatt* (1968) 122 CLR 556, 571 (Barwick CJ).

<sup>49</sup> *Ibid* 567.

<sup>50</sup> *Hedley Byrne v Heller* [1964] AC 465.

case of physical acts or omissions were denied in the case of information and advice given with a lack of due care'.<sup>51</sup>

The same argument applies to public sector information (PSI) disseminated online under open content licences. The fact that incorrect information can cause loss or damage cannot be denied.<sup>52</sup> However, it is important to recognise that the context in which the information is shared may be quite different from previous cases involving negligent misstatement. The early cases of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,<sup>53</sup> *MLC v Evatt*<sup>54</sup> and *Shaddock v Parramatta*<sup>55</sup> were concerned with ascertaining conditions which would attract a duty of care in responding to an inquiry for *specific information*. In addition, the provision of information or assurances by the public authority in *Shaddock v Parramatta*<sup>56</sup> incurred a prescribed fee.

Previous decisions are but illustrations of the general duty of care in its application to particular circumstances of negligent misstatement, because 'the special complications which arise in connection with the imposition of a duty of care on the author of a statement can only be unraveled in a variety of factual situations'.<sup>57</sup> Until there is a clear judicial pronouncement on the issue, the question remains - are the features of a special relationship as identified in these cases still applicable to this situation of government making PSI available online under an open content licence? Indeed, the release of information in the online medium creates another set of factors which may impact on the existence of a duty of care.

### 5.1.2 The Online Medium

Where information is made available online (whether by a government agency or otherwise), liability may be greatly expanded.<sup>58</sup> It is difficult to assess how wide the neighbourhood principle extends.<sup>59</sup> Unlike the ginger beer in *Donoghue v Stevenson*<sup>60</sup> which can only be drunk once and in all likelihood by one person only, information may be used by many, perpetuating the damage or causing multiple damages.<sup>61</sup> The features of the relationship become more akin to communications via mass media, rather than a special relationship between the parties. Consequently, there may be good grounds to fear imposition of liability 'in an indeterminate amount for an indeterminate time to an indeterminate class'.<sup>62</sup>

---

<sup>51</sup> *Ibid* 516 (Lord Devlin).

<sup>52</sup> *MLC v Evatt* (1968) 122 CLR 556, 569.

<sup>53</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

<sup>54</sup> *MLC v Evatt* (1968) 122 CLR 556.

<sup>55</sup> *Shaddock v Parramatta* (1980) 150 CLR 225.

<sup>56</sup> *Ibid*.

<sup>57</sup> *San Sebastian v Minister* (1986) 162 CLR 340 (Gibbs CJ, Mason, Wilson and Dawson JJ).

<sup>58</sup> F J Fisher, *Legal Exposures Facing the Software Industry*, Lectric Law Library, <<http://www.lectlaw.com/files/bul17.htm>> (12 January 2009).

<sup>59</sup> K Stewart et al, 'Geographical Information Systems and Legal Liability' (1997) 8 *Journal of Law & Information Science* 84, 97.

<sup>60</sup> *Donoghue v Stevenson* [1932] AC 562.

<sup>61</sup> S Charlton, 'An Introduction to the Legal Liabilities of Information Producers' in C Edwards, N Savage & I Walden (eds), *Information Technology & The Law* (Macmillan Publishers Ltd, UK, 2<sup>nd</sup> ed, 1990) 16.

<sup>62</sup> *Ultramares Corporation v Touche* 255 NY 170 (1931) (Cardozo CJ). Under Australian choice of law rules, the general principle in tort cases is that the law of the place where the tort arose will apply: *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458, 468 (Lord Pearson). Where PSI is available on the internet, the tort (e.g. publication or dissemination) could potentially be seen to arise at the place where the PSI was downloaded: see for example, *Dow Jones & Company v Gutnick* [2002] HCA 56. Whether an Australian

Thus, it is all the more essential to identify the ‘relationship of proximity’ in order to limit liability for information published to the world at large in this context.<sup>63</sup> However, this concept of proximity does not define legal rules which prescribe an issue of fact on which legal consequence depends.<sup>64</sup> As a result, it has been described as a ‘label of choice’, concealing underlying policy considerations motivating that decision<sup>65</sup> Further, the High Court has criticized it as ‘a convenient short-hand method of formulating the ultimate question in the case,’ but one which ‘provides no assistance in deciding how to answer the question’.<sup>66</sup> Instead, by drawing analogies with previously decided cases, combined with a process of induction and deduction, we may systematically identify factors relevant in those cases to finding a duty of care and perhaps identify previously unidentified factors.<sup>67</sup>

In the present context, it would appear that there are several factors (carrying with them corresponding policy reasons) which *may* influence whether a duty of care may be found to exist:

1. the PSI is provided without fee for the benefit of the public;
2. the PSI is proactively provided to the public in general; or
3. the PSI is provided by government.

### **Fee Free Provision of PSI for the Benefit of the Public**

Although tortious liability is entirely separate from contractual liability and the concept of consideration is not relevant to tort, the provision of PSI by government on a no-fee or non-commercial basis may well present an additional layer of complexity relevant to the application of negligence principles. In commercial transactions where the information or advice is paid for, the acceptance of responsibility by the provider is implicit.<sup>68</sup> Conversely, where the government provider supplies PSI on a no-fee, non-commercial basis, it is arguably reasonable to hold it to a lower standard of legal liability.

In the case of *San Sebastian v Minister*,<sup>69</sup> the plaintiffs argued that the publication of redevelopment feasibility study documents (a plan which was later abandoned) gave rise to a duty of care on the part of the Authority and the Council due to the intention or purpose of inducing developers to develop the land in accordance with the plan. Whilst the intention or purpose of inducing another to act on a representation may be critical to the existence of a duty of care in certain cases,<sup>70</sup> it is not an absolute requirement. It is but one

---

State or Federal government is liable in an overseas jurisdiction for the release of incorrect PSI will depend on that foreign jurisdiction’s choice of law rules which are beyond the scope of this paper.

<sup>63</sup> *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 595 (Deane J).

<sup>64</sup> *San Sebastian v Minister* (1986) 162 CLR 340 (Brennan J).

<sup>65</sup> Ivan F Ivankovich, “Accountants and third party liability — back to the future” (1991) 23 *Ottawa Law Review* 505.

<sup>66</sup> *Sullivan v Moody* [2001] HCA 59, 48 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

<sup>67</sup> F McGlone and A Stickle, *Australian Torts Law* (LexisNexis Butterworths, Chatswood, NSW, 2005) 124 (referring to the ‘multi-factorial’ approach of Kirby J in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 220, 243, and Spigelman CJ in *New South Wales v Godfrey* (2004) Australian Torts Reports ¶81-741).

<sup>68</sup> *MLC v Evatt* (1968) 122 CLR 556, 586.

<sup>69</sup> *San Sebastian v Minister* (1986) 162 CLR 340.

<sup>70</sup> See for example *Candler v Crane, Christmas & Co.* (1951) 2 KB 164; *Glanzer v Shepard* (1922) 135 NE 275; also see *Esanda Finance Corp Ltd v Peat Marwick Hungerford (Reg)* (1997) 188 CLR 241, 275 (McHugh J).

of the various means by which it may be shown that the plaintiff's reliance on the information was reasonable.<sup>71</sup> As Kitto J stated in *MLC v Evatt*:<sup>72</sup>

Just as words which otherwise would create a contract (because the speaker or writer receives a quid pro quo) are held not to do so if the parties are dealing with one another on a plane where there is really no intention of altering legal relations – as in the case of purely domestic arrangements – so **words giving information or advice without any quid pro quo will be held to entail no legal responsibility for carelessness** if the correct conclusion from the circumstances be that the person who acted upon them could not reasonably have understood them as uttered, as one might say, in the way of business, or (to express it more generally) as uttered on a plane to which legal liability naturally belongs.<sup>73</sup> [emphasis added]

The general interest which governments have in promoting or encouraging the digital economy is not a 'pecuniary interest' which supports the existence of a duty of care.<sup>74</sup> Conversely, by releasing PSI for free under unrestrictive licensing regimes, the government is putting into practice the overriding principle that 'the community has a right to information held by the [g]overnment';<sup>75</sup> it is not seeking a private commercial benefit. In *San Sebastian v Minister*,<sup>76</sup> it was ultimately held that reliance on the publication was unreasonable due to the general nature of the documents which contained no representation or assurance about the ultimate level of development or continuing application by the Council.

A duty of care should not be lightly imposed where a government provider does not charge a fee for the information. The courts must consider whether the imposition of such a duty would deter socially desirable activity. In the words of Brennan J in *San Sebastian v Minister*:<sup>77</sup>

Helpful information and friendly advice, even on matters of the gravest import, will often be proffered without any thought of the informant or adviser being responsible for its truth or soundness. **To impose a legal duty of care on the unsolicited and voluntary giving of any information and advice on serious or business matters would chill communications which are a valuable source of wisdom and experience for a person contemplating a course of conduct.**<sup>78</sup> [emphasis added]

In short, the wide range of PSI which could be released by government to benefit the public presents a strong public policy reason against imposing tortious liability on government in such circumstances.<sup>79</sup>

---

<sup>71</sup> *Esanda Finance Corp Ltd v Peat Marwick Hungerford (Reg)* (1997) 188 CLR 241.

<sup>72</sup> *MLC v Evatt* (1968) 122 CLR 556.

<sup>73</sup> *Ibid* 585 (Kitto J).

<sup>74</sup> See for example *Council of the City of Lismore v Stewart* (1990) 18 NSWLR 718, where the provision of land use information in exchange for a fee was held not to give rise for a contract. Relevant to this finding was the inherently governmental nature of the activity and the fact that the arrangement involved no negotiations. By analogy, the proactive provision of information online is a governmental activity which does not carry with it a commercial intention to induce use of the information by the public.

<sup>75</sup> Queensland Government's comments on the Australian Government's Digital Economy Discussion Paper, available at <http://www.qgcio.qld.gov.au/SiteCollectionDocuments/Resources/Publications/Queensland%20Government%20Submission%20-%20Digital%20Economy%20Future%20Directions.pdf> (21 June 2009).

<sup>76</sup> *San Sebastian v Minister* (1986) 162 CLR 340.

<sup>77</sup> *Ibid*.

<sup>78</sup> *Ibid* 372.

<sup>79</sup> See generally *The Laws of Australia* Electronic, Torts - Public Policy [33.2.390] (last updated 1 August 2007) at 26 June 2009.

### **A General Proactive Publication of PSI**

Should there be a duty where general PSI (non-specific to the particular plaintiff) is made available online? Whilst the existence of an antecedent request for information certainly assists in demonstrating reliance, it is by no means essential.<sup>80</sup> The fact that information is proactively made available to the world by a government does not preclude a duty of care from arising.

All the same, it is undoubtedly of importance to consider the specificity and relevance of that information in relation to the person or class of persons to whom it is directed when determining whether reliance by that particular person or member of that particular class is reasonable. For example, in *Perre v Apand Pty Ltd*,<sup>81</sup> the damage caused was not too remote as it was possible for the respondent to identify precisely who would be affected by an outbreak of bacterial wilt caused by its negligence. Depending on the nature and purpose of the information, it may be possible for the government to identify the class of possible plaintiffs. Arguably, whilst the government may not be able to identify the particular individual users, it may be within contemplation that the information is likely to be downloaded and used by certain categories of people for serious purposes.<sup>82</sup>

Nevertheless, where PSI is released by the government to the general public without a specific request, it may be difficult for the government to foresee how and by whom the information will be used. There is a lesser extent of proximity between the government provider and the user of the information, upon which the government provider may be seen to have assumed legal responsibility. In *Crimmins v Stevedoring Industry Finance Committee*,<sup>83</sup> McHugh J was of the opinion that the imputation of constructive knowledge should be treated with caution, because “it would be a far-reaching step to impose affirmative obligations on a statutory authority merely because it could have or even ought to have known that the plaintiff was, or was a member of a class which was, likely to suffer harm of the relevant kind.”<sup>84</sup>

### **Provision by Government**

Where government provides the information, it is more likely to be seen as being in a special relationship with users of the information and it may be seen to have assumed responsibility to the public by making information available. This is largely because a government is often in a better position than the general public to ensure the accuracy of the information released. While this may not always be so where PSI is utilised by people with special skills or knowledge or by large corporations, the argument is especially compelling where the government has a monopoly on important information, and formally

---

<sup>80</sup> *San Sebastian v Minister* (1986) 162 CLR 340; *MLC v Evatt* (1968) 122 CLR 556, 571-572.

<sup>81</sup> *Perre v Apand Pty Ltd* (1999) Australian Torts Reports ¶81-516.

<sup>82</sup> *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556, 571 (Barwick CJ).

the speaker must realize or the circumstances be such that he ought to have realized that the recipient intends to act upon the information or advice in respect of his property or of himself in connexion with some matter of business or serious consequence.

Accepted in *L Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225, 248-249 (Mason J, as he then was); *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1; (Gaudron J).

<sup>83</sup> *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1.

<sup>84</sup> *Ibid* 42.

sets itself up as the distributor.<sup>85</sup> In this scenario, the public may be seen as being in a position of relative vulnerability.<sup>86</sup>

It has been said that the “risk of indeterminate liability must give way to the more important role attributed to the law of negligence in the form of its deterrent effect”.<sup>87</sup> However, the law of negligence does not operate in a vacuum. Finding liability not only affects the defendant government but also society as a whole. If faced with extensive liability, the provision of information may represent such a financial risk that it is prohibitory.<sup>88</sup> Where it is a discretionary undertaking by a government agency, the risk of liability is highly likely to deter the release of information, because there is neither a specific public obligation<sup>89</sup> nor a financial incentive to do so. In determining whether a duty of care should be recognised, the possibility that its recognition might lead to a flood of claims, although not decisive, weighs the balance against the recognition of that duty.<sup>90</sup>

In Queensland, recognition of the constraints applicable to public or governmental authorities is contained s 35 of the *Civil Liability Act 2003* (Qld).<sup>91</sup> Section 35 states that, in deciding whether a public or other authority has a duty or has breached a duty, the following principles apply —

- (a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising the functions;
- (b) the general allocation of financial or other resources by the authority is not open to challenge;
- (c) the functions required to be exercised by the authority are to be decided by reference to the broad range of its activities (and not merely by reference to the matter to which the proceeding relates); and
- (d) the authority may rely on evidence of its compliance with its general procedures and any applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceeding relates.

Section 35 reflects the common law principle as espoused by Gleeson CJ in *Graham Barclay Oysters v Ryan* that ‘decisions as to raising revenue, and setting priorities in the allocation of public funds between competing claims on scarce resources, are essentially political...[and] are ordinarily decided through the political process.’<sup>92</sup>

---

<sup>85</sup> *L Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225, 243 (Stephen J). In other words as provider of the information or advice, it has some special expertise or knowledge, or some special means of acquiring information which is not available to the recipient: *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 142 ALR 750, 768.

<sup>86</sup> *Perre & Ors v Apand Pty Ltd* (1999) Australian Torts Reports 81-516 (Kirby J); *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 93-94 (McHugh J).

<sup>87</sup> Promoted, for example, in *Rosenblum v Adler* 93 NJ 324; see C Phegan, ‘Reining in foreseeability: liability of auditors to third parties for negligent misstatement’ (1997) 5 *Torts Law Journal* 123.

<sup>88</sup> D Butler, ‘Media Negligence in the Information Age’ (2000) 8(2) *Torts Law Journal* 159, 163-4.

<sup>89</sup> Note that there will often be a general public obligation in the sense that the government is responsible and accountable to the public. However, in this situation, the risk of liability for release of information is likely to outweigh the risk of liability for *failing* to release information.

<sup>90</sup> *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 665 (Callinan J).

<sup>91</sup> Note the comparable legislation in other Australian jurisdictions except the Northern Territory and South Australia: *Civil Law (Wrongs) Act 2002* (ACT) s 110; *Civil Liability Act 2002* (NSW) s 42; *Civil Liability Act 2002* (Tas) s 38; *Wrongs Act 1958* (Vic) s 83; *Civil Liability Act 2002* (WA) s 5W.

<sup>92</sup> *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 546.

These additional section 35 conditions when taken into account may, depending on the circumstances, lead to the conclusion that there is no duty of care. Alternatively, where a duty of care is held to exist, these principles will again be relevant in assessing whether the duty of care was breached.

### 5.1.3 Does the CLA Bind the Crown in Right of the Commonwealth?

In Australia, the Crown's historical immunity from suit was removed by the various state Crown Proceedings Acts<sup>93</sup> and at the Commonwealth level, the *Judiciary Act 1903* (Cth).<sup>94</sup> Under these Acts, the Crown (both in right of the Commonwealth and in right of the State) is subject to the same common law tortious principles as its subjects and may be held vicariously liable for torts committed by its employees.<sup>95</sup>

As there is no Commonwealth civil liability legislation, question arises as to whether the States and Territories have the legislative power to bind the Commonwealth government under their civil liability legislation. The Queensland legislation is the only state or territory legislation which specifically purports to bind the Commonwealth, so far as it is able to.<sup>96</sup> New South Wales, South Australia, Western Australia and the Northern Territory legislatures provide that their respective pieces of legislation bind not only the Crown of the respective jurisdiction, but also, so far as able, the 'Crown' in all its capacities.<sup>97</sup>

As yet, the courts have not been called upon to decide whether State or Territory civil liability legislation will bind the Crown in right of the Commonwealth. Generally, State laws of general application can bind the Commonwealth. In *Pirrie v McFarlane*,<sup>98</sup> the High Court held that a member of the Air Force was required to hold a Victorian driver's licence when carrying out Commonwealth duties involving the operation of a motor vehicle within Victoria. Therefore, Commonwealth officers, employees and agents must comply with State laws of general application even when undertaking Commonwealth Government activities. However, in *Commonwealth v Cigamic Pty Ltd (in liq)*,<sup>99</sup> the Court held that States cannot bind the Commonwealth with laws which define or regulate Commonwealth rights or duties towards its subjects or which regulate or control its

---

<sup>93</sup> *Crowns Proceedings Act 1988* (NSW) s 5; *Crowns Proceedings Act 1980* (Qld) s 9; *Crowns Proceedings Act 1992* (SA) s 5; *Crowns Proceedings Act 1993* (Tas) s 5; *Crowns Proceedings Act 1958* (Vic) s 23; *Crowns Proceedings Act 1947* (WA) s 5; *Crowns Proceedings Act 1992* (ACT) s 5; *Crowns Proceedings Act 1993* (NT) s 5.

<sup>94</sup> *Judiciary Act 1903* (Cth) ss 56, 64.

<sup>95</sup> *Judiciary Act 1903* (Cth) s 64; *Crowns Proceedings Act 1988* (NSW) s 5; *Crowns Proceedings Act 1980* (Qld) s 9; *Crowns Proceedings Act 1992* (SA) s 5; *Crowns Proceedings Act 1993* (Tas) s 5; *Crowns Proceedings Act 1958* (Vic) s 23; *Crowns Proceedings Act 1947* (WA) s 5; *Crowns Proceedings Act 1992* (ACT) s 5; *Crowns Proceedings Act 1993* (NT) s 5. See *Darling Island Stevedoring Lighterage Co Ltd v Long* (1957) 97 CLR 36, 63 (Kitto J); *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

<sup>96</sup> *Civil Liability Act 2003* (Qld) s 6.

<sup>97</sup> *Civil Liability Act 2002* (NSW) s 4(1); *Wrongs Act 1958* (Vic) s.14C; *Civil Liability Act 1936* (SA) s.2; *Civil Liability Act 2002* (WA) s 5; *Personal Injuries (Liabilities and Damages) Act* (NT) s.6; *Proportionate Liability Act 2005* (NT) s.5.

<sup>98</sup> *Pirrie v McFarlane* (1925) 36 CLR 170.

<sup>99</sup> *Commonwealth v Cigamic Pty Ltd (in liq)* (1962) 108 CLR 372.

prerogative rights.<sup>100</sup> These principles were affirmed by the majority of the High Court in *Re Residential Tenancies Tribunal of NSW and Henderson*.<sup>101</sup>

Civil liability legislation are laws of general application which apply to the Crown in regards to actions in which it may choose to engage in exercise of its capacities and functions (i.e. activities which it carries on in common with other citizens).<sup>102</sup> The acts do not purport to govern the capacities and functions of the Crown in right of the Commonwealth.<sup>103</sup> In other words, the legislation covers the civil liability of the Crown should it be negligent in releasing PSI which causes loss, but it does not affect the Crown's ability to release PSI. In short, it is likely that, as far as negligent acts or omissions are concerned, the Commonwealth is bound by State and Territory civil liability legislation, so long as there is no inconsistency with Commonwealth legislation that would attract the operation of s 109 of the Commonwealth Constitution.<sup>104</sup> Even if the State civil liability legislation is held not to apply to the Crown in right of the Commonwealth, general negligence principles at common law will still apply.<sup>105</sup>

#### 5.1.4 Is the Provision of Information a Matter of Policy?

A duty of care cannot arise in relation to acts and omissions that reflect the policy-making involved in the exercise of statutory discretions.<sup>106</sup> In accordance with the separation of legislative, executive and judicial powers in Australia, it is 'not the function of the judicial review court to determine the merits of the exercise of an administrative power. The court is limited to deciding whether that exercise was lawful, and it remains lawful even if the court thinks that it would have been better exercised in another way.'<sup>107</sup>

Nevertheless, unlike budgetary allocations and the constraints which they entail in terms of the allocation of resources, the courts may be called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.<sup>108</sup>

Consequently, a public authority or governmental body which exercises statutory powers may place itself in a relationship to others which imports a common law duty to take

---

<sup>100</sup> *Commonwealth v Cigamic Pty Ltd (in liq)* (1962) 108 CLR 372, 378 (Dixon CJ). This principle was expounded earlier in *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278, 308.

<sup>101</sup> *Re Residential Tenancies Tribunal of NSW and Henderson* (1997) 190 CLR 410. The 4/7 majority was comprised of Brennan CJ, Dawson, Toohey and Gaudron JJ.

<sup>102</sup> See *Re Residential Tenancies Tribunal of New South Wales and Henderson* (1996) 190 CLR 410, 439 (Dawson, Toohey and Gaudron JJ); 424 (Brennan CJ):

...as to the true operation and effect of *The Commonwealth v Cigamic Pty Ltd (In liq)*...I would draw a distinction between the capacities and functions of the Crown in right of the Commonwealth and the transactions in which that Crown may choose to engage in exercise of its capacities and functions.

<sup>103</sup> *Ibid.*

<sup>104</sup> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

<sup>105</sup> See for example, *Austral Pacific Group Limited v Airservices Australia* (2000) 203 CLR 136.

<sup>106</sup> *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 468-469 (Mason J) citing *Anns v Merton London Borough Council* (1978) AC 728.

<sup>107</sup> Mark Aronson, 'Government Liability in Negligence' (2008) 32(1) *Melbourne University Law Review* 44.

<sup>108</sup> *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 468-469 (Mason J) citing *Anns v Merton London Borough Council* (1978) AC 728.

care.<sup>109</sup> For example, the decision whether or not to release certain information, in exercise of a statutory power, would be a policy decision, and cannot as such be subject to a duty of care. However, a duty of care may still arise where operational effect is given to the policy decisions by making information available to the public. Here, a duty of care requiring the government agency to take reasonable steps to ensure the reasonable accuracy of the information may be held to arise.

While a discretionary exercise of powers may involve a combination of policy and operational decisions, ‘when a duty of care is found to exist, a failure to exercise a statutory power said to be relevant to the cause of negligence in the operational sense is not to be excused merely because the ultimate decision to exercise the power may be classed as a policy one.’<sup>110</sup> Therefore, the fact that information is released based on an initial policy decision does not preclude a duty of care from arising. However, the fact that information is released by government may have an impact on the applicable standard of care.<sup>111</sup>

### 5.1.5 Conclusion on Duty of Care

In summary, where information is pro-actively released online to the public, a relationship of sufficient proximity, which warrants reliance on such information without proper consideration, is unlikely to exist between the government and the user. This is especially so where information is provided free of charge, without any implicit inducement or warranty as to the accuracy of the information.<sup>112</sup> Accordingly, where information is made available online by government to the general public, without expectation of economic profit, a duty of care is not likely to exist.

Simply put, governments are releasing PSI for the benefit of the public. An individual who places undue reliance on the general information provided by a government without proper critical consideration or proper exercise of common sense, and consequently suffers a loss, has not acted reasonably. It should be the individual’s responsibility to obtain professional advice before relying heavily on such information. Likewise, where a professional or skilled individual, or a corporation experienced in the particular field is involved, a reasonable reliance on PSI will be even harder to prove.

### 5.1.6 Switching from Duty to Standard of Care and Breach

It must be kept in mind that the elements of reliance and assumption of responsibility are merely illustrations of principles as applicable to previous cases, which cannot be strictly adhered to and applied in every instance. In the present context, the courts may be reluctant to simply deny a duty of care, allowing the government free range to disseminate information without considering its accuracy. This is especially so in light the High Court’s decision in *Brodie v Singleton Shire Council*,<sup>113</sup> described as signalling ‘a major shift in focus from a duty of care to breach’.<sup>114</sup> In that case, factors which were previously

---

<sup>109</sup> *Torts Commentary* Electronic. ‘Introduction Special Defendants Time Limits’, CCH Australia, [¶1-830] (27 November 2008).

<sup>110</sup> *Parramatta City Council v Lutz* (1988) Aust Torts Reports ¶80-159, 67,423 (Kirby P).

<sup>111</sup> See Part 5.2.2 of this article “A Standard of Care particular to Government”.

<sup>112</sup> Disclaimers and limitation of liability clauses are discussed in this article under Part 5.4 “Disclaiming Negligence”.

<sup>113</sup> *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 577–8 (Gaudron, McHugh and Gummow JJ); 601 (Kirby J).

<sup>114</sup> Above n 107.

relevant to negating the existence of a duty instead became criteria to be considered and evaluated against the court's conception of reasonableness in the context of the standard of care and breach of that standard.<sup>115</sup>

Whilst the role of government is to maintain the public good,<sup>116</sup> it may be difficult to determine which 'public good' outweighs another, for example here, the dissemination of valuable information, or the avoidance of potential mishaps from the use of or reliance upon incorrect information. An appropriate balance has to be struck between the need to encourage the dissemination and reuse of data, and the protection of public users. An unnecessarily conservative approach which suppresses the innovative use and re-use of PSI is contrary to the characteristics of a modern democratic government which should be committed to stimulating economic growth and productivity.

Accordingly, the courts may seek to retain judicial flexibility by imposing a duty of care, but provide the government with some leeway by applying a suitably lower standard of care in the circumstances. This way, the courts are able to respond to novel situations in a way that accords with public policy concerns as to whether the state should compensate certain classes of loss.<sup>117</sup>

## 5.2 Standard of Care and Breach

Having discussed factors relevant to the existence of a duty of care, this paper will now move on to consider the standard of care applicable should a duty of care be held to exist. Arguably, shifting the debate away from duty may lead into a highly policy-oriented discussion of the content and standard of care in the particular context.<sup>118</sup> For instance, where information is provided by government without fee for the benefit of the public, the courts may impose a relatively low standard of care. This way, the government's implementation of PSI re-use and open access policy is encouraged, yet the government is not free to release information without consideration of its accuracy. Similarly, where there is no inducement for the user to rely on the information, the standard of care applicable will be relatively low. This lower standard may be compared to the standard of care which may be expected from a commercial information provider. Thus, the fact that information is provided for free, without expectation of profit, is likely to have a very strong impact on the applicable standard of care.

### 5.2.1 Civil Liability Legislation

Section 9 of the *Civil Liability Act 2003* (Qld)<sup>119</sup> is relevant to establishing whether a person has breached their duty of care. Section 9(1) states that a person does not breach a duty to take precautions against a risk of harm unless:

---

<sup>115</sup> Ibid.

<sup>116</sup> B Fitzgerald & N Suzor, 'Legal Issues for the Use of Free and Open Source Software for Government' (2005) 29 (2) *Melbourne University Law Review* 412, 426.

<sup>117</sup> Above n 107.

<sup>118</sup> Ibid.

<sup>119</sup> As discussed in Part 5.1.3 of this article "Does the CLA bind the Crown in right of the Commonwealth?", the Commonwealth is likely to be bound by State and Territory civil liability legislation, provided there is no inconsistency with Commonwealth legislation. Comparable legislation in other Australian jurisdictions except the Northern Territory are: *Civil Liability Act 2002* (NSW) s 5B; *Civil Law (Wrongs) Act 2002* (ACT) s 43; *Civil Liability Act 1936* (SA) s 32; *Civil Liability Act 2002* (Tas) s 11; *Wrongs Act 1958* (Vic) s 48; *Civil Liability Act 2002* (WA) s 5B.

- (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
- (b) the risk was not insignificant; and
- (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.

Further, section 9(2) specifies that in deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among other relevant things):

- (a) the probability that the harm would occur if care was not taken;
- (b) the likely seriousness of the harm;
- (c) the burden of taking precautions to avoid the risk of harm;
- (d) the social utility of the activity that creates the risk of harm.

Although users of PSI may expect a government to ensure the information provided is substantially accurate and that reasonable attempts are made to use error-free procedure,<sup>120</sup> it should be emphasized that the obligation is no more than to use reasonable care *in the circumstances*.<sup>121</sup> Certain information, such as geographic information, is inherently inaccurate.<sup>122</sup> Often, they are the end products of a complex accretion of data from a number of different sources.<sup>123</sup> It is possible for loss or damage to be caused by inherent inaccuracy which would have gone undetected even if the task was carried out competently. As such, a government is not required to ensure that their information is free of error, but rather free of errors which a reasonable public or governmental authority exercising reasonable care in the circumstances would have detected and corrected. Therefore, even if damage is caused by a data error attributable to the government, the action may still fail without the element of fault (i.e. the error was not due to a failure by government to exercise reasonable care). The test is not one of strict liability. In other words, a government is not in breach merely because it releases incorrect information which causes loss to others.

In addition, the courts will take into account the social utility of the activity, i.e. of making PSI openly accessible to the public. If the overall benefit to the community outweighs the harm caused to the individual, it is possible that the injured claimant will not be compensated.<sup>124</sup> However, this principle is unlikely to be extended as far as to allow the incompetent handling and dissemination of PSI. Again, it comes down to whether the defendant government information provider has exercised reasonable care in the circumstances.

---

<sup>120</sup> Above n 59, 98.

<sup>121</sup> *MLC v Evatt* (1968) 122 CLR 556, 573.

<sup>122</sup> Above n 59, 87.

<sup>123</sup> *Ibid.*

<sup>124</sup> *E v Australia Red Cross* (1991) 31 FCR 299 where the court rejected a claim against the Red Cross Blood Bank in negligence for the supply of HIV-infected blood to a plaintiff. The court took into account the public benefit of the service provided by the Red Cross and the significant problems associated with a potential blood shortage if untested blood had to be discarded. Note that the cause pre-dated the availability of blood tests for HIV antibodies in 1985: D Mandelson, *The New Law of Torts*, (Oxford University Press, South Melbourne, 1997) 284.

### 5.2.2 A Standard of Care Particular to Government

Governments are often in a factually different position to private defendants. The reasonable person, placed in the position of a government would be subject to the statutory and financial constraints which might inhibit its conduct.<sup>125</sup> Thus the standard applicable to government is what ought a reasonable public or governmental authority to have done in the circumstances.<sup>126</sup> Courts have accepted that budgetary, political and other constraints are factors to be taken into account in determining the standard of care and whether it has been breached.<sup>127</sup> This is reflected in s 35 of the *Civil Liability Act 2003* (Qld),<sup>128</sup> which requires consideration of financial and political constraints in determining whether a public authority has breached its duty of care. Thus, if the government lacks the resources necessary to avoid an error, the consequences may be that the failure to do so will not constitute a failure to take reasonable care and therefore no breach will arise.<sup>129</sup>

These statutory and budgetary constraints, combined with the considerations already canvassed in relation to a duty of care - i.e. the information is made available online to the general public 'as is' in an unpackaged form by government without expectation of economic profit - means that even if a duty of care is held to exist in the circumstances, the government will be held to a relatively low standard of care. Arguably, the relevant act or omission would be a breach of a duty of care only if no reasonable authority in the defendant government's position would have behaved in the same way.<sup>130</sup>

Provided the government and its agencies or departments, without gross negligence or disregard of the PSI's accuracy, take reasonable steps and precautions in creating, collecting, analyzing, and disseminating the various and voluminous PSI that is created or held by government departments and agencies, the government is not likely to be in breach of the applicable standard of care.

In this respect, implementation of standard systematic protocols throughout the information life cycle (from producing or collecting, recording, disseminating, archiving and analyzing information) may be sufficient to show that reasonable steps were taken to minimize the risk of harm, and therefore show that there has been no breach of the duty of care. Such standard protocols would form part of any whole-of-government or agency Information Management Framework.

---

<sup>125</sup> *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 468-469 (Mason J).

<sup>126</sup> *Crimmins v Stevedoring Industry Finance Committee* (1999) Australian Torts Reports ¶81-532, 34, 90 (McHugh J), [34] (Gaudron J); *Brodie v Singleton Shire Council*; *Ghantous v Hawkesbury City Council* (2001) Australian Torts Report ¶81-607, 150] (Gaudron, McHugh and Gummow JJ).

<sup>127</sup> Torts Commentary Electronic. 'Introduction Special Defendants Time Limits', CCH Australia, [¶1-830] (27 November 2008) see *Romeo v Conservation Commission of the Northern Territory* (1998) Australian Torts Reports ¶81-457;

<sup>128</sup> Note the comparable legislation in other Australian jurisdictions except the Northern Territory and South Australia: *Civil Law (Wrongs) Act 2002* (ACT) s 110; *Civil Liability Act 2002* (NSW) s 42; *Civil Liability Act 2002* (Tas) s 38; *Wrongs Act 1958* (Vic) s 83; *Civil Liability Act 2002* (WA), s 5W.

<sup>129</sup> Torts Commentary Electronic. 'Introduction Special Defendants Time Limits', CCH Australia, [¶1-835] (27 November 2008).

<sup>130</sup> This standard is known as *Wednesbury* unreasonableness: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229-30 (Lord Greene MR); see also *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, 360. The *Wednesbury* standard of unreasonableness expressly applies to public or other authorities in proceedings based on breach of statutory duty: see *Civil Liability Act 2003* (Qld) s 36.

### 5.2.3 Information Management Frameworks

An Information Management Framework (IMF) comprises policies, procedures and systems to enable the strategic management of information.<sup>131</sup> Currently, federal government agencies such as the Australian Taxation Office<sup>132</sup> and the Bureau of Meteorology<sup>133</sup> already have IMFs in place as a strategic direction. Similarly, the New South Wales Government has a Natural Resources Information Management Strategy (NRIMS),<sup>134</sup> the Queensland Government has the Queensland Government Information Management Strategic Framework, and the Victorian Government has committed to the Economic Development and Infrastructure Committee's recommendation for the development of a whole-of-government IMF.<sup>135</sup>

The specified protocols under these IMF's should not be taken for granted as mere standard practice for the sake of consistency. These practices, if credible and reasonable, are important as:

- pre-release precautions to ascertain that sufficient rights attach to the information to allow its release, and therefore to avoid the infringement of copyright; and
- evidence that the government information provider has taken reasonable steps to minimise the risk of harm, that may arise from the release of incorrect information.

Whilst the specifics of these standard protocols are beyond the scope of this article, at the very least, standard protocols should be in place for every stage of the information life cycle, for example:

- collecting the information from credible sources;
- checking the information for noticeable errors before releasing it online;
- updating the information once new information is obtained;<sup>136</sup> and
- clearly detailing the scope and currency of the information.<sup>137</sup>

<sup>131</sup> Information Management Framework (webpage), National Archives of Australia <<http://www.naa.gov.au/records-management/IM-framework/index.aspx>> (17 February 2010).

<sup>132</sup> Australian Taxation Office <<http://www.ato.gov.au/corporate/content.asp?doc=/content/48331.htm&pc=001/001/002/008&mnu=18629&mfp=001&st=&cy=1>> (3 September 2004).

<sup>133</sup> Queensland Department of Environment and Resource Management in consultation with the Bureau of Meteorology Water Division, *Government Information Licensing Framework (GILF) for Water: Recommended Practice* (2009) <[http://www.bom.gov.au/water/regulations/dataLicensing/document/GILF\\_4\\_H20.pdf](http://www.bom.gov.au/water/regulations/dataLicensing/document/GILF_4_H20.pdf)> and *Bureau of Meteorology to release water data under CC*, Creative Commons Australia, (17 November 2009).

<sup>134</sup> Natural Resources Information Management Strategy <<http://www.nrims.nsw.gov.au/policies/imf.html>> (17 February 2010).

<sup>135</sup> Department of Innovation, Industry and Regional Development (DIIRD) (Vic), *Whole of Victorian Government Response to the Final Report of the Economic Development and Infrastructure Committee's Inquiry into Improving Access to Victorian Public Sector Information and Data*, (9 December 2010), <<http://www.diird.vic.gov.au/diird-projects/access-to-public-sector-information>> The Victorian Government at page 8 stated:

**A commitment to develop an Information Management Framework**

The Victorian Government endorses the committee's overarching recommendation that the default position for the management of PSI should be open access. The Victorian Government further commits to the development of a whole-of-government Information Management Framework (IMF) whereby PSI is made available under Creative Commons licensing by default with a tailored suite of licences for restricted materials.

<sup>136</sup> Note that the information provider has a continuing obligation to correct inaccuracies: *Meadow Gem Pty Ltd v ANZ Executors and Trustee Co Ltd* (1994) ATPR (Digest) 46-130.

<sup>137</sup> This will be discussed in more detail under Part 5.4 of this article entitled 'Disclaiming negligence'.

The adherence to protocols or standards procedures under an IMF, whilst no guarantee that information released will be free of inaccuracies, is cogent evidence that the information provider has acted reasonably in the circumstances.<sup>138</sup> Section 35(d) of the *Civil Liability Act 2003* (Qld)<sup>139</sup> specifically provides that, in deciding whether a public or other authority has a duty or has breached a duty, the authority may rely on evidence of its compliance with its general procedures and any applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceeding relates. Such evidence leaves very little scope for a plaintiff to argue that the information provider was negligent.

### 5.3 Causation and Scope of Liability

Whilst damage is usually the result of a complex set of conditions, the user of the PSI must be able to show on the balance of probabilities that the defendant government's act or omission was causally related to the injury or damage suffered by the user.<sup>140</sup>

Section 11(1) of the *Civil Liability Act 2003* (Qld)<sup>141</sup> is essentially a "but for" test of causation, and states that a decision that a breach of duty caused particular harm comprises the following elements:

- (a) the breach of duty was a necessary condition of the occurrence of the harm; and
- (b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused.

In active systems (e.g. navigation systems), where decision-making on matters of real consequence is delegated to a computer system,<sup>142</sup> it may be easier to causally link the error in data in the system to the damage caused. Conversely, where loss is caused by reliance on incorrect information, contention arises because damage is caused not immediately from a government's act in providing the information, but from the user's reliance on the information.<sup>143</sup> In other words, the factors which establish the existence of a duty of care (for instance, a reasonable reliance) are also relevant to establishing a causal link between the defendant's breach of duty and the harm caused. Therefore, although an unreasonable reliance on the information may break the chain of causation, the question of causation will not arise where a duty of care is found not to exist in the circumstances.

---

<sup>138</sup> See for example, *Dancorp Developers v Auckland City Council* [1991] 3 NZLR 337, 353, 354 where the Council provided incorrect information because a vital report was missing from its files. However, the Council had an above average filing system in place and it was held not to be negligent.

<sup>139</sup> Note the comparable legislation in other Australian jurisdictions except the Northern Territory and South Australia: *Civil Law (Wrongs) Act 2002* (ACT) s 110; *Civil Liability Act 2002* (NSW) s 42; *Civil Liability Act 2002* (Tas) s 38; *Wrongs Act 1958* (Vic) s 83; *Civil Liability Act 2002* (WA) s 5W.

<sup>140</sup> *Civil Liability Act 2003* (Qld) s 12; F McGlone and A Stickley, *Australian Torts Law*, (LexisNexis Butterworths, Chatswood NSW, 2005) 222; see for example *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428, where the causal link failed to be established because plaintiff's husband would have died even with medical treatment.

<sup>141</sup> Note the comparable legislation in other Australian jurisdictions except the Northern Territory: *Civil Law (Wrongs) Act 2002* (ACT) s 45(1); *Civil Liability Act 1936* (SA) s 34(1); *Civil Liability Act 2002* (Tas) s 13(1); *Wrongs Act 1958* (Vic) s 51(1); *Civil Liability Act 2002* (WA) s 5C(1); *Civil Liability Act 2002* (NSW) s 5D(1).

<sup>142</sup> R Clarke, *Who is Liable for Software Errors? Proposed New Product Liability Law in Australia* (1988) Department of Computer Science, Australian National University,

<<http://www.anu.edu.au/people/Roger.Clarke/SOS/PaperLiaby.html>> (11 May 1988).

<sup>143</sup> *San Sebastian v Minister* 162 CLR 340 (Gibbs CJ, Mason, Wilson and Dawson JJ).

## 5.4 Disclaiming Negligence

Having considered the three elements of tortious liability in the context of PSI, it is necessary to consider the effect of disclaimers in preventing a duty of care from arising or as a defence where a duty of care exists.

Most open content licences have express disclaimer of warranty and limitation of liability clauses. For example, clause 5(a) of the Creative Commons Attribution 3.0 Australia licence, headed 'Representations, Warranties and Disclaimer'<sup>144</sup> states:

Except as expressly stated in this Licence or otherwise agreed to by the parties in writing, and to the full extent permitted by applicable law, the Licensor **offers the Work 'as-is'** and **makes no representations, warranties or conditions** of any kind concerning the Work, express, implied, statutory or otherwise. This includes, without limitation, any representations, warranties or conditions **regarding:**

- i. **the contents or accuracy of the Work;**
- ii. title, merchantability, or fitness for a particular purpose;
- iii. non-infringement;
- iv. **the absence of latent or other defects;** or
- v. **the presence or absence of errors,** whether or not discoverable. [emphasis added]

Clause 6(a) 'Limit of Liability' in the licence states:

To the full extent permitted by applicable law, and except for any liability arising from contrary agreement, **in no event will the Licensor be liable to You on any legal basis (including without limitation, negligence) for any loss or damage** whatsoever... . [emphasis added]

These clauses, or similar disclaimers, may protect a government information provider from liability, where:

1. the user of the information has accepted the risk; or
2. the user's reliance on the information is unreasonable.

### 5.4.1 Acceptance of Risk

If a user of public sector information consents to the negligence of a government, the government may raise the defence of *volenti non fit injuria* (i.e. no injury is done to one who voluntarily consents).<sup>145</sup> In order to prove the defence and deny a recovery of damages, it must be proven that:

- the user of the PSI had full knowledge of the risk; and
- the user voluntarily accepted the risk.<sup>146</sup>

### Full Knowledge of Risk

A subjective test is applied in establishing whether the user was aware of the facts and circumstances that gave rise to the risk.<sup>147</sup> Compared to the danger of physical risk, the risk of information being incorrect due to errors in internal information management or collection systems of government may not be as obvious to the general public.

---

<sup>144</sup> <<http://creativecommons.org/licenses/by/3.0/au/legalcode>>.

<sup>145</sup> *Rootes v Shelton* (1967) 116 CLR 383.

<sup>146</sup> F McGlone and A Stickley, *Australian Torts Law*, (LexisNexis Butterworths, Chatswood NSW, 2005) 250.

<sup>147</sup> *Canterbury Municipal Council v Taylor* [2002] NSWCA 24.

Consequently, it is important that government, in publishing PSI for public use, clearly delimits the uses of the information.<sup>148</sup>

### Acceptance of the Risk

Acceptance of the licence containing the disclaimer may constitute acceptance of the risk by the licensee. An illustration of such acceptance may be drawn from the UK case of *Ashdown v Samuel Williams & Sons Ltd*,<sup>149</sup> where the plaintiff was injured whilst crossing a railway line she had permission to cross. The defendants, who had negligently shunted a train on the line, had posted notices purporting to exempt the defendants from liability for any injury caused by negligence on their land. It was held that the plaintiff, as a licensee on the land and having read the notice, had accepted the risk of injury on the terms specified by the defendants. Similarly, in using PSI, the user accepts the conditions of use contained in the applicable licence, thereby accepting that any loss caused by errors in the data will not be borne by the licensor.

Again, additional considerations apply where the duty of care is created by the granting of a *gratuitous* licence by the defendant to the plaintiff.<sup>150</sup> As Parker LJ stated in *Ashdown v Samuel Williams & Sons Ltd*: 'It is, I think, clear that in granting a licence to enter upon the land the occupier can impose conditions whereby he is absolved from all or some liability which he would otherwise be under at common law.'<sup>151</sup> In other words, it is reasonable for the licensor, in granting access without payment in return, to limit its liability; otherwise there would be no incentive to grant access in such a case.

### 5.4.2 Unreasonable Reliance

Potentially, an appropriate disclaimer may operate as a warning, which may be sufficient to discharge the relevant duty of care.<sup>152</sup> Alternatively, where a user utilizes the information without regard to a clear warning against such use, it could be seen as an unreasonable reliance in the circumstances (therefore preventing a duty of care from arising).<sup>153</sup>

For example, liability should not be imputed to government when uninformed users use the information incorrectly,<sup>154</sup> outside of its known limits. In *De Bardeleben Marine Corp v United States*,<sup>155</sup> liability was avoided when a mariner did not have an updated 'notice to Mariners' on board a barge that sank, even though these notices were routinely and widely available. The court held that the time had passed at which any reasonable mariner would have conceived an updated chart, and this exonerated the government from negligence liability.<sup>156</sup>

### 5.4.3 What is an Effective Disclaimer?

---

<sup>148</sup> See further "5.4.3 What is an effective disclaimer?" below.

<sup>149</sup> *Ashdown v Samuel Williams & Sons Ltd* (1957) 1 QB 409.

<sup>150</sup> J R M Lowe, 'The Exclusion of Liability for Negligence', (1974) 37 *Modern Law Review* 218, 218.

<sup>151</sup> *Ashdown v Samuel Williams & Sons Ltd* [1957] QB 409, 427.

<sup>152</sup> *Torts Commentary* Electronic. 'Principles of Liability', (CCH Australia [¶50-690] 27 November 2008.

<sup>153</sup> *MLC v Evatt* (1968) 122 CLR 556, 585.

<sup>154</sup> JL Philips, 'Information Liability: the Possible Chilling Effect of Tort Claims Against Producers of Geographic Information Systems Data' (1999) 26 *Florida State University Law Review* 743, 769.

<sup>155</sup> *De Bardeleben Marine Corp v United States* 451 F 2d 140, 141.

<sup>156</sup> *Ibid* 149.

To be effective, written disclaimers must be clear, detailed and prominent.<sup>157</sup> As Kirby J stated in *Butcher v Lachlan Elder Realty*:<sup>158</sup> ‘The more harsh the exemption, the stricter has been the approach of the courts to the duty of the party that seeks to rely upon it to draw it to specific notice.’<sup>159</sup> The finer the ‘fine print’, the more readily will a court draw a conclusion that insufficient notice has been given, so as to take the provision outside the operation of an effective exemption.<sup>160</sup>

A disclaimer is not a catch-all solution to excluding liability, and will be construed strictly.<sup>161</sup> As the duty of care arises by operation of law and not purely by virtue of a person’s personal and factual assumption of responsibility, courts are likely to take the view that information providers *may not always* exempt themselves from the performance of a duty.<sup>162</sup> Rather, a disclaimer would be another factor to be taken into consideration with all the circumstances.<sup>163</sup>

In terms of the release of PSI by government, an effective disclaimer should cover details such as data quality, source materials and any known limitations of the data, and include a statement eliminating the provider from any liability for misuse of data.<sup>164</sup> In relation to data currency, the disclaimer should declare the data valid to a certain date, or simply provide the date in which the data was last updated.<sup>165</sup>

In addition to a disclaimer notice, advancement in information technology now means that licence information and the relevant disclaimer can be attached as metadata to the information or dataset released online.<sup>166</sup> This metadata may carry with it a verification link, so that downstream users can always link to the source and check for updates or obtain their information directly.<sup>167</sup> A prominent notice should advise users to check both the metadata and verification link.

Further, where the information can be independently verified or specific professional advice can be sought about its use, government should explicitly warn users to do so before relying on the information. The importance of this warning is evidenced by the recent UK case of *Patchett v Swimming Pool & Allied Trades Association Ltd*,<sup>168</sup> where the defendant website proprietor was held not to owe a duty of care for incorrect statements on its website. This result ensued because the court was of the view that the

---

<sup>157</sup> *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60, 216.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Oceanic Sun Line* 165 CLR 197, 229.

<sup>160</sup> *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60, [219]. For instance, very detailed exclusion clauses were held to be effective in *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10 by the New Zealand Court of Appeal. Conversely, in *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, an extremely wide exemption clause was held not to absolve the defendant parking company of liability for personal injury caused while the plaintiff was picking up his car. See generally *Torts Commentary Electronic*, ‘Principles of Liability’, CCH Australia, [¶50-690] (27 November 2008).

<sup>161</sup> *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; *Bright v Sampson and Duncan* (1985) 1 NSWLR 246.

<sup>162</sup> F McGlone and A Stickley, *Australian Torts Law* (LexisNexis Butterworths, Chatswood NSW, 2005) 336.

<sup>163</sup> *Ibid.*

<sup>164</sup> Above n 59, 111.

<sup>165</sup> *Ibid.*

<sup>166</sup> ‘*Embedded Metadata*’ <[http://wiki.creativecommons.org/Embedded\\_Metadata](http://wiki.creativecommons.org/Embedded_Metadata)> (3 December 2010).

<sup>167</sup> *Ibid.*

<sup>168</sup> *Patchett v Swimming Pool & Allied Trades Association Ltd* [2009] EWCA Civ 717. <

degree of reliance on the accuracy of the statements which the defendant could reasonably have anticipated was limited by advice that potential customers should obtain additional verification in the form of a further information pack.<sup>169</sup> However, where the government is the sole repository of that information, such a warning is likely to be unreasonable, and therefore ineffective in disclaiming liability.

These steps in ensuring users are adequately informed about the data could avoid improper use of the information, and prevent assumptions about the information's accuracy from arising. This delineation of the limits of the data is important:

- to show that users of PSI have full knowledge of any risks of errors it may carry as a result of these limits (where acceptance of risk is used as a defence); or
- to show that reliance on the information was unreasonable.

Preferably, a disclaimer or exemption of liability should strike an appropriate balance between the rights of the individual on the one hand and potential liability confronting governments.<sup>170</sup> A disclaimer, which clearly sets out the limitations of the information and informs the public when the government will be responsible for errors and when it will not be responsible, avoids a situation whereby information is simply released to be used 'at your own risk'. It is a step in encouraging the use and re-use of PSI by instilling a degree of confidence in governments' efforts to ensure the information's accuracy, yet shielding governments from an overtly heavy burden of potential liability. For example, the US government's Data.gov portal provides in its Data Policy that:

For all data accessed through Data.gov, each agency has confirmed that the data being provided through this site meets the agency's Information Quality Guidelines.<sup>171</sup>

.....

Once the data have been downloaded from the agency's site, the government cannot vouch for their quality and timeliness.<sup>172</sup>

.....

This Data Policy is intended only to improve the internal management of information controlled by the Executive Branch of the Federal Government and it is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by a party against the United States, its Departments, Agencies, or other entities, its officers, employees, or agents.<sup>173</sup>

In comparison, a broad exemption of liability (such as clauses 5(a) and 6(a) of the Creative Commons Attribution 3.0 Australia licence) *in itself* is arguably neither adequate to prove the defence of *volenti* (in the unlikely event that a duty of care and a breach of that duty is found) nor sufficient to show unreasonable reliance by the user. However, the clause will be considered in conjunction with all the relevant circumstances of the case (i.e. matters already canvassed in relation to a duty of care and breach of that duty). If information is released under a Creative Commons licence carrying a broad exemption of liability *combined with* a notice and attached metadata informing users of inherent limitations to the data, and the data provider has adhered to reasonable information management practices and is provided free of charge to the public, then the scope for finding the

---

<sup>169</sup> Ibid [34].

<sup>170</sup> See for example *Mid Density Developments Pty Limited v Rockdale Municipal Council* [1993] FCA 408, [19] & [31].

<sup>171</sup> *Data.gov - Data Policy*, paragraph 4 – Data Quality and Retention (3 July 2009). <<http://www.data.gov/datapolicy>> .

<sup>172</sup> Ibid, paragraph 5 – Secondary Use.

<sup>173</sup> Ibid, paragraph 8 – Applicability of this Data Policy.

provider of information liable for inaccuracies is severely limited. In short, the cumulative effect of all these factors combined with the exemption clause is sufficient to deny a plaintiff user's recovery of damages.

## 6 What about Public Sector Information not Subject to Copyright?

Although copyright may subsist in the compilation as a whole, the Australian High Court held in the recent case of *IceTV Pty Limited v Nine Network Australia Pty Limited*<sup>174</sup> that copyright in a compilation of data is not infringed simply where unoriginal portions of the data are taken.<sup>175</sup> The High Court did not overrule its previous decision in *Desktop Marketing v Telstra*<sup>176</sup> in regards to the subsistence of copyright in compilations of data. Nevertheless, in light of Gummow, Hayne and Heydon JJ's obiter remarks that the reasoning in *Desktop Marketing v Telstra*<sup>177</sup> was "out of line with the understanding of copyright law over many years" and had to be treated with caution,<sup>178</sup> it is prudent to consider the application of negligence principles to the release of PSI which may not be subject to copyright.

Where copyright does not subsist in the work, a copyright licence such as a Creative Commons licence cannot attach to it.<sup>179</sup> There are several alternatives to a copyright licence in order to disclaim liability. These include click-wrap contracts, or disclaimer notices on the source website or information metadata. The difference between these alternatives and copyright licensing is that these notices or contract clauses fail to bind downstream users; there is no direct licensor-licensee relationship between the government information provider and the user.<sup>180</sup>

But is it necessary for the disclaimer or warning to be contained in an operative licence to have the requisite legal effect of limiting potential liability to the public? It is submitted that this factor does not have a huge implication on its effectiveness, for there is only one point of divergence. The point of divergence is this: where a licensor-licensee relationship with downstream users does not exist, there is no assumption of liability implied because there is no acceptance of any copyright licence for the use of the work. Acceptance of the copyright licence is not required to enable the lawful use of that information<sup>181</sup>

In any case, this analysis requires an application of the same tortious principles expressed in *MLC v Evatt*<sup>182</sup> to this new factual scenario. Again, we ask if there was a reasonable reliance or an acceptance of risk in light on the disclaimers/warnings present. A disclaimer/warning may still be effective where it is of sufficient prominence (regardless

---

<sup>174</sup> *IceTV Pty Limited v Nine Network Australia Pty Limited* (2009) 239 CLR 458.

<sup>175</sup> *Ibid.*

<sup>176</sup> *Desktop Marketing v Telstra* (2002) 119 FCR 491.

<sup>177</sup> *Ibid.*

<sup>178</sup> *IceTV Pty Limited v Nine Network Australia Pty Limited* (2009) 239 CLR 458 (French CJ, Gummow, Hayne, Heydon, Crennan and Kiefel JJ); See also *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCA 44, where Gordon J at [5] held that copyright did not subsist in Telstra's Yellow Pages and White Pages directories because the computer generated compilation had failed the authorship requirement. It appears likely that the decision will be taken on appeal on this and other grounds.

<sup>179</sup> That is, none of the 6 Creative Commons licences (see <<http://www.creativecommons.org.au/licences>>); cf CC Zero and the Public Domain Mark (<http://creativecommons.org/publicdomain/>).

<sup>180</sup> See Anne Fitzgerald, Brian Fitzgerald and Neale Hooper, 'Enabling open access to public sector information with Creative Commons Licences: the Australian experience'; Brian Fitzgerald (ed), *Access to Public Sector Information : Law, Technology & Policy*(Sydney University Press, Sydney, 2010) 16.

<sup>181</sup> See for example, *Ashdown v Samuel Williams & Sons Ltd* (1957) 1 QB 409.

<sup>182</sup> *MLC v Evatt* (1968) 122 CLR 556, 571 (Barwick CJ).

of whether it is in a licence, contract, website notice or metadata) so as to demonstrate that the user has unreasonably relied upon the information.

Moreover, where non-copyright works are obtained downstream, there carries a risk that the information is altered, and disclaimers or metadata are no longer attached to the work (and are no longer effective to limit liability). However, it is submitted that it is very difficult to positively establish a relationship of proximity between a government information provider and a downstream user who utilises that information without verifying its provenance from the source. In other words, reliance on information not sourced directly from the government portal is unlikely to be reasonable in the circumstances. This is especially so where a verification link, which allows the users to check the source website for updates, is included with the information.

Nevertheless, in the case of information not subject to copyright, best practice would be to include the appropriate warnings/disclaimers in a prominent position with the information itself (not merely as a notice on the source website) and also to embed this in the information's metadata. Even if there is no guarantee that the disclaimer will remain attached to the information, it is a preventive measure in limiting liability.

## 7 Conclusion

This paper has argued that where information is made available by government online to the general public without expectation of economic profit, a court is unlikely to uphold a duty of care on the part of the government body or agency providing access to PSI.

Even if a government body or agency is held to be subject to a duty of care, the duty would be of a relatively low standard compared to the standard of care which may be expected from a firm or private individual providing specific information or advice to another for a fee. Section 35 of the *Civil Liability Act 2003 (Qld)*<sup>183</sup> further entrenches this lower standard by requiring that financial and political constraints be taken into account in determining the existence of a duty and whether any duty has been breached. Moreover, these factors must be considered in light of the strong public policy argument that PSI as a publicly funded resource should be made available to the public.<sup>184</sup> The standard of care is also less likely to be breached where government employees have adhered to reasonable information management practices, and where there are clear disclosures or warnings about the limitations of the information.

In short, the combined effect of:

- i. the circumstances (i.e. PSI proactively being made available online for free under an open content licence);
- ii. the public policy arguments for open access;
- iii. the adherence to credible information management practices; and
- iv. the existence of disclosures or warnings about the limitations of the information and a limitation of liability clause,

---

<sup>183</sup> Note the comparable legislation in other Australian jurisdictions except the Northern Territory and South Australia: *Civil Law (Wrongs) Act 2002 (ACT)* s 110; *Civil Liability Act 2002 (NSW)* s 42; *Civil Liability Act 2002 (Tas)* s 38; *Wrongs Act 1958 (Vic)* s 83; *Civil Liability Act 2002 (WA)* s 5W.

<sup>184</sup> D Bushell-Embling, 'Private Eyes on Public Data', *The Sydney Morning Herald*(Sydney) 25 September 2007, <<http://www.smh.com.au/news/technology/private-eyes-on-public-data/2007/09/24/1190486224755.html?page=fullpage>> (26 June 2009).

means that governments are unlikely to be held tortiously liable for information released under an open content licence, provided they are not grossly negligent in collecting, processing and releasing the information to the public. Where these factors are present, the scope for finding that government information provider liable for inaccuracies is severely limited. The cumulative effect of all these factors is likely to be sufficient to deny a plaintiff user's recovery of damages.

Governments, in carrying out their duties to the public, should be subject to a realistic risk of legal liability, and be prepared to accept that level of risk. A government which adopts a completely risk averse approach by not releasing digitised public sector information is squandering the various opportunities for innovation, economic growth and social engagement that are presented by making the PSI available online under an open access regime.<sup>185</sup>

At the same time, users of freely available public sector information should carefully consider any limitations made explicit to them concerning the information and should ensure that they deal with the information responsibly. In the new online open access space, the public has a shared responsibility with governments in making the most of this valuable taxpayer funded informational resource.

---

<sup>185</sup> Economic Development and Infrastructure Committee, Parliament of Victoria, *Inquiry into Improving Access to Victorian Public Sector Information and Data (Final report)* (21 June 2010) Parliament of Victoria<[http://www.parliament.vic.gov.au/edic/inquiries/access\\_to\\_PSI/final\\_report.html](http://www.parliament.vic.gov.au/edic/inquiries/access_to_PSI/final_report.html)> 7-17; Terry Cutler, 'Innovation and Open Access to Public Sector Information' in Brian Fitzgerald (ed), *Legal Framework for e-Research: Realising the Potential* (Sydney University Press, 2008) 25.