

YEAR 2000 INFORMATION DISCLOSURE BILL 1999

Explanatory Notes

Part 1 - Preliminary

Clause 1: Short Title

Short title of the Act.

Clause 2: Commencement

The Act will be brought into operation on the day of Royal Assent. This will ensure that rights are only altered after the date of assent. The Commonwealth Act took effect from 27 February 1999.

Clause 3: Definitions

This clause sets out the definitions to be used for the purposes of the Bill. Words and expressions used in the Bill have the same meaning as in the Commonwealth Act, unless the contrary intention appears.

Clause 4: Crown bound

The measure will bind the Crown in right of the State and also, so far as the legislative power of the State extends, in all its other capacities.

Part 2 - Year 2000 Disclosure Statements

Clause 5: Year 2000 disclosure statements

This clause provides that a Year 2000 disclosure statement will include both original and republished Year 2000 disclosure statements.

Clause 6: Original Year 2000 disclosure statements

Clause 6 (1) provides details of the requirements for a statement to be considered a Year 2000 disclosure statement for the purposes of this Act.

Importantly by sub-clause (d) the Bill provides that a Year 2000 disclosure statement may be made after 27 February 1999 and before 1 July 2001. When read in conjunction with the Commencement clause this means that rights can only be altered after Assent. This is an area where the Bill differs from the Commonwealth Act. In practice this means that a civil action commenced after 27 February 1999, and before this Bill receives Royal Assent, will not be affected by this Bill. However, if a legal action is commenced following Assent all information statements made after 27 February 1999 will be protected by this Bill.

The various requirements for a statement to be considered a Year 2000 disclosure statement, for the purposes of this Act, do not limit each other.

By sub-clause (3) wording is provided which, if included in a disclosure statement, will mean that the statement complies with subsection (1)(b) and (c).

Clause 7: Republished Year 2000 disclosure statements

Clause 7 provides that a republished Year 2000 disclosure statement is a re-statement, within a specified period, of the whole of an original Year 2000 disclosure statement in any of a number of different forms (ie sub-clause (a)) and by a number of different means (ie sub-clause (c)).

Part 3 – Protection from Civil Liability

Clause 8: Protection from civil actions

Clause 8 sets out general liability protection with respect to Year 2000 disclosure statements.

Subclause (1) protects a person from civil liability arising out of or incidental to the making of a Year 2000 disclosure statement. The Bill removes civil liability which might otherwise exist under several causes of action including negligent misstatement, defamation and trade practices and fair trading legislation.

Subclause (2) provides that a Year 2000 disclosure statement will not be admissible against a person who made it. Under this provision, for example, a Year 2000 disclosure statement which discloses that goods or services supplied by the maker of the statement are not Year 2000 compliant will not be admissible in a civil action against the maker of the statement as evidence that a failure of the goods or services was actually caused by Year 2000 related difficulties. This would not prevent evidence of the matters contained in the Year 2000 disclosure statement being adduced through other sources.

Clause 9: Exceptions

Clause 9 provides exceptions to the protection from civil action provided in clause 8.

False and misleading statements

A Year 2000 disclosure statement which is materially false and misleading will not be protected where the person seeking to rely on clause 8 knew that the statement was materially false or misleading, or was reckless as to whether the statement was materially false or misleading. This exception operates in conjunction with the explanatory statement requirement contained in clause 10.

A Year 2000 disclosure statement will be made recklessly where the consequences of the person making the statement are not so substantially certain that he or she must be taken to have intended them but the person is so indifferent to the likely consequences that he or

she must be taken to have foreseen them (see *The Laws of Australia*, The Law Book Company Limited, Vol. 33, Torts, 33.8[8], 1998).

Pre-contractual statements

A Year 2000 disclosure statement made to another person will not be protected in a civil action where the statement was made in connection with the formation of a contract (including as a warranty) and the other person concerned, or a representative of the other person (such as an executor, liquidator, receiver or administrator), is party to the civil action which relates to that contract. A Year 2000 statement made as part of pre-contractual negotiations whether by person who subsequently becomes a party to the contract or by some other party such as a manufacturer, for example, will not be protected in a civil action relating to the subsequent contract.

Statements made in fulfilment of an obligation

A Year 2000 disclosure statement will not be protected where the statement was made in fulfilment of an obligation under a contract or a law of the Commonwealth, State or a Territory. A statement will not be protected, for example, where the terms of an existing contract require reports or notices to be provided to the party and the statement is provided for that purpose.

Statements made to induce consumers to acquire goods or services

A Year 2000 disclosure statement will not be protected in a civil action where the statement has been made with the sole or dominant purpose of inducing consumers or a particular consumer to acquire goods or services, and the consumer concerned, or a representative of the consumer concerned (such as an executor, liquidator, receiver or administrator), is party to the civil action which relates to the goods or services acquired by the consumer.

Restraining injunction or declaratory relief

Liability protection will not be given to a Year 2000 disclosure statement in a civil action to the extent that it consists of proceedings for a restraining injunction or for declaratory relief. A person may, for example, obtain an injunction to prevent the further publication of a defamatory Year 2000 disclosure statement.

Proceedings instituted in the performance of a regulatory function or power

Liability protection will not be given to a Year 2000 disclosure statement in a civil action to the extent that it consists of proceedings by a person or body under a law of the Commonwealth, a State or a Territory in the performance of a regulatory or enforcement function or the exercise of a regulatory or enforcement power.

Intellectual property rights

Liability protection will not be given to a Year 2000 disclosure statement in relation to a civil action solely based on the infringement of a copyright, a trademark, a design or a patent. A person will be liable in an action which is based on a Year 2000 disclosure statement containing material which breaches an intellectual property right of another person.

Clause 10: False or misleading statement exception - explanatory statement to be given

In order to gain the protection of the clause 8 liability protection, a person who made the Year 2000 disclosure statement must, in the course of a civil action, provide the other party with an explanatory statement which sets out the belief that the Year 2000 disclosure statement was *bona fide* and not reckless.

This explanatory statement may be used by the other person in deciding how (or whether) to proceed, but will not be admissible as evidence in any civil action except for determining whether subclause (1) has been complied with.

The person instituting the civil action will be able to waive compliance with subclause (1).

Clause 11: False or misleading statement exception - imputed knowledge

Clause 11 sets out how the knowledge requirements contained in clause 9(1) (a) may be imputed in relation to corporations and persons other than corporations.

In any proceedings it is necessary to establish whether a party to the proceedings knew or was reckless as to whether a Year 2000 disclosure statement was false or misleading. It is sufficient to show that a director, employee or agent engaged in conduct in relation to the Year 2000 disclosure statement, was acting within apparent authority and knew or was reckless as to whether a Year 2000 disclosure statement was false or misleading.

Part 4 – Presumption against amendment of contracts

Clause 12: Presumption against amendment of contracts

Clause 12 provides that a Year 2000 disclosure statement is taken not to amend, alter or vary a contract unless either both the parties to the contract have expressly agreed to the amendment, alteration or variation in written form or the contract expressly provides for the amendment, alteration or variation by way of making the Year 2000 disclosure statement. Parties cannot affect the operation of statutory conditions or warranties.

Part 5 – Exemption from section 45 of the Competition Code

Clause 13: Exemption from section 45 of the Competition Code

Section 45 of the *Competition Code* prohibits certain anti competitive contracts, arrangements or understandings. Some commentators have suggested that the exchange of information about Year 2000 problems and remediation efforts might give rise to liability under section 45.

Clause 13 permits contracts, arrangements or understandings made or arrived at, or proposed to be made or arrived at, which might otherwise breach section 45 of the *Competition Code*, to the extent to which the contract, arrangement or understanding provides for the disclosure and/or exchange of information, by any of the parties to the

contract, arrangement or understanding, for the sole purpose of facilitation any or all of a number of specified year 2000 issues.

Part 6 – Regulations

Clause 14: Regulations

Though a regulation making provision is included, use of this clause is not envisaged.

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