

YEAR 2000 INFORMATION DISCLOSURE BILL 1999

EXPLANATORY NOTES

GENERAL OUTLINE

Objectives of the Legislation

The objective of the Bill is to encourage the voluntary disclosure and exchange of information about Year 2000 (Y2K) problems, rectification efforts and readiness.

Reasons for the Bill

Y2K is a significant challenge for many businesses and government agencies. It has the potential to cause extensive disruption to the economy and the community.

Disclosing information regarding Y2K problems, rectification efforts or readiness could, under certain circumstances, expose that person or organisation to potential legal action. A range of legal risks may arise, the most significant relating to:

- negligent misstatement, where statements which are relied upon cause loss or injury;
- defamation, where statements have the effect of injuring a business or personal reputation;
- breach of contract, where consumers choose either to purchase a product or elect to terminate a contract with a supplier as a result of a Y2K statement; and
- the Commonwealth *Trade Practices Act 1974* (TPA), particularly in relation to s. 52(1) (conduct which is misleading and deceptive); s. 53 (false representation of the standard of goods);

and s. 45(2) (arrangements which have the effect of substantially lessening competition) and similar provisions under the Queensland *Fair Trading Act 1989*.

The extent of risk in these areas of potential liability varies. As a result, persons and organisations (including government agencies) are managing these risks by making no statements concerning their Y2K status and providing no rectification advice to other bodies. This is partly due to the difficulty in determining the scope of the audience for the information and the extent of any reliance upon information that may be disclosed.

Organisations (including governments) have been reluctant to date to reveal their Y2K preparedness to other bodies, or to assist other organisations become Y2K-ready—for example, by releasing the outcomes of early Y2K testing. The absence of this information means the Y2K preparedness of some organisations is incomplete. A lack of meaningful information is inhibiting a range of activities, including checking supply chain readiness (particularly in relation to advice from utilities about continuity of power, water and communications services) and provision of information to the public on the Y2K preparedness of organisations and industries.

Organisations that lack confidence in the Y2K preparedness of their supply chains will face increased costs arising from the need to ensure contingency planning is comprehensive (ie. based on ‘worst-case’ scenarios) rather than targeted at areas of real risk (ie. based on ‘most likely’ scenarios).

In light of current progress trends which indicate many organisations will not complete remediation of all Y2K problems before the end of this year, Y2K contingency planning can be considered an essential activity for most (if not all) organisations. Information on the potential disruption to public utilities, industry, finance, transport and public services is critical to enable effective contingency planning. Information is also necessary to allay public concern and minimise the risk of panic about the potential and likely consequences of service failures. Any action by the Queensland Government designed to facilitate a greater flow of Y2K compliance and readiness information is arguably in the public interest.

In order to adequately address these issues the Commonwealth Government convened a National Y2K Summit in December 1998 to examine ways in which Australia may better prepare for the year 2000. At

the National Summit the Commonwealth Government announced it would introduce Y2K information disclosure ('Good Samaritan') legislation early in 1999. All State and Territory governments indicated in principle support for similar legislation. The Commonwealth Government's *Year 2000 Information Disclosure Bill 1999* was passed by Federal Parliament earlier this year and commenced on 27 February 1999.

The Commonwealth Act is intended to encourage the exchange of information about Y2K problems, rectification efforts and readiness. It does so by providing a limited form of protection against liability for errors in certain Y2K statements. The Act provides limited protection relating to voluntary Y2K disclosure statements made between the day after Royal Assent (27 February 1999) and 30 June 2001.

The Commonwealth Act only applies to disclosure statements to the extent that the Commonwealth has power to legislate. Under the Act, a Y2K disclosure statement is protected if:

- the maker of the statement is the Commonwealth, a trading corporation or an authority of the Commonwealth or is authorised by those bodies; or
- the statement is made in a Territory; or
- the statement is made in the course of interstate or international trade or commerce; or
- the statement is sent by post or is electronically communicated; or
- the civil action is under a law of the Commonwealth or a Territory.

A number of potential disclosures made by a range of organisations are therefore not subject to the protection offered by the Commonwealth legislation. This is especially the case in the context of purely intra-State disclosures by organisations including:

- local governments;
- Queensland Government-owned corporations (including electricity operators);
- State-based corporations and other entities; and
- Queensland Government agencies.

If the Commonwealth legislation is to have full effect, it is desirable that Queensland introduces complementary legislation.

Ways in which objectives are to be achieved

The objectives of the Bill are to be achieved by effectively complementing the protection offered by the Commonwealth legislation by extending similar protection to purely intra-State Y2K disclosures by organisations including:

- local governments;
- Queensland Government-owned corporations (including electricity operators);
- State-based corporations and other entities; and
- Queensland Government agencies.

Alternatives to the Bill

There are no alternatives to this Bill.

Administrative Cost to Government

There are no administrative costs to the Government to implement the legislation, apart from some costs associated with any public education program which may be put in place. The Government proposes to produce educational materials including for example, a plain English guide to making Y2K disclosures.

Consistency with Fundamental Legislative Principles

The Bill is consistent with fundamental legislative principles.

The Bill provides limited immunity from prosecution or proceedings in certain circumstances. This may potentially conflict with fundamental legislative principles as prescribed in the *Legislative Standards Act 1992*. The immunity to be afforded under the Bill is limited in scope and is confined to acts of good faith, so as to seek to retain certain basic standards of conduct. The immunity does not excuse deliberate and misleading acts in the provision of information to the public.

Adequate justification exists in this case to afford limited immunity from prosecution or proceedings, given the public interest in facilitating greater availability of information on the potential disruption to public utilities, industry, finance, transport and public services. Access to this information is also necessary if the Government is seeking to allay public concern and minimise the risk of panic about the potential and likely consequences of service failures.

Consultation

The Departments of Premier and Cabinet, Justice and Attorney-General and Equity and Fair Trading have been consulted concerning any provisions in the Bill intersecting with their responsibilities. These departments have not raised any objections to the Bill.

Commencement

The Bill provides for the Act to commence retrospectively from 27 February 1999 so as to align with the date of commencement of the Commonwealth Act and ensure consistency for this national framework. The intention is to avoid a situation whereby a person acting in good faith and in accordance with legislative provisions in one jurisdiction could be deemed to be liable in another.

NOTES ON CLAUSES

YEAR 2000 INFORMATION DISCLOSURE BILL 1999

PART 1—PRELIMINARY

Short Title

Clause 1 describes the short title of the Act as being the *Year 2000 Information Disclosure Act 1999*.

Commencement

Clause 2 provides that the Act is taken to have commenced on 27 February 1999.

Dictionary

Clause 3 provides for the meanings of the various terms used in the Act to be laid out in the Schedule.

Attachment

Clause 4 provides that the meanings of various terms in the Trade Practices Act 1974 (Cwlth) and the Australian Securities and Investments Commission Act 1989 (Cwlth) and applied in this Act, are set out in the attachment.

Act binds all Persons

Clause 5 provides for the Act to bind all persons, including the State. The State will have the same rights and liabilities as industry and other members of the community with respect to making and receiving Year 2000 disclosure statements.

PART 2—YEAR 2000 DISCLOSURE STATEMENTS**Meaning of “year 2000 disclosure statements”**

Clause 6 provides that a Year 2000 disclosure statement will include both original and republished Year 2000 disclosure statements.

Meaning of “original Year 2000 disclosure statements”

Clause 7 provides that a Year 2000 disclosure statement is a statement that:

- relates solely to any or all of the following:
 - Year 2000 processing;
 - the detection of problems relating to Year 2000 processing;
 - the prevention of problems relating to Year 2000 processing;
 - the remediation of problems relating to Year 2000 processing;
 - the consequences or implications for the supply of goods or services, of problems relating to Year 2000 processing;
 - contingency planning, risk management, remediation efforts or other arrangements for dealing with the aforementioned consequences or implications;
 - the consequences or implications for the activities or capabilities of a person of problems relating to Year 2000 processing;
 - contingency planning, risk management, remediation efforts or other arrangements for dealing with the aforementioned consequences or implications for the capabilities of a person;
- includes words to the effect that the statement is a Year 2000 disclosure statement for the purposes of the Act;
- includes words to the effect that a person may be protected by the Act from liability for the statement in certain circumstances;
- is made after the commencement of Clause 7 and before 1 July 2001 (it being recognised that remediation of non-business critical systems may continue through the 2000/2001 financial year);
- identifies the person who authorised the statement; and
- is either made in writing, in a data storage device (such as a computer disk) which is capable of being reproduced in writing from that device (with or without the aid of any other article or device), or is made by way of an electronic communication of writing.

To avoid doubt, Clause 7(2) provides that the subparagraphs of Clause 7(1)(a) do not limit each other.

Clause 7(3) provides that the following sentences are taken to comply with the form requirements in *Clauses 7(1)(b) and 7(1)(c)* relating to the legal status of the Year 2000 disclosure statement:

“This statement is a Year 2000 disclosure statement for the purposes of the *Year 2000 Information Disclosure Act 1999*. A person may be protected by that Act from liability for this statement in certain circumstances.”

Meaning of “republished year 2000 disclosure statements”

Clause 8 provides that a republished Year 2000 disclosure statement is a statement that:

- consists of the republication, retransmission, reproduction, recital or reading aloud of the whole of an original Year 2000 disclosure statement;
- is made after the commencement of *Clause 8* and before 1 July 2001 (it being recognised that rectification of non-business critical systems may continue through the 2000/2001 financial year); and
- the statement is either made orally, in writing, in a data storage device (such as a computer disk) which is capable of being reproduced in writing from that device (with or without the aid of any other article or device), or the statement is made by way of an electronic communication of writing or an electronic communication of speech.

A republication, retransmission, reproduction, recital or reading aloud of an original Year 2000 disclosure statement must be unamended and in its entirety, including the words used to describe the legal status and effect of the statement and the name of the person who authorised the statement.

For example, where a retailer makes photocopies of a manufacturer’s original Year 2000 disclosure statement for distribution to consumers, the photocopies will be republished Year 2000 disclosure statements for the purpose of the Act. Similarly, where a newspaper publishes an exact copy of a manufacturer’s original Year 2000 disclosure statement (for example, as an advertisement), this will also be a republished Year 2000 disclosure statement for the purpose of the Act.

However, where a newspaper publishes a summary of a manufacturer's Year 2000 disclosure statement, that summary will only be protected if it meets the requirements of an original Year 2000 disclosure statement. Where a retailer compiles parts of several suppliers' Year 2000 disclosure statements with its own material, the consolidated statement will similarly only be protected if it meets the requirements of an original Year 2000 disclosure statement.

PART 3—PROTECTION FROM CIVIL LIABILITY

Protection from civil actions

Clause 9(1) protects a person from civil liability arising out of the making of a Year 2000 disclosure statement. Civil liability which might otherwise exist under several causes of action including negligent misstatement, defamation and trade practices and fair trading legislation, is removed.

Clause 9(2) provides that a Year 2000 disclosure statement will not be admissible against a person who made it. 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.

Exceptions

Clause 10(1) provides exceptions to the protection from civil liability provided in Clause 9.

False and misleading statements

Clause 10(1)(a) provides that a Year 2000 disclosure statement which is materially false and misleading will not attract the protection afforded by Clause 9 where the person seeking to rely on Clause 9 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 11.

Pre-contractual statements

Clause 10(1)(b) provides that a Year 2000 disclosure statement made to another person will not attract the protection afforded by Clause 9 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 a 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 fulfillment of an obligation

Clause 10(2) provides that a Year 2000 disclosure statement will not attract the protection afforded by Clause 9 where it 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

Clause 10(3) provides that a Year 2000 disclosure statement will not attract the protection afforded by Clause 9 where it has been made for the 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 a party to the civil action which relates to the goods or services acquired by the consumer.

This exception will apply to Year 2000 disclosure statements which are made for the purpose of motivating or persuading the wider public or individual consumers to acquire goods or services, including the use of a Year 2000 disclosure statement issued to consumers on a face-to-face basis

and the use of a statement in print media advertising or other promotional material aimed at more than one consumer.

Restraining injunction or declaratory relief

Clause 10(4)(a) provides that the protection afforded by Clause 9 will not apply 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

Clause 10(4)(b) provides that the protection afforded by Clause 9 will not apply 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

Clause 10(4)(c) provides that the protection afforded by Clause 9 will not apply to a Year 2000 disclosure statement in relation to a civil action solely based on the infringement of a copyright, a trade mark, 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(5) provides that Clauses 10(1), (2), (3) and (4) do not limit each other.

Clauses 10(6), 10(7) and 10(8) describe the application of the *Trade Practices Act 1974* (Cwlth) and the *Australian Securities and Investments Commission Act 1989* (Cwlth).

False or misleading statement exception—explanatory statement to be given

Clause 11(1) provides that in order to gain the protection afforded by Clause 9(1), 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.

Clause 11(2) provides that this explanatory statement may be used by the other party in deciding how (or whether) to proceed, but will not be admissible as evidence in any civil action except for determining whether Clause 11(1) has been complied with.

Clause 11(3) provides that the person instituting the civil action will be able to waive compliance with Clause 11(1).

False or misleading statement exception—imputed knowledge

Clause 12 sets out how the knowledge requirements contained in Clause 10(1)(a) may be imputed in relation to corporations and persons other than corporations.

Clause 12(1) provides that Clause 12(2) applies where, for the purposes of proceedings arising out of Clause 10(1)(a), it is necessary to establish whether a corporation knew that, or was reckless as to whether, a Year 2000 disclosure statement was materially false or misleading.

Clause 12(2) provides that in the event of proceedings arising out of Clause 10(1)(a), it is sufficient to show that a director, employee or agent of the corporation acting within the scope of his or her actual or apparent authority knew that, or was reckless as to whether, the Year 2000 disclosure statement was materially false or misleading.

Clause 12(3) provides that Clause 12(4) applies where, for the purposes of proceedings arising out of Clause 10(1)(a), it is necessary to establish whether a person other than a corporation knew that, or was reckless as to whether, a Year 2000 disclosure statement was materially false or misleading.

Clause 12(4) provides that in the event of proceedings arising out of Clause 10(1)(a), it is sufficient to show that an employee or agent of the person acting within the scope of his or her actual or apparent authority knew that, or was reckless as to whether, the Year 2000 disclosure statement was materially false or misleading.

Clause 12(5) provides that a reference in Clauses 12(1)-(4) to a ‘director’ will include a reference to a constituent member of a body corporate incorporated for a public purpose by Commonwealth, State or Territory law

such as a member of a statutory authority or Government Business Enterprise.

PART 4—PRESUMPTION AGAINST AMENDMENTS OF CONTRACTS

Presumption against amendment of contracts

Clause 13(1) provides that a Year 2000 disclosure statement is taken not to amend, alter or vary a contract unless either the parties to the contract have expressly agreed to the amendment, alteration or variation according to the conditions specified in Clause 13(2), or the contract expressly provides for the amendment, alteration or variation by way of making the Year 2000 disclosure statement.

Clause 13(2) provides that the conditions specified in Clause 13(1) are that the agreement is made in writing, is embodied in a data storage device and is capable of being reproduced in writing from that device, and is made by way of one or more electronic communications of writing.

Clause 13(3) provides that no action under Clause 13 can affect the operation of a condition or warranty taken to form part of a contract under another Act.

PART 5—EXEMPTION FROM SECTION 45 OF THE COMPETITION CODE

Exemption from section 45 of the Competition Code of Queensland

Clause 14(1) provides that Clause 14 applies to an arrangement made or proposed to be made after the commencement of this section and before 1 July 2001.

Clause 14(2) provides that Section 45 of the Competition Code of Queensland does not apply to an arrangement to the extent that arrangement

provides for the disclosure or exchange of information for the sole purpose of facilitating any or all of the matters mentioned in Clause 14(3).

Clause 14(3) provides that those matters are:

- the detection of problems relating to Year 2000 processing;
- the prevention of problems relating to Year 2000 processing;
- the remediation of problems relating to Year 2000 processing;
- awareness of the consequences or implications, for the supply of goods or services, of problems relating to Year 2000 processing;
- contingency planning, risk management, remediation efforts or other arrangements for dealing with the aforementioned consequences or implications;
- awareness of the consequences or implications, for the activities or capabilities of a person, of problems relating to Year 2000 processing;
- contingency planning, risk management, remediation efforts or other arrangements for dealing with the aforementioned consequences or implications for the capabilities of a person.

Clause 14(4) provides that an arrangement may include an understanding arrived at and a contract made.

PART 6—MISCELLANEOUS

Quarterly reports about Year 2000 processing issues relating to Departments

Clause 15(1) provides that the Minister must table a report about processing issues for departments in the Legislative Assembly at least once in each quarter. Each report must indicate the progress made by departments in detecting, preventing and remedying problems relating to Year 2000 processing.

Clause 15(2) provides that a quarter means the period of 3 months beginning on the date of assent and each subsequent period of 3 months.

Regulation—making power

Clause 16 authorises the Governor in Council to make regulations under the Act.