

Year 2000 Information Disclosure Act 1999

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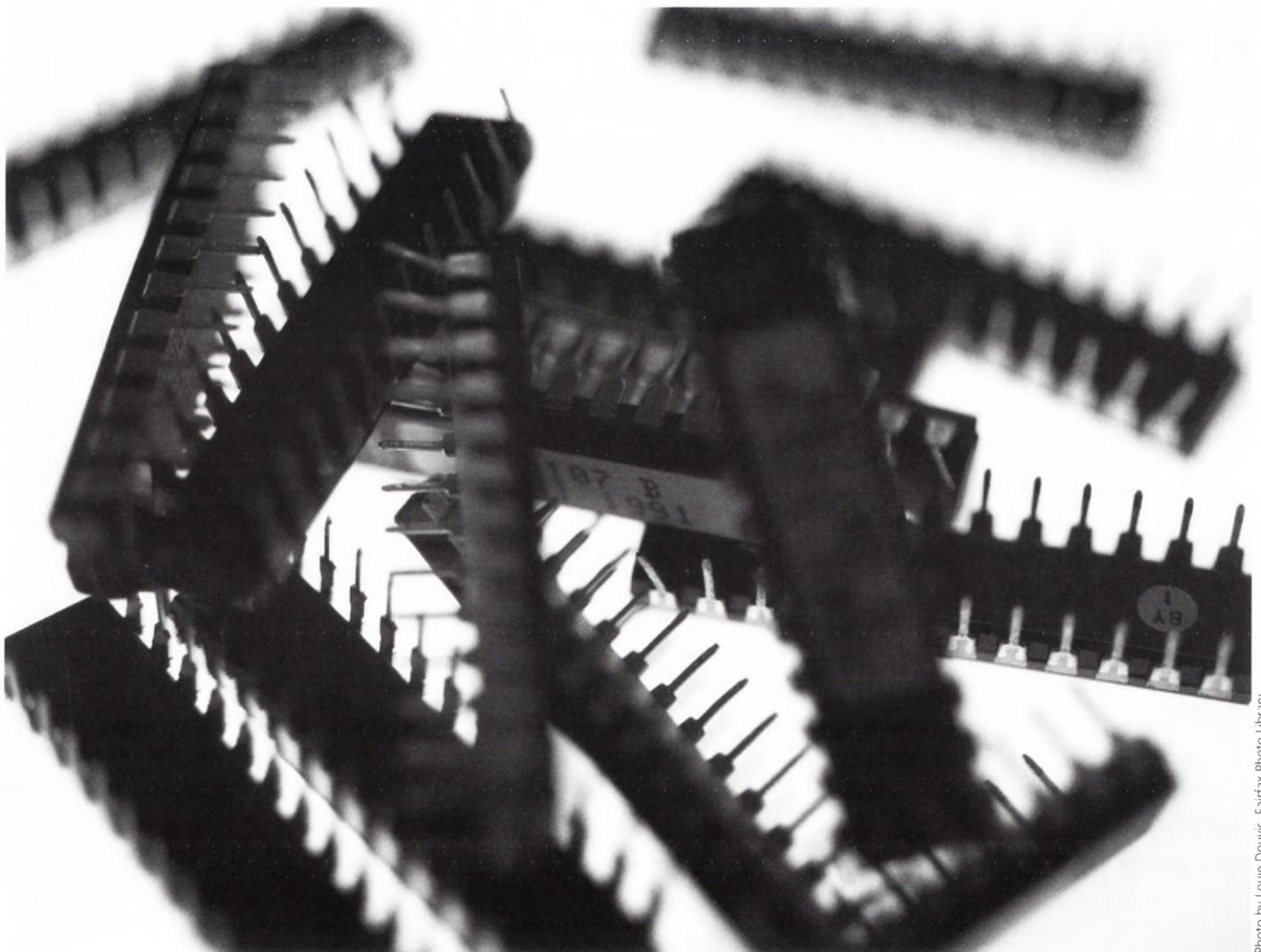


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Background

For a problem whose existence and cause have been known about since programmers created it in the sixties, the Y2K problem has generated a great deal of last minute panic. The popular press has

been filled with stories about aeroplanes falling from the sky, survivalists stocking up their secret hideaways with long life food and guns and the crash of the stock market as everyone hordes their cash. It has grown from an issue of concern for

only computer programmers and IT managers, to one that every person in the community is worried about.

A great deal of negative energy has been generated around the issue of Continued on page 3

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disclosing the extent of an entity's preparedness for the rollover to the Year 2000. One of the most worrying aspects of the problem has been the fact that, until recently, most people did not even understand what the problem is. This lack of understanding has made it particularly difficult for businesses and the government to undertake a meaningful dialogue about how best to prepare for the changeover to 1/1/00 (and other key dates) and what remediation work and contingency planning remains to be done. The christening of the issue as the 'Millennium Bug', likening it to hundreds of other virus scares, has added to the confusion. The image of a bug or insect, used in early awareness campaigns, only further deepened the misapprehension in the minds of public and private sector managers, who should have been developing plans to deal with the problem, and the general public, that it was something for the IT department to deal with, something that could be fixed in a short time and with only a small outlay of cash. Some people even reported being told that all they had to do was turn off their computer on New Year's Day 2000 and they could avoid the problem altogether.

This lack of understanding of the problem led to the situation where there was little recognition of the need for consultation between various groups about how to solve the problem. This problem was later compounded by fear of the legal consequences of disclosing information about Y2K preparedness.

In the US, the problem of lack of communication and co-operation was recognised as a major obstacle to compliance and remediation efforts. Businesses were reluctant to disclose information regarding their state of Y2K preparedness in case the statements proved to be inaccurate and were later used as the basis for legal liability

in the event of Y2K failure. Not only was this important in terms of consumer confidence and reporting requirements, but also to ensure the remediation task was effective across the board. Even if one business is compliant, that will not be of assistance if the other businesses in the chain of supply have not solved their problems. Therefore businesses were sending letters to one another seeking information about their state of readiness but no one was willing to make a full and frank disclosure in case it was later used as the basis of liability.

Another major problem inhibiting progress with Y2K remediation work has been the shortage of programmers still possessing skills in COBOL and other programming languages that had fallen out of vogue. The original programmers who had made the decision to save processing space by truncating the date field to six digits had assumed that no one would still be using the large mainframe computers on which these programs were run in 1999. They were wrong. New systems with the processing power to crunch larger amounts of data were simply built on top of the existing systems without consideration of the programming issue. This meant that information about how to solve the problem was scarce and what little there was, was not being shared.

The encouragement of information sharing regarding Y2K remediation therefore became a major priority if the task was to be completed by the critical dates.

The US response

In order to promote greater disclosure of accurate information and accelerate the remediation task the US government enacted the *Year 2000 Information Readiness and Disclosure Act*, known as the 'Good Samaritan' legislation in October 1998. This Act was designed to provide

limited protection to designated statements and disclosures regarding Y2K preparedness. It excluded civil liability in respect of such statements except where they were made with intent to mislead or deceive or with knowledge of their inaccuracy. This limited level of protection was granted in the hope that it would promote co-operation and disclosure.

The Year 2000 Information Disclosure Act 1999 (Cth)

Following publicity concerning delays in Y2K remediation work, particularly involving SMEs, the relevant Commonwealth, State and Territory ministers agreed in December 1999 to enact legislation modelled on the US Good Samaritan legislation.

The *Year 2000 Information Disclosure Act 1999* was enacted by the Federal Government in February of this year. Like its US counterpart, the purpose of the Act is to encourage voluntary disclosure and the exchange of information about the Y2K problem, remediation efforts and readiness. The Act will provide limited liability for certain Y2K disclosure statements made between 26 February 1999 and 30 June 2001. It is closely modelled on the US legislation but has no retrospective operation. Under the US legislation a statement made after 1 January 1996 can be brought under the auspices of the Act by designating it as a Y2K readiness disclosure.

In Australia, a Year 2000 disclosure statement is broadly defined as a statement that relates to the processing, transmitting or receiving of date related data (Year 2000 processing) and the detection, prevention, remediation, consequences, contingency plans, risk assessment and consequences of any problems related to Year 2000 processing. The statement must explicitly indicate that it is a Year 2000 disclosure statement for the purposes of the Act and

that a person may be protected from any liability for the statement in certain circumstances. The Act provides that the following words will satisfy this requirement:

“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.”

Further, the statement must identify the person who authorised the statement and must be in writing or some other tangible form, including electronic form. Under the US legislation specially designed oral statements may be protected.

Year 2000 disclosure statements are protected by the Act which provides that no civil action may be brought against the maker of the statement in relation to anything relating to the statement and the statement is not admissible in evidence in civil litigation against the maker of that statement. This immunity is subject to a number of exceptions, such as where the statement is materially false or misleading and the maker of the statement knew or was reckless as to whether the statement was false or misleading, and where the statement was made in connection with the formation of a contract. Statements made in fulfillment of an obligation imposed by law or by contract are also excluded. Another key exception relates to statements made to induce consumers to acquire certain goods or services. Immunity does not apply in relation to proceedings for an injunction or declaratory relief, nor does it apply in respect of infringement actions arising in respect of copyright, trade marks, designs or patents.

Republished Year 2000 disclosure statements are granted a similar level of protection, subject to the same exceptions, provided that they are reproduced in full. Republished Year 2000 disclosure statements may be published orally or in writing. This is intended to capture the situation where, for example, a vendor provides a customer with the manufacturer's Y2K disclosure statement.

If the defendant is seeking to rely on the protection of the Act, they must provide a written statement to the plaintiff asserting that the disclosure was made in

good faith and setting out the grounds for that belief. This is intended to limit recourse to litigation. This statement is not admissible in any civil action except for the purpose of determining whether the requirement has been complied with.

The Act makes it clear that the making of a Year 2000 disclosure statement will not affect or alter an existing contract unless there is explicit agreement by the parties effected in writing or it is anticipated by the express terms of the original contract.

It is notable that the effect of section 45 of the *Trade Practices Act*, which deals with anti-competitive conduct, is expressly excluded. Any contract, arrangement or understanding made or reached during the relevant time period (26 February 1999-1 July 2001) is exempted from the operation of section 45 to the extent that it relates to the exchange and disclosure of information relating to the detection, prevention, remediation, consequences of and planning in relation to Year 2000 processing.

The Act does not seek to exclude liability for actual failure or damage caused by a Y2K problem. Any damage arising from failure will still be actionable by the person suffering loss, but the Y2K disclosure statement will not be able to be used as the sole basis of liability. Note also that the Act does not compel disclosures. All disclosures under the Act are voluntary. Therefore the Act has been criticised for not going far enough to fulfil its intention of promoting the dissemination and sharing of information on the problem and how to fix it.

The legislation has also been criticised on the basis that it does not preclude legal liability in relation to such statements. It may merely shift the legal argument to whether such statements were made recklessly rather than whether the statement itself was false. Others have suggested that the exceptions are too broad and that it will do nothing to increase the quality of disclosures. Entities will make disclosures without proper regard for their accuracy on the basis that a certain level of immunity is granted. These arguments have also been canvassed in the US.

Similar legislation has now been enacted in Victoria, South Australia,

Tasmania, Queensland and the Northern Territory.

Recent developments

The enactment of disclosure legislation has certainly not pre-empted Y2K litigation. A number of cases have already been litigated and settled in the US, with thousands more, including class actions expected. Recent matters have related to point of sale systems, accounting software and computers.

In the light of the continually growing tide of litigation, the US Senate recently passed a bill that sought to impose a further restriction on Y2K liability. That Bill requires parties involved in a dispute involving Y2K failure to submit to a 90 day 'cooling off' period during which time they have to attempt to settle their dispute out of court. It also provides a cap on punitive damages for small business and provides immunity to local authorities such as water, education, fire and public health services. The White House had reached a stalemate with Congress in relation to the Bill with President Clinton indicating that he would not sign the Bill into law. However, recent negotiations have seen a compromise reached on the matter, with an indication that a revised bill will be enacted.

The Bill will make it more difficult to bring a class action and imposes certain financial limits on class action suits. It will also result in limiting the liability of defendants in certain situations, acting as a further deterrent to litigation.

Certainly, the US and Australian disclosure legislation is only a limited step towards promoting co-operation on the remediation effort, co-operation which is essential if the task is to be even partially successful. It does not purport to compel disclosure nor does it provide blanket immunity from liability. It is however intended to support and encourage co-operation before it is too late. ■

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