Limited liability law 'bad'

MARK HOLLANDS
❑ Year 2000

NEW United States legislation limiting financial compensation from Year 2000 failures could have a dramatic effect on Australian companies, a leading IT lawyer has warned.

The possibility the Australian Government could follow the US lead after copying the Washington-inspired Good Samaritan law could not be ruled out, according to Phillip Hourigan, of Deacons Graham & James.

The Year 2000 Limitation of Liability Act, passed by Congress last week, creates proportionate liability in which IT companies can be prosecuted only for a share of any Y2K damage.

Compensation would be set at $US250,000 ($375,000) in many instances.

The Act would affect the rights of Australian companies to recover compensation for Y2K damage caused by US-based vendors, said Mr Hourigan, who specialises in IT and intellectual property cases.

"This legislation shows the power and influence of IT companies in the US and also indicates the political realisation of the value of the IT industry to the US economy," he said.

"But the legislation has removed the rights of the consumer in the case of IT failures.

"It is designed to stop any possibility of class actions arising from Year 2000 failures," he said.

Many analysts and legal firms had been predicting the US would be awash with Y2K compensation claims next year. Some predicted IT companies could face up to $US1 trillion in total claims, making the law cases more expensive than the Y2K remediation work.

Mr Hourigan said he would now advise any Australian company to avoid taking part in a US-initiated class action against an American hardware or software vendor.

"It is just not worth the time and effort," Mr Hourigan said.

"The legislation has been designed to stop massive pay-outs that we have seen in the past."

He argued the $US250,000 liability cap had stripped away consumer rights, which was unfair for a company that could be wiped out because of a long-term computer failure.

The legislation covers consequential damages, such as loss of life or injury, which would normally attract court-arbitrated damages that could run into the millions of dollars.

"We need to watch the Australian Government to see whether it will follow the US example," he said.

He described the local Good Samaritan law, passed earlier this year to encourage the exchange of information on Y2K issues, as an unmitigated disaster.

"There were too many loopholes in the Australian law. It had had little impact in convincing company executives and their lawyers that it was safe to talk openly about their Y2K experiences," he said.

American multinational companies based in Australia would not be covered by the new Act.

Local companies could sue US subsidiaries under the provisions of the Trades Practices Act or the Goods and Services legislation.

However, local businesses using US companies with no local office or distributor would have to use US courts and would not have the breadth of remedies that exist in Australia.

Mr Hourigan said the new US legislation was also aimed at curbing opportunist lawyers who were looking to create class actions from IT failures.

"These lawyers work on contingency fees and take a third of the pay-out if they win the case. It can be a pot of gold for them," he said.

"The legislation has outlawed that practice and curbed legal charges to $US1000 an hour."

While that was not an insignificant charge, Mr Hourigan said it was little compared with the financial benefits of a compensation pay-out.

Australia did not have the same aggressive environment of litigation as the US, but companies such as Slater & Gordon were heading towards that sort of action, he said.

Once cost constraints had given birth to the practice of date truncation, a series of factors ensured its longevity. Consumers demand backward compatibility – the guarantee that a software upgrade or sequel will continue to work harmoniously with earlier generations of data and programs. Few things are as guaranteed to earn a programmer or software vendor a caning as an upgrade that impairs users' access to files that worked perfectly before the 'improved version' was installed. To deliver compatibility between two versions, it makes sense not to change anything that doesn't have to be changed – which for many years included date formats.

Code recycling also played a part. Software often calls for the same functionality to be replicated many times, within a single program or across many. Like lawyers who create new documents by cutting and pasting from precedents, programmers frequently re-use portions of tried and true computer code. Just as lawyers save time and control quality by relying on precedents rather than originally drafting every line, so do programmers. As many standard routines embody truncated dates, replication of the code has cast the Y2K problem far and wide.

Business priorities have as much to answer for as any other factor. If the world had waited for universities to deliver the personal computer, this article would have been produced on a manual typewriter; it's private capital that has fuelled the revolution – under the watchful eye of financial controllers. Put simply, getting funding to solve an IT problem that will manifest itself in four, three, two or even one decade is as close to the definition of 'impossible' as you'll get.

The Unix Analogy

An interesting parallel with the Y2K problem is the 'Year 2038 issue' with Unix computers. Unix is an industrial strength multi-user operating system that still dominates mission-critical functions for large organisations. If all the computers in the world stopped tomorrow, we'd be ruing the loss of the Unix 'boxes' more than the PCs. And in a mere 39 years, if nothing is done, all the Unix machines will stop.

Unix measures time in seconds elapsed since midnight on 1 January 1970. The designers of the operating system made sure the system could count a very large number of seconds – 2,147,483,647 to be precise. Which takes us up to 18 January 2038, a date which will provide Unix with similar indigestion to the Year 2000 problem. Massive systems that control whole enterprises will fail. Government departments will cease functioning. Banks will fail.