

# Y2K: a problem for everyone

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*By now everyone should be aware of the Millennium Bug, also known as the Year 2000 problem or simply Y2K. It is not simply a computer problem, nor is it a problem restricted to 1 January 2000. It is a problem everyone needs to think about and plan for, especially businesses. Therefore, please read on.*

## Impact of the Problem

Y2K is not just a problem which will affect people with computers. Obviously for businesses with any automated systems dependence, Y2K is indeed a potential threat. But even if particular businesses do not have an automated system, they may be relying on a supplier with such systems or the systems of another business.

However, the problem is even wider than that. Businesses not only need to think about whether their business can survive a Y2K breakdown, but they then need to consider whether they can be sued because of that breakdown. The businesses which are most at risk are those reliant on date generated computer information to formulate such things as:

- Provision of products or services
- Manufacturing of products
- Inventory management
- Payroll calculations
- Legal commitments
- Distribution of products
- Communication systems
- Maintenance of security
- Trustee Duties
- Health & Safety systems
- Collection of debts
- Investment plans

## Directors' Responsibilities

If any of your clients are company directors, they need to be made aware that they are responsible for protecting the company's assets and this includes coming to terms with Y2K. If a director fails to

implement a strategy to deal with a potential problem, they may be held personally liable or negligent. And directors need to realise that they may not be able to hide behind their liability insurance. Insurance companies have gone to great lengths to emphasise that they will not indemnify directors who have ignored this problem (please see my further comments on this issue below). To avoid (or successfully defend) any such claim, directors would have to demonstrate that they took all reasonable steps to assess the risks and institute a compliance program to rectify the problem. In addition they would also need to show that the compliance program was completed in time to allow for sufficient testing of the system.

Businesses could be sued because they were unable to supply a certain product or service and are in breach of contract. Or, they could be sued because they made representations about their Y2K compliance that is found to be false, misleading or deceptive under the *Trade Practices Act*.

## Government Legislation

In an attempt to assist businesses, the Commonwealth Government has recently passed the Year 2000 Information Disclosure Act (the Act). The object of the Act is to encourage voluntary disclosure and exchange of information about the Y2K problem, remediation efforts and compliance. Under the Act a person making a disclosure statement about Y2K readiness will be protected from action such as negligent mis-statement and liability under the *Trade Practices Act*.

Because statements made in good faith for the purpose of sharing information about Y2K compliance may later provide a cause of action under both statute and common law, such statements are often not made. Business is managing the risk of liability by not issuing such state-

ments. The Act is attempting to reverse this situation.

A Y2K Disclosure Statement is one in a written form which relates solely to any or all of certain listed matters associated with Y2K processing, the detection, prevention and remediation of Y2K processing problems, the consequences or implications of problems for the supply of goods and services, and plans put into place to deal with those consequences or implications. The statement must contain words indicating that the person of the business may be protected by the Act from liability for the statement in certain circumstances.

It should be noted that a Y2K Disclosure Statement would not be protected where:

- It was materially false or misleading, or was reckless as to whether the statement was materially false or misleading;
- Was made for the sole/dominant purpose of inducing consumers to acquire goods or services;
- Was made in connection with the formation of the contract and a party to the contract is a party to a civil action in respect of that contract;
- Was made in fulfilment of contract or statutory obligations;
- Is the basis for a civil action seeking declaratory relief or a restraining injunction;
- Is a basis of a civil action for infringement of copyright, trademark or patent.

## The Insurance Industry

The position of the insurance industry on Y2K also needs to be considered. Most insurance companies have now inserted exclusion clauses into most insurances to provide that the insurance does not cover loss or damage caused directly by the failure of any computer program or electronic system to properly or accurately process

day to day or data functions. Most insurers have refused to indemnify their clients unless a company has obtained a Y2K compliance certification. Recent reports in the press suggest that about two thirds of company directors have failed to maintain their liability insurance in respect of Y2K compensation claims.

#### Plan for Risks

Finally all businesses need to put in place contingency plans to cover both internal business problems as well as those from clients. Issues which need to be considered include:

- What are the single points of failure for the business;
- How long can the business be down without its key system;
- What are the minimum operations for the business to survive;
- What are the practicalities of doing things manually;
- Is your business critically dependent on electricity if there is an electricity failure;

- What would happen if the phone system didn't work? Perhaps mobile phone numbers need to be published to customers or suppliers or have a separate phone line established to avoid the PABX.

To demonstrate the cascading effect of Y2K, companies should have one of their directors undertake a walk through of their offices or premises to highlight all the potential risk areas. For example, will the front door automatically open in a system failure exposing the company to theft? Will the fire alarm system continue to operate? Will the lifts still work, which would be a particular problem if the company is located on the 30th floor?

An important point to remember is that this problem will not just affect your clients but it will directly affect your own practice!

#### Other important dates

Just to add to the woes, you and your clients also need to be aware of other critical dates:

- 9 September 1999 may be a problem

as the combination 9999 is often used as an end of file marker or as an indicator of a special condition in a computer;

- 29 February 2000. The year 2000 is a leap year, and as this particular combination only occurs once every 400 years, systems need to be checked to make sure they can handle it.
- 2001 Roll over. Systems need to be checked that they can also function properly in 2001. ■

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#### Editor's note

The author of this article has noted that Callinan and Gaudron discuss issues of causation and loss of chance in their judgments. These subjects were not necessary to the decision in this case but are interesting indicators of the Court's thinking on these issues. The same issues were discussed in *Chappell v. Hart*. John Gordon will be delivering a paper on these topics at APLA's National Conference to be held in Sydney in October (Ed).

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