

First print



New South Wales

Year 2000 Information Disclosure Bill 1999

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to protect persons from civil liability for certain statements concerning the processing of dates beyond 1 January 2000 and, for that purpose, to exempt certain contracts, arrangements and understandings from the operation of certain restrictive trade practices provisions of the *Competition Code of New South Wales*. The Bill is complementary to similar legislation enacted, or to be enacted, in the Commonwealth and in other States and Territories.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides that the proposed Act is taken to have commenced on 27 February 1999. That date was the date of commencement of the *Year 2000 Information Disclosure Act 1999* of the Commonwealth.

Clause 3 defines certain words and expressions used in the proposed Act.

Clause 4 provides that the proposed Act is to bind the Crown.

Part 2 Year 2000 disclosure statements

Clause 5 recognises two kinds of Year 2000 disclosure statement, namely, an original Year 2000 disclosure statement and a republished Year 2000 disclosure statement.

Clause 6 defines an original Year 2000 disclosure statement to be a statement, made after the commencement of the proposed section and before 1 July 2001:

- (a) that relates to Year 2000 processing, and
- (b) that states that it is such a statement, and
- (c) that gives notice of the fact that such a statement attracts the protection of the proposed Act and of the corresponding laws of other jurisdictions.

A particular form of words (identical to the form prescribed by the corresponding Commonwealth Act) is declared to satisfy the requirements of the proposed section as to the form in which such a statement must be made.

Clause 7 defines a republished Year 2000 disclosure statement to be a statement made after the commencement of the proposed section before 1 July 2001, being a statement that consists of the republication, retransmission, reproduction, recital or reading aloud of an original Year 2000 disclosure statement.

Part 3 Protection from civil liability

Clause 8 is the first of two core provisions in the proposed Act. It states that no civil action lies against a person for or in relation to any matter or thing arising out of, or incidental to, the making of a Year 2000 disclosure statement and that such a statement is not admissible as evidence against a person in a civil action to which the person is a party.

Clause 9 sets out certain circumstances in which the rules in proposed section 8 do not apply. Briefly, those circumstances are as follows:

- (a) where the statement is deliberately false or misleading,
- (b) where the statement is made under a contractual obligation and the civil action relates to the contract,
- (c) where the statement is made to a consumer in circumstances giving rise to a consumer claim under Commonwealth or State consumer protection legislation,
- (d) where the civil action consists of proceedings for injunctive or declaratory relief, proceedings for the enforcement of statutory duties or proceedings for infringement of copyright, trade marks, designs or patents.

The clause also sets out certain circumstances in which the rules in proposed section 8 do not apply.

Clause 10 provides that the defence afforded by proposed clause 8 applies only if the defendant gives notice to the plaintiff of the grounds of that defence before pleading it.

Clause 11 deals with the circumstances in which a corporation and its directors, employees and agents, may be taken to have knowledge that a particular statement was false or misleading.

Part 4 Presumption against amendment of contracts

Clause 12 provides that the making of a Year 2000 disclosure statement is taken not to amend, alter or vary a contract unless the contract so provides or the parties to the contract so agree and that such action cannot affect the operation of a condition or warranty that is taken to form part of a contract by virtue of the provisions of another Act.

Part 5 Exemption from section 45 of Competition Code

Clause 13 is the second core provision of the proposed Act. It excludes from the operation of section 45 of the *Competition Code of New South Wales* contracts, arrangements and understandings entered into, or proposed to be entered into, before 1 July 2001 in relation to Year 2000 processing. The prohibitions against certain restrictive trade practices will consequently not apply to any such contract, arrangement or understanding.

Part 6 Miscellaneous

Clause 14 empowers the Governor to make regulations for the purposes of the proposed Act.



New South Wales

Year 2000 Information Disclosure Bill 1999

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New South Wales

Year 2000 Information Disclosure Bill 1999

No , 1999

A Bill for

An Act to encourage the voluntary disclosure and exchange of information about year 2000 computer problems and remediation efforts; and for other purposes.

The Legislature of New South Wales enacts:

Part 1 Preliminary

1 Name of Act

This Act is the *Year 2000 Information Disclosure Act 1999*.

2 Commencement

This Act is taken to have commenced on 27 February 1999 (the date of commencement of the Commonwealth Act).

3 Definitions

(1) In this Act:

civil action means a civil action in a court or tribunal, and includes a civil proceeding in a court or tribunal.

Commonwealth Act means the *Year 2000 Information Disclosure Act 1999* of the Commonwealth.

corresponding law means a law of the Commonwealth, another State or a Territory that corresponds to this Act.

original Year 2000 disclosure statement has the meaning given by section 6.

republished Year 2000 disclosure statement has the meaning given by section 7.

Year 2000 disclosure statement has the meaning given by section 5.

(2) Subject to subsection (1), words and expressions used in the Commonwealth Act and this Act have the same respective meanings in this Act as they have in the Commonwealth Act, except to the extent to which the context or subject-matter otherwise indicates or requires.

4 Crown to be bound

This Act binds the Crown in right of the State and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

Part 2 Year 2000 disclosure statements

5 Year 2000 disclosure statements

For the purposes of this Act, a *Year 2000 disclosure statement* is:

- (a) an *original Year 2000 disclosure statement* (see section 6),
or
- (b) a *republished Year 2000 disclosure statement* (see section 7).

6 Original Year 2000 disclosure statements

- (1) For the purposes of this Act, an *original Year 2000 disclosure statement* is a statement that:

- (a) relates solely to any or all of the following:
 - (i) Year 2000 processing,
 - (ii) the detection of problems relating to Year 2000 processing,
 - (iii) the prevention of problems relating to Year 2000 processing,
 - (iv) the remediation of problems relating to Year 2000 processing,
 - (v) the consequences or implications, for the supply of goods or services, of problems relating to Year 2000 processing,
 - (vi) contingency planning, risk management, remediation efforts or other arrangements for dealing with consequences or implications referred to in subparagraph (v),
 - (vii) the consequences or implications, for the activities or capabilities of a person, of problems relating to Year 2000 processing,
 - (viii) contingency planning, risk management, remediation efforts or other arrangements for dealing with consequences or implications referred to in subparagraph (vii), and
- (b) includes words to the effect that the statement is a Year 2000 disclosure statement for the purposes of this Act or a corresponding law, and

- (c) includes words to the effect that a person may be protected by this Act or a corresponding law from liability for the statement in certain circumstances, and 1
 - (d) is made after the commencement of this section and before 1 July 2001, and 2
 - (e) identifies the person who authorised the statement, and 3
 - (f) satisfies at least one of the following conditions: 4
 - (i) the statement is made in writing, 5
 - (ii) the statement is made in a data storage device and is capable of being reproduced in writing from that device (with or without the aid of any other article or device), 6
 - (iii) the statement is made by way of an electronic communication of writing. 7
- (2) The subparagraphs of subsection (1) (a) do not limit each other. 8
- (3) The provisions of subsection (1) (b), (c), (d) and (e) do not apply to a statement that appears in a document to which access is given under the *Freedom of Information Act 1989* on or after 27 February 1999 so long as the statement became part of the document before 1 July 2001. 9
- (4) A statement is taken to comply with subsection (1) (b) and (c) if the statement includes the following words: 10
- 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. 11

7 Republished Year 2000 disclosure statements 12

- (1) For the purposes of this Act, a **republished Year 2000 disclosure statement** is a statement that: 13
- (a) consists of the republication, retransmission, reproduction, recital or reading aloud of the whole of an original Year 2000 disclosure statement, and 14

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| (b) | is made after the commencement of this section and before 1 | 1 |
| | July 2001, and | 2 |
| (c) | is made: | 3 |
| (i) | orally, or | 4 |
| (ii) | in writing, or | 5 |
| (iii) | in a data storage device, or | 6 |
| (iv) | by way of an electronic communication of writing, or | 7 |
| (v) | by way of an electronic communication of speech. | 8 |
| (2) | The provisions of subsection (1) (b) do not apply to a statement that | 9 |
| | appears in a document to which access is given under the <i>Freedom</i> | 10 |
| | <i>of Information Act 1989</i> on or after 27 February 1999 so long as the | 11 |
| | statement became part of the document before 1 July 2001. | 12 |

Part 3 Protection from civil liability

8 Protection from civil actions

- (1) No civil action lies against a person for or in relation to any matter or thing arising out of, or incidental to, the making of a Year 2000 disclosure statement.
- (2) A Year 2000 disclosure statement is not admissible as evidence against a person in a civil action to which the person is a party.

9 Exceptions

- (1) The rules in section 8 do not apply to a person (the *first person*) if:
 - (a) the Year 2000 disclosure statement is false or misleading in a material particular and the first person:
 - (i) knew that the statement was false or misleading in a material particular, or
 - (ii) was reckless as to whether the statement was false or misleading in a material particular, or
 - (b) all of the following conditions are satisfied:
 - (i) the Year 2000 disclosure statement was made to another person (otherwise than in the other person's capacity as a member of the public or of a section of the public) in connection with the formation of a contract,
 - (ii) the other person, or a representative of the other person, is a party to the civil action,
 - (iii) the civil action relates to the contract.
- (2) The rules in section 8 do not apply to a Year 2000 disclosure statement if:
 - (a) the Year 2000 disclosure statement was made in fulfilment of an obligation imposed under a contract, or
 - (b) the Year 2000 disclosure statement was made in fulfilment of an obligation imposed under a law of the Commonwealth, a State or a Territory.

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- (3) The rules in section 8 do not apply to a civil action if: 1
- (a) all of the following conditions are satisfied: 2
- (i) the Year 2000 disclosure statement was made for the 3
sole or dominant purpose of inducing persons to 4
acquire goods or services identified in the statement, 5
- (ii) any of those persons acquired the goods or services as 6
a consumer, 7
- (iii) the consumer concerned, or a representative of the 8
consumer concerned, is a party to the civil action, 9
- (iv) the civil action relates to the goods or services acquired 10
by the consumer, or 11
- (b) all of the following conditions are satisfied: 12
- (i) the Year 2000 disclosure statement was made for the 13
sole or dominant purpose of inducing a particular 14
consumer to acquire goods or services identified in the 15
statement, 16
- (ii) the consumer acquired the goods or services, 17
- (iii) the consumer, or a representative of the consumer, is a 18
party to the civil action, 19
- (iv) the civil action relates to the goods or services acquired 20
by the consumer. 21
- (4) The rules in section 8 do not apply to a civil action to the extent to 22
which: 23
- (a) the civil action consists of proceedings for a restraining 24
injunction or for declaratory relief, or 25
- (b) the civil action consists of proceedings instituted by a person 26
or body under a law of the Commonwealth, a State or a 27
Territory: 28
- (i) in the performance of a regulatory or enforcement 29
function conferred on the person or body by such a 30
law, or 31
- (ii) in the exercise of a regulatory or enforcement power 32
conferred on the person or body by such a law, or 33
- (c) the civil action is an action for infringement of copyright, a 34
trade mark, a design or a patent. 35
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| (5) | The paragraphs of subsections (1), (2), (3) and (4) do not limit each other. | 1
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| (6) | Section 4B of the <i>Trade Practices Act 1974</i> of the Commonwealth applies for the purposes of subsection (3) (a) and (b) of this section in a corresponding way to the way in which it applies for the purposes of the <i>Trade Practices Act 1974</i> of the Commonwealth. | 3
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| (7) | For the purposes of subsection (6), it is to be assumed that a reference in section 4B of the <i>Trade Practices Act 1974</i> of the Commonwealth to services does not include a reference to financial services (within the meaning of that Act). | 7
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| (8) | Section 12BC of the <i>Australian Securities and Investments Commission Act 1989</i> of the Commonwealth applies for the purposes of subsection (3) (a) and (b) of this section in a corresponding way to the way in which it applies for the purposes of Division 2 of Part 2 of that Act. | 11
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| 10 | False or misleading statement exception: explanatory statement to be given | 16
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| (1) | If a civil action is instituted against a person (the <i>first person</i>) by another person (the <i>second person</i>), the first person is not entitled to plead or otherwise rely on the rule in section 8 (1) unless: | 18
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| (a) | the first person gives the second person a statement (the <i>explanatory statement</i>) to the effect that the first person believes that the exception set out in section 9 (1) (a) is not applicable, and | 21
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| (b) | the explanatory statement sets out the grounds for that belief, and | 25
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| (c) | the explanatory statement satisfies one of the following conditions: | 27
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| (i) | the explanatory statement is made in writing, | 29 |
| (ii) | the explanatory statement is made in a data storage device and is capable of being reproduced in writing from that device (with or without the aid of any other article or device), | 30
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| (iii) | the explanatory statement is made by way of an electronic communication of writing. | 34
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- (2) If the first person gives the second person an explanatory statement as mentioned in subsection (1), the explanatory statement is not admissible in any civil action except for the purposes of determining whether subsection (1) has been complied with. 1
- (3) The second person may waive compliance with subsection (1). 2
- 11 False or misleading statement exception: imputed knowledge** 3
- (1) If, in any proceedings arising out of section 9 (1) (a), it is necessary to establish: 4
- (a) whether a corporation knew that a Year 2000 disclosure statement was false or misleading in a material particular, or 5
- (b) whether a corporation was reckless as to whether a Year 2000 disclosure statement was false or misleading in a material particular, 6
- it is sufficient to show that: 7
- (c) a director, employee or agent of the corporation engaged in conduct in relation to the Year 2000 disclosure statement, and 8
- (d) the director, employee or agent was, in engaging in that conduct, acting within the scope of his or her actual or apparent authority, and 9
- (e) the director, employee or agent: 10
- (i) knew that the Year 2000 disclosure statement was false or misleading in a material particular, or 11
- (ii) was reckless as to whether the Year 2000 disclosure statement was false or misleading in a material particular, 12
- as the case may be. 13
- (2) If, in any proceedings arising out of section 9 (1) (a), it is necessary to establish: 14
- (a) whether a person other than a corporation knew that a Year 2000 disclosure statement was false or misleading in a material particular, or 15
- (b) whether a person other than a corporation was reckless as to whether a Year 2000 disclosure statement was false or misleading in a material particular, 16
- it is sufficient to show that: 17
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- (c) an employee or agent of the person engaged in conduct in relation to the Year 2000 disclosure statement, and
- (d) the employee or agent was, in engaging in that conduct, acting within the scope of his or her actual or apparent authority, and
- (e) the employee or agent:
 - (i) knew that the Year 2000 disclosure statement was false or misleading in a material particular, or
 - (ii) was reckless as to whether the Year 2000 disclosure statement was false or misleading in a material particular,as the case may be.
- (3) A reference in this section to a *director* includes a reference to a constituent member of a body corporate incorporated for a public purpose by a law of the Commonwealth, a State or a Territory.

Part 4 Presumption against amendment of contracts**12 Presumption against amendment of contracts**

- (1) The making of a Year 2000 disclosure statement is taken not to amend, alter or vary a contract unless:
- (a) both:
- (i) the parties to the contract have expressly agreed to the amendment, alteration or variation, and
- (ii) that agreement satisfies one of the conditions set out in subsection (2), or
- (b) the contract expressly provides for the amendment, alteration or variation by way of the making of a Year 2000 disclosure statement.
- (2) The conditions referred to in subsection (1) (a) (ii) are as follows:
- (a) the agreement is made in writing,
- (b) the agreement is embodied in a data storage device and is capable of being reproduced in writing from that device (with or without the aid of any other article or device),
- (c) the agreement is made by way of one or more electronic communications of writing.
- (3) No action under this section can affect the operation of a condition or warranty that is taken to form part of a contract by virtue of the provisions of another Act.

Part 5 Exemption from section 45 of Competition Code

13 Exemption from section 45 of Competition Code

(1) Section 45 of the *Competition Code of New South Wales* does not apply to or in relation to:

(a) a contract or arrangement made:

(i) after the commencement of this section, and

(ii) before 1 July 2001, or

(b) an understanding arrived at:

(i) after the commencement of this section, and

(ii) before 1 July 2001,

to the extent to which the contract, arrangement or understanding provides for the disclosure or exchange of information, or both, by any or all of the parties to the contract, arrangement or understanding, for the sole purpose of facilitating any or all of the following:

(c) the detection of problems relating to Year 2000 processing,

(d) the prevention of problems relating to Year 2000 processing,

(e) the remediation of problems relating to Year 2000 processing,

(f) awareness of the consequences or implications, for the supply of goods or services, of problems relating to Year 2000 processing,

(g) contingency planning, risk management, remediation efforts or other arrangements for dealing with the consequences or implications referred to in paragraph (f),

(h) awareness of the consequences or implications, for the activities or capabilities of a person, of problems relating to Year 2000 processing,

(i) contingency planning, risk management, remediation efforts or other arrangements for dealing with the consequences or implications referred to in paragraph (h).

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- (2) Section 45 of the *Competition Code of New South Wales* does not
apply to or in relation to:
- (a) a contract or arrangement proposed to be made:
 - (i) after the commencement of this section, and
 - (ii) before 1 July 2001, or
 - (b) an understanding proposed to be arrived at:
 - (i) after the commencement of this section, and
 - (ii) before 1 July 2001,
- to the extent to which the proposed contract, arrangement or
understanding would provide for the disclosure or exchange of
information, or both, by any or all of the parties to the proposed
contract, arrangement or understanding, for the sole purpose of
facilitating any or all of the following:
- (c) the detection of problems relating to Year 2000 processing,
 - (d) the prevention of problems relating to Year 2000 processing,
 - (e) the remediation of problems relating to Year 2000 processing,
 - (f) awareness of the consequences or implications, for the supply
of goods or services, of problems relating to Year 2000
processing,
 - (g) contingency planning, risk management, remediation efforts
or other arrangements for dealing with the consequences or
implications referred to in paragraph (f),
 - (h) awareness of the consequences or implications, for the
activities or capabilities of a person, of problems relating to
Year 2000 processing,
 - (i) contingency planning, risk management, remediation efforts
or other arrangements for dealing with the consequences or
implications referred to in paragraph (h).

Part 6 Miscellaneous

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14 Regulations

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The Governor may make regulations, not inconsistent with this Act,
for or with respect to any matter that by this Act is required or
permitted to be prescribed or that is necessary or convenient to be
prescribed for carrying out or giving effect to this Act.

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