YEAR 2000 INFORMATION DISCLOSURE BILL 1999

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Communications, Information Technology and the Arts, Senator the Hon Richard Alston)
The main object of the Year 2000 Information Disclosure Bill 1999 (the Bill) is to encourage voluntary disclosure and exchange of information about Year 2000 problems, remediation efforts and compliance.

The Year 2000 computer problem is a large and complex issue for many businesses and government agencies. It has the potential to cause significant disruption to the economy and community at large.

Statements made in good faith for the purpose of sharing information about Year 2000 compliance may later provide the basis of a cause of action under statute and common law. Industry appears to be managing the risk of liability by refraining from issuing public statements.

This Bill provides limited liability protection for voluntary Year 2000 disclosure statements made between the day after Royal Assent and 30 June 2001.

A Year 2000 disclosure statement, defined in clause 7, is a statement in written form which relates solely to any or all of certain listed matters associated with Year 2000 processing; the detection, prevention, and remediation of Year 2000 processing problems, the consequences or implications of problems for the supply of goods and services and activities of people and organisations, and the plans put in place to deal with those consequences or implications.

A Year 2000 disclosure statement includes a republication of an original Year 2000 disclosure statement. The statement must contain words indicating that a person (including a corporation) may be protected by the Bill from liability for the statement in certain circumstances. The statement must also contain the name of the person who has authorised the statement. The Bill applies only in relation to the making of this voluntary statement, and does not affect any liability under statute or common law for actual Year 2000 related failures of goods and services.

Part 1 of the Bill deals with its commencement, provides a simplified outline of the Bill to assist readers, and sets out key definitions used in the Bill. It also provides for the Crown in right of the Commonwealth, a State or Territory to be bound by the Bill and for the Bill to extend to all external Territories including the Indian Ocean Territories and Norfolk Island.

Part 2 of the Bill defines Year 2000 disclosure statements.

Part 3 of the Bill sets out the core protection provided to Year 2000 disclosure statements. The protection against liability extends to any civil actions that are based on a person (including a body corporate or body politic) making a Year 2000 disclosure statement. Part 3 also provides that a Year 2000 disclosure statement will not be admissible as evidence against a person in a civil action to which the person is a party.
A Year 2000 disclosure statement will not be protected where:

- the statement is materially false or misleading and the person seeking protection knew that the statement was materially false or misleading or was reckless as to whether the statement was materially false or misleading;
- the statement was made for the sole or dominant purpose of inducing consumers or a particular consumer to acquire goods or services and a consumer (or a consumer’s representative) is a party to a civil action with respect to the goods or services subsequently acquired;
- the statement was made in connection with the formation of a contract and a party to the contract (or the party’s representative) is a party to a civil action in respect of that contract;
- the statement was made in fulfilment of a contractual or statutory obligation;
- the statement is the basis for a civil action which consists of proceedings for a restraining injunction or for declaratory relief;
- the statement is the basis for proceedings relating to the exercise of regulatory or enforcement power by a regulatory or enforcement body under Commonwealth, State or Territory law; or
- the statement is the basis for a civil action for infringement of copyright, a trademark, a design or patent.

In a civil action based on the making of a Year 2000 disclosure statement, the defendant will only be able to claim protection where the defendant has given the plaintiff a statement setting out the defendant’s belief that the Year 2000 disclosure statement was bona fide and not reckless.

Part 4 of the Bill provides that the making of a voluntary Year 2000 disclosure statement will not change the maker’s rights or liabilities under any pre-existing contract, except where both parties have expressly agreed to an amendment, alteration or variation in written form, or where the original terms of the contract provide for amendment, alteration or variation through the making of a Year 2000 disclosure statement.

Part 5 of the Bill provides that section 45 of the Trade Practices Act 1974 will not apply to contracts, arrangements and understandings providing for the disclosure and/or exchange of information for the sole purpose of facilitating certain listed activities associated with Year 2000 processing. This overcomes the potential that such contracts, arrangements or understandings might otherwise breach section 45 by having the likely effect of substantially lessening competition.

Part 6 of the Bill deals with miscellaneous matters. It provides for the concurrent operation of State and Territory laws (including in particular State and Territory laws dealing specifically with Year 2000 information disclosure), and for the non-application of the Bill with respect to State banking or insurance that does not extend beyond the limits of the State concerned. It also provides for the making of regulations for the purposes of the Bill.

FINANCIAL IMPACT STATEMENT
This Bill will not impose direct costs on business or impose administrative burdens on the Commonwealth. While decisions to share Year 2000 information may involve some costs to organisations, the strictly voluntary nature of any disclosure provides the ability to control costs. Businesses are likely to make Year 2000 disclosure statements where it is in their commercial interest to do so. Any increase in the level of Australia’s Year 2000 remediation efforts could have a positive effect on Australia’s economy.

REGULATION IMPACT STATEMENT

BACKGROUND
A recent survey by the Australian Bureau of Statistics of 8000 businesses indicated a high level of awareness (92 percent) of the Year 2000 problem. The proportion of businesses intending to undertake Year 2000 remediation work is more variable, ranging from 45 percent in Tasmania to 68 percent in the Australian Capital Territory.

Almost one-fifth of the businesses intending to undertake work have yet to start investigations into the likely impact. Only 20 percent of all businesses have sought some form of assurances from suppliers, service providers or customers about their state of Year 2000 readiness. Even fewer (13 percent) have contingency plans if disruptions were to occur due to the Year 2000 problem.

Because of the limited time available, there is a need to examine measures to accelerate the rate of Year 2000 remediation progress by Australian organisations to enable services to operate seamlessly into the Year 2000.

PROBLEM
As the making of statements of Year 2000 problems, compliance or remediation could, under certain circumstances, expose the maker to legal liability, organisations (including governments) have been reluctant to reveal their Year 2000 preparedness to other bodies or assist other organisations to achieve early compliance.

The absence of this information means that the Year 2000 preparedness of some organisations is incomplete. Lack of meaningful information is inhibiting the checking of supply chains (particularly in relation to advice from utilities about continuity of power, water and communications services); limiting the ability of large organisations (such as banks) to assist the remediation of smaller ones (such as customers) and the provision of information to the public on the Year 2000 preparedness of organisations. Organisations are generally responding to enquiries from supply chain partners on a bilateral basis rather than through use of public statements. This is adding to costs.

Organisations which lack confidence in the Year 2000 preparedness of their supply chains will face increased costs as contingency planning will need to be comprehensive rather than targeted at areas of real risk.
There is a range of legal risks in relation to the making of statements on Year 2000 readiness, the most significant relating to:

- negligent misstatement, where statements which are relied upon cause loss or injury (such as a statement which causes a business to rely on a telecommunications carrier whose services fail as a result of a Year 2000 problem). The fact that statements were made with care and in good faith may not necessarily provide adequate defence;

- defamation, where statements have the effect of injuring a business or personal reputation (such as a statement that a business has poor Year 2000 preparedness);

- 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 Year 2000 statement. This acts as a significant disincentive to suppliers to provide contractual partners with advice concerning their Y2K preparedness, such as the information which an electricity supplier may be asked to provide to a factory; and

- the 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).

The extent of risk in these areas of potential liability varies. Risk of negligent misstatement can be managed through appropriate disclaimers, though disclaimers can have the effect of heightening concern (eg where a disclaimer indicates that information should not be relied upon).

There are defences in defamation actions, which may be available in relation to statements concerning Year 2000 preparedness. Specific tests differ to some extent between jurisdictions, but broadly encompass justification, fair comment and qualified privilege.

Contractual liability concerning the Year 2000 compliance of a product can be avoided through the use of an appropriate disclaimer. Statements of this kind will, however, have no effect on certain unavoidable statutory conditions or warranties deemed to be incorporated in consumer contracts (eg that the goods sold are fit for the purpose for which they are required).

The most likely circumstances in which liability for a Year 2000 disclosure statement may arise under the TPA are under s. 52 and s. 53. It would be impossible to rule out civil liability in relation to s. 52, where no defences are available for a misleading or deceptive statement made by a corporation in trade or commerce which causes loss.

Some advisers to non-government bodies have suggested that an exchange of information about Year 2000 compliance between competitors in an industry may involve a breach of TPA s. 45(2). TPA s. 45(2) prohibits a corporation entering into a contract, arrangement or understanding where this “has the purpose, or would have or be likely to have the effect, of substantially lessening competition” or giving effect to any contract, arrangement or understanding which has the purpose or has, or would be likely to have, that effect. While it is possible that in certain circumstances, exchange of information about Year 2000 preparedness between competitors in a particular industry could breach s. 45(2), the risk is considered low.
Legal advisers have indicated that they routinely advise clients (including governments) to manage these varying risks by making no written disclosures concerning their Year 2000 status and providing no remediation advice to other bodies. This is because of the difficulty in determining the scope of the audience for the information and the extent of any reliance upon it.

Two State Premiers and several major corporations have petitioned the Commonwealth to introduce disclosure legislation as a means of providing greater certainty for makers of Year 2000 disclosure statements.

**OBJECTIVES**

The continued delivery of business and government services across the Year 2000 boundary would be assisted by measures to encourage the voluntary disclosure and exchange of information about Year 2000 problems, remediation efforts and compliance.

To ensure their own continuity of service, organisations need to establish the preparedness of their supply chains. Some organisations wish to be able to make statements to clients and the public concerning their level of preparedness for commercial reasons. Large organisations, such as banks, have indicated that they wish to have the ability to provide remediation advice to smaller organisations, such as customers. This is so-called “Good Samaritan” activity.

Requirements of Commonwealth, State and Territory Governments and the Australian Stock Exchange for bodies within their jurisdiction to report regularly on Year 2000 compliance progress do not capture all organisations with significant supply-chain responsibilities, such as some utilities and small and medium sized businesses.

Governments and regulatory bodies are limited, for reasons of confidentiality, in their ability to pass on detailed compliance information concerning their agencies or organisations within their jurisdiction and are not well-placed to make statements concerning aspects of the Year 2000 preparedness of individual bodies that may be sought by particular client groups or vendors.
OPTIONS

Option 1: Do nothing
This approach would seek to improve levels of disclosure and information-sharing through existing mechanisms such as leadership by governments in publicly reporting compliance progress; statements by public figures (such as recent comments by the Reserve Bank Governor) and moral suasion by governments on business to seek greater cooperation.

Option 2: Self-regulation and other informal measures
Industry associations have expressed reluctance to assume responsibility for the Year 2000 preparedness of member organisations. Industry bodies have declined to assume responsibility for warranting the Year 2000 preparedness of members because of legal risks to the industry association and because few member organisations to date have been prepared to publicly acknowledge their own Year 2000 readiness status.

In July 1998, Action 2000, the United Kingdom’s Year 2000 awareness body, launched “The Pledge” as a means of assisting information-sharing within the private sector. Signatories to The Pledge provide an undertaking that the company will seek to address Year 2000 issues positively and cooperatively. It also indicates the company’s intention to work with its supply chain. The Pledge is a statement of good intentions, with appropriate references to sharing and cooperation in good faith. It is not a legally binding document and signatories are not constrained from taking legal action.

Uptake of The Pledge by UK companies was slow. By September 1998, there were only 120 companies, but following a relaunch and more promotional activity by Action 2000, the number of signatories rose to about 900.

Australia’s Year 2000 National Steering Committee (comprising representatives of all levels of government, industry and consumers) has examined the feasibility of a pledge in the Australian context. A draft document was developed, however, the level of industry feedback and support was not sufficiently encouraging and the Committee agreed not to proceed.

Option 3: Disclosure legislation
Such legislation has recently been enacted in the United States of America. The “Year 2000 Information Readiness Disclosure Act”, October 1998 (the “Good Samaritan” Legislation) provides that business, including governments, that share and exchange information in good faith are not, in certain circumstances, held legally liable if it is subsequently found to be inaccurate or misleading. There is limited information available at this stage concerning the effectiveness of the US legislation and insufficient to make judgements concerning its effectiveness.

Draft Australian legislation has been developed which provides a framework to encourage the voluntary disclosure and exchange of information about Year 2000 computer problems and remediation efforts. The draft Bill will:

- protect a person from civil liability for a Year 2000 disclosure statement from commencement of the Act until 1 July 2001 unless one of the exceptions set out in
the Act applies. This will provide protection from liability in relation to the principal legal risks identified above, except where one or more of the statutory exceptions applies:

- provide that a Year 2000 disclosure statement will not amend a contract unless the parties otherwise agree; and
- provide that arrangements for the disclosure of Year 2000 information are exempt from s. 45 of the TPA.

Protection from civil action will not generally apply, however, in relation to:

- statements which were made recklessly or known to be false or misleading;
- actions instituted by one or more consumers in relation to goods or services which they had purchased following inducements provided by a Year 2000 disclosure statement;
- actions instituted in relation to a contract which involved the making of a Year 2000 disclosure statement in the formation of a contract;
- Year 2000 disclosure statements made in the context of obligations imposed by a contract or a Commonwealth, State or Territory law;
- proceedings for a restraining injunction or for declaratory relief;
- proceedings relating to the exercise of regulatory or enforcement power by a regulatory or enforcement body; or
- action for infringement of a copyright, a trademark, a design or a patent.

These exceptions, particularly those relating to the rights of consumers and those entering into contracts, may limit the extent of disclosures to the general public. These exceptions, however, seek to minimise the scope for Year 2000 disclosures to be used to misrepresent the Year 2000 status of goods and services for commercial reasons. The current rights of consumers would, therefore, remain unchanged. Regulators will continue to be able to exercise regulatory or injunctive action. This could include, for instance, an application by the ACCC to the Federal Court for a pecuniary penalty in relation to anti-competitive conduct under s. 76 of the TPA, or an order from a court on the application of the Australian Securities and Investments Commission in relation to the failure of a director to act with due care and diligence. The ACCC could seek an injunction from the Federal Court to restrain breaches of the TPA (including s. 45 and ss. 52, 53 and 59).

Where a civil action is instituted (eg in the event of losses sustained by the failure of a good or a service), a Year 2000 statement cannot be used in court as evidence against the maker of the statement. This is an additional protection which the draft legislation provides to makers of statements. It is subject to the same exceptions noted above.

If action is taken against a person, however, they cannot rely on protection from liability unless they provide a written statement to the person bringing the action, setting out their reasons for believing that the first of the above exceptions does not apply. This measure will assist anyone bringing an action against the maker of a statement as it will provide them with information concerning the basis for the statement and may assist them in preparing their case or in determining whether to proceed with any action.
To enable people and organisations to make Year 2000 statements with greater certainty of protection from liability, and because of certain constitutional differences, draft Australian legislation differs in some respects to the US legislation:

– while the US legislation offers protection for both oral and written Year 2000 disclosures, protection in Australia would be limited to written statements to reduce scope for misuse and because of the difficulties in identifying the precise content of oral statements;

– while the US legislation provided for readiness disclosures which predate the Act to be converted to a protected “Year 2000 readiness disclosure” provided action was taken by 3 December 1998, draft Australian legislation will not provide back-dated protection, because of the effect it may have of extinguishing actions already vested.

**Option 4: Statutory extinguishment of all liability for any Year 2000 related failure**

The provisions of Option 3 could be expanded to extend protection from potential liability to include protection for some or all damages arising from Year 2000 product or service failure.

Such protection could limit potential losses to governments and businesses and significantly reduce Year 2000 related litigation. Statutory limitation of liability in relation to product or service failure is, however, likely to limit the remediation efforts of organisations and is therefore not supported.

**Option 5: Mandatory reporting requirements**

The provisions of Option 3 could be expanded to include statutory reporting requirements for industry. Such requirements could be imposed on corporations and on other persons who carry on activities capable of being regulated under Commonwealth law. However, to assist in this end, Commonwealth law could not impose functions specifically on a State or State body without the consent of that State.

There are also practical difficulties in determining how material would be collected (potentially legislation would need to identify all possible regulators); what use is made of the information collected and how the quality of information can be adequately mandated. For these reasons, this option is not supported.

**IMPACT ANALYSIS**

The groups potentially affected by the problem and the proposed solution are governments and businesses who seek to establish the Y2K preparedness of their supply chains or to provide remediation advice on Y2K processing issues to assist the remediation progress of other organisations, and the public, who wish to be informed concerning the extent of any risk of Y2K service failure as a means of determining the need for any contingency behaviour.
**Option 1: Do nothing**

If incentives are not provided to encourage disclosure and information sharing on Year 2000 processing, it is likely that there will be minimal increase over current levels of activity. Governments may be able to address the information needs of the community in relation to provision of non-corporatised government services through use of appropriate disclaimers. Because of the high level of risks posed by possible breach of s. 52 of the TPA, they are likely to provide highly aggregated information only in relation to the compliance status of government businesses.

Governments and businesses will continue to experience difficulty in seeking assurances from organisations in their supply chain, threatening their own service continuity and adding significantly to the cost of contingency planning.

There will continue to be little incentive for large organisations to provide remediation advice to customers and small businesses. This will increase the risk of small business failure and add to the contingency planning costs of individual business.

Limited availability of reliable information to the public concerning the Year 2000 status of goods and services could lead to unnecessary and costly contingency measures, such as cash-hoarding and cancellation of travel plans.

Rights of consumers will continue to be protected by the TPA. Provisions of this Act, together with potential liability from Year 2000 related product or service failure will continue to provide strong incentives for government and industry to continue to address system remediation.

**Option 2: Self-regulation and other informal measures.**

As indicated above, there has been no support from industry associations to assume responsibility for ensuring the Year 2000 preparedness of members. In the absence of mechanisms to enforce such a role on bodies without a regulatory function, the effect of this option on stakeholders would be as for Option 1.

Outcomes of a Pledge would be uncertain. Promotion of a Pledge would require substantial funding by governments. Governments are likely to consider that funds could be more effectively applied to remediation efforts and information dissemination.

While a Pledge may generate some increase in the level of information sharing, effects are unlikely to be significant in the absence of industry support. The effect of a pledge on stakeholders is likely to be similar to that of Option 1.

**Option 3: Disclosure legislation**

Disclosure legislation will significantly reduce barriers to disclosure and information sharing by governments and industry. Principal benefits are likely to relate to information sharing between organisations for the purposes of checking supply chains (such as advice from a water supplier to a commercial nursery), reduction in the costs of providing advice to supply chain partners (such as advice from a manufacturer to a group of retailers) and so-called “Good Samaritan” activity, where large organisations...
assist the remediation of smaller ones (such as a bank assisting small business customers).

While this option is expected to increase available information on Year 2000 preparedness, there may be costs to business where the information provided is inaccurate or incomplete. The draft legislation seeks to mitigate this risk, by providing no protection where statements were known to be false or misleading or made recklessly. It is possible that in some instances, the protection which a statement attracts could weaken its effectiveness, as readers may be concerned that all information may not be correct. The benefits of legislation are likely, however, to outweigh the costs as improved information flows will increase Y2K remediation activity and reduce potential for losses or injury from Y2K service failure.

The legislation will not impose direct costs on business or impose administrative burdens. While decisions to share Year 2000 information may involve some costs to organisations, the voluntary nature of any disclosure provides the ability to control costs. Businesses are likely to use the provision to make statements on Year 2000 preparedness where it is in their commercial interest to do so. Any increase in the level of Australia’s Year 2000 readiness could have a positive effect on Australia’s international competitiveness.

While small business would be particularly vulnerable in the event that false and misleading information within a statement was not detected, the risk of small business failure through inadequate remediation is considered to be greater. Small businesses are likely to be particular beneficiaries because the legislation would reduce barriers to larger organisations providing remediation advice and assistance to smaller ones.

The creation of a precedent in seeking to override provisions of the Trade Practices Act 1974, could limit that Act’s long term effectiveness. If this happened, it may impose significant costs on the economy. The legislation limits protection from civil action to statements which relate solely to Year 2000 processing and protection in relation to s. 45 of the TPA would operate for the sole purpose of facilitating the detection, prevention or remediation of problems relating to Year 2000 processing. The provisions of the Act would be time-limited, with no protection for statements made after 30 June 2001.

CONSULTATION
Draft legislation has been developed by the Department of Communications, Information Technology and the Arts in consultation with the Treasury, the Attorney-General’s Department and the Department of Prime Minister and Cabinet. This followed circulation of legislative principles to all portfolio departments and major Commonwealth agencies. A meeting on 17 December 1998 of Commonwealth, State and Territory Ministers with responsibility for Year 2000 issues unanimously welcomed the Commonwealth’s announcement that it would introduce Year 2000 disclosure legislation early in the New Year. All States and Territories indicated in principle support for similar legislation as soon as possible. A number of businesses have made representations to Government in support of disclosure legislation and there has been consultation with industry representatives and lawyers on a
confidential basis. Further public consultation has not been possible due to the time constraints resulting from the Government’s commitment to early introduction.

CONCLUSION AND RECOMMENDED OPTION
Option 1 is unlikely to provide sufficient incentive to encourage organisations to share information on Year 2000 problems, compliance and remediation efforts. Calls by governments, industry associations and regulators for greater commitment by organisations have not had any significant effect, in Australia or overseas. Similar results could be expected from Option 2, because of lack of industry support.

Option 3 will reduce barriers to organisations providing information which could assist checking of supply chains; sharing of remediation solutions and enable large organisations to have greater assurance in assisting the compliance progress of SMEs. Option 3 is the only option to have industry and government support and is therefore recommended as a means of creating the most favourable environment to improve disclosure and information sharing.

IMPLEMENTATION AND REVIEW
The proposal will be implemented through enactment of new legislation, which will have effect in relation to statements made from the date of introduction to 30 June 2001.

In view of the limited period of application of the Act, no formal review is proposed.
NOTES ON CLAUSES

YEAR 2000 INFORMATION DISCLOSURE BILL 1999

PART 1 – INTRODUCTION

Clause 1 – Short Title
Clause 1 provides that the Bill, when enacted, may be cited as the Year 2000 Information Disclosure Act 1999.

Clause 2 – Commencement
Clause 2 provides that the Bill, when enacted, will commence on the day after the day on which it receives Royal Assent. This will ensure that the Bill will not have retrospective operation. If the Bill commenced on the day it received Assent, it could apply to statements made earlier on that day.

Clause 3 – Simplified outline
Clause 3 sets out a simplified outline of the Bill to assist readers.

Clause 4 – Definitions
Clause 4 provides definitions of key terms used in the Bill.

For the purposes of this Bill, a civil action is defined to mean civil action in a court and includes any civil proceeding in a court. An example of the use of this term is in clause 10 which sets out the general protection from civil action. The application of this protection is restricted by the exceptions contained in clause 11. The use of Year 2000 disclosure statements in criminal proceedings is unaffected by this Bill.

An electronic communication of writing is defined as a means of communication of writing by means of guided and/or unguided electromagnetic energy.

The reference to ‘writing’ will include any mode of representing or reproducing words, figures, drawings or symbols in a visible form (see section 25 of the Acts Interpretation Act 1901).

The reference to communication of writing by means of ‘guided electromagnetic energy’ (wording taken from the Telecommunications Act 1997) will include communication by means of a wire, cable, waveguide or other physical medium used, or for use, as a continuous artificial guide for or in connection with the carrying of the communication.

The reference to communication of writing by means of ‘unguided electromagnetic energy’ (wording also taken from the Telecommunications Act 1997) includes communications by means of radiocommunication. This definition will include
television broadcasting, facsimile, email, Internet sites and other similar means of communicating information.

A Year 2000 disclosure statement, an original Year 2000 disclosure statement and a republished Year 2000 disclosure statement are defined in sections 7, 8 and 9 respectively. These concepts are closely related to the term Year 2000 processing, which is defined as the processing (including calculating, comparing, sequencing, displaying or storing), transmitting or receiving of date data (whether or not the date data relates to the year 2000). In recognition that the Year 2000 problem encompasses the processing of date data relating to dates falling outside the Year 2000, the definition will include the processing of all dates including, but not limited to: 9 September 1999 (09/09/99), 31 December 1999 (31/12/99), 1 January 2000 (01/01/2000), and 29 February 2000 (29/02/2000) (a leap year date).

Clause 5 – Crown to be bound
Clause 5 provides that the Bill, when enacted, will bind the Crown in right of the Commonwealth, a State or a Territory. The Commonwealth Government and State and Territory Governments will have the same rights and liabilities as industry with respect to making and receiving Year 2000 disclosure statements.

Clause 6 – External Territories
Clause 6 provides that the Act will extend to all external Territories (this will include Indian Ocean Territories and Norfolk Island).

PART 2 – YEAR 2000 DISCLOSURE STATEMENTS

Clause 7 – Year 2000 disclosure statements
Clause 7 provides that a Year 2000 disclosure statement will include both original and republished Year 2000 disclosure statements.

Clause 8 – Original Year 2000 disclosure statements
Clause 8 provides that a Year 2000 disclosure statement is a statement that:

- relates solely to any or all of the following:
  - Year 2000 processing (see clause 4 definition);
  - the detection of problems (including potential problems – see clause 4 definition) relating to Year 2000 processing;
  - the prevention of problems (or potential problems) relating to Year 2000 processing;
  - the remediation of problems (or potential problems) relating to Year 2000 processing;
  - the consequences or implications (including potential consequences or potential implications – see clause 4 definitions) for the supply of goods or services, of problems (or potential 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 (or potential consequences or potential implications), for the activities or capabilities of a person (including a corporation or body politic), of problems (or potential 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 8 and before 1 July 2001 (it is recognised that remediation of non-business critical systems may continue through the 2000/2001 financial year);

identifies the person who authorised the statement (this person could be a company – see paragraph 22(1)(a) of the Acts Interpretation Act 1901); and

the statement 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 the statement is made by way of an electronic communication of writing (see clause 4 definition).

For the avoidance of doubt, subclause 8(2) provides that the subparagraphs of paragraph 8(1)(a) do not limit each other.

While not compulsory, subclause 8(3) deems the following sentences to comply with the form requirements in paragraphs 8(1)(b) and 8(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.”.

A ‘statement’ is defined in clause 4 to include, unless the contrary intention appears, (a) a distinct part of a larger statement, and (b) a statement made to the public or a section of the public. Part (b) of this definition is not intended to limit other meanings of ‘statement’ such as a statement made directly by one person to another. Part (a) of this definition makes it clear that a part of a document distinguished by the use of italics or bold print, or by the use of borders or shading, may be a ‘statement’ for the purposes of the Bill. If a document in part contains material relating to Year 2000 processing, but this material cannot be distinguished from the document as a whole, the document will not be a Year 2000 disclosure statement for the purposes of the Bill.
Clause 9 — Republished Year 2000 disclosure statements

Clause 9 provides that a republished Year 2000 disclosure statement is a statement that:

- consists of the republication, retransmission or reproduction of the whole of an original Year 2000 disclosure statement;
- is made after the commencement of clause 9 and before 1 July 2001 (it is recognised that remediation of non-business critical systems may continue through the 2000/2001 financial year); and
- the statement 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 the statement is made by way of an electronic communication of writing (see clause 4 definition).

A republication, retransmission or reproduction of an original Year 2000 disclosure statement means the republication, retransmission or reproduction of the whole of an original Year 2000 disclosure statement, 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.

Where, for example, 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 Bill. 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 Bill.

Where, however, 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

Clause 10 — Protection from civil actions

Clause 10 sets out general liability protection with respect to Year 2000 disclosure statements, subject to the exceptions in clause 11.

Subclause 10(1) protects a person from civil liability arising out of the making of Year 2000 disclosure statement. The Bill removes civil liability which might otherwise exist under several causes of action including negligent misstatement, defamation and Commonwealth, State and Territory trade practices and fair trading legislation.
Subclause 10(2) provides that a Year 2000 disclosure statement will not be admissible against a person who made it. Under this provision, 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.

Clause 11 — Exceptions

Clause 11 provides exceptions to the protection from civil liability provided in clause 10.

False and misleading statements

A Year 2000 disclosure statement which is materially false and misleading will not be protected where the person seeking to rely on clause 10 knew that the statement was materially false or misleading, or was reckless as to whether the statement was materially false or misleading (paragraph 11(1)(a)). This exception operates in conjunction with the explanatory statement requirement contained in clause 13.

A Year 2000 disclosure statement will be made recklessly where the consequences of the person making the statement are not so substantially certain that he or she must be taken to have intended them but the person is so indifferent to the likely consequences that he or she must be taken to have foreseen them (see The Laws of Australia, The Law Book Company Limited, Vol. 33, Torts, 33.8[8], 1998).

There are provisions setting out the circumstances in which the knowledge of directors, employees or agents may be imputed to persons (see clause 14).

Pre-contractual statements

A Year 2000 disclosure statement made to another person will not be protected in a civil action 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 (paragraph 11(1)(b)). 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.

There will be a number of cases where either paragraph 11(1)(b) or 11(3)(b) may apply. They are not intended to be mutually exclusive (see subclause 11(5)).

Statements made in fulfilment of an obligation

A Year 2000 disclosure statement will not be protected where the statement was made in fulfilment of an obligation under a contract or a law of the Commonwealth, State or a Territory (subclause 11(2)). 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. Similarly, a statement will not be protected where it was made in pursuance of a continuous disclosure requirement under the Corporations Law or ASX Listing Rules, or in pursuance of the prospectus or takeover requirements of the Corporations Law.

**Statements to made to induce consumers to acquire goods or services**

A Year 2000 disclosure statement will not be protected in a civil action where the statement has been made for the sole or dominant 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 (for example, under Part VI of the Trade Practices Act 1974) (subclause 11(3)). The term ‘acquire’, in relation to goods or services, is defined in clause 4 of the Bill to have the same meaning as in the Trade Practices Act 1974. Section 4 of that Act defines the acquisition of goods to include acquisition by purchase, exchange or taking on lease, on hire or on hire-purchase. It defines the acquisition of services to include accepting services.

This exception will apply to Year 2000 disclosure statements which are made for the sole or dominant 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.

The meaning of the term **consumer** will depend on the types of goods or services purchased:

- in relation to a consumer of goods or non-financial services, the concept of a consumer is defined by section 4B of the Trade Practices Act 1974 (subclauses 11(6) and (7));
- in relation to a consumer of financial services, the concept of consumer is defined by section 12BC of the Australian Securities and Investments Commission Act 1989 (subclause 11(8)). A financial service is defined in section 12BA of that Act to mean a service that consists of providing a financial product or is otherwise supplied in relation to a financial product. A financial product means a facility for taking money on deposit made available in the course of conducting a banking business, a security, a futures contract, a contract of insurance, a retirement savings account, or a superannuation interest.

Both Acts define a consumer by reference to the types or value of goods or services purchased. This concept forms part of the consumer protection exception in subclause 11(3). A person (including a corporation) will be a consumer in relation to goods or services where the services cost $40,000 or less, or where the goods or services cost more than $40,000, the goods or services are of a kind usually purchased for personal, domestic or household use or consumption. In the case of financial services, where a person or corporation employs fewer than 20 people, or where a person or a corporation engaged in the manufacture of goods employs fewer than 100 people,
they will also be a consumer provided that the financial services were of a kind ordinarily acquired for business use.

Restraining injunction or declaratory relief
Liability protection will not be given 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 (paragraph 11(4)(a)). A person may, for example, obtain an injunction to prevent the further publication of a defamatory Year 2000 disclosure statement. It should be noted, however, that some regulatory bodies retain the power in a civil proceeding to seek further measures such as corrective advertising, such as the ACCC under section 80A of the Trade Practices Act 1974.

Proceedings instituted in the performance of a regulatory function or power
Liability protection will not be given 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 (paragraph 11(4)(b)).

The regulatory and enforcement roles of bodies such as the Australian Competition and Consumer Commission under the Trade Practices Act 1974, and the Australian Securities and Investments Commission under Corporations Law and the Australian Securities and Investments Commission Act 1989 will be unaffected by this Bill. However, the maker of a Year 2000 disclosure statement may be protected in a civil action brought by such a body acting in a non-regulatory, non-enforcement role, such as in its own capacity as a purchaser of goods or services (e.g., computer facilities) that any other person might bring.

Intellectual property rights
Liability protection will not be given 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 (paragraph 11(4)(c)).

The paragraphs of subclauses (1), (2), (3) and (4) do not limit each other (subclause 11(5)).

Clause 12 — Provisions to attract Commonwealth legislative power
Clause 12 provides a constitutional underpinning of clause 10.

It provides that clause 10 will apply in reliance on the following legislative powers:
- interstate and international trade and commerce (s51(i) of the Constitution);
- postal, telegraphic, telephonic and other like services (s51(v));
- Australian trading or financial corporations and foreign corporations (including, subject to clause 19, banking and insurance corporations) (s51(xx));
• territories (s122); and
• powers to regulate the rights and liabilities of the Commonwealth and any authority of the Commonwealth.

Subparagraph 12(1)(g)(i) provides that this Bill will apply to Year 2000 disclosure statements sent by post or other like service. The reference to ‘other like service’ is intended to include a service such as a parcel delivery or document exchange service.

Subclause 12(2) provides that a State will include a prescribed self-governing Territory and that a Territory does not include a prescribed self-governing Territory. This subclause permits regulations to be made to allow a self-governing Territory to be treated as a State for the purposes of the Bill. A self-governing Territory is defined in clause 4 as the Australian Capital Territory, the Northern Territory or Norfolk Island. This will also permit regulations to be made to exclude the operation of paragraph 12(1)(e) and to limit the operation of paragraphs 12(1)(f) and (h) in relation to a self-governing Territory specified in the regulations.

Clause 13 – False or misleading statement exception – explanatory statement to be given

In order to gain the protection of the clause 10 liability protection, 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 (subclause 13(1)).

This explanatory statement may used by the other person in deciding how (or whether) to proceed, but will not be admissible as evidence in any civil action except for determining whether subclause (1) has been complied with (subclause 13(2)).

The person instituting the civil action will be able to waive compliance with subclause 13(1) (subclause 13(3)).

Clause 14 – False or misleading statement exception – imputed knowledge

Clause 14 sets out how the knowledge requirements contained in paragraph 11(1)(a) may be imputed in relation to corporations and persons other than corporations.

Corporations

Where, for the purposes of proceedings arising out of paragraph 11(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, the corporation will be imputed to have the knowledge of a director, employee or agent of the corporation acting within the scope of his or her actual or apparent authority who knew that, or was reckless as to whether, the Year 2000 disclosure statement was materially false or misleading (subclause 14(1)). A reference in subclause 14(1) 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 (subclause 14(3)).

**Persons other than corporations**

Where, for the purposes of proceedings arising out of paragraph 11(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, the person will be imputed to have the knowledge of an employee or agent of that person acting with the scope of his or her actual or apparent authority who knew that, or was reckless as to whether, the Year 2000 disclosure statement was materially false or misleading (subclause 14(2)).

**PART 4 – PRESUMPTION AGAINST AMENDMENTS OF CONTRACTS**

**Clause 15 – Presumption against amendment of contracts**

Clause 15 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 in written form or the contract expressly provides for the amendment, alteration or variation by way of making the Year 2000 disclosure statement.

Where a party to an existing contract makes a Year 2000 disclosure statement, the rights of that party under the contract will not change unless either the contract or a further agreement expressly provides for such a change. Year 2000 disclosure statements made during pre-contractual negotiations are not covered by this clause and they generally will not be protected under the Bill (see paragraph 11(1)(b)). Year 2000 disclosure statements made pursuant to a requirement of an existing contract are similarly not protected (see paragraph 11(2)(a)).

**Clause 16 – Provisions to attract Commonwealth legislative power**

Clause 16 provides a constitutional underpinning of clause 15.

It provides that clause 15 will apply in reliance on the following legislative powers:

- interstate and international trade and commerce (s51(i) of the Constitution);
- postal, telegraphic, telephonic and other like services (s51(v));
- Australian trading or financial corporations and foreign corporations (including, subject to clause 19, banking and insurance corporations) (s51(xx));
- territories (s122); and
- powers to regulate the rights and liabilities of the Commonwealth and any authority of the Commonwealth.

Subparagraph 16(1)(d) provides that the Bill will apply to a contract made by post or other like service. The reference to ‘other like service’ is intended to include a service such as a parcel delivery or document exchange service.
Subclause 16(2) provides that a State will include a prescribed self-governing Territory and that a Territory does not include a prescribed self-governing Territory. This subclause permits regulations to be made to allow a self-governing Territory to be treated as a State for the purposes of the Bill. This will also permit regulations to be made to limit the operation of paragraph 16(1)(b) and to exclude the operation of paragraph 16(1)(c) in relation to a self-governing Territory specified in the regulations.

PART 5 – EXEMPTION FROM SECTION 45 OF THE TRADE PRACTICES ACT 1974

Clause 17 – Exemption from section 45 of the Trade Practices Act 1974

Section 45 of the Trade Practices Act 1974 prohibits certain anti-competitive contracts, arrangements or understandings. Some commentators have suggested that the exchange of information about Year 2000 computer problems and remediation efforts might give rise to liability under section 45. Clause 17 permits contracts, arrangements or understandings made or arrived at, or proposed to be made or arrived at, which might otherwise breach s45 of the Trade Practices Act 1974, to the extent to which the contracts, arrangements or understandings provide for the disclosure and/or exchange of information, by any of the parties to the contracts, arrangements or understandings, for the sole purpose of facilitating any or all of the following:

- the detection of problems (including potential problems – see clause 4 definition) relating to Year 2000 processing;
- the prevention of problems (or potential problems) relating to Year 2000 processing;
- the remediation of problems (or potential problems) relating to Year 2000 processing;
- awareness of the consequences or implications (including potential consequences or potential implications – see clause 4 definitions) for the supply of goods or services, of problems (or potential 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 (or potential consequences or potential implications), for the activities or capabilities of a person (including a corporation or body politic), of problems (or potential 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.

The term ‘arrive at’ in relation to an understanding, is defined in clause 4 to include reach or enter into. This clause will apply only in relation to the disclosure or exchange of Year 2000 information, and will not cover any collusive boycott or other anti-competitive action by competitors.
PART 6 – MISCELLANEOUS

Clause 18 – Concurrent operation of State and Territory laws
Clause 18 provides that the Bill will not exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with the Bill. A State or Territory will be able to enact independent legislation dealing with the Year 2000 computer problem provided that the legislation does not conflict with the provisions of this Bill.

Clause 19 – This Act does not apply to State banking and State insurance
Clause 19 provides that the Bill will not apply with respect to State banking or State insurance that does not extend beyond the limits of the State concerned. This Bill will apply in general to corporations which carry out banking or insurance activities. However there are constitutional limitations on the Commonwealth’s power to legislate with respect to intra-state ‘State banking’ and ‘State insurance’ (ss51(xiii) and 51(xiv) of the Constitution).

Clause 20 – Regulations
Clause 20 is a standard regulation-making clause which allows the Governor-General to make regulations necessary to give effect to the Bill.