Did This "Good Samaritan" Come Too Late?

Year 2000 Information Disclosure Act 1999

A tangible result of the greatly feared Year 2000 ("Y2K") phenomenon is the paper war that has erupted between organisations assessing the risk of not being able to operate because of a lack of Y2K compliance. While no one will actually know until next year whether the Y2K problem has simply been a management inconvenience or the cause of total chaos, a near certainty is that litigation will follow if major disruption occurs.

The Year 2000 Information Disclosure Act 1999 ("the Act"), which came into force on 15 May 1999, addresses this near certainty by offering organisations certain protections from civil liability for statements about their Y2K problems and what they are doing to fix them.

Purpose of the Act

Fear of legal action has apparently made many organisations reluctant to issue voluntary statements about their Y2K readiness, or share ideas about fixing possible Y2K problems. The Act aims to relieve some of those concerns and encourage the voluntary disclosure and exchange of information about Y2K problems and remedies. Modelled on Australian and US legislation, the Act is widely proclaimed as an example of "Good Samaritan legislation".[1]

To achieve its aim, the Act, broadly:

(a) Offers protection from civil liability for statements relating to Y2K date processing;[2] and
(b) makes Y2K disclosure statements inadmissible in civil proceedings.[3]

Scope of the protection

The Act applies to anyone either making an original Y2K disclosure statement,[4] or republishing one.[5] The Act offers limited protection from civil liability which includes, for example, liability in negligence or under the Fair Trading Act 1986 for misleading statements.

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1 "Bug will bite, Government is warned" *New Zealand Herald* 24 March 1999, A1.
2 Section 8(1).
3 Section 9(1).
4 Section 6 sets out the criteria for qualification as an "original Year 2000 information disclosure statement".
5 Section 7 sets out the criteria for a "republished Year 2000 information disclosure statement".

The Act, however, only protects Y2K disclosure statements that relate to Year 2000 date processing matters.[6] Protection extends no further than the actual disclosure statement itself. As a result, merely because a Y2K disclosure statement may be protected to a certain extent by the Act, it does not mean that the maker of the statement can avoid liability for injury, damage or loss caused by goods or services with Y2K problems.

In addition, the Act will not protect an organisation from being sued in contract where, for example, a Y2K problem causes loss or damage to the purchaser of goods under a contract.[7]

In short, where any loss or injury is independent from a published Y2K disclosure statement, the protection offered by the Act is of limited or no value in defending a civil lawsuit.[8]

Exceptions to protection

The protection from civil liability for Y2K disclosure statements is not a blanket one. The Act carves out several specific exceptions to protection.

(a) The Exceptions

There is no protection where a person knowingly or recklessly makes a false or misleading Y2K disclosure statement,[9] or where the statement was made to satisfy an obligation imposed by another statute.[10]

Nor is there protection if the civil proceedings or civil liability relate to:

(a) Any person or organisation's rights, obligations, or remedies under contract law;[11]
(b) any consumer's right or remedy under the Fair Trading Act 1986 or Consumer Guarantees Act 1993;[12]
(c) any obligation to maintain the confidentiality of information in a person's possession or control;[13]

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6 Section 3(1) exhaustively defines what constitutes a "Year 2000 date processing matter". See infra note 25 and accompanying text.

7 Section 11. One "trap for young players" created by the exception for deeds and contracts in section 11 is that disclosure of organisations' Y2K non-compliance may unwittingly constitute, for example, breach of warranty given under a separate contract.

8 A practical example: if a company's premises were damaged by a computer-controlled sprinkler system which malfunctioned due to a Y2K problem, the company would be able to sue the software owner and/or the sprinkler company for negligence, regardless of whether there was a Y2K disclosure statement concerning the sprinkler system software.

9 Section 10.

10 Section 13.

11 Section 11.

12 Section 12.

13 Section 15.

(d) the infringement of an intellectual property right, including those under the Copyright, Trademarks, Layout Designs, Patents, and Plant Variety Acts;[14]
(e) applications for injunctions or declarations.[15]

(b) False and Misleading Statements

Protection is lost where the maker of a statement knows, or is reckless as to whether the statement is false or misleading.[16] Importantly, the Act imputes to a company the knowledge of any director, employee or agent of the company who is "engaged in conduct in relation to the Year 2000 information disclosure statement".[17]

(c) No Alteration to Contract Law

In drafting the Act, the Government did not wish the Act to allow anybody to escape liability under a contract.[18] The exception in s 11 for liability relating to contracts and deeds is aimed at pre-contractual Y2K disclosure statements, and Y2K disclosure statements made or republished in satisfaction of a contractual obligation.

The Act offers no protection from civil liability for these types of Y2K disclosure statements where the person making and the person receiving the statement are *both* parties to the civil proceeding in question.[19] This last requirement was put in to clarify that a Y2K disclosure statement made to one person could not be used by a person other than the intended recipient.[20]

(d) Consumer Protection Laws Not Affected

Parliament did not want the new Act to erode rights under consumer protection laws, namely the Consumer Guarantees Act and the Fair Trading Act.[21] As a result, there is no protection where civil liability or civil proceedings relate to the rights or remedies of a consumer under those Acts. This exception is significant as it means, for example, the maker of a Y2K disclosure statement is still liable to a consumer for anything (even innocently) misleading or deceptive in a Y2K disclosure statement.[22] This exception only relates to the rights or remedies of consumers.

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14 Section 16.
15 Section 14.
16 Supra note 9.
17 Section 18.
18 Commerce Committee Report on the Year 2000 Information Disclosure Bill, April 1999.
19 Where the Year 2000 information disclosure statement was made in the course of negotiations leading to the making of the contract: section 11(2)(a). (emphasis added).
20 Supra note 15.
21 Ibid. Support for protection of consumer laws also came from the New Zealand Law Society: "Rights under threat from Y2K Bill says Law Society" *The Dominion* 16 April 1999, 2.
22 No intention to mislead or deceive is required for liability under section 9 of the Fair Trading Act 1986: *Bonz Group Pty Ltd v Cooke* (1996) 7 TCLR 206 (CA).

"Consumer" has the same definition as under the Consumer Guarantees Act 1993: namely a person who:[23]

(a) Acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption; and
(b) Does not acquire the goods or services, or hold himself or herself out as acquiring the goods or services, for the purposes of a business, including for the purpose of –
 (i) Resupplying them in trade; or
 (ii) Consuming them in the course of a process of production or manufacture; or
 (iii) In the case of goods, repairing or treating in trade other goods or fixtures on land.

How to Get the Protection on Offer

The Act only applies to original Y2K disclosure statements and republished Y2K disclosure statements made between 15 May 1999 and 30 June 2001.[24]

Original Y2K Disclosure Statements

To be protected as an original statement, the statement must be made between 15 May 1999 and 30 June 2001, and include a clear statement invoking the Act's protection. The Act itself suggests the following disclaimer language:[25]

> This statement is a year 2000 information disclosure statement for the purposes of the Year 2000 Information Disclosure Act 1999. A person may be protected by that Act from civil liability for this statement in certain circumstances.

In addition, the statement must:[26]

(a) Relate solely to one or more year 2000 date processing matters;
(b) identify the person making the statement; and
(c) be made in writing (which includes the electronic communication of writing, for example, an Internet website).

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[23] Section 3(1).
[24] Section 5.
[25] Section 6(2).
[26] Section 6(1).

What are Year 2000 Date Processing Matters?

The Act defines year 2000 processing as the electronic processing, transmitting, or receiving of information relating to dates occurring in the period 15 May 1999 to 30 June 2001.[27]

For protection, the statements must relate solely to year 2000 date processing matters. These matters include:[28]

(a) Detecting, preventing or remedying problems relating to Y2K date processing;
(b) the consequences or implications for the supply of goods or services of problems relating to Y2K date processing;
(c) the consequences or implications for the activities or capacity of a person of problems relating to Y2K date processing; and
(d) arrangements (including contingency planning, risk management, and remedial action) for dealing with the consequences or implications of the above.

Republished Y2K disclosure statements are also protected

An organisation can also get the Act's protection from civil liability where it republishes a Y2K disclosure statement.[29]

The concept of republished statements is directed at protecting those who repeat what someone else has said about year 2000 date processing matters, provided the source and location of the original Y2K disclosure statement is clearly identified.

The republishing can be oral or in writing, and includes the electronic communication of oral or written statements (for example, a telephone call, or a radio or television broadcast).

To qualify as a republished statement, the statement must be the republishing of a complete original Y2K disclosure statement, or parts of an original Y2K disclosure statement, *including* the parts that contain the required wording invoking the Act's protection. It must identify the original statement maker, and describe where the original Y2K disclosure statement can be obtained.

To be protected, a republished statement, as with an original Y2K disclosure statement, must be made between 15 May 1999 and 30 June 2001. Examples of republished Y2K disclosure statements might include:

(a) A subsidiary reproducing and distributing its parent company's original statement;

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27 Supra note 23.
28 Ibid.
29 Supra note 5.

(b) a wholesaler photocopying and distributing to retailers a manufacturer's original statement; or
(c) a distributor's call centre employee repeating over the telephone a manufacturer or supplier's original statement.

What About Y2K Disclosure Statements that are Already Published?

As the Act is not retrospective, it does not protect anyone from liability for a Y2K statement that was made prior to 15 May 1999. For those who published Y2K disclosure statements prior to 15 May, the Act will only be useful where the statements are amended and reissued to qualify as an original Y2K disclosure statement.

Conclusion

The Act provides some protection for civil liability for Y2K disclosure statements and may, in part, achieve its Good Samaritan aim of encouraging organisations to share information relating to Y2K problems and remedies.

However, the protection offered should not be overstated. In publishing a Y2K disclosure statement, organisations must be aware of the notable exceptions to protection and the fact that the protection is strictly limited to matters relating to Y2K date processing, *not* the consequential effects of an actual Y2K problem affecting anybody. Combine this limitation on the protection offered with the fact that the Act does not protect Y2K disclosure statements made before 15 May 1999 and we must legitimately ask whether this Good Samaritan is too late.

However, on a final more promising note, the Act - while arguably a "sheep in wolf's clothing" - is nonetheless a good example of a move towards more user-friendly legislation. For example, s 2 is headed "What this Act is about": surely a heading the architects of the Acts and Regulations Publication Amendment Bill would see as a positive move forward as we approach a new millennium of legislative possibility.

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Vehicle Impoundment – A New Regime for Road Safety

The Land Transport Act 1998

The Land Transport Act 1998 ("the Act") introduces a number of significant reforms relating to road use. The main objective of the Act is to improve road safety and in particular reduce the road toll.[1] A number of new provisions and police powers have been enacted to achieve this. While public and media attention has largely focused on the new photographic licensing regime, this note will examine the equally important new powers that the police have to impound vehicles in certain circumstances under the Act.

Mandatory 28 Day Impoundment

The focus of this provision is on disqualified and unlicensed drivers. Land Transport Safety Authority ("LTSA") statistics indicate that in 1997 these drivers were involved in ten percent of fatal crashes and nine percent of all serious injury crashes.[2]

(a) Grounds for Impoundment

Section 96 of the Act provides that an enforcement officer must seize and impound a vehicle for 28 days if the officer believed on reasonable grounds that a person drove the vehicle on a road while:[3]

(i) The person was disqualified from holding or obtaining a driver licence; or
(ii) The person's driver licence was suspended or revoked; or
(iii) In the case of a person who was previously forbidden to drive because the person was an unlicensed driver or his or her driver licence had expired, the person did not hold a driver licence.

(b) Notice Requirements

Once a vehicle is impounded, the enforcement officer is obliged to fulfil certain notice requirements. A notice in the prescribed form must be completed and distributed to the driver of the vehicle, the registered owner of the vehicle, and the storage provider

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1 574 NZPD 13818 (3 December 1998).
2 Factsheet 63 - Roadside vehicle impoundment. <http://www.ltsa.govt.nz/factsheets/63.html> 30 July 1999.
3 Section 96(1).

who stores the vehicle. In addition, the enforcement officer must retain a copy of the notice. The notice must state a variety of particulars, including the name and address of the driver, the place where the vehicle is to be impounded and the rights of appeal against the impoundment.[4]

(c) Limitation of Scope

Three limitations are contained in the statute. First, an enforcement officer does not have to seize or impound a motor vehicle if the officer has good cause to suspect that the vehicle is a stolen vehicle or had been converted, is a write-off, or has suffered severe damage.[5] This is a sensible provision that leaves the enforcement officer with discretion in circumstances where it may be inappropriate to impound a vehicle.

Second, an enforcement officer is not permitted to seize or impound a trailer or any other vehicle without motive power that is being towed by or is attached to a motor vehicle.[6] The focus of the impoundment provisions is on the actual motor vehicle used by the disqualified driver; it is unreasonable to also impound a trailer or other such vehicle.

Third, the impoundment regime does not apply if the person driving the vehicle had been previously ordered by a court to attend a traffic improvement school, and the driving occurred in the course of his or her attendance at that school.[7]

Appeals against Impoundment

The Act contains an appeals regime for owners of vehicles that have been impounded. The owner can only appeal to the Police on the following grounds:[8]

- (i) The impounded vehicle was stolen or converted; or
- (ii) The enforcement officer who seized the vehicle did not have reasonable grounds of belief as required by s 96 or did not comply with the notice requirements stated above; or
- (iii) The owner did not know and cannot reasonably have been expected to know that the driver was not permitted to drive; or
- (iv) The owner took all reasonable steps to prevent the driver from driving the vehicle; or
- (v) The driver drove the vehicle in a serious medical emergency.

The focus of these grounds is generally on situations where the owner or driver cannot reasonably be held accountable for the situation leading to the impoundment.

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4 Section 96(2).
5 Section 96(5).
6 Section 96(7).
7 Section 96(8).
8 Section 102(1)(a)-(e).

The second ground is effectively a safeguard designed to ensure that enforcement officers follow correct procedures.

Once the appeal has been lodged, the Commissioner of Police appoints an enforcement officer to hear and determine the appeal.[9] This must occur not later than two working days after the appeal has been lodged if the appeal is based on the first ground noted above, or not later than five working days after the lodgement otherwise.[10] Should the appeal be successful, the enforcement officer must immediately release the vehicle to the owner.[11]

Should an appeal to the Police be unsuccessful, the owner may then appeal against the Police's decision to the District Court.[12] The District Court is restricted to determining the appeal on one or more of the grounds set out above.[13] Again, if the appeal is successful, the vehicle is immediately released.[14] The decision of the District Court on an appeal is final.[15]

Storage and Release of Impounded Vehicles

A motor vehicle that is seized and impounded under the Act will be stored where the enforcement officer directs.[16] The owner of the vehicle is liable to pay the costs of towing and storing the vehicle.[17] An impounded vehicle may not be released except under the provisions of the Act.[18] Where an appeal is unsuccessful, the following provisions govern the release of impounded motor vehicles.

Section 98 states when a vehicle may be released from storage. The registered owner of the vehicle, or a person authorised by the registered owner, may remove the vehicle after 28 days if two conditions are met. First, the owner or authorised person must show the storage provider proof of identity and either proof of ownership or the owner's copy of the notice of acknowledgment of seizure and impoundment. Second, the fees and charges for towage and storage must either be paid, or an arrangement to pay entered into.[19]

In only one limited circumstance may a vehicle be released before the 28-day period has expired in one limited circumstance. This is where the vehicle was impounded from an unlicensed driver, and that person has paid the towage and storage fees and produced to an enforcement officer his or her current driver licence.[20] This

9 Section 102(3).
10 Section 102(4).
11 Section 102(3).
12 Section 110(1).
13 Section 110(2).
14 Section 110(3).
15 Section 111(4).
16 Section 97(1).
17 Section 97(2).
18 Section 97(3).
19 Section 98(1).
20 Section 98(3).

obviously covers the situation where an unlicensed driver has gained or regained a driver licence in the period after the impoundment.

If the vehicle's owner has not claimed the vehicle, paid towage and storage costs, or entered into a payment arrangement, and no other person has established that they are entitled to possession, then after 28 days following the close of the initial 28-day period, the storage provider may take steps to recover his or her costs. The storage provider does this by applying to a specially authorised enforcement officer for approval to dispose of the vehicle. Upon such approval (which may be made on such terms and conditions as the officer sees fit), the storage provider becomes the owner of the vehicle for all purposes.[21]

Personal Property

An important issue concerning the impoundment of vehicles is the status of the personal property contained in the vehicles. This is particularly relevant if the seized vehicle was carrying commercial cargo. Section 96(4) provides that personal property (not including property attached to or used in connection with the operation of the vehicle) present in the vehicle at the time of impoundment *must* be released on request to a person who produces evidence that they were entitled to possession of the vehicle or personal property before the vehicle was moved. As the objective of the impoundment regime is to remove the means of transportation from the driver, it is unreasonable and unnecessary to retain personal property.

It is worthwhile noting here that the Act provides that those who are authorised by an enforcement officer to move or store the vehicle "must do everything reasonably necessary to ensure that the vehicle and personal property in or on the vehicle are not damaged".[22] While this provision is to be expected in this type of legislation, issues may still arise concerning damage to perishable goods, such as goods that must be kept refrigerated. It is not clear from this legislation how far storage providers must go to fulfil their duty of care, but it is suggested here that the phrase "reasonably necessary" places a strong duty on storage providers to ensure that such goods are not damaged.

Impoundment in an Emergency

In addition to the mandatory 28-day impoundment, s 122 provides that an enforcement officer may also seize and impound a vehicle for up to 12 hours in an emergency. This power may only be used if an enforcement officer believes on reasonable grounds that it is in the interests of public safety that a motor vehicle be seized and impounded, and that it is unlikely that those interests could be secured by

21 Section 98(4),(5).

22 Section 117(1).

exercising powers other than by this provision.[23] Sections 96(4), 97 and 98, which provide guidelines for the storage and release of impounded vehicles, also apply to vehicles seized under s122, with any necessary modification arising from the different nature of the impoundment. Impoundment under this provision is likely to be rare and will only occur in exceptional situations, where the risk to the public is high.

Impoundment Following an Accident

Section 123 states that an enforcement officer may impound a vehicle for up to seven days for the purposes of preserving evidence or establishing the cause of a "serious traffic accident". A "serious traffic accident" is defined as "an accident involving a vehicle that results in an injury to or the death of a person".[24] The officer must believe on reasonable grounds that the vehicle was involved in a serious traffic accident or a hit-and-run offence, or that the vehicle had failed to stop when requested to by Police.[25] Sections 96(4) and 97 (except those provisions relating to storage fees), which relate to personal property, and the storage of the vehicle, apply with any necessary modifications. Unlike the emergency impoundment provision, the s 98 release provisions do not apply. The period of impoundment may be extended for a further seven days on application to the District Court. Extensions can themselves be renewed on further application to the District Court.[26]

Ownership Issues

One of the most controversial issues of the impoundment regime is that the driver of the impounded vehicle does not have to be its owner. Generally, the Act places an obligation on the owner of the vehicle to ensure that only people with current licences drive the vehicle. If the owner does not fulfil this simple obligation, he or she must run the risk that their vehicle will be impounded and that they will be liable for the towage and storage costs. The Act does, however, contain a number of safeguards to ensure that diligent owners are not held liable for circumstances out of their control.

This issue presents obvious problems for those involved in the business of commercial transport, or for those who allow employees to drive company vehicles. As noted above, the obligation is on owners to ensure that drivers of their vehicles are licensed. The Road Transport Association, the Bus and Coach Association, and the Contractors Federation were concerned about the considerable logistical problems involved in organisations having to constantly check that those driving their vehicles hold valid licences.[27] The LTSA have come up with a pragmatic solution to this

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23 Section 122(1).
24 Section 123(4).
25 Section 123(1).
26 Section 123(3).
27 574 NZPD 13819-20 (3 December 1998).

problem. Employers may now register a list of their drivers with the LTSA, and the LTSA will contact the employer if any driver is disqualified.[28] If an organisation chooses to ignore this regime and does not continually check the status of their drivers, they run the risk of having their vehicle impounded.

Conclusion

This note has focused on a small but important part of the Land Transport Act 1998. The introduction of the impoundment regime has added wide new powers to allow the police to primarily target unlicensed or disqualified drivers. It contains adequate safeguards to protect owners of vehicles that have been impounded through no fault of their own. This legislation should prove to be a valuable tool in the struggle to improve New Zealand's dismal road safety record.

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[28] Ibid 13820.

Improving Efficiency and Reducing Risk in Finance

Banking and Insolvency (Netting and Payments Finality) Bill

The Banking and Insolvency (Netting and Payments Finality) Bill ("the Bill") was given assent on 26 April 1999. The Bill aimed to improve efficiency and reduce risk in the financial system by amending the law in relation to netting agreements and payments finality. The Bill amended the Companies Act 1993, the Corporations (Investigation and Management) Act 1989, the Insolvency Act 1967 and the Reserve Bank Act 1989 ("the Amendments").

The provisions affecting.payments finality are designed to ensure that those payments which are completed on the same day as, but before the commencement of, liquidation, bankruptcy or statutory management, do not have to be unwound. To achieve this, the instrument which puts the entity into liquidation, bankruptcy or statutory management must now record the time as well as the date of execution.

The provisions affecting netting are intended to provide certainty that netting arrangements will be enforceable in the event that a party is put into liquidation, bankruptcy or statutory management. To get statutory protection, a netting agreement must be in writing and be either a bilateral netting agreement or a recognised multilateral netting agreement.

Payments Finality

The payments finality provisions have been driven by technological developments within the banking industry, especially Real Time Gross Settlement Payments ("RTGSP").

Previously, a company was deemed to have been put into liquidation from the first moment of the day on which a liquidator was appointed (the zero hour rule), regardless of the actual time at which the court order, or other instrument, was made. The effect of the zero hour rule was that if a bank, or any other institution issuing and settling payments on a real time basis, was placed in liquidation there would be a reversal of all payments settled between the start of the day and the time when the company was put into liquidation, unless validated by the court.

The Companies Act 1993 has been amended to state that the liquidation of a company commences at the date *and time* at which the liquidator is appointed, and that when a liquidator is appointed, by whatever instrument, the time as well as the date must be recorded.

Similar amendments have been made to the Insolvency Act 1967 in relation to bankruptcy, and the Reserve Bank Act 1989 and the Corporations (Investigation and Management) Act 1989 in relation to statutory management.

A remaining area of uncertainty is where a transaction is irrevocably entered into before the time of liquidation, but not processed until after this time.

Netting

The netting provisions seek to provide certainty that netting agreements will be enforceable in the event that a counterparty is put into liquidation, bankruptcy or statutory management. Under the law prior to the Amendments, there was uncertainty as to whether netting would be effective when a company was in statutory management and whether the court would uphold the operation of netting agreements, particularly multilateral netting agreements, in a liquidation.

Netting agreements effectively provide contractual rights of set-off. However, under the previous law, set-off rights were not available in an insolvency apart from mandatory statutory set-off in liquidation and bankruptcy (s 310 Companies Act 1993 and s 93 Insolvency Act 1967 respectively). Where netting agreements provided for set-off rights different to those under statutory set-off, they could potentially be challenged on the grounds of:

1. The *pari passu* rule (that is, the requirement that all unsecured creditors be treated equally);
2. the liquidator's power to disclaim onerous property; or
3. the prohibition on the enforcement of rights over the property of a company in liquidation.

When statutory management commences, a moratorium comes into effect, which prevents the enforcement or exercise of a range of rights, including set-off, making it uncertain whether netting agreements would be effective. The effects of an unenforceable netting agreement are greater where a statutory manager is appointed as there are no statutory set-off provisions.

Under the Amendments, netting agreements are not affected by the commencement of liquidation or bankruptcy, provided that the agreement is in writing. If a party to a netting agreement goes into liquidation or bankruptcy, then the netted balance is calculated according to the netting agreement, and that is the amount that may be claimed in the liquidation or is payable to the company. Transactions subject to a netting agreement are not affected by statutory set-off, nor are they subject to a moratorium if the entity is under statutory management.

There are advantages to claiming set-off rights under a netting agreement as opposed to statutory set-off. Under statutory set-off, nobody is entitled to claim the benefit of a set-off arising from a transaction made within six months of liquidation, unless they can prove that at the time of the transaction they did not have reason to suspect that the company was unable to pay its debts as they became due. No such regime is provided for in the Amendments when claiming under a netting agreement.

The Amendments also state that netting agreements or transactions under a netting agreement are not onerous property which liquidators or assignees can disclaim.

In so much as the *pari passu* rule has been displaced in relation to netting agreements, the rights of other creditors have been reduced. However, where the effect of entering into a netting agreement is to reduce any amount that is owing by or to the company at the time the company enters into the agreement, the creditor still has the protection offered by s 292 (transactions having preferential effect) and s 297 (transactions at an undervalue) of the Companies Act 1993. In addition to these rights, the court may order that a bilateral netting agreement be set aside where it is between a company and a related person.

What Constitutes a Netting Agreement?

A broad definition of netting agreement is given in the Amendments and is intended to apply beyond netting agreements in the finance industry. With certain exceptions, the Amendments are intended to cover all forms of contractual netting, and to apply to a wide range of netting agreements between any types of counterparties, and in respect to any types of transactions or dealings.

Netting agreement has been defined as being either a bilateral netting agreement or a recognised multilateral netting agreement which is a multilateral netting agreement which is contained in, or subject to, the rules of a clearinghouse which has been recognised by the Reserve Bank.

Bilateral netting agreements must be in writing, and transactions subject to a bilateral netting agreement must constitute mutual credits, mutual debts or other mutual dealings. This means that the claims must be owed between the same persons in the same right. Other than these two limitations, all bilateral netting agreements come within the Amendments, including those outside the finance industry, and it is envisaged that new forms of netting may develop due to this.

The definition of "Bilateral Netting Agreement" as given in the Amendments is broad and will include payments netting, netting by novation, and close-out netting. In a banking context, however, it is unlikely to extend to the normal set-off provisions included in standard loan agreements. This may be an area where standard contractual terms can be updated to take advantage of the new Amendments.

Multilateral netting agreements must also be in writing, but transactions subject to a multilateral netting agreement do not require mutuality unless one of the parties is a trustee who is not authorised by the terms of the trust to enter into the transaction. A further requirement for multilateral netting agreements is that it must be contained in, or subject to, the rules of a clearinghouse which has been recognised by the Reserve Bank. This greater level of control is due to the fear that without it there would be opportunities to avoid the operation of the *pari passu* principle in situations that are inappropriate and not within the scope of the policy objectives of the legislation.

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