

<http://law.gov.au/ecommerce>

***Policy Issues for Trade
Law Reform focusing on Cross
Border Insolvency and E-Commerce***


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Presentation outline

- ◆ Part I - Globalisation and Maritime Law
- ◆ Part II - Trade Law and Electronic Commerce Policy Considerations
- ◆ Part III - Trade Law and Insolvency Policy Considerations

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Part I - Globalisation and Maritime Law (1)

- ◆ The challenge presented by electronic commerce
 - 'Universal, pervasive technology. Local, diverse law' - Kirby J
 - thesis: commercial certainty requires domestic laws to reflect international norms

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Globalisation and Maritime Law (2)

- ◆ Maritime law has developed out of the need for global harmonisation of relevant laws
- ◆ Harmonisation leads to commercial confidence, increased trade and economic benefits

Globalisation and Maritime Law (3)

- ◆ International problems require international solutions
- ◆ Common bonds to underpin common rules can be difficult to find
- ◆ Despite the benefits, there can be many legal and political obstacles to harmonisation

Globalisation and Maritime Law (4)

- ◆ The question: should the policy goals for trade law reform be domestic or international?
- ◆ The answer: probably both

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Part II - Trade Law and Electronic Commerce Policy Considerations

- ◆ Electronic commerce presents enormous opportunities for business and government
 - overcomes geographical isolation
 - increases potential market reach
 - can reduce costs

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Domestic policy issues (1)

- ◆ **Aust/NZ policy parameters:**
 - (1) **light handed regulation**
 - » **role of Government to facilitate rather than prescribe or restrict**
 - (2) **business lead development of electronic commerce**
 - » **business free to choose what, if any, technology is appropriate for their particular requirements**

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Domestic policy issues (2)

- (3) **technology neutrality**
 - » **don't discriminate between technologies**
- (4) **functional equivalence**
 - » **treat paper and electronic communications equally**
- (5) **no modification of fundamental legal principles**
- (6) **compatible with international developments**

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Putting policy into practice

- ◆ NZ - Law Commission reports
 - links civil and criminal law issues
- ◆ Aust - PM's Investing for Growth statement
- ◆ Electronic Commerce Expert Group
 - terms of reference reflect policy parameters
 - » consider international developments¹¹

Policy into practice (2)

- ◆ ECEG recommendations
 - light handed framework legislation to remove legal impediments
 - » don't deal with particular legal issues eg crime, corporations, privacy, copyright etc
 - based on UNCITRAL Model Law on Electronic Commerce
 - no legislative regime for digital signatures

Policy into practice (3)

- ◆ **Most recommendations adopted**
- ◆ **Uniform national legislation**
 - agreement in principle at SCAG
 - based on Commonwealth's Bill
- ◆ **Commonwealth Electronic Transactions Bill 1999 developed through public consultation**
 - business support is essential

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Policy into practice (4)

- ◆ **Government facilitates by:**
 - providing guidance and assistance
 - removing impediments
- ◆ **Strategic Framework for the Information Economy**
 - priorities identified
 - Action Plans developed

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Policy into practice (5)

- ◆ Strategic focus demonstrated by creation of:
 - MCIE
 - NOIE
 - Online Council
- ◆ Business input through AIEAC
- ◆ Assist business eg NEAC

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International policy issues

- ◆ Domestic policy on electronic signatures
- ◆ Legislation/regulation on electronic signatures
 - eg EU draft directive, Singapore
- ◆ UNCITRAL Uniform Rules on Electronic Signatures

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UNCITRAL Uniform Rules (1)

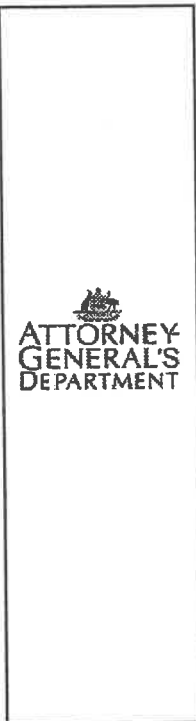
- ◆ **Need for Uniform Rules**
 - harmonisation of two basic approaches and between common and civil law systems
- ◆ **Link to UNCITRAL Model Law on Electronic Commerce**
 - article 7 on signatures

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UNCITRAL Uniform Rules (2)

- ◆ **Issues addressed**
 - legal presumptions
 - conduct of parties
 - cross-border certification
- ◆ **assumptions**
 - based on PKI model
 - difficulty of discussing technology issues

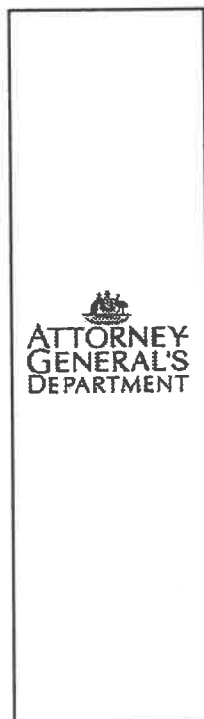
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UNCITRAL Uniform Rules (3)

- ◆ **Developments at Sept 1999 meeting**
 - Uniform Rules will be revised
 - willingness to resolve difficult issues
 - » not clear what is required
 - » insufficient trade experience
 - » legislation driving commercial practice in many jurisdictions
 - will States adopt them anyway?

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Part III - Trade Law and Insolvency Law Policy Considerations

- ◆ **Reform of New Zealand insolvency law required**
 - law inadequate in some areas eg corporate insolvencies
- ◆ **UNCITRAL Model Law on Cross-Border Insolvency**
 - internationally recognised template

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Policy Issues

- ◆ Five factors identified in considering whether to adopt UNCITRAL Model Law:
 - (1) globalisation
 - (2) fiscal
 - (3) efficiency and fairness
 - (4) adequacy of existing legislation
 - (5) sovereignty

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Application of policy issues

- ◆ commercial certainty requires legislative action before problems arise
- ◆ economic analysis requires fair treatment of foreign creditors
- ◆ consideration of policy issues favoured reform

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Conclusions and Questions

- ◆ New Zealand experience
- ◆ Australian experience
- ◆ Any questions?

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