

Second 2008 APEC Technical Assistance Seminar on International Implementation of the APEC Privacy Framework

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A civil society perspective on the current work of the APEC Data Privacy Subgroup, including the Data Privacy Pathfinder projects

Speaking notes from Nigel Waters, Privacy International

Overlapping Objectives

- Civil Society's objective remains *effective and enforceable* privacy protection in all countries and applying to data moving across national borders.
- The APEC Privacy Framework only shares this objective to the extent that protection is necessary to facilitate cross border data transfer, particularly in the commercial sector.
- The APEC Privacy Principles set a minimum 'floor' level of protection. Whether they are as strong or comprehensive 'on paper' as other international instruments (EU, OECD, CoE) is disputed, but in practice the effectiveness of all of the alternative instruments depends on how they are interpreted and implemented.
- Civil society will continue to campaign for higher privacy protection standards, both internationally and domestically, but accepts that the APEC principles, if implemented in good faith, will be an improvement on the current situation in many APEC economies.

The role of the APEC Pathfinder

- The Cross Border Privacy Rules (CBPR) approach being developed in the Pathfinder is only one mechanism for implementing the APEC Privacy Framework.
- Another mechanism is the adoption of domestic privacy regulation within member economies and Civil Society welcomes and supports progress towards this in several economies. Civil Society believes that active encouragement of and facilitation of domestic law should remain a focus of the Privacy Subgroup, at least as much as the CBPR work. Civil society's preference is for strong comprehensive information privacy laws as the simplest and least cost route both for consumers and for business.
- Civil society also welcomes clear statements both from the Privacy Subgroup and from some participating governments that the Pathfinder is not intended, and will not be allowed, to detract from the existing level of privacy protection in any member economy – and acceptance that any CBPR scheme in operation must meet the standards required by domestic regulation.

- This means that any CBPR scheme, which may include private sector accountability agents such as trustmarks, must be able to guarantee legally enforceable remedies for breaches of the APEC principles in every participating economy, and this in turn will require legislative support (although not necessarily a privacy law – could be in general consumer protection law or sectoral regulations).

Emphasis within the Pathfinder

- It is gradually becoming clearer how CBPR mechanisms may assist businesses seeking to transfer personal data to or from jurisdictions which have minimum binding requirements, although there is still considerable uncertainty and scepticism about their practical value.
- Projects 1-3 are developing processes for businesses to draw up CBPR and submit them to a recognised accountability agent for approval. This will be an 'extra' compliance step not currently required by any Asia-Pacific privacy laws (unlike the registration or licensing schemes in many European laws) and can therefore only assist in adoption of and compliance with privacy protection standards.
- Civil Society can support these projects in principle and will seek to ensure that the substantive content and criteria in the CBPR processes not only meet the minimum standards of the APEC privacy principles but also accommodate the need for demonstrable compliance with any relevant domestic laws.
- The directory project (No 4), which has yet to receive any attention, will be critical in making any CBPR scheme transparent and accessible to consumers. The directory must be freely accessible on an Internet site and must include not only the names of participating businesses but also functional contact details and links to their CBPR.
- The four projects concerning cross border enforcement co-operation (Nos 5,6, 7 & 8) are or can be independent of CBPR and support *all* implementation mechanisms, including domestic privacy legislation. Civil Society strongly supports these projects and seeks to ensure that they are not unnecessarily limited to CBPR or to private sector application.
- The overall test of the CBPR components – Project 9 – which will commence after the August Subgroup meeting, will be critical in demonstrating how the scheme will work and deliver effective privacy protection in the context of cross border data transfers. Civil Society will monitor this project to ensure that the scheme meets the objectives and is not used in any way to detract from existing domestic privacy protection standards.
- Civil Society strongly supports the work of the 'Friends of the Chair' communications group to develop explanatory material about the CBPR approach. Transparency and shared understanding of how a CBPR scheme will work is essential to its success.
- Civil Society representatives will continue to participate in the work of the Pathfinder project groups to the extent that their severely limited resources, and their unofficial status, allow.

Stakeholder Consultation

- Civil Society welcomes the recognition by APEC Ministers, and by the Privacy Subgroup, of the importance of consultation with Civil Society, but remains concerned about the imbalance of membership of the Data Privacy

Subgroup, with no independent consumer voice to balance those of business interests. The applications for guest status on the Data Privacy Subgroup by Privacy International and the Electronic Privacy Information Centre will be considered again by APEC's Electronic Commerce Study Group (ECSG) at its August 2008 meeting in Lima.

- Civil society also calls on all member economies to implement the commitment in the Pathfinder to consultation with the full range of stakeholders in their own jurisdiction.
- Civil society supports continued consultation with regional privacy agencies (through the Asia Pacific Privacy Agencies forum) and with the OECD, but also with the Council of Europe and with European Data Protection agencies, since the APEC framework will eventually need to be reconciled with the 'adequacy' provisions of the EU Data Protection Directive.

**Nigel Waters, nigelwaters@iprimus.com.au
Privacy International www.privacyinternational.org**