Cross-border data flows:
Who benefits from abandoning borders?

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Graham Greenleaf & Nigel Waters
Let’s send your details to Russia

+ UPP 11 now applies to agencies as well as companies
Ø No longer any border controls on data transfers, only ‘accountability’
  – Never a breach merely because of destination of transfer.
  – Consent to transfer not required before transfer occurs.
  – Not even possible to forbid transfer of your data to anywhere overseas, once it has been collected.
  – It’s always OK to transfer your data to Russia
    • Or to anywhere else where sending personal data is dangerous to you
    • Subject to compliance with Use & Disclosure principles - including secondary use
Ø Transferors remain liable for UPP breaches (‘accountability’)
  – BUT only if they are foolish enough not to fit under any of 4 exemptions (so ‘accountability’ will probably never happen)
• ‘Accountability’ is inadequate protection in any event
  Ø Requires individual to be aware of, and to prove, breach of UPPs in a foreign country before any liability to arise in transferor

*Bottom line: Better to make transfer a breach in itself (ie ‘border controls), unless an justifiable exemption from liability applies*
How to avoid ‘accountability’ for Russian transfers

*How justifiable are the ALRC’s proposed exemptions from liability?*

1. Exempt from liability if on a Government-published Whitelist.
   - Inadequate guarantees on objectivity of Whitelist
   - OPC to have no role in development of Whitelist
   - Not even a legislative instrument - No Parliamentary oversight
   - Result is that whole thing is political, and privacy will lose

2. Exempt from liability if you transfer to a country you ‘reasonably believe’ to have ‘protections substantially similar to the model UPPs’.
   - ‘Reasonable belief’ is easily manipulated: Just hire a pliable consultant to inform your belief. Black can become White.
   - **Objective test needed**: are the protections in fact substantially similar?
   - Ambiguous?: ‘Effectively upholds privacy protections’ implies remedies, not only principles, but ‘substantially similar *to these principles*’ undermines that. Should say ‘to this Act’ to remove doubt.
More exemptions from liability

3 Exemption if authorised or required by law (UPP 11(1)(c)).
- Preferable if only where required by law

4 Exemption if notice given of ‘no liability for transfer’ (UPP 11(1)((b))
- Only applies after express advice that transferor will no longer be liable (b).
  + Notice of ‘no liability’ may serve to prevent some unwise consents
- But consent is likely to be illusory - ALRC failed to deal with bundled consent, which can include consent to overseas transfers.
- ALRC does not require this notification to state the proposed destination
  • Informing individuals of overseas transfers - but it is inadequate
    + Privacy Policy has to say whether PI may be transferred outside Australia, and to list which countries it will go to (Good – helpful perhaps with SWIFT).
    Ø BUT the UPP 11(1)((b)) notice given to individuals, where this would be far more use, is not required to state this.
- Result is very poor: a Privacy Policy need not distinguish between different PI collected, but a Notice should relate to specific PI collected.
Ø Borders abandoned

Border posts abandoned, but with no countervailing benefits to consumers/citizens

Accountability is no substitute unless it applies in all cases except transfers required by law or with much stronger requirements for fully informed, and non-bundled consent than are currently proposed.
CoE Conv 108 standards

• What standard does CoE Convention 108 require?
  – Consultative Committee may advise Council of Ministers (A 19, 20) whether non-European countries meet Conv 108 requirements (uncertain as yet)
  – Principles are similar to those of OECD Guidelines
  – Enforcement and mutual assistance requirements are modest

• Additional Protocol (ETS No 181) adds complications
  – 20/40 parties to Conv. 108 have acceded; 14 more have signed
  – Requires legislation and an independent authority (Conv 108 does not)
  – Requires data export limitations (Conv 108 does not)

• Which non-European countries could meet CoE accession requirements?
  – Arguable that Australia and NZ could accede to both Convention and Additional Protocol
  – Arguable that South Korea, Japan and Taiwan could accede to Convention
  – Potentially, Canada, some Latin American, and some Middle East countries

Bottom Line: Considerable scope for non-European accessions
Potential for CoE Conv 108 adoption in Asia-Pacific

• Potential advantages
  – Not inconsistent with APEC obligations
  – Joining a Convention is voluntary, not an external imposition
  – Would result in free flow of PI to and from signatory non-EU countries (A 12(2) requires)
  – Would result in free flow of PI to and from EU countries, unless they specifically derogate against exports to a country (A 12(3)(b))
  – Would encourage other Asia-Pacific countries to develop their laws and enforcement to CoE standard, to gain the benefits of accession

• Potential disadvantages
  – Civil Society view may be that Conv. 108 standards are too low
  – Might it require exports to countries whose laws are not strong enough?
  – No mechanism to require acceding countries to adhere to standards

Bottom Line: Deserves considerable further study by all Asia-Pacific countries with data protection laws; May be a path to a global agreement, avoiding some problems of EU ‘adequacy’; But without the Additional Protocol, it may set too low a standard