

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

Lima, Peru

18 February 2008

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

Objectives and role for a CBPR approach

- The objective of the APEC Framework is to ensure *effective and enforceable* privacy protection to facilitate cross border data transfers.
- Civil society remain unclear about the value of the Cross Border Privacy Rules (CBPR) approach in meeting this objective, given that it has been accepted that any overall scheme must meet the standards required by domestic regulation.
- This means that any CBPR scheme, which may include a trustmark element, must be able to guarantee enforceable remedies for breaches of the APEC principles in every participating economy, and this in turn will require legislative support (not necessarily a privacy law – could be in general consumer protection law).
- It is still not clear how CBPR mechanisms will assist businesses seeking to transfer personal data to or from jurisdictions which have minimum binding requirements. Greater clarity about what CBPR would look like, with examples, is urgently required.

Emphasis within the Pathfinder

- Given these reservations, civil society believe there is too great an emphasis in the Pathfinder on the CBPR approach, which is *only one* mechanism for implementation of the APEC Framework.
- Four of the Pathfinder projects (Nos 5,6, 7 & 8) are or can be independent of CBPR and support *all* implementation mechanisms. NGOs would like to see more emphasis within the Pathfinder on these projects.
- Civil society would also like to see the APEC Data Privacy Subgroup continue to explore and promote other ways of implementing the APEC Framework, with a preference for strong comprehensive information privacy laws as the simplest and least cost route both for consumers and for business.

Alternative models and legislative standards

- The APEC principles provide only a common minimum ‘floor’. Many economies will choose to legislate a higher or more specific standards and civil society will support this.
- The choice is not just between the APEC principles and European models of regulation. Existing Asia-Pacific laws, such as those in Canada, Japan, Korea, Australia, New Zealand and Hong Kong also offer models which can operate within the APEC Framework whilst also potentially satisfy European standards – as Canada’s private sector law already does.
- There is more difference in interpretations of the same principles by different regulators than there is between the different sets of principles (e.g. APEC and EU). This will be a challenge for the future, as cross-border enforcement co-operation will expose differences in interpretation.
- The CBPR approach, which may include a role for trustmarks, may complement other mechanisms and may provide some privacy protection for individuals in those economies in early stages of developing a regulatory response.
- Civil society is prepared to participate constructively in the development of the CBPR approach, provided it is not used as an excuse for rejecting alternative approaches to implementation such as legislation.
- Early attention needs to be given to the mechanisms and criteria for ‘accreditation’ of CBPRs and trustmarks, to demonstrate how they would comply with the requirements of those economies which have binding privacy regulation.

Stakeholder Consultation

- Civil society supports continued consultation with the privacy agencies (through the Asia Pacific Privacy Agencies forum) and with the OECD, but also 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.
- Civil society remains concerned about the imbalance of membership of the Data Privacy Subgroup, with no independent consumer voice to balance those of business interests.
- 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.

An alternative?

- Businesses may also wish to consider an easier solution than developing and implementing a complex CPBR approach – that is to adopt the highest common standards from all jurisdictions with binding privacy law, and then join with civil society in lobbying for all economies to legislate to this common standard. This would ensure that no business would suffer competitive disadvantage, whilst maximizing consistency and simplicity, in the interests of consumers and businesses alike.

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