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## **APF Policy Statement**

### **International Data Privacy Standards: A Global Approach**

Version of 3 August 2013

The Australian Privacy Foundation (APF) is the country's leading privacy advocacy organisation. A brief backgrounder is attached.

This document declares APF's Policy in relation to international data privacy instruments.

#### **1. Evolving international standards and Australia**

- 1.1 International data privacy standards continue to evolve. The OECD privacy Guidelines (1980) and the first version of Council of Europe Convention 108 (1981) set modest but reasonable standards for the 1980s. This basic, but outdated, 'first generation' standard has been applied even quite recently, e.g. in the APEC Privacy Framework (2005).
- 1.2 The EU data protection Directive (1995), and the CoE Convention 108 Additional Protocol (2001) (which brought its standards to approximate parity with the EU Directive), set a new and higher standard appropriate for a pre-Internet 1990s. These 'second generation' higher standards have been adopted, at least to some extent, in the legislation of nearly 50 countries outside Europe (Greenleaf, 2011).
- 1.3 Revisions underway in 2013 of the EU Directive (in the form of a Regulation) and the Council of Europe Convention 108 and Additional Protocol (called 'modernisation') are likely to contribute to the evolution of a third and higher international data privacy standard. The 2013 revision of the OECD's Guidelines, on the other hand, has failed to deliver any higher standard.
- 1.4 Australia, like all other countries, has a strong interest in the development of these global standards as a necessary element in the protection of its citizens.
- 1.5 **APF supports** the continuing evolution of higher standards of data privacy in international agreements, commensurate with the greater threats to privacy posed by new business and government practices, and technological developments enabling them.
- 1.6 Data privacy standards are complemented by international standards to limit and control information surveillance (dataveillance). **APF supports** the International Principles on the Application of Human Rights to Communications Surveillance (2013) developed by a coalition of Civil Society organisations. However, APF considers that these Principles are an interim measure developed under circumstances of urgent need, and **APF supports** and wishes to participate in their further development.
- 1.7 The purpose of this document is to summarise APF's position on each of the main international instruments concerning data privacy, stating which aspects of and uses of these instruments that it supports and opposes.

#### **2. OECD privacy Guidelines (1980, revised 2013)**

- 2.1 Australia is a member of the OECD and adopted the OECD privacy Guidelines in 1984.

- 2.2 APF and its Board members have been involved in the OECD WPISP expert group on reform of the Guidelines. Revised Guidelines and a Supplementary Explanatory Memorandum were adopted in July 2013.
  - 2.3 The OECD's 2013 decision to leave the OECD's 'Basic Principles of National Application' unchanged is a missed opportunity to respond to the developments of the last 35 years. The only significant positive addition is a new Part on 'Implementing Accountability,' which introduces additional obligations on data controllers, including breach notification requirements.
  - 2.4 Negative changes have been made to other Parts of the Guidelines concerning cross border data transfer controls and interoperability of privacy regimes. They are harmful in that they potentially restrict the ability of countries to limit exports of personal information to jurisdictions with weaker privacy standards.
  - 2.5 Consequently, **APF opposes** any continuing recognition of the (revised) OECD Guidelines as an international data privacy standard suitable for current and future social and technical environments, with a particular deficiency being the weakened cross-border data transfer provisions.
  - 2.6 APF notes, however, that Part 2 'Basic principles of national application' of both the original and revised Guidelines continue to play a useful role as a minimum set of data privacy principles which it is valuable for countries with no data privacy laws to enact (if it is not possible for them to enact stronger provisions) rather than to continue to have no data privacy law at all.
- 3. Council of Europe Convention 108 (1981), plus Additional Protocol (2001)**
- 3.1 Australia is able to accede to Convention 108 and the Additional Protocol.
  - 3.2 APF is accredited as an Observer to the Convention 108 Consultative Committee.
  - 3.3 **APF supports** the general approach of the current proposals for 'modernisation' of Convention 108 but opposes those aspects of the current proposals that weaken the limitations on data exports (Greenleaf, 2013)
  - 3.4 **APF supports** the 'globalisation' of Convention 108 into a world-wide data protection convention, on the basis of high standards for accession to the Convention being maintained (Greenleaf, 2013a), and will continue to work toward such standards being maintained.
  - 3.5 **APF supports** and advocates that Australia should apply to accede to Convention 108 and the Additional Protocol.
- 4. European Union data protection Directive (1995) and proposed Regulation**
- 4.1 Because of the widespread international adoption of European data protection standards, it is of considerable interest and importance to all countries that the EU continues to evolve its data protection standards to meet changing conditions.
  - 4.2 Australian data protection law is not considered 'adequate' by the EU, for good reasons, and this continues to provide an impetus to Australian legislators and regulators to improve our standards. **APF supports** the EU's maintenance of high standards concerning data export limitations.
  - 4.3 **APF supports** the development of an EU Regulation to substantially replace the EU Directive of 1995, so as to achieve both a higher standard of data privacy protection and greater consistency in application across Europe, without lowering the level of data privacy protection in those European countries that have comparatively strict data privacy protection laws. **APF supports** the current policy of the European Commission that the Regulation should not in any respect weaken the protections provided by the 1995 Directive.
  - 4.4 **APF opposes** the attempts by some EU Member States to reduce the protections in the proposed Regulation by making them 'harm-dependant' or 'damage-dependant' rather than standards operating per se.
- 5. APEC Privacy Framework (2005) and Cross-Border Privacy Rules (CBPR) (2011)**
- 5.1 Australia is member of APEC, and has been actively involved in all aspects of APEC's privacy developments.

- 5.2 APF Board members have been critical commentators on, and participants in, APEC privacy developments since they commenced in 2003.
- 5.3 Most but not all of the basic 'first generation' standards of OECD (1980) and CoE 108 (1981) were adopted by the APEC Privacy Framework (2005). **APF opposes** the acceptance of the APEC Privacy Framework (2005) as a worthwhile international standard for data protection suitable for current and future social and technical environments. The APEC Privacy Framework is at best 'OECD Lite', embodying standards nearly 25 years old when it was framed, but in a key respect is a lower standard than the OECD Guidelines, because it does not contain the same acceptance of legitimate data export limitations, replacing it with a very low and unacceptable 'due diligence' approach. (Waters, 2009 and Greenleaf, 2009).
- 5.4 Consistent with our approach to the OECD Guidelines, and because most APEC members are not members of the OECD and party to those Guidelines, APF notes that the APEC Privacy Framework, insofar as it is consistent with the OECD's 'Basic principles of national application', can play a useful role as a minimum set of data privacy principles which it is valuable for countries with no data privacy laws to enact (if it is not possible for them to enact stronger provisions) rather than to continue to have no data privacy law at all.
- 5.5 APF notes that two positive aspects of the APEC privacy initiative are that it has prompted interest in data privacy in many member economies (some of which have since enacted data privacy laws) and it has established a Cross Border Privacy Enforcement Cooperation Agreement (CPEA) which may lead to useful cooperation independently of the CBPR system.
- 5.6 **APF opposes** the Cross Border Privacy Rules (CBPR) system as a way of implementing the APEC Privacy Framework because it has irretrievably lost credibility. Further, **APF opposes** the recognition by APEC of TRUSTe as an Accountability Agent for the USA as part of the CBPR system. TRUSTe clearly fails to satisfy many of the recognition criteria and the failure of the approval process fatally damages the credibility of the CBPR system. (Sources: Waters, 2013; Waters, Connolly and Greenleaf, 2013).
- 5.7 **APF opposes** any use of the APEC CBPR system as the basis for acceptance of cross-border data transfers, and in particular:
- (1) **APF opposes** any acceptance of the APEC CBPR as a standard having overall equivalence with European or other international data protection standards.
  - (2) **APF opposes** Australia playing any further role in the APEC CBPR system,
  - (3) **APF opposes** the recognition of APEC CBPR as a basis for international transfers under the new APP 8 in the Australian Privacy Act 1988.

## 6. United Nations instruments – ICCPR (1966) and Guidelines (1990)

- 6.1 Australia is a party to the International Covenant on Civil and Political Rights (1966), the only binding global convention dealing with privacy rights (in Article 17), and is also a party to the ICCPR's Optional Protocol which gives individual Australians the right to make 'communications' (complaints) to the UN Human Rights Council if Australia does not adhere to its Article 17 obligations.
- 6.2 **APF supports** Australia's adherence to the ICCPR and the rights of Australians under the Optional Protocol.
- 6.3 The UN General Assembly adopted by resolution Guidelines for the Regulation of Computerized Personal Data Files (1990, resolution 45/95), for implementation by member States. The UN Guidelines set out 'minimum guarantees' which are consistent with, and in some respects stronger than, the OECD Guidelines and the original Council of Europe Convention 108. APF notes that the UN Guidelines can play a useful role as a minimum set of data privacy principles which it is valuable for countries with no data privacy laws to enact (if it is not possible for them to enact stronger provisions) rather than to continue to have no data privacy law at all.
- 6.4 **APF supports** any UN convention being developed not from the current UN Guidelines, but rather from Council of Europe Convention 108 and its Additional Protocol.

## 7. United States law and policy

- 7.1 Increasingly large quantities of the personal information of Australians are now ending up in the hands of US corporations and the US government. The lack of sufficiently strong privacy

standards in the USA means that the privacy of Australians is constantly and increasingly at risk from US practices.

- 7.2 The USA was an early leader in the development of fair information principles in the 1960s and early 1970s. It has subsequently enacted valuable protections in such areas as children's privacy rights and medical records. However, the USA falls far short of the standards of the OECD privacy Guidelines (1981), especially in its regulation of its private sector. The 'Consumer Privacy Bill of Rights' proposals by the Obama Administration (2012) would not meet the standard of the OECD Guidelines even if they were implemented (which is in any case highly unlikely to occur). There are constitutional and market power impediments to the USA ever meeting what the rest of world considers to be acceptable international privacy standards (Greenleaf and Waters, 2012). The strength of any future US protections for privacy cannot be assumed until they are enacted and implemented.
- 7.3 In 2012-13 the USA has been strenuously promoting in numerous forums that its privacy standards are the basis for 'interoperability' with those of other regions and countries. **APF opposes** any international acceptance of US privacy standards as being equivalent or otherwise comparable or 'interoperable' with the standards required by the EU, the Council or Europe, the OECD or any other international privacy standard worthy of recognition, until its legislation demonstrably meets such standards.

## References

APEC CBPR documents, at <http://www.apec.org/Groups/Committee-on-Trade-and-Investment/Electronic-Commerce-Steering-Group.aspx>

Civil Society Organisation International Principles on the Application of Human Rights to Communications Surveillance (2013), at <https://en.necessaryandproportionate.org/text>

Greenleaf and Waters, 2012 'Obama's Privacy Framework: An Offer to be Left on the Table?' Privacy Laws & Business International Report, No. 119, pp. 6-9, October 2012, at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2187234](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2187234)

Greenleaf, 2013 "'Modernising' Data Protection Convention 108: A Safe Basis for a Global Privacy Treaty?" (2013) Computer Law & Security Review, Vol 29, Issue 4, at <http://ssrn.com/abstract=2262296>

Greenleaf, 2013a 'Uruguay Starts Convention 108's Global Journey with Accession: Toward a Global Privacy Treaty?' Privacy Laws & Business International Report, Issue 122, 20-23, April 2013, at <http://ssrn.com/abstract=2280121>

Greenleaf, 2009 'Five Years of the Apec Privacy Framework: Failure or Promise?' Computer Law & Security Report, Vol. 25, pp. 28-43, 2009, at <http://ssrn.com/abstract=2022907>

Waters, 2013 'The APEC Cross Border Privacy Rules system: A Civil Society perspective', at <https://www.privacyinternational.org/blasts/the-apec-cross-border-privacy-rules-system-a-civil-society-perspective>

Waters, 2009 'The APEC Asia-Pacific Privacy Initiative – a new route to effective data protection or a trojan horse for self-regulation?', (2009) 6:1 SCRIPTed 75, at <http://www.law.ed.ac.uk/ahrc/scripted/vol6-1/waters.asp>

Waters, Connolly and Greenleaf, 2013 'Application by TRUSTe for recognition as an Accountability Agent under the APEC Cross Border Privacy Rules System: Civil Society comments on the Joint Oversight Panel 'Addendum', April 2013 (unpublished, copies available on request)

## Declaration

No support has been received from any outside organisation that had, or in the Board's view could reasonably be seen to have had, any influence on the development of these policies.

## Australian Privacy Foundation

### Background Information

The Australian Privacy Foundation (APF) is the primary national association dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues that pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions.

The APF's primary activity is analysis of the privacy impact of systems and proposals for new systems. It makes frequent submissions to parliamentary committees and government agencies. It publishes information on privacy laws and privacy issues. It provides continual background briefings to the media on privacy-related matters.

Where possible, the APF cooperates with and supports privacy oversight agencies, but it is entirely independent of the agencies that administer privacy legislation, and regrettably often finds it necessary to be critical of their performance.

When necessary, the APF conducts campaigns for or against specific proposals. It works with civil liberties councils, consumer organisations, professional associations and other community groups as appropriate to the circumstances. The Privacy Foundation is also an active participant in Privacy International, the world-wide privacy protection network.

The APF is open to membership by individuals and organisations who support the APF's Objects. Funding that is provided by members and donors is used to run the Foundation and to support its activities including research, campaigns and awards events.

The APF does not claim any right to formally represent the public as a whole, nor to formally represent any particular population segment, and it accordingly makes no public declarations about its membership-base. The APF's contributions to policy are based on the expertise of the members of its Board, SubCommittees and Reference Groups, and its impact reflects the quality of the evidence, analysis and arguments that its contributions contain.

The APF's Board, SubCommittees and Reference Groups comprise professionals who bring to their work deep experience in privacy, information technology and the law.

The Board is supported by Patrons The Hon Michael Kirby and Elizabeth Evatt, and an Advisory Panel of eminent citizens, including former judges, former Ministers of the Crown, and a former Prime Minister.

The following pages provide access to information about the APF:

- Policies <http://www.privacy.org.au/Papers/>
- Resources <http://www.privacy.org.au/Resources/>
- Media <http://www.privacy.org.au/Media/>
- Current Board Members <http://www.privacy.org.au/About/Contacts.html>
- Patron and Advisory Panel <http://www.privacy.org.au/About/AdvisoryPanel.html>

The following pages provide outlines of several campaigns the APF has conducted:

- The Australia Card (1985-87) <http://www.privacy.org.au/About/Formation.html>
- Credit Reporting (1988-90) <http://www.privacy.org.au/Campaigns/CreditRpting/>
- The Access Card (2006-07) [http://www.privacy.org.au/Campaigns/ID\\_cards/HSAC.html](http://www.privacy.org.au/Campaigns/ID_cards/HSAC.html)
- The Media (2007-) <http://www.privacy.org.au/Campaigns/Media/>