

Asia-Pacific developments in information privacy law and its interpretation

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Outline

- **What are the international influences?**
- **Privacy Commissioners acting collectively**
 - **Global: The Montreux Declaration 2005**
 - **EU: The Article 29 Committee**
 - **Asia-Pacific: APPA Forum**
- **The UN's roles in global privacy protection**
- **The APEC Privacy Framework**
- **Influence of the EU privacy Directive**
- **Some ways ahead for privacy principles in the Asia-Pacific**

Montreaux Declaration 2005

- **Privacy Commissioners acting globally**
- **The world's Privacy Commissioners set out a log of claims:**
 - **UN to prepare a binding legal privacy treaty**
 - **Governments to adopt global privacy principles and extend them to their international relations as well**
 - **Council of Europe to invite non-European States to join Council of Europe privacy Convention 1981**
 - **WSIS 2005 final declaration to commit to a legal framework to protect privacy**

Montreaux Declaration 2005

... and yet more demands:

- **International and supranational organisations to commit to data protection rules**
- **International NGOs to draw up data protection standards**
- **Manufacturers to develop privacy-enhancing technologies (PETs)**
- **The global Commissioners have never been this organised or assertive**
 - **Proposed regular assessments of progress**
 - **Can they sustain this?**

Montreaux Declaration 2005

- **Claim of ‘universal ... data protection principles’ which should be implemented**
- **9 standard vague headings for principles**
- **+ 2 implementation principles**
 - **‘legal sanctions’ required for enforcement, under an independent supervisory body**
 - **personal data exports require adequate protections**
 - **Asia-Pacific Privacy Commissioners have supported these last 2 principles, but they go beyond what APEC *governments* have accepted**

European Commissioners - effective collective action

- **30 years of collaboration**
- **Data Protection Working Party since 1997**
 - **Est. under A29 of the EU privacy Directive**
 - **Consists of all EU privacy Commissioners**
 - **Advises EU bodies on ‘adequacy’ of other laws**
 - **118 collective Opinions, Annual Reports and Working documents since 1997 (12 p/a)**
 - **Very visible to the public via its website**
 - **Aims include ‘to make recommendations to the public at large’ on matters affecting the EU**
 - **One of the world’s most authoritative and respected voices on privacy issues**

Asia-Pacific Commissioners - What collective effectiveness?

- **Asia-Pacific Privacy Authorities Forum (APPA) Has met for 14 years**
- **Privacy bodies from Australia, NZ, HK and Korea (but not Canada)**
- **Objectives (2005) no more concrete than to exchange information and promote best practice**
- **What APPA has not done:**
 - **Any collective opinions on regional/global issues**
 - **Collective input into APEC Privacy Framework development**
 - **Obtained any public profile; eg no website**

Asia-Pacific Commissioners

What role?

- **It is more difficult in the Asia-Pacific**
 - **No formal privacy agreements, no formal roles**
 - **Limited consensus across the region that privacy should even be protected by law**
 - **Selective reluctance to interfere in affairs of other countries, and greater cultural/political variation**
- **A collective role for Commissioner was not even on the APEC discussion agenda**
- **They have not yet invented a public role for themselves**
- **Since 2005 APPA is more organised -**
 - **will this result in a more substantive role?**
 - **Or will this region always be far behind?**

UN roles: A17 ICCPR

- **What progress has the UN made on privacy?**
 - **Is a new UN treaty likely?**
- **A12 of Universal Declaration of Human Rights is modern starting point**
- **A17 ICCPR 1966 prohibits arbitrary interference with privacy and promises legal protection**
 - **Considerable European jurisprudence on equivalent A8 ECHR**
 - **Little A17 ICCPR enforcement or jurisprudence ..**

UN roles: 1st Optional Protocol & Human Rights Committee

- **A17 can only be enforced against parties to 1st Optional Protocol to ICCPR**
 - Only Australia, Canada, NZ and S.Korea are parties in Asia-Pacific, though more than 100 worldwide
- **Few A17 cases before Human Rights Committee**
 - *Toonen v Australia*: laws criminalising homosexuality
 - *Coeriel and Aurik v Netherlands*: right to use Hindu names
 - *Hope and Bessert v France*: privacy of ancestral burial ground
- **Privacy jurisprudence of UN therefore slight and peripheral to most information privacy concerns**
- **Will the new UN human rights body make any difference?**

UN roles: Privacy guidelines

- **Guidelines Concerning Computerized Data Files**
 - adopted by UN General Assembly 1990
 - Standard headings for data protection principles
 - Have had **no known effect**
- **UN has *not* made privacy principles enforceable within UN organisations**
 - Contrast EU, with internal Commissioner

UN roles: World Summit on the Information Society (WSIS)

- **2 meetings (Geneva 2003, Tunis 2005) constituted WSIS**
- **The final WSIS documents contained only vague endorsements of privacy protection (and not necessarily legislation)**
- **Main achievement was not to have privacy completely subordinated to security**
- **Seems to be little likelihood UN will be the source of any future international privacy standards**

APEC Privacy Framework

- **Why is APEC important?**
 - **‘Asia-Pacific Economic Cooperation’ (APEC) - 21 ‘economies’ from Chile to Singapore**
 - **4 continents; 1/3 world population; 1/2 world GDP; 1/2 world trade**
 - **Too big? - Will it be overtaken by an Asian body?**
- **No ‘APEC treaties’, no constitution**
 - **Everything works on consensus and cooperation**
 - **Few if any legal requirements or constraints**
 - **‘Agreements’ in APEC are very different from the binding treaties or Directives of Europe**

The possibilities of the APEC Privacy Framework

- **Asia-Pacific has more privacy laws than any other region outside Europe**
- **A regional agreement was logical:**
 - **To create a minimum privacy standard**
 - **To help ensure free flow of personal data**
- **Is it either of these possibilities?**
 - **The most significant global privacy initiative since the EU Directive: a spur for new laws?**
 - **A divisive low-standard ‘counter bloc’ to the EU?**

History of the APEC Privacy Framework

- **Few APEC privacy developments pre-2003**
- **Hostility of Australian and US governments to EU privacy Directive**
- **Australian proposal to base APEC privacy on OECD Guidelines of 1981 (Feb 03)**
- **Draft IPPs by APEC ECSG privacy sub-group; no consultation until 9th draft of IPPs**
 - **one NGO submission, no changes made**
- **No consultation on implementation (Pt IV)**
- **Some business organisations in national delegations**
- **APEC Ministers announce Framework (Nov 04)**
 - **But data export elements were missing until Sept 05**

APEC's 9 Privacy Principles

- I Preventing Harm**
- II Notice**
- III Collection limitation**
- IV Uses of personal information**
- V Choice**
- VI Integrity of Personal Information**
- VII Security Safeguards**
- VIII Access and Correction**
- IX Accountability** (includes Due diligence in transfers)

APEC's IPPs = 'OECD Lite'

5 types of criticisms

(1) Weaknesses inherent in OECD IPPs

- **OECD now 20 years old, even Kirby is critical**
- **Allows secondary uses for 'compatible or related purposes'**
- **Weak collection limitations; No deletion IPPs**

(2) Further weakening of OECD IPPs

- **OECD 'Purpose specification' and 'Openness' IPPs missing - both are valuable**
- **Broader allowance of exceptions**
- **Otherwise substantially adopts OECD**
- **Slightly stronger than OECD on notice**

APEC's IPPs = 'OECD Lite'

5 types of criticisms

(3) Potentially retrograde new IPPs

- **'Preventing harm' (I) - sentiment is OK, but a strange IPP; really a basis for rationing remedies or lowering burdens; could justify piecemeal coverage**
- **'Choice' (V) - redundant in use and disclosure IPPs; does not seem to justify contracting out of other IPPs**

APEC's IPPs = 'OECD Lite'

5 types of criticisms

(4) Regional experience ignored

- **No borrowings from the often stronger laws in the region (eg Korea, HK, NZ, Australia, Canada) - 17 years ignored**
- **Some stronger IPPs are 'standards'**

(5) EU compatibility ignored

- **No borrowings of new EU IPPs (eg automated processing)**
- **Is this an attempt to define 'adequacy' as 'OECD Lite'? - or 'just don't care'?**

10 'missing' IPPs

- Found in at least 2 regional laws -

- *Openness*
- *Collection from the individual*
- *Data retention*
- *Third party notice of correction*
- *Data export limitations*
- *Anonymity option*
- *Identifier limitations*
- *Automated decisions*
- *Sensitive information*
- *Public register principles*

Implementation

- anything goes!

- **Framework Part IV(A): ‘Domestic Implementation’**
 - **non-prescriptive in the extreme**
- **Any form of regulation is OK**
 - **Legislation not required or even recommended**
 - **‘an appropriate array of remedies’ advocated**
 - **‘commensurate with the extent of the actual or potential harm’**
 - **Choice of remedies supported**
- **No central enforcement body required**
 - **A central access point for information advocated**
 - **Education and civil society input advocated**

Implementation - anything goes!

- **Accountability**
 - **‘Individual Action Plans’ - periodic national reports to APEC on progress (starting 2006)**
 - **No self-assessment or collective assessment (contra v1, 2003)**
- **Bottom line**
 - **Part IV exhorts APEC members to implement the Framework without requiring or proposing any particular means of doing so, or any means of assessing whether they have done so**
 - **considerably weaker than any other international privacy instrument**

Data exports (Pt V(B) - Final (uncontentious) result

- **Final version (Sept 05) only encourages recognition of binding corporate rules**
 - Says nothing about export restrictions
- **APEC Framework does NOT do any of:**
 - Forbidding exports to non-APEC compliant countries (contrast EU Directive)
 - Allowing restrictions on exports to such countries (contrast OECD and CoE)
 - Requiring exports be allowed to APEC-compliant countries (contrast EU, OECD, and CoE)
- **The weakest privacy agreement yet seen**
 - Will have little direct impact on data exports between EU and Asia-Pacific, in either direction

Implementation of the Framework

- **US Commerce Dept project with 2 Australian consultants (Ford, Crompton)**
- **3 Implementation Seminars 2005-06 (Hong Kong, Seoul, Hanoi)**
 - **most APEC economies have sent delegates, including many with no privacy laws: valuable**
 - **Strong emphasis so far on finding ways to allow data exports**
- **Economies encouraged to file IAPs (Individual Action Plans) during 2006**
- **No concrete outcomes yet, but early days**

APEC IPPs -

Does ‘Lite’ matter?

- **Does a low APEC baseline matter?**
 - **No FORMAL data export adverse consequences: no requirement to export to countries with low standards of privacy protections**
 - **Danger of a counter-bloc to the EU stemming from an ‘anti-export-restriction’ Pt IV(B) has disappeared**
 - **Merely encourages countries with no privacy laws to adopt some: most APEC countries**
- **APEC IPPs are a ‘floor not a ceiling’**
 - **Nothing explicit in Framework to deter national adoption of stronger IPPs**
 - **But there is a bias in implementation favouring free flow of information**

Continuing influence of the EU privacy Directive

- **EU's 'mandatory' data export restrictions have taken longer to bite than expected**
- **Few EU determinations of (in-)adequacy yet made**
 - **Australia, HK, NZ, Korea still to come**
- **But EU adequacy will not go away, nor should it**
- **Attraction of simplifying trade by obtaining a global adequacy assessment from EU will remain**
 - **will pull Asia-Pacific countries toward global standards**

Some ways ahead for Asia-Pacific privacy standards

1 Do better than APEC's lowest common denominator

- All Asia-Pacific countries can aspire to stronger protection
- Those wanting higher standards (eg NZ) need to actively participate in APEC implementation processes
- Learn from other regional countries' legislation

2 Harness civil society inputs

- Much expertise lies outside governments
- Asia-Pacific Privacy Charter Council ([APPC](#))
 - regional expert group (formed 2003), slow to start
- APEC did nothing much, APPA could do more

Some ways ahead for Asia-Pacific privacy standards

3 Create an Asia-Pacific privacy jurisprudence

- **Learn from the case-law experience of other jurisdictions**
 - **WorldLII's [Privacy Law Project](#) databases is a start**
 - includes decisions of Courts, Tribunals + Commissioners
 - Now including legislation, treaties + law reform reports
 - **Montreux Declaration suggests a permanent website**
- **[interpreting Privacy Principles \(iPP\) Project](#)**
 - **We have too little case law to understand privacy laws (NZ an exception?)**
 - **3 year project to research whether there is an Asia-Pacific privacy jurisprudence, and how to develop one (Greenleaf/ Roth/ Bygrave/ Waters); based at UNSW**
- **Most Commissioners need to publish more casenotes**
 - **Adopting a citation standard was a good start**
 - **Standards for *which* cases should be published are needed**

Some ways ahead for Asia-Pacific privacy standards

4 Join Council of Europe Convention (+ Protocol)?

- Option for Asia-Pacific (A-P) countries already with advanced privacy laws**
- CoE Convention allows this, but not yet used**
 - CoE Cybercrime Convention has had global adoption**
- Would encourage other A-P countries to develop their laws and enforcement to CoE standard**
- A standard higher than APEC, and improving**
 - Protocol requires laws & independent authority**
 - Also requires data export limitations - ‘adequacy’**
- Would guarantee free flow of personal information within signatory A-P countries, and between any of them and Europe (will ensure EU adequacy)**
- Sidesteps UN and APEC limitations: advances the development of a global privacy treaty**

Some ways ahead for Asia-Pacific privacy standards

5 Regional bodies can contribute

- there is no one way forward for Asia-Pacific development**
- APPA Forum, regional UNESCO (Seoul), APPCC, *iPP* Project, can hold forums to explore alternatives**
- Regional debate on both making the best of APEC and CoE alternatives is needed**
- Who is willing to make a contribution?**

References

- **Asia-Pacific Privacy Charter pages (includes key APEC documents and critiques)** <<http://www.bakercyberlawcentre.org/appcc/>>
- **1st Implementation Seminar (HK, June 05) papers** <http://www.pco.org.hk/english/infocentre/apec_ecsg1_2.html>
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