



**Australian
Privacy
Foundation**

<http://www.privacy.org.au>

Secretary@privacy.org.au

<http://www.privacy.org.au/About/Contacts.html>

APF Policy Statement

International Data Privacy Standards: A Global Approach

Revised Version of 17 September 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 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 it supports and opposes.
- 1.2 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 This basic, but outdated, 'first generation' standard has been applied even quite recently, e.g. in the APEC Privacy Framework (2005).
- 1.3 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).
- 1.4 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.
- 1.5 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.
- 1.6 **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.
- 1.7 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.

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 by the OECD 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, interoperability of privacy regimes and 'risk-based' assessment. They are harmful in restricting 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. **APF opposes** the OECD's invitation to non-Members of the OECD to adopt the Guidelines as the desirable standard of privacy protection, wherever a higher standard is possible.
- 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 to enact if they no data privacy law and it is not possible for them to enact stronger provisions, in preference to 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 privacy convention, on the basis of high standards for accession to the Convention being maintained (Greenleaf, 2013a), and will continue to work toward the maintenance of such standards.
- 3.5 **APF supports** the development by the Council of Europe of mechanisms by which individuals in a State which is a party to Convention 108 can make a complaint concerning non-adherence to the Convention by that State.
- 3.6 **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 privacy standards, it is of considerable interest and importance to all countries that the EU continue to evolve its data privacy standards to meet changing conditions.
- 4.2 Australian data privacy 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, and thus improve Australia's position in relation to trade with Europe. **APF supports** the EU's maintenance of high standards concerning data export limitations.
- 4.3 **APF supports** the development of an EU Regulation to replace substantially 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-dependent' or 'damage-dependent' 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 key respects is a lower standard than the OECD Guidelines, because it does not accept legitimate data export limitations, requiring instead an unacceptably weak 'due diligence' approach, and because it allows a 'harm-based' approach without protection against breaches *per se* (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 some 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 Cross-Border Privacy Rules (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's 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 Committee 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** the development of a global privacy treaty from Council of Europe Convention 108 and its Additional Protocol, rather than the development of a new UN convention (whether based the current UN Guidelines or otherwise). However, UN support for the ‘globalisation’ of Convention 108 would be valuable. **APF supports** the development of a mechanism by which the ICCPR Optional Protocol could be used to allow individual communications (complaints) concerning non-adherence to Council of Europe Convention 108 by State parties.

7. United States law, policy and practices

- 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. There is both an absence of privacy standards for some records and weak protections for other records. US practices and standards are therefore considered here because of their capacity to undermine other international standards.
- 7.2 The USA was an early leader in the development of fair information principles (FIPs) in the 1960s and early 1970s (Gellman 2013). It has subsequently enacted protections that are valuable in part in such areas as children’s privacy rights, medical records and breach notification. However, the USA falls far short of the standards of the OECD privacy Guidelines (1980), especially in its regulation of its private sector. The ‘Consumer Privacy Bill of Rights’ proposals (2012), even if implemented (which is highly unlikely), would not meet the standard of the OECD Guidelines. There are political, constitutional and market power impediments to the USA’s ever meeting what the rest of world considers to be international privacy standards (Greenleaf and Waters, 2012; Gellman 2013). 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 and enforcement authorities (with limited privacy jurisdiction) 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.

8 ISO and other technical standards

- 8.1 All countries are affected by companies and government agencies adopting technical standards concerning privacy and security. Such technical standards may assist data controllers and processors to more consistently provide privacy protection, but this depends on the extent to which they implement high or low international privacy standards, and the extent to which they meet local legislative requirements. The key standard, ISO/IEC 29100:2011 ‘Information technology -- Security techniques -- Privacy framework’ includes principles which are higher than those in the OECD Guidelines, including some but not all aspects of the ‘second generation’ principles, but are silent on the question of international transfers. There has been insufficient analysis of technical standards affecting privacy and security by civil society privacy organisations and experts, reflecting in part their limited availability and cost, reflecting the lack of opportunities for civil society input.
- 8.2 **APF supports** technical standards concerning privacy and security being used to assist industry and government compliance with legislative requirements, but calls for reform of standards setting processes to ensure greater input from civil society. It is not yet clear that such standards have improved compliance levels or delivered other benefits, or that they will do so. **APF opposes** technical standards being used as a substitute for legislative requirements.

9 ICDPPC Resolution (‘Madrid Declaration’) (2009)

- 9.1 The International Conference of Data Protection and Privacy Commissioners (ICDPPC) adopted a Resolution on International Standards of Privacy at its 2009 meeting, commonly called the ‘Madrid Declaration’. The Australian Privacy Commissioner is a member of the Conference.
- 9.2 **APF supports** the general approach of the Madrid Resolution, including its support for development of a binding international instrument concerning privacy.

9.3 **APF supports** the Resolution adopted by the ICDPPC in 2008 which supported the Council of Europe's invitation to States, whether or not members of the Council of Europe, to ratify Convention 108 and its Additional Protocol.

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>

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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

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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>

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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)

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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
- The Media (2007-) <http://www.privacy.org.au/Campaigns/Media/>