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Agenda Item: II

Report of Second Technical Seminar on International Implementation of the APEC Privacy Framework

Purpose: Information

Submitted by: Information Integrity Solutions



**Data Privacy Subgroup Meeting
Cairns, Australia
27 June 2007**

Report of Second Technical Seminar on International Implementation of the APEC Privacy Framework

Cairns, Australia

25-26 June 2007

Introduction

One of the main goals of the APEC Data Privacy Subgroup work agenda for 2007 is to develop options for Pathfinder projects to be pursued in 2008 that would begin to put in place arrangements for safer movement of personal information between APEC economies. The two Technical Seminars being held in 2007 were intended to contribute to the work of the Data Privacy Subgroup in developing Pathfinder projects and to help economies build capacity to participate effectively.

The Second Technical Seminar was held in Cairns, Australia on 25 and 26 June 2007. Some 17 economies were represented by some 100 delegates who attended.

Purpose of the Second Seminar

The second seminar was designed to build on the work of the January seminar and meetings. In particular, the second seminar was to build confidence in an accountable system for personal information moving between economies:

- (a) To begin scoping and developing cooperative cross-border arrangements for implementing a Cross-Border Privacy Rules (CBPR) system based on the preferred model identified in the First Technical Assistance Seminar; and
- (b) To provide input to decisions on APEC projects to undertake in 2008 within the proposed Pathfinder framework that would assist in implementing these cooperative arrangements.

The seminar built on the conclusions reached by the First Technical Seminar in January in Canberra and the subsequent Data Privacy Sub-Group meeting.

The focus of the first seminar had been the development and use of Cross-Border Privacy Rules by business. In particular, the first seminar had introduced the concept of four basic elements being required for a CBPR system: self-assessment; compliance review; recognition/acceptance; and dispute resolution/ enforcement. These elements were derived from the APEC Privacy Framework.

Structure of the Seminar

The seminar began by focusing on the development of Cooperative Arrangements for implementing Cross-Border Privacy Rules, including two sessions where experts discussed two Fact Scenarios to illustrate how a Choice of Approach Model might work.

Then on the second day the seminar focused on taking steps towards implementing CBPRs. This included a break out session where small groups discussed a number of possible projects that might be included in a Pathfinder framework for implementation in 2008, then summarising that thinking in a plenary session. In this way, the seminar sought to provide input to the work of the Data Privacy Sub-Group.

The key papers developed for the seminar were:

Seminar Background Paper,

APEC paper number 2007/SOM3/ECSG/SEM/002, and

Pathfinder Project Outlines: Possible Pathfinder Projects for implementing an APEC CBPR System

APEC paper number 2007/SOM3/ECSG/SEM/003

In addition, one of the background papers developed for the first seminar was again tabled to help ensure participants had a clear background briefing:

Cross-Border Privacy Rules Implementation: A Discussion Paper for the Seminar

APEC paper number 2007/SOM3/ECSG/SEM/005.

Intended Seminar Outcomes

The Discussion Paper for the first seminar suggested specific Success Criteria for any model developed by APEC, now being considered for inclusion in a Pathfinder project.

The first criteria come direct from the APEC Privacy Framework. In particular, drawing on paragraph 48 of the Framework, the following success criteria were formulated:

- Does the model facilitate responsible and accountable cross-border data transfer?
- Does the model facilitate effective privacy protections?
- Does the model avoid creating unnecessary barriers to information flows and unnecessary administrative and bureaucratic burdens?

Other success criteria included:

- Does the model ensure that privacy promises made at the local level are met as data is processed globally?
- Does the model provide credibility to the main stakeholders (ie. consumers and business)?

Importantly, where the seminar identified impediments in current legal frameworks to an otherwise preferred model, participants were asked to find ways of minimising such impediments and spell out clearly what might be needed to remove those that remain. Hence additional success criteria for each model were:

- Can the model be implemented within the current domestic legal frameworks of the participating APEC economies and within current international legal frameworks?
- If there are legal impediments, have these been minimised?
- Are any outstanding legal impediments clearly identified so that economies participating in a pilot or pathfinder can consider whether and how they might address them?

As noted in the Discussion Paper, it is important to note that the CBPR system being considered at this point is not seeking to improve domestic privacy protections within participating APEC economies.

Day 1 – Developing Cooperative Arrangements for Implementing Cross-Border Privacy Rules

Delegates were welcomed to the seminar by the Attorney-General of Australia, the Hon Philip Ruddock MP. He laid the background to discussion by drawing attention to the complexity of business services today – across companies and across economies.

He also noted the fear expressed every day by individuals that grew out of poor experiences that ranged from identity theft that exploited stolen personal information to concern about how companies use personal information. Hence the Australian focus on APEC developing a framework that allows safer movement of personal information between economies.

The Minister also remarked on the progress made by APEC on privacy since the previous seminar, based on developing a Choice of Approach model structured around a Four Elements structure. In this model trustmarks would have a significant role to play as well as regulators.

In particular, the Minister strongly endorsed the development of a series of projects within an APEC Pathfinder approach and urged economies to endorse the proposed Pathfinder framework formally. He noted that endorsement of the Pathfinder framework did not imply commitment to any of the 9 project options to be discussed during the seminar. Endorsement would simply mean agreeing that something should be done.

The seminar then moved onto an overview of the progress to date in developing an APEC Privacy Framework and the reason why this seminar is focused on cross-border data flows. This was provided by presentations from Colin Minihan, the Chair of the Data Privacy Sub-Group and Michael Donohue, from the OECD Secretariat and involved in the work of its Working Party on Information Security and Privacy.

Colin Minihan pointed to the key role that regulators play in making any cross border arrangements work and credible. The seminar had been designed with a strong focus on the extent to which they could contribute under current legal frameworks. He also noted the emergence of trustmarks as a key component for implementing the Four Elements structure of the Choice of Approach Model. However he also noted that to date, trustmarks for many participants existed more in theory than in practical detail. An important component of the seminar was to help us all understand them better.

Michael Donohue gave the participants an overview of the OECD work on privacy law enforcement over the last two years. This project started with the OECD survey of economies and the way they undertake privacy law enforcement. Copies of the recent *OECD Recommendation on Cross-Border Co-operation in the Enforcement of Laws Protecting Privacy* resulting from the project were made available to participants. He noted the strong correlation between the new recommendations and the APEC privacy framework. He emphasised the practical tools that the OECD was developing – a contacts list, a request for assistance form for use between privacy law enforcement authorities and a restricted access website.

After that in Session I, the seminar heard from a number of the public authorities who are privacy regulators in APEC economies on existing international arrangements for cross-border cooperation.

They also expressed strong interest in gaining a clear picture from the seminar of the path forward for their own economies and were keen to understand how, when, what the new cooperative arrangements would work. They also expressed a clear interest in contributing to cooperative framework.

Developing international arrangements included the expanding membership and activities of the Asia Pacific Privacy Authorities forum (APPA, www.privacy.gov.au/international/index.html). Cooperation was developing in many forms,

including sharing expertise, best practices and policy issues as well as enforcement. Recent work of APPA had included developing a common citation for and publication of Case Notes, the multi-economy Privacy Awareness Week in 2007 and the improved sharing of resources.

Much of the work being undertaken by APPA falls within the framework of “Building with BRICKS”:

- Best practice
- Resources
- Improvement continuously
- Knowledge sharing.

Cooperation between privacy regulators within Canada has given them good insight into the process of cooperation where there are similar but not identical laws. Canada is also developing a working relationship with the US Federal Trade Commission.

On the other hand, further development of cooperation will have its complexities and up to now this has included lack of perceived need and lack of certain powers. Indeed, Significantly, a number of speakers made the point that they faced restrictions in law on sharing information, even with other regulators.

There are also limitations on the extent to which the regulators can investigate or undertake law enforcement. Hong Kong, for example, can only investigate breach of the Hong Kong privacy law to the extent it has taken place in Hong Kong, although other law can give powers of cooperation in the case of criminal investigation. Hence the importance of using law reform opportunities to make suitable amendments that will facilitate better information sharing, cooperation in cross border investigation and law enforcement cross border development of privacy rules.

Subsequent sessions canvassed the practicalities of investigating complaints about privacy compromises and enforcing the results of investigations, including through the discussion of hypothetical Fact Scenarios. Sessions also informed participants of the progress being made by trustmarks, including the Asia Trustmark Alliance and a conference convened in Mexico, in developing Common Criteria for assessing trustmarks within the framework of the APEC Privacy Framework. This includes building on initiatives already under way outside of APEC processes. Business expectations of a privacy protection framework were also presented, including the difficulty of meeting current requirements within the EU framework for Binding Corporate Rules (“we just want to know what the regulators want”). This led to speakers with a business perspective asking how the APEC processes for CBPRs would be genuinely better and simpler. In short, they called for clarity, consistency, cooperation and consensus.

The consultant’s summary of the points made by speakers during Day 1 of the seminar is set out in [Appendix A](#).

Day 2 – Taking Steps Towards Implementing Cross-Border Privacy Rules

The first substantive sessions on Day 2 focused on the challenge of building the trust in trustmarks and the processes. Presentations from leading trustmark providers in the APEC region provided a deeper insight into how to create an effective trustmark. This included strong program/certification requirements; thorough and impartial audit (more than self assessment); accountability and enforcement; credible oversight from multiple parties; and evolving standards and accountability and an ability to address new issues.

The seminar also heard that there can be considerable differences between economy experiences and expectations of trustmarks. In the Australian experience, evidence is mixed on whether trustmarks are effective in enhancing consumer confidence. This included questions about how consumers are to know that businesses are complying or are using a self-created logo. It has also provided reaffirmation of the widely held view that trustmarks

need to be part of a wider compliance framework. Consumer awareness can also be a problem – consumers are not necessarily aware of trustmark programs or of the details of any one of the programs. As a consequence, they find it difficult to differentiate between good and bad schemes, especially when there are a lot in existence. Government involvement could involve consumer information, criteria for effective schemes, evaluation and accreditation of schemes. The *Benchmarks for Industry-based Customer Dispute Resolution Schemes* were promulgated in Australia in 1997 and are available online at www.treasury.gov.au/contentitem.asp?NavId=&ContentID=1124. The Banking and Financial Services Ombudsman is required to meet these Benchmarks and privacy code adjudicators can only be approved under the Australian Privacy Act if they meet them (www.privacy.gov.au/business/guidelines/index.html).

After having considered trustmarks in some detail, the seminar turned to discussing what Pathfinder projects might be undertaken. A strong business perspective was put forward suggesting guidance on what to consider when selecting suitable Pathfinder projects. Business will be very tightly focused on the business case for participating in an APEC CBPR system. In fact, developing suitable Pathfinder projects would be a challenge because the proposed approach is a non legal solution to the legal problem of inconsistent laws. In addition, Pathfinder projects must pay regard to domestic laws and every additional process element can lead to erosion of the business case. More specific observations included the need for more effective consumer protection, but not at any price. Rather, as emphasized in previous seminars and presentations, the goal must be that original promise is kept even if it moves into a new context, no more and no less.

Other business observations on the value add that the APEC CBPR system could bring to business were improved trust or reputation management and a more flexible legal environment for logical deployment of resources. For some businesses at least, trustmarks that specialized in assurance in specific areas worked best, eg fulfillment or security or privacy. On the other hand, great care was needed not to provide confusion of assurances to consumers by a great range of trustmarks, most of which would not mean much to them.

There was also a strong call for consumer interests to be involved, noting that this opportunity had often been available but that funding had not always been available to assist it, something critical for under resourced consumer interests.

The final phases of the seminar addressed the best way of approaching a Pathfinder framework and considering what projects might be included in the framework for commencement in 2008.

For a Pathfinder to be successful, it needed to address a number of challenging aspects.

First, it needed to be clearly in line with the policy development behind the APEC Privacy Framework. As shown in the seminar papers, the Pathfinder clearly met this criterion.

Second it needed to address the fact that the Pathfinder was multi-stakeholder and was multi-layered. The proposed Pathfinder documentation had been prepared in a multi-layered format. The first layer set out a one page, over-arching statement of intent. It was the minimum documentation for obtaining endorsement from economies and needed to pass the test of no objection from economies. The second level comprised the outline of a work plan with some timelines. The third set out the actual projects. The latter list can be a rolling list – some will come off the list when complete or priorities change; others will roll on in later years.

Participants in the seminar were then broken into four groups to consider the individual options outlined in the *Pathfinder Project Outlines* paper. These options were presented in order to generate discussion on possible projects rather than as firm proposals and successfully generated well informed discussion. Breakout group leaders then briefly

reported back to the seminar as a whole. Detailed reports on the individual discussions are being prepared separately for input to the Data Privacy Subgroup when it considers the proposed Pathfinder framework and projects.

Key points made by break out group leaders and in the subsequent discussion included:

- While some stakeholders might take the lead on particular Pathfinder projects, each project needed strong engagement with all stakeholder groups, especially regulator, business and trustmark interests in developing workable arrangements and consumer interests to ensure that their expectations were addressed.
- Capacity building for stakeholders remained crucial, particularly for consumer interests so that they understood and could contribute to the development of the Pathfinder process.
- Well organized project management was essential to ensure coordination and appropriate stakeholder engagement at the right time.
- The mooted Project Number 9 could act as a ‘laboratory’ for early testing of components emerging from other Projects. However timing and sequence was critical, with sufficient output from those projects to generate critical mass for the laboratory process.

Conclusion – The success of the seminar and next steps

Colin Minihan closed the seminar with some brief remarks to summarise what had been achieved. He noted that there was a general view that the seminar appeared to have contributed significantly to thinking on the Pathfinder framework and component projects and established general support, along with the commitment of stakeholders to undertaking them. This was a significant achievement.

He also thanked all participants, especially the seminar organizers, the speakers and the staff of the Attorney-General’s Department who had put in a so many hours towards making the seminar a success.

Work was already under way for continuing the seminar series next year. As APEC host economy for 2008, Peru has lodged a bid for funding for a seminar on the use of trustmarks, regulator enforcement issues and capacity building, to be held in Peru in February 2008, and another in September on CBPR enforcement.

Daily Summaries of the Seminar by Consultant





Summary of Seminar

Day 1

APEC ECSG Second technical implementation seminar on International implementation of the APEC Privacy Framework

*Canberra, Australia
25 June 2007*

Seminar theme – “CBPRs: building confidence in an accountable system for personal information moving between economies”

- “Privacy is local; processing is global”
 - How to make accountability also global?
 - APEC Privacy Principle 9
 - How to keep the original privacy promise
 - Original economy law
 - Company privacy policy and other undertakings
 - Consumer choices



LIMITED first steps

- APEC’s ECSG Data Privacy Sub-Group wants to address a small part of the problem in pathfinder projects in 2008
 - Consumer to business (& business to business) only
 - A volunteer group of APEC economies only
 - Cross-Border Privacy Rules only
 - For Businesses that opt in only
 - Hence, probably large companies only
- Expand later if successful
 - Start again if not successful !?
- Remember this integrates into wider Sub-Group work eg on information sharing & cooperation between regulators

Where are we right now?

Yesterday:

“Begin scoping & developing cooperative cross-border arrangements for implementing a Cross-Border Privacy Rules (CBPR) system based on the preferred model identified in the First Technical Assistance Seminar”

Today:

“Provide input to decisions on APEC projects to undertake in 2008 within the proposed Pathfinder framework that would assist in implementing these cooperative arrangements”

What did we learn yesterday?

- Regulators showing clear willingness to work together
 - APPA, OECD
 - Very real differences in laws affecting privacy regulation
- Trustmarks also
 - ATA & GBDe; Mexico conference
- Business plea
 - Clarity, Consistency, Cooperation & Consensus
- Consumer view
 - VERY cautious if non-government accountability agents make processes more complex