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# Australian data transfer policies and impact on commerce

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**Beijing, China  
18-20 July 2016**

# The law in Australia

## ➤ Privacy Act 1988

### **8 Australian Privacy Principle 8—cross-border disclosure of personal information**

8.1 Before an APP entity discloses personal information about an individual to a person (the *overseas recipient*):

- (a) who is not in Australia or an external Territory; and
- (b) who is not the entity or the individual;

the entity must take such steps as are reasonable in the circumstances to ensure that the overseas recipient does not breach the Australian Privacy Principles (other than Australian Privacy Principle 1) in relation to the information.

Note: In certain circumstances, an act done, or a practice engaged in, by the overseas recipient is taken, under section 16C, to have been done, or engaged in, by the APP entity and to be a breach of the Australian Privacy Principles.

# The law in Australia

## ➤ Privacy Act 1988

8.2 Subclause 8.1 does not apply to the disclosure of personal information about an individual by an APP entity to the overseas recipient if:

- (a) the entity reasonably believes that:
  - (i) the recipient of the information is subject to a law, or binding scheme, that has the effect of protecting the information in a way that, overall, is at least substantially similar to the way in which the Australian Privacy Principles protect the information; and
  - (ii) there are mechanisms that the individual can access to take action to enforce that protection of the law or binding scheme; or
- (b) both of the following apply:
  - (i) the entity expressly informs the individual that if he or she consents to the disclosure of the information, subclause 8.1 will not apply to the disclosure;
  - (ii) after being so informed, the individual consents to the disclosure; or
- (c) the disclosure of the information is required or authorised by or under an Australian law or a court/tribunal order; or ....

# The law in Australia

## ➤ My Health Records Act 2012

### **77 Requirement not to hold or take records outside Australia**

- (1) The System Operator, a registered repository operator, a registered portal operator or a registered contracted service provider that holds records for the purposes of the My Health Record system (whether or not the records are also held for other purposes) or has access to information relating to such records, must not:
  - (a) hold the records, or take the records, outside Australia; or
  - (b) process or handle the information relating to the records outside Australia; or
  - (c) cause or permit another person:
    - (i) to hold the records, or take the records, outside Australia; or
    - (ii) to process or handle the information relating to the records outside Australia.

# APEC CBPR System

- APEC Cross Border Privacy Rules System (CBPR) is a common benchmark to address:
  - **Regulatory fragmentation** among economies
  - Growing realisation of importance and need to **protect personal information** as it travels across borders
- CBPR System should meet requirements of Australian Privacy Principle 8.2 (a)
  - See [Report for APEC: Australia - Phase 1 - CBPR - Impediment Analysis](#), presented to the Data Privacy Subgroup of the [APEC Electronic Commerce Steering Group](#) in Beijing, China, August 2014

# Benefits of CBPR: Three perspectives



Government



Business



Regulators

- [Preliminary assessment: Potential benefits for APEC economies and businesses joining the CBPR System](#), presented to the Data Privacy Subgroup of the [APEC Electronic Commerce Steering Group](#), Lima, Peru, February 2016

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# Overall assessment of CBPR

- Extent to which participants find value in the CBPR System depends on:
  - Each economy's underlying domestic law
  - Underlying domestic law of current and future trading partners
  - Requirements of stakeholders
- CBPR System helps to facilitate trade (which is increasingly data-driven) by providing a scalable baseline set of privacy standards
- Businesses are key contributors to, and beneficiaries of, the CBPR System

# China Australia Free Trade Agreement

## ➤ China Australia Free Trade Agreement, Chapter 12 covers Electronic Commerce

- Full text, Chinese and English:  
[http://fta.mofcom.gov.cn/Australia/Australia\\_xdwb.shtml](http://fta.mofcom.gov.cn/Australia/Australia_xdwb.shtml);  
<http://dfat.gov.au/trade/agreements/chafta/official-documents/Pages/official-documents.aspx>

### Article 12.8: Online Data Protection

1. Notwithstanding the differences in existing systems for personal information protection in the territories of the Parties, each Party shall take such measures as it considers appropriate and necessary to protect the personal information of users of electronic commerce.

2. In the development of data protection standards, each Party shall, to the extent possible, take into account international standards and the criteria of relevant international organisations.

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# Impact

- Impact of Australia Data Transfer Policies on Commerce is hard to measure in financial terms
  - Australian business seem reasonably satisfied with Australian law
- Modelling by European Centre for International Political Economy (ECIPE) estimated economy-wide data localisation requirements reduced projected GDP growth by 1.2% in China, 0.7% in Indonesia and 1.1% in the Republic of Korea
  - For more detail, see [Success Through Stewardship: Best Practice in Cross-Border Data Flows](#) prepared for NCAPEC, January 2015

# Questions?

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