



Australian Government
Attorney-General's Department

Deputy Secretary
National Security and Criminal Justice

10/27823-01

16 December 2010

Mr Stephen Palethorpe
Committee Secretary
Senate Standing Committee on Environment and Communications
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Palethorpe

Online Privacy Inquiry - Australian Privacy Foundation Supplementary Submission

I refer to your letter to the Department of 2 December 2010 providing the Attorney-General's Department with an opportunity to respond to the supplementary submission of the Australian Privacy Foundation (APF) 30 November 2010. I note that the Department consulted with the Department of Prime Minister and Cabinet which now has portfolio responsibility for privacy issues.

Specifically, the APF submission states (at page 10, under heading 4.2):

The APEC privacy framework was an active attempt by the USA to create an extremely weak alternative to the prevalent European model. The Australian Attorney-General's Department connived with the USA to assist the APEC framework into existence. If any aspects of that empty model were to be implemented in Australia, there would be a massive reduction in protections.

By way of background, the Asia-Pacific Economic Cooperation (APEC) Data Privacy Sub-Group was formed in response to an Australian Government proposal put forward in a paper called 'An APEC Approach to Privacy Protection' (APEC document number 2003/SOM/ECSG/003) which was considered at the meeting of the APEC Electronic Commerce Steering Group (ECSG) in Thailand in February 2003. The ECSG is comprised of representatives of all APEC member economies. Australia's proposal was endorsed by the ECSG and the Data Privacy Sub-Group was established. Australia was elected as the first Chair of the Data Privacy Sub-Group. The Data Privacy Sub-Group has a mandate which has been reviewed every two years. The regular renewal of the mandate has been endorsed by APEC members.

We are aware that a number of commentators have made publicly available their views on the APEC Privacy Principles. Commentators have put forward differing opinions. An analysis by Mr Nigel Waters has compared the differing views and the privacy principles of APEC, the European Union, the Organisation for Economic Co-operation and Development (OECD) and the Council of Europe ('The APEC Asia Pacific Privacy Initiative – a new route to effective data protection or a Trojan horse for self-regulation?', (available at: <http://law.bepress.com/unswwps/flrps08/art59/>)). After analysing the different instruments and commentators, Mr Waters concluded as follows (page 8):

In summary, the APEC principles themselves, despite some deficiencies, are not too bad as a 'floor', and arguably little different in one key respect from the OECD Principles, the EU Directive Articles or the COE Convention 108 Principles in that all allow for considerable interpretation when they are translated into binding obligations. Pounder suggests that the EU Directive was a response to the Convention being too general and 'high level' and that the APEC Framework runs the risk of being similarly too general. I suggest that the EU Directive, while appearing to be more specific in some respects, is substantively just as subject to differing interpretation as the other instruments. High level principles in international instruments will inevitably be pitched at the level of general principles which are a product of compromise and to some extent a 'lowest common standard'. Of greater practical significance is the way in which the obligations are firstly embodied in domestic law and secondly enforced.

The Government does not comment on or endorse the views of any commentator.

Yours sincerely


Geoff McDonald
Acting Deputy Secretary