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A civil society perspective on international privacy developments and their implications for Australia and New Zealand

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International developments

- OECD Guidelines (1980), Council of Europe Convention 108 (1981) and EU Directive (1995) all currently under review
- Newer initiatives include International Commissioners' proposed international privacy standard (The Madrid Resolution, 2009), and the 'Accountability' project (private sector led but supported by various European Commissioners)
- Cross Border Privacy Rules system as a means of implementing the APEC Privacy Framework (2004-05) finalised in 2011 for commencement in 2012.

Common themes/issues

- Need for greater emphasis on practical compliance rather than procedural matters – on outcomes not process.
- Need for increased enforcement – perhaps involving new or increased powers for regulators
- Interest in enhanced role for intermediaries and trusted third parties
- Consideration of new rights – to anonymity, to be forgotten?
- Limitations of 'notice and consent' models
- New tools in regulatory toolkit, including
 - Data Breach Notification requirements
 - Privacy Impact Assessment
 - Privacy by design – early intervention
 - Representative complaints & class actions (super-complaints)
 - Statutory cause of action (in common law jurisdictions)

Risks

- Strong lobbying by government agencies and multinational businesses for greater flexibility – 'code' for accommodating new public administration and business models that involve greater surveillance and data sharing.
- Misuse of 'accountability' concept to promote self-regulation as a softer alternative with relief from supervision or sanctions (Accountability discussion OK as long as it is about *additional* obligations to 'demonstrate that you do what you say you are doing')
- Weakening of cross border data transfer rules to allow outsourcing/offshoring/cloud services on basis of assurances rather than enforceable jurisdiction

¹ *Nigel Waters represents Privacy International at international fora including the OECD and APEC privacy working groups*

Australia/NZ context

- Recent Law Reform reports & recommendations
- Government responses pending
- Some strengthening of protections seem likely but rearguard action by government agencies
- Already committed to significant changes in credit reporting
- Uncertain effect of proposed changes to general principles, including cross border transfer rules
- Authorisation of privacy intrusive initiatives under other laws (e.g. in Aus, e-health, anti-money laundering, telecommunications interception, data retention)
- Sector or activity specific privacy regulation (e.g. in Aus, Spam, Do Not Call + privacy safeguards in legislation authorising intrusions)
- Reviews of media regulation (Aus)
- Cause of action consultation (Aus)

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