

# Appropriate Remedies for APEC's Privacy Framework

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APEC Implementation Seminar, Hong Kong, 2 June 2005

# - Aims of remedies - Objectives in enforcement

- An effective **range of remedies**, to ensure:
  - **Justice** to individual complainants
  - **Correction** of systemic problems affecting others
- **Effective procedures**
  - **Low-cost** complaints system
  - **Choice** of procedures to suit different problems
- **Accountability** of the regulator
  - **appeals** against / review of decisions
  - **publication** of cases and outcomes

# APEC is a floor, not a ceiling

## Most Asia-Pacific laws do better

- Most Asia-Pacific privacy laws have **higher Principles** than APEC's Framework
- Most also have **stronger enforcement measures** than APEC requires (but within the Framework)
- Countries newly protecting privacy can aspire to regional standards, not only the APEC minimum
- See Greenleaf 'APEC's Privacy Framework sets a new low standard for the Asia-Pacific'
  - APEC's Principles are 'OECD Lite', at best an approximation of the 20 year old OECD standard

# 9 'essentials' for effective enforcement

- 'Self-resolution' first
- Apologies
- Changing practices
- Financial compensation
- Choice of procedures
- Representative complaints
- Rights of appeal / review
- Publication of cases
- Outcome statistics

# ‘Self-resolution’ first

- Legislation should require that the business/government complained about should first have the opportunity to fix the problem
  - only then does the regulator intervene
- ‘self-resolution’, not self-regulation
- The business/government knows that it must act, or the regulator will investigate
- Most complaints will disappear as a result

# Apologies

- In most cases complainants are satisfied by
  - an apology (acknowledgment)
  - knowledge that this will not happen to others
- Sincere apologies should also reduce compensation paid
  - apologies reduce the mental harm

# Changing practices

- Privacy authorities should be able to *order changes to practices* breaching Principles
  - Systemic problems require systemic changes
  - Allow appeals to the Courts to avoid abuse of power by regulators
- Prevention of *proposed* practices
  - Australian Act s98 allows injunctions to prevent *proposed* practices which would breach an IPP
  - Most Acts only deal with *actual* practices: too limited

# Financial compensation

- Compensatory damages for serious breaches show a privacy law is serious - deterrent and symbolic value
- They should include compensation for emotional harm
- Examples -
  - A\$20K settlement (Victorian Privacy Commissioner) where disclosure to violent spouse required new identity
  - A\$20K settlement (Australian Privacy Commissioner) where disclosure of identity put relatives overseas in danger
- Better if a Commissioner or a non-judicial Tribunal can award compensation, not a Court (compare HK s66)
- Consistent with APEC's Principle I 'Preventing Harm' - real harm deserves real compensation



# Choice of procedures

- No remedial procedure is perfect - apply APEC's 'Choice' principle to remedies
- Informal mediation supervised by the regulator should be explicitly allowed
  - But either side should be able to insist on adjudication
- The regulator should be able to award all remedies after a cheap and informal hearing
  - But sometimes they take too long, or are wrong
- An ability to go directly to a Court is good, but will rarely be used (HK s66; Australia s98)

# Representative actions

- 2 good features in both HK and Australian laws:
  - One complainant can represent all others affected by a practice
  - A civil society organisation can represent a complainant
- TICA complaints in Australia the best example:
  - Forced Commissioner to make the first adjudication against a privacy sector body
  - First time systemic changes to practices were required
- ‘Own motion’ investigations by Commissioner also very valuable, provided damages are possible

# Rights of appeal / review

- No regulator is perfect - they all make mistakes
  - Misinterpretations of the law may be corrected
  - Remedies granted may be inadequate or excessive
  - Regulator can be improperly influenced by powerful interests
- Appeals make it safe to give regulators strong powers
- Appeals allow more serious complaints to escalate to more senior tribunals
- Many privacy laws have inadequate appeal rights
- Examples
  - Compensation was increased 7 times (Australia)

# Publication of cases

- Decisions in significant individual complaints (adjudicated or mediated) must be published
  - The complainants should be anonymised
  - Essential for accountability, rule of law, education, deterrence and to show the ‘tariff’ for breaches
  - Gives regulators pride in their work
  - See Greenleaf paper for reasons (reference at end)
- Most Asia-Pacific privacy authorities now publish selected decision summaries on their websites

# Publication (cont)

- WorldLII's Privacy Project
  - 15 databases of decisions of privacy authorities can be searched in (see handout)
- These published cases are some of the best guides to how privacy issues are resolved in practice

# Statistics on outcomes

- Does anyone get a remedy? We often don't know.
- Commissioners are very good at publishing how *many* complaints they investigate (workload!!)
- They are often poor at publishing statistics on the *outcomes* of *all* these complaints
- Outcome statistics are essential for accountability
  - why have expensive complaints regimes?
  - few complaints are significant enough for case reports
- See Hendrie (2005) paper to PAANZA+ proposing uniform statistics reporting

# What is not essential

- Criminal prosecutions
  - Most privacy breaches are small matters, do not justify criminal prosecutions
  - Fines only enrich governments; compensation to victims are better than fines (Harm Principle)
  - Should be reserved for repeated & intentional, malicious or fraudulent privacy interferences
- ‘Trust’ marks and similar schemes
  - No use in the absence of legislation, not enforced
  - Useful as an independent warranty of compliance

# What is useless?

## Pure self-regulation

- Pure self-regulation (without legislative backup) has no evidence of success
- Co-regulation (supervised by authorities) can work if an industry is large & honest enough
  - Right of appeal from an industry complaint body to a privacy authority is necessary
  - But this is then less appealing to industry
    - Eg Australian ‘Codes’ ignored by industry
    - Insurance industry Code may be abandoned
- ‘Self-resolution’ first (in a legislative scheme) is the best role for industry self-correction



# The choice is yours

- Privacy laws are about protecting individual people
  - helping governments, business or ‘free flow of information’ are secondary considerations
  - Human rights and e-commerce are compatible
- Please don’t design a smokescreen
  - don’t legitimate more surveillance by pretending to protect privacy
- APEC’s Framework is a floor not a ceiling
  - a stronger law is still within the Framework
- Your children and your fellow citizens will thank you for strong privacy laws

# References

Greenleaf papers are at <<http://www2.austlii.edu.au/~graham/>>

- Greenleaf ‘APEC’s Privacy Framework sets a new low standard for the Asia-Pacific’ (2005)
- Greenleaf ‘Reforming reporting of privacy cases: A proposal for improving accountability of Asia-Pacific Privacy Commissioners’ (2003)
- Hendrie ‘PANZA+ Comparative Privacy Statistics Project’ (2005) (from NZ Privacy Commissioner)
- Greenleaf ‘WorldLII’s Privacy Project’ (handout)
- WorldLII Privacy Project  
<<http://www.worldlii.org/int/special/privacy/>>