

Challenges to APEC-CBPR credibility

GRAHAM GREENLEAF AM
PROFESSOR OF LAW & INFORMATION SYSTEMS
UNSW AUSTRALIA

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What has APEC-CBPR shown in 2 years?

Questions:

- What is the value proposition for companies to become certified?
- What is the value proposition for consumers?
- Is CBPR being run as effective regulation?
 - Is APEC requiring that countries meet its standards?
 - Was the only certification of an AA rigorous enough?
 - Will the renewal of that AA be rigorous enough?
- What further tests of CBPR credibility will arise?

APEC-CBPR: What is the value proposition for companies to become certified?

- Certification does not reduce or satisfy obligation to comply with all local laws – including data export limits
- Certification has no effect on the same company in other APEC countries: NO 'APEC-wide' certification
- Certification does not mean personal data can be transferred FROM any other APEC country
 - It also has no direct effect on ability to import from outside APEC
- In countries with higher privacy standards than APEC, certification adds nothing – most APEC countries, but not US
 - Gilbert+Tobin Lawyers (Australia): 'no compelling reason to participate'
- CBPR will not lead to EU 'interoperability'
 - EU A29 finds BCRs require more than CBPR in 26/27 elements
 - Some have no common elements eg no 3rd P beneficiary rights

APEC-CBPR: Of no value to consumers

- Companies are only required to meet the 1980's standard APEC Principles (eg no deletion required)
- CBPR certification does not cover all personal data a company collects – only data it intends to export!
 - Consumers cannot know if particular data is protected
- CBPR certification does not even mean that a company complies with *local* laws
- CBPR certification does not require compensation payments for breaches – or any other remedies
- CBPR certification does not apply to processors

APEC-CBPR administration: No independent assessment of economy participations

- CBPR participating countries must have effective laws enforcing to APEC standard
 - 'laws and regulations ... the enforcement of which have the effect of protecting personal information consistent with the APEC Privacy Framework'
- Problem: JOP charter only allows consultation with economy concerned, not independent viewpoints
 - No provision for any external submissions before accreditation
- JOP Findings Reports show no external inputs or research – they are close to self-assessment
 - Eg Failure of Japan to enforce its laws is never questioned

APEC-CBPR administration: Ignoring the AA rules

- USA's appointed AA did not meet APEC standards
 - Did not meet at least 21 of APEC's program requirements
 - Only required by JOP to remedy non-application to offline activities; and to separate CBPR reporting from others
- Problem: no formal procedure for third party input
- AA's first year shows continuing failure to comply
 - Did not apply program to offline activities, mobiles etc
 - 2/5 certifications involved conflicts of interest in certifications
- Renewal of AA appointment tests credibility of JOP
 - Australian Privacy Foundation submission opposes renewal

APEC-CBPR administration: Further challenges ahead

- Will JOP require AA applicants to meet APEC standards?
 - Will JOP ever refuse an AA application/renewal?
 - If applications/renewals cannot fail, is this regulation?
- Will AAs ever revoke company certifications?
- Will AAs publish objective selections of case studies?
- Will any non-US companies get certification?
- Can CBPR certification be made relevant to consumers?

*APEC CBPR should prove itself, not be taken on trust
The EU & all interested parties need to remain vigilant*

Documentation

- Australian Privacy Foundation (APF) 'Submission [to APEC-CBPR JOP] opposing the 2014 renewal of recognition of TRUSTe as a CBPR Accountability Agent (AA)' (13 June 2014).
- G Greenleaf 'APEC's Cross-Border Privacy Rules System: A House of Cards?' (2014) 128 *PLBIR*, 27-30
<http://ssrn.com/abstract=2468782>
- G Greenleaf & N Waters 'APEC's CBPRs: Two years on – take-up and credibility issues' (2014) 129 *PLBIR*, 12-15
<http://ssrn.com/abstract=2481812>
- G Greenleaf & F Shimpo 'The puzzle of Japanese data privacy enforcement' (2014) 4 (2) *International Data Privacy Law* 139-154
<http://idpl.oxfordjournals.org/content/4/2/139.abstract>