9 October 2024

GLOBAL DATA ALLIANCE COMMENTS ON THE PRIVACY AND OTHER LEGISLATION AMENDMENT BILL 2024

The Global Data Alliance (**GDA**) welcomes the opportunity to submit comments to the Senate Legal and Constitutional Affairs Legislation Committee (**Committee**) on the Privacy and Other Legislation Amendment Bill 2024 (**Privacy Bill**)[1] and the accompanying Explanatory Memorandum (**Memo**).[2]

The GDA is a cross-industry coalition of companies, headquartered in different regions of the world, that are committed to high standards of data privacy and security. The GDA supports policies that help instill trust in the digital economy without imposing undue cross-border data restrictions or localization requirements that undermine data security, cybersecurity, innovation, economic development, and international trade. Given the GDA's focus on cross-border data, we comment specifically on Privacy Bill's proposal to introduce a mechanism to prescribe countries and binding schemes that provide substantially similar privacy protections to the Australian Privacy Principles (**APPs**). [3]

The GDA strongly supports the importance of facilitating cross-border data transfers. As explained in the Memo, companies can already transfer data to overseas recipients through a variety of methods consistent with the Australian Privacy Act 1988 (**Privacy Act**).[4] These include disclosing data pursuant to APP 8.1, which adopts the accountability model and requires companies to meet certain obligations before transferring data to an overseas recipient, most notably the requirement to "take reasonable steps" to ensure the overseas recipient does not breach the APPs in relation to the information.[5] Separately, companies can also transfer data under APP 8.2 to an overseas recipient that is subject to a "substantially similar" privacy law or binding scheme, without adopting the obligations imposed in APP 8.1.[6]

The proposed mechanism under the Privacy Act would prescribe the countries and certification schemes that provide "substantially similar protection" under APP 8.2(a). The new mechanism would therefore

---

[1] Privacy and Other Legislation Amendment Bill 2024, September 2024, https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r7249_first-reps/toc_pdf/24115b01.pdf;fileType=application%2Fpdf.

[2] Privacy and Other Legislation Amendment Bill 2024 Explanatory Memorandum, September 2024, https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r7249_ems_a01fc1bd-4aa3-4fc2-87d7-ed8aa84ab564/upload_pdf/JC014082.pdf;fileType=application%2Fpdf.

[3] Explanatory Memo (2024), p. 11. See also: The Australian Privacy Principles, January 2014, https://www.oaic.gov.au/__data/assets/pdf_file/0006/2004/the-australian-privacy-principles.pdf.

[4] Explanatory Memo (2024), p. 44.

[5] The Australian Privacy Principles (2014), APP 8.1.

[6] The Australian Privacy Principles (2014), APP 8.2.

make it easier for companies to transfer data under APP 8.2(a) by identifying countries that have "substantially similar protections," rather than requiring companies to assess for themselves which countries have such protections. Crucially, GDA notes that the new scheme would not limit companies from transferring data under the accountability model reflected in APP 8.1 or pursuant to any of the other grounds for transfers recognised in APP 8.2(b)-(f). **In the circumstances, GDA supports the introduction of this proposed mechanism, as it will provide businesses with greater legal certainty and substantially reduce compliance burdens.**

However, GDA also observed that neither the Privacy Bill nor the Memo explained what would constitute a "substantially similar" level of protection. If the mechanism establishes an unnecessarily strict interpretation of "substantially similar", it would be counterproductive to the policy objective of increasing certainty for companies transferring data internationally. For example, to the extent a new mechanism applies the term "substantially similar" to mean a standard akin to the European Union's "essentially equivalent" standard, it may unnecessarily restrict transfers conducted under APP 8.2(a).[7] Requiring foreign privacy laws deemed "substantially similar" to mirror, point-by-point, the APPs, would defeat the purpose of the mechanism. **We recommend conducting further consultations on the process for, and factors involved in, determining whether a country or certification scheme offers the appropriate level of protection.**

Relatedly, GDA recalls that the AGD's Privacy Act Review Report 2022 (**AGD Report**)[8] suggested that Australia could prescribe the Cross Border Privacy Rules (**CBPR**) system under APP 8.2(a) as a binding scheme that provides a "substantially similar" level of protection to the APPs.[9] **In this regard, we reiterate our support for recognising internationally recognised certifications and standards such as the Global CBPR system**. Similarly, the Act could also recognise compliance with ISO 27701 as creating "substantially similar" protections; that standard was published in 2019 and is the first privacy management standard published by the International Standards Organization.

Finally, we also observe that Australia – and many of its closest trading partners – have reflected their commitment to the protection of personal data from governmental overreach in the context of the OECD Declaration on Government Access to Personal Data Held by Private Sector Entities.[10] The Global CBPR Forum and the OECD Declaration on Government Access to Personal Data Held By Private Sector Entities are specifically designed to bring together governments with a substantially similar view of the importance of personal data protection in a cross-border data policy context. **We encourage Australia to consider presumptively deeming the signatories of these mechanisms to meet the "substantially similar" standard under the APPs.**

Recommendations: GDA supports the introduction of a mechanism to prescribe countries and binding schemes that provide substantially similar privacy protections to the APPs. However, we recommend that that the Privacy Bill specify what constitutes "substantially similar" privacy protections and conducts further consultations on the process for, and factors involved in, determining whether a country or certification scheme offers the appropriate level of protection. We also encourage the Australian Government to take account of the longstanding efforts of Australia and its allies to improve cross-border data privacy interoperability by presumptively deeming the signatories of the Global CBPR Forum and OECD Declaration on Government Access to Personal Data Held By Private Sector Entities to meet the "substantially similar" standard under the APPs.

---

[7] We note that the GDPR's adequacy determinations are based on the standard of "essential equivalence." See: Questions & Answers on the adoption of the adequacy decision ensuring safe data flows between the EU and the Republic of Korea, December 2021, https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_6916.

[8] Privacy Act Review Report 2022, February 2023, https://www.ag.gov.au/sites/default/files/2023-02/privacy-act-review-report_0.pdf.

[9] AGD Report (2023), p. 247-248.

[10] OECD Declaration on Government Access to Personal Data Held by Private Sector Entities, December 2022, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0487.

Conclusion

We appreciate the opportunity to share these views and hope that they will be helpful as the Australian Parliament reviews the Privacy Bill. Please do not hesitate to contact us with any questions regarding this submission.

Sincerely,

Joseph P. Whitlock
Executive Director
Global Data Alliance
josephw@GDA.org