President’s Foreword

iappANZ has wrapped up the year with the iappANZ Privacy Summit, a thought provoking event, the highlights of which are shared below. Audios and powerpoints of the presentations will be available in the members’ area of the iappANZ website early in the new year. The success of the conference is largely attributed to the efforts of the Board Directors and our new part-time General Manager, Judith Cantor, but in particular to our outgoing President, John Pane, who remains with us as the Immediate Past President.

On 29 November 2011 we held our AGM, the results of which are outlined below. Three new Board Directors were elected at the AGM, as we farewell three other Board Directors.

In the last few days, there has been a reshuffle of Minister portfolios. Brendan O’Connor is no longer the Minister of Privacy and Freedom of Information. Nicola Roxon, former Minister for Health and Ageing, is now the new Australian Attorney-General with additional responsibility for Privacy and Freedom of Information.

We are fast approaching the festive season and Summer holidays. I wish all a safe and festive season and look forward to the new year as we grow iappANZ membership and deliver news and events of value to you.

Annelies Moens
President
iappANZ
annelies@iappanz.org
AGM Results - New Board Directors

On 29 November annual elections took place for iappANZ Board Directors. We thanked Brent Carey, Anna Johnston and Kevin Shaw for their service to iappANZ and welcomed three new replacement Board Directors, Anna Kuperman, Samantha York and Kate Johnstone. Their biographies will be available on iappANZ’s website, under Current Board.

Elected position holders:
**President:** Annelies Moens
**Vice-President:** Emma Hossack
**Treasurer:** Helen Lewin
**Secretary:** David Templeton

Ordinary Board Directors:
Malcolm Crompton
Kate Johnstone
Anna Kuperman
Melanie Marks
John Pane
Melina Rohan
Nicole Stephensen
Samantha Yorke
iappANZ Summit Highlights

This year’s iappANZ Summit was a huge success providing a feast of ideas, international perspectives and glimpses of the future all in one day.

Some highlights of the day are summarised below.

Brendan O’Connor, Minister for Privacy and Freedom of Information looked at how privacy and technology has evolved over the last 30 years and reflected on the Government’s commitment to open Government resulting in the formation of the Office of the Information Commissioner. The Minister also confirmed that the Government is giving careful consideration to its response to the Finance and Public Administration Senate Committee’s final recommendation on the draft Australian Privacy Principles and Credit Reporting and foreshadowed that the legislation will be introduced into Parliament in the autumn sittings of 2012.

The Minister raised the controversial issue of the introduction of a statutory cause of action for a serious invasion of privacy noting that the Government retained an open mind in relation to this issue but was motivated to ensure that individuals could seek a remedy from a court where their private life had been seriously invaded in a way that ordinary Australians would consider highly offensive. It is clear that there is a wide diversity of views on this matter and weighty issues such as freedom of speech and how freedom of the media underpins stable democracies, a deleterious effect on business and media and the need to prevent arbitrary interference into the private lives of citizens.

Alessandro Acquisti, Associate Professor of Information Systems and Public Policy, Carnegie Mellon University wowed the audience with his discussion of the behavioural economics of privacy. He shared the results of his research which suggests that individuals will share more information about themselves online if they feel that they have ‘control’ over that data. Where he really captured our attention was in his provocative vision of the future of ‘data accretion’, demonstrating how advanced facial recognition technologies can be used to enable the combination of offline and online data to create highly personal and sensitive profiles of individuals. Along with some of the other speakers, Alessandro anticipated that the distinction between personal information and non personally identifiable information will increasingly become blurred, and asserted that ‘personally predictable information’ will become the focus of privacy advocates.

Scott Shipman, Associate General Counsel and Global Privacy Leader eBay spoke to the Privacy Summit about Privacy and the C-Suite. Scott talked about the importance to business strategy of the CPO gaining buy-in from CEO, CFO, CIO to ensure that privacy was viewed broadly and not merely as a risk to be mitigated when things went wrong.

Scott said that it was important to use a new language to engage the C-Suite, to ensure that they were engaged in the process of keeping privacy issues at the forefront of their minds when considering new aspects of the business. For example when geo-location technology is used, it needs to be considered as a potential benefit by the CEO/CFO and not merely a privacy risk. Companies need to delight their customers, not alarm them. So, in the case of geo-location technology, customers would opt-in to enable provision of data based on their location, rather than be required to turn it off, should they be alarmed by it. To ensure that privacy is protected, whilst opportunities exploited, Scott recommends the Privacy by Design Principles enunciated by the Canadian Privacy Commissioner, Anna Cavoukian.

eBay’s business is founded upon trust by the sellers and the buyers so absolute clarity of communication on how and why their data is used is of paramount importance as is the need to ensure they are comfortable with any changes to the privacy settings eBay deploys.
The Honourable Michael Kirby AC CMG, whilst serving as Chairman of the Australian Law Reform Commission, led the expert committee that conceived and authored the 1980 OECD Guidelines on the protection of privacy and transborder flows of personal data. These guidelines state the fundamental principles of privacy law. In various forms, they are reflected in laws protecting most of the developed world. There is almost certainly no better qualified individual to both share the personal distress caused by unwanted publication of private matters and explain how the law should respond. We were privileged to hear his honour make a compelling case for legislation to protect individuals from egregious interference in private matters by media, and how the concepts of publication and media must extend to search engine results.

Dr Michael Bainbridge, a former GP voted “UK Health ICT Champion” and now working with the National E-Health Transition Authority (NEHTA) presented on the improved healthcare landscape which could be achieved with effective and socially useful data sharing. Mike’s thesis is that our healthcare system is overburdened and will face growing pressure as our population ages. Innovation is needed to put patients at the centre of their care and correspondingly, their health information. With e-Health initiatives emerging in Australia and around the globe, a new dialogue on the use of medical records must be constructed, focusing on the benefits of the uses of medical data. By shifting our thinking about how information is managed within healthcare, we open up new opportunities for efficiency and ultimately better healthcare outcomes for patients.

Peter Leonard, partner Gilbert + Tobin Lawyers presented on the competing visions the Australian Government is considering in reaching a decision on whether Australia needs a statutory cause of action for an invasion of privacy. Peter entertained the audience with anecdotes, whilst providing a deep insight into the various complex matters that must be considered before deciding this question including:

- a summary of the common law cause of action so far developed by the Australian courts,
- the common law cause of action for privacy as it has been established in New Zealand,
- a deep analysis on the cases that have come before the English courts including the development of the somewhat controversial “Gagging” & “Super” injunctions,
- freedom of expression and the media.

Peter then proceeded to dissect and analyse four contending visions that have so far been provided to Australian State and Federal Governments:

- the Australian Law Reform Commission (ALRC), the discussion & recommendations for a statutory tort,
- the New South Wales Law Reform Commission report (NSWLRC) recommending a statutory tort and excluding the common law,
- the Victorian Law Reform Commission Report (VLRC) - Surveillance in Public Places which recommends a statutory tort with the defence of public interest; and
- Peter’s alternate vision for consideration, developed by Peter and his partner Michael Burnett and submitted to the Government’s issues paper and provided to the iappANZ’s Privacy Summit.

Katrine Evans, New Zealand Assistant Commissioner (Legal and Policy) reported that New Zealand is reviewing its privacy legislation with draft legislation expected in April or May 2012. New Zealand is also in the process of examining the introduction of a Do Not Call Register. At this stage a co-regulatory model is being considered where the Marketing
Association will administer the register but the Privacy Commissioner will enforce compliance.

The Privacy Commissioner will be responsible for publishing reports to Cabinet on government proposals and special focus has been on creating a user guide for cloud computing that offers significant benefits in terms of disaster recovery and business continuity in the event of natural disasters.

Timothy Pilgrim, Australian Privacy Commissioner made a compelling case that the take up of social media does not mean that privacy is dead citing the increasing media coverage of privacy issues, the recent settlement between Facebook and the Federal Trade Commission, increasing number of privacy complaints and growing awareness that the increasing amount of data being held can lead to data breaches. The Commissioner called for increased powers to give the Commissioner additional credibility pointing specifically to the limited powers the Commissioner has when conducting own motion investigations.

The Commissioner also foreshadowed an increased willingness to use existing powers noting that he was prepared to use all the powers available to his office including determinations (more on this in the article below). Finally Mr Pilgrim opined that any statutory cause of action should require the courts to take into account public interest matters including freedom of speech and that due consideration should be given to including a dispute resolution step that would be overseen by the Office of the Australian Information Commissioner to facilitate resolution of matters prior to full court proceedings needing to be commissioned by an individual. Timothy’s speech is available on the Commissioner’s website at: www.oaic.gov.au/news/speeches/timothy_pilgrim/timothy_pilgrim_iappANZ_summit_Nov_11.html

A New Privacy Determination Dawn Breaks!

by Anna Kuperman, Senior Associate, Corrs Chambers Westgarth, iappANZ Board Director

Last month at the International Association of Privacy Professionals Australia/New Zealand Privacy Summit in Melbourne, Australian Privacy Commissioner Timothy Pilgrim made it clear that he was motivated to use the Commissioner’s determination powers under the Privacy Act to protect the privacy rights of all Australians. To put this in context, for the last 7 years, successive Commissioners have not found it necessary to use the formal determination making power. The use of the Commissioner’s determination powers is in line with the long awaited privacy law reforms for improved complaints handling and additional powers for the Privacy Commissioner to direct organisations to comply with the Privacy Act, to commence proceedings and to seek significant civil penalties in the Federal Court for serious or persistent breaches.

On the 9th December 2011 for the first time since April 2004, the Privacy Commissioner made a determination under section 52 of the Privacy Act. In ‘D’ and Wentworthville Leagues Club [2011] AICmr 9, the Privacy Commissioner found that the Club interfered with the complainant’s privacy by disclosing the complainant’s membership details and gaming information to the complainant’s ex-partner. The Commissioner ordered the Club to:

- apologise in writing to the complainant;
- review its training of staff in the handling of personal information and legal requests for personal information including court subpoenas; and
• pay the complainant $7500 for non-economic loss caused by the interference with the complainant’s privacy but rejected claims for economic loss and punitive and aggravated damages.

Under section 52, a determination may:

• prohibit the respondent organisation from continuing or repeating conduct that has breached the Privacy Act;
• direct the organisation to perform any reasonable course of conduct to redress loss or damage suffered by the complainant; and
• direct the organisation to pay a specified amount to the complainant by way of compensation.

If the parties do not comply with the terms of a determination, section 55A of the Privacy Act allows the Commissioner to approach the Federal Court or the Federal Magistrates Court to seek enforcement via a new (de novo) hearing. To date, this step has never been taken.

Based on the investigation by his Office, the Commissioner found that the disclosure of personal information in this case was not authorised under law as it was not in accordance with the requirements of the subpoena. The Privacy Act does not override legal obligations to use or disclose personal information. NPP 2.1(g) provides that an organisation can use or disclose personal information where this is required or authorised by law. ‘Law’ includes Commonwealth, State and Territory legislation, as well as the common law. The term ‘required by law’ covers circumstances in which there is a legal obligation to use or disclose personal information in a particular way.

In this case, the Commissioner made the following findings.

1. The Club is an ‘organisation’ for the purposes of the Privacy Act and bound to comply with the National Privacy Principles.
2. The Club received a letter from the complainant’s ex-partner with a copy of a subpoena issued by the Federal Magistrates Court in family law proceedings involving the parties. The subpoena required the Club to provide to the Court all gambling records, or records of transactions linked to any gambling cards related to or held in the name of complainant or the complainant’s company.
3. A manager at the Club provided computer printouts of information about the complainant including full membership details, bonus point activity statements, the complainant’s total turnover and winnings and the complainant’s then balance with the Club.
4. The Club did not present the documents to the Court but rather directly to the complainant’s ex-partner and the subpoena required the Club to provide these documents to the Court.

The determination shows that the Commissioner will be continuing to take a robust approach to ensuring privacy compliance and with potentially new stronger powers in the not too distant future, organisations must ensure that their privacy compliance processes are well oiled.
Upcoming Conferences

- Emerging Challenges in Privacy Law: Australasian and EU Perspectives, Monash University, Melbourne, 23-24 February 2012
  www.law.monash.edu.au/about-us/events/privacylaw

- Global Privacy Summit, International Association of Privacy Professionals, Washington DC, 7-9 March 2012
  www.privacyassociation.org/events_and_programs/global_privacy_summit
  (Please note iappANZ members can attend at IAPP member rates)

  www.legalwiseseminars.com.au

- Data Governance, Health Informatics Society of Australia, Melbourne, 29-30 March 2012