

Sanctioning Powers of Overseas Privacy Commissioners
or Data Protection Authorities

1. Regarding the sanctioning powers of overseas Privacy Commissioners or Data Protection Authorities, the Office of the Privacy Commissioner for Personal Data (“PCPD”) has conducted a research covering the United Kingdom, Australia, Macau, New Zealand, France and Canada. Details of the research can be found in the attached Schedule.

2. The following is a summary of the overseas experiences and practices which should serve as useful reference for considering PCPD’s proposals:-

Proposal (a) : Empowering the PCPD to Impose Monetary Penalty on Serious Contravention of Data Protection Principles

The Privacy Commissioners or Data Protection Authorities of the United Kingdom, France, and Macau are empowered to impose fines or monetary penalties on data controllers for breach of the data protection laws.

Proposal (b) : Empowering the PCPD to Carry Out Mediation and Award Compensation to Aggrieved Data Subjects

The Australia Privacy Commissioner is empowered to make a determination to award compensation to the aggrieved data subjects if conciliation fails to resolve a complaint. Furthermore, alternative dispute resolutions such as mediation and conciliation are also provided for under the data protection laws in New Zealand and Canada.

*Office of the Privacy Commissioner for Personal Data
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Schedule

<u>Jurisdiction</u>	<u>Sanctioning Powers of Overseas Privacy Commissioners or Data Protection Authorities</u>
United Kingdom	<p>1. The UK Information Commissioner is empowered to issue Enforcement Notices.</p> <p>Section 40 of the UK <i>Data Protection Act 1998</i> provides that if the Information Commissioner is satisfied that a data controller has contravened or is contravening any of the data protection principles, and that the contravention has caused or is likely to cause any person damage or distress, he may serve the data controller with an enforcement notice. A data controller who fails to comply with an enforcement notice is guilty of an offence under section 47(1).</p> <p>2. Also, the UK Information Commissioner is empowered to impose monetary penalty on data users in cases involving serious contravention of the data protection principles.</p> <p>Under section 55A of the Act, the Information Commissioner may serve a data controller with a monetary penalty notice if he is satisfied that: (a) there has been a serious contravention of data protection principles; (b) the contravention was of a kind likely to cause substantial damage or distress; and (c) either the contravention was deliberate or the data controller knew or ought to have known that there was a risk that the contravention would occur and that such contravention would be of a kind likely to cause substantial damage or distress, but failed to take reasonable steps to prevent the contravention.</p> <p>Sections 55B, 55C, 55D and 55E set out the procedural aspects. The Information Commissioner is required to serve a “notice of intent” before imposing a monetary penalty, and give the data controller a period of time to make representations. The data controller will have a right of appeal against a monetary penalty notice. The amount of penalty determined by the Information Commissioner must not exceed the amount as prescribed by the Secretary of State. The current amount prescribed by the Secretary of State is not more than £500,000.</p> <p>The Information Commissioner has published a <i>Guidance about the issue of Monetary Penalties prepared and issued under section 55C(1) of the Data Protection Act 1998</i>. The Guidance has been approved by the Secretary of State and laid before the Parliament. It sets out the criteria or factors which the Commissioner has to take into consideration in deciding to impose monetary penalties and how to determine the amounts.</p>
Australia	<p>1. The Australia Privacy Commissioner is empowered to make a determination after investigation in that the respondent may be required not to continue the conduct and to perform any act to redress the loss and damage of the complainant. The Australia Privacy Commissioner may also declare that the complainant is entitled to a specified amount by way of compensation for the loss and damage suffered (including injury to feelings and humiliation suffered) by reason of the act or practice complained against. (Sections 52(1)(b)(i)(ii)(iii) and 52(1A) <i>Privacy Act 1988</i>). The Commissioner may determine such amount to be reimbursed to the complainant for expenses reasonably incurred in connection with the making of the complaint and the investigation (<i>Section 52(3) Privacy Act 1988</i>).</p>

	<ol style="list-style-type: none"> 2. The Privacy Commissioner or the complainant may commence proceedings in the Federal Court or the Federal Magistrates Court for an order to enforce a determination made under section 52. (Section 55A <i>Privacy Act 1988</i>). 3. In the <i>Australian Law Reform Commission Report 108</i> released on 11th August 2008, it is recommended that the Privacy Commissioner should be given the power to conciliate a complaint if the Commissioner considers that conciliation may be successful (<i>Recommendation 49-5</i>).
<p>Macau</p>	<ol style="list-style-type: none"> 1. It will be an offence if an organization fails to comply with the obligations in the <i>Personal Data Protection Act (Act 8/2005)</i> and an administrative fine may be imposed. The Office for Personal Data Protection is responsible for the application of the fines provided for under the <i>Personal Data Protection Act. (Article 32, 33 & 36)</i> 2. The Office for Personal Data Protection is also empowered to (1) order prohibition of processing, blocking erasure or destruction of data, (2) publish judgment, and (3) issue public warning or censure of the data controller provided by in Sections II and III of Chapter VIII of the <i>Personal Data Protection Act. (Article 43)</i>
<p>New Zealand</p>	<ol style="list-style-type: none"> 1. The New Zealand Privacy Commissioner is empowered to secure a settlement between the parties and an assurance against repetition of any action that is the subject matter of the complaint. The Commissioner may call for a compulsory conference. If a settlement cannot be reached or that an assurance cannot be secured, the Commissioner may refer the matter to the Proceedings Commissioner for a civil proceedings to be instituted before the Complaints Review Tribunal against the person being complained against under section 82. (<i>sections 74, 76 & 77 of the Privacy Act 1993</i>) 2. The New Zealand Privacy Commissioner is also empowered to issue a transfer prohibition notice to an agency proposing to transfer personal information outside New Zealand if she is satisfied, on reasonable grounds, that (a) the information has been, or will be received in New Zealand from another State and is likely to be transferred to a third State where it will not be subject to a law providing comparable safeguards to the <i>Privacy Act 1993</i>; and (b) the transfer would be likely to lead to a contravention of the Organization for Economic Co-operation and Development Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data. (<i>section 114D of the Privacy Act 1993</i>)
	<p>France</p> <ol style="list-style-type: none"> 1. The Commission Nationale de l'informatique et des libertes (CNIL) may issue a warning to a data controller who does not comply with the obligations under the <i>Act N 78-17 of 6 January 1978 on data Processing, Data files and Individual Liberties</i>. The CNIL may also order the data controller to cease the breach within a time limit that it determines. If a data controller does not comply with the order, the CNIL may impose financial penalties and injunction. (<i>Article 45</i>) The financial penalty shall be proportional to the gravity of the breaches committed and the profits obtained from the breach. In the first breach, the penalty may not exceed €150,000. In the event of a second breach within 5 years, the penalty may not exceed €300,000 or in case of a legal entity, 5% of gross turnover, within a maximum of €300,000. (<i>Article 47</i>) 2. The CNIL may pronounce the penalties imposed in a report and make public the warning that it issues. (<i>Article 46</i>)

<p>Canada</p>	<ol style="list-style-type: none"> <li data-bbox="384 138 1461 280">1. The Canada Privacy Commissioner may attempt to resolve complaints by means of dispute resolution mechanisms such as mediation and conciliation. <i>(section 12(2) of the Personal Information Protection and Electronic Documents Act)</i> <li data-bbox="384 280 1461 826">2. The Canada Privacy Commissioner is empowered to issue an investigation report containing his findings and recommendations, and a request that notice be given to the Privacy Commissioner within a specified time of any action taken or proposed to be taken to implement the recommendations. <i>(Section 35 of the Privacy Act and section 13 of the Personal Information Protection and Electronic Documents Act)</i> The complainant may apply to the Court for a hearing in respect of any matter in respect of which the complaint was made or that is referred to in the Commissioner's report. <i>(section 14 of the Personal Information Protection and Electronic Documents Act)</i> Where, following investigation of a complaint relating to a refusal to give access to personal information under the Privacy Act, access is not given to the complainant, the Commissioner shall inform the complainant that he has the right to apply to the Court for a review of the matter investigated. <i>(section 35(5) of the Privacy Act)</i>
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