

U.S. House of Representatives
Committee on the Judiciary

Washington, DC 20515–6216
One Hundred Sixteenth Congress

October 4, 2019

Honorable Peter Dutton
Minister for Home Affairs
P.O. Box 6022
Parliament House of Australia
Canberra ACT 2600

Dear Minister Dutton:

I understand that our governments will meet later this month to discuss, among other things, work towards an executive agreement under the Clarifying Lawful Overseas Use of Data Act (“CLOUD Act”).¹ Australia is a close ally and trusted partner of the United States on many fronts—including in our common effort to balance the needs of law enforcement with meaningful privacy considerations for our citizens.

I write to express my concern, however, that Australia’s Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 (“Access Act”) may undermine your ability to qualify for an executive agreement under the CLOUD Act.

The CLOUD Act authorizes the United States to enter into comity agreements with foreign nations that maintain “robust substantive and procedural protections for privacy and civil liberties.”² Once subject to an agreement, a partner nation’s law enforcement agencies may request relevant content held by U.S. providers without first seeking approval from American authorities. The CLOUD Act also provides for expedited Congressional disapproval should we determine that an executive agreement does not comport with the letter or spirit of the law.³ As you know, in the House of Representatives, it falls to the Judiciary Committee to review any such executive agreement.

A diverse coalition of technologists, Australian and U.S. technology firms, and civil society advocates has expressed concerns that the Access Act has profound impacts on privacy

¹ See, e.g., Jamie Smyth, *US tech groups push back on Australia social media law*, FINANCIAL TIMES, Apr. 3, 2019.

² 18 U.S.C. § 2523(b)(1).

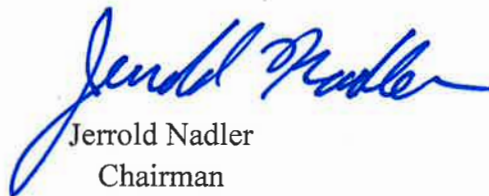
³ *Id.* § 2523(d)(4).

and security well beyond Australia's borders.⁴ The Access Act allows your government to order private companies, regardless of where they are located, to build or implement specific surveillance capabilities. As currently drafted, the Access Act does not require independent judicial review before or after the government issues an order requesting content from private businesses. The Law Council of Australia notes specifically that the Access Act "[does] not meet some of the specific criteria required by the CLOUD Act" and "does not provide sufficient requirements for . . . independent judicial oversight."⁵

I hope you will clarify to the Judiciary Committee how you plan to address these concerns prior to negotiating any executive agreement under the CLOUD Act. I would also appreciate any information you can provide about provisions of the Access Act that may weaken encryption or other security measures on certain consumer devices.⁶ This is an area of keen interest to the Committee. In fact, during process of drafting the CLOUD Act, the Committee specifically included a provision prohibiting an executive agreement from creating any requirement that providers be capable of decrypting data.⁷

The Committee has a responsibility to understand the effects of laws passed by potential signatory nations under the CLOUD Act, but we also appreciate the close friendship between our two countries. We have a common interest in resolving concerns like those raised by the Access Act well in advance—so that we can ensure that any proposed agreement comports with our common values. Thank you for your consideration. I look forward to your response.

Sincerely,



Handwritten signature of Jerrold Nadler in blue ink.

Jerrold Nadler
Chairman

cc: Honorable Doug Collins, Ranking Member, House Committee on the Judiciary

⁴ See Review of the amendments made by the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 Submission 19.

⁵ *Review of the amendments made by the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 (CtH)*, Law Council of Australia submission to the Parliamentary Joint Committee on Intelligence and Security, July 16, 2019.

⁶ The CLOUD Act also requires that a nation's domestic law provide "protection from arbitrary and unlawful interference with privacy." 18 U.S.C. § 2523(b)(1)(B)(iii)(I).

⁷ *Id.* at § 2523(b)(3).