



**THE HON PETER DUTTON MP**  
**MINISTER FOR HOME AFFAIRS**

Ref No: MS19-003207

The Hon Jerrold Nadler  
 Chairman  
 Committee on the Judiciary  
 United States House of Representatives  
 2138 Rayburn House Office Building  
 Washington, D.C. 20515  
 United States of America

Dear Mr Nadler

Thank you for your correspondence of 4 October 2019 regarding the interaction between Australia's *Telecommunications and Other Legislation (Assistance and Access) Act 2018* (Assistance and Access Act) and Australia's qualification for an executive agreement with the United States under the Clarifying Lawful Overseas Use of Data Act 2018 (CLOUD Act). Negotiations have begun between Australia and the United States to work towards such an executive agreement.

Australia prides itself on supporting the protection of the privacy and civil liberties of all people. The Assistance and Access Act does not derogate from our commitment to these important principles.

Rather, the Act provides a more effective framework for agencies to work collaboratively with service providers on technical matters. Requests or notices for technical assistance under the Assistance and Access Act are subject to strong safeguards and oversight mechanisms.

The technical assistance framework under the Assistance and Access Act cannot compel the production of the content of a person's communications, or the data surrounding their communications. Under Australian law, a warrant or authorisation must be sought from an appropriately authorised independent body (such as a Judge or Magistrate) to obtain such data.

Much has been made of the ability under the Act to ask companies to build new capabilities and the suggestion that this allows Australia to break encryption. This is not the case. If a company is capable of removing encryption they have applied, a technical assistance notice may be used. However, if they are not capable of removing the electronic protections they have applied, a technical capability notice cannot be issued. The Assistance and Access Act also prohibits Australian agencies from requiring companies to maintain any existing capability to decrypt data, should

companies wish to change or remove this capability.

The Assistance and Access Act establishes a mechanism for independent scrutiny of notices requiring the development of new capabilities. While requests and notices under the Assistance and Access Act are not judicially authorised, these requests and notices are subject to judicial review, using the jurisdiction of the High Court provided by the Constitution of Australia. I should note that if a CLOUD Act executive agreement is concluded between our two governments, the assistance powers available under the Assistance and Access Act would not be orders that fall under that agreement.

Australia has engaged closely with the United States from the earliest days of the Assistance and Access Act, particularly in the context of the CLOUD Act. I welcome the opportunity to engage further with the Committee on the Judiciary. I have asked officials from the Australian Embassy to be in contact with you to offer any briefings you or the Committee may require.

Australia and the United States have long been allies in the global fight to combat serious crime. I thank you for your letter and look forward to further enhancing the strong relationship between our two countries through the successful negotiation and implementation of an executive agreement under the CLOUD Act.

Yours sincerely



PETER DUTTON 04/12/19

cc: the Hon William Barr, United States Attorney General

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**QUESTION TIME BRIEF (QTB)**  
**CLOUD ACT**

**QUESTION: Does the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* contain measures that are contrary to the criteria in the United States Clarifying Lawful Overseas Use of Data (CLOUD) Act?**

**KEY TALKING POINTS:**

- **No** issues have been identified with the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* that would prevent Australia from successfully negotiating a CLOUD Act bilateral agreement with the United States.
  - The *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* establishes a framework for Government to work cooperatively with companies supplying communications services and devices within Australia, including United States corporations.
  - The framework does not replace the need for authorities to seek a warrant or authorisation from an independent authority to access communications data.
  - A CLOUD Act bilateral agreement would not require service providers to decrypt client data.
- 
- The CLOUD Act is intentionally neutral on issues relating to encryption.
  - Requests and notices under the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* do not compel the disclosure of communications data that would otherwise require a warrant or authorisation. That warrant or authorisation must still be obtained.
  - Access to communications data will continue to be subject to appropriate independent authorisation, such as judicial approval – domestically and for requests under an eventual CLOUD Act bilateral agreement.
  - All investigatory powers that would operate under a CLOUD Act agreement would be subject to independent review.
- If asked: Has the United States expressed any concerns regarding a CLOUD Act agreement with Australia?*
- My colleague the US Attorney General is pleased that we have commenced negotiations for such an important bilateral agreement.

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**QUESTION TIME BRIEF (QTB)**  
**CLOUD ACT**

- The Attorney General recognised Australia as a close partner with robust protections for privacy and civil liberties.
- Officials from our two countries have also engaged extensively in advance of commencing negotiations for an agreement.
- On 4 October 2019, Chairman of the Committee on the Judiciary of the United States House of Representatives, the Honorable Jerrold Nadler, wrote to me about the proposed agreement.
- I can advise that no issues have been identified with the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act* that would prevent Australia from successfully negotiating a CLOUD Act bilateral agreement with the United States.
- The *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* establishes a framework for Government to work cooperatively with companies supplying communications services and devices within Australia, including United States corporations.
- The framework does not replace the need for authorities to seek a warrant from an independent authority to intercept communications.
- All investigatory powers that would operate under a CLOUD Act agreement would be subject to independent review.
- A CLOUD Act bilateral agreement would not require service providers to decrypt client data.

## BACKGROUND AND CHRONOLOGY

On 4 October 2019, Chairman of the Committee on the Judiciary of the United States House of Representatives, the Honorable Jerrold Nadler, wrote to express concerns that the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* may undermine Australia's ability to qualify for a CLOUD Act agreement.

The letter was extensively picked up in Australian and international media.

On **date** you responded to Nadler advising that no issues have been identified with the Act that would prevent Australia from successfully negotiating an agreement.

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**QUESTION TIME BRIEF (QTB)**  
**CLOUD ACT**

The Committee on the Judiciary is responsible for reviewing any CLOUD Act executive agreement prior to commencement in the United States.

Lead Division

Contact: Andrew Warnes, Assistant Secretary National  
Security Policy Branch

Division: National Security and Law Enforcement  
Division

Date first prepared: 09 October 2019

Originating Source: HA

Phone:

s22(1)(a)(ii)

s22(1)(a)(ii)

Action Officer:

s22(1)(a)(ii)

Date last Updated: 2/01/2020 - 3:30 PM

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Australian Government  
Department of Home Affairs

## Submission

For decision

PDMS Ref. Number MS19-003207

To Minister for Home Affairs

Subject

s22(1)(a)(ii)

Timing

Please action by noon 4 November 2019 s22(1)(a)(ii)

### Recommendations

That you:

s22(1)(a)(ii)

5. sign and date the letter to the Chairman of the United States House Judiciary Committee relating to bilateral cross-border access to data agreement with the United States, at Attachment D.

signed / not signed

s22(1)(a)(ii)

Minister for Home Affairs

Signature.....

Date:...../...../2019

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Minister's Comments				
<b>Rejected</b> Yes/No	<b>Timely</b> Yes/No	<b>Relevance</b> <input type="checkbox"/> Highly relevant <input type="checkbox"/> Significantly relevant <input type="checkbox"/> Not relevant	<b>Length</b> <input type="checkbox"/> Too long <input type="checkbox"/> Right length <input type="checkbox"/> Too brief	<b>Quality</b> Poor 1.....2.....3.....4.....5 Excellent <b>Comments:</b>

## Key Issues

s22(1)(a)(ii)

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s22(1)(a)(ii)

*Ministerial correspondence*

10. On 4 October 2019, Chairman of the Committee on the Judiciary of the United States House of Representatives, the Honorable Jerrold Nadler, wrote to you about work between Australia and the United States to negotiate a bilateral agreement under the United States Clarifying Overseas Use of Data (CLOUD) Act (**Attachment G**).
11. Mr Nadler expressed concerns that Australia's *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* ("the Assistance and Access Act") may undermine Australia's ability to qualify for a CLOUD Act agreement.
12. The Department of Home Affairs has engaged extensively with the United States Department of Justice on the Assistance and Access Act, and ahead of commencing CLOUD Act negotiations. No issues have been identified with the Assistance and Access Act that would prevent Australia from successfully negotiating a CLOUD Act bilateral agreement. Further, a CLOUD Act bilateral agreement would not require service providers to decrypt client data.
13. References to Mr Nadler's letter were widely picked up in Australian and international media.

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14. On 15 October 2019, Senator the Hon Kristina Keneally, also wrote to you about Australia's efforts to negotiate a bilateral agreement under the CLOUD Act (Attachment H).
15. Senator Keneally expressed concerns that the Assistance and Access Act would undermine Australia's ability to qualify for a CLOUD Act agreement, referencing Mr Nadler's letter of 4 October 2019. Senator Keneally also expressed concerns that Australia had only recently commenced formal negotiations with the United States.

s22(1)(a)(ii)



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s22(1)(a)(ii)



24. The United States Department of Justice has been consulted regarding the response to Mr Nadler.

s22(1)(a)(ii)



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s22(1)(a)(ii)



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## Attachments

s22(1)(a)(ii)

### Attachment D

Response letter to Chairman of the Committee on the Judiciary of the US House of Representatives, Jerrold Nadler

s22(1)(a)(ii)

### Attachment G

4 October 2019 letter from Chairman of the Committee on the Judiciary of the US House of Representatives, Jerrold Nadler

s22(1)(a)(ii)

#### Authorising Officer

Cleared by:

Hamish Hansford  
Acting Deputy Secretary  
Policy Group

Date: 30 October 2019

Ph: s22(1)(a)(ii)

**Contact Officer** Andrew Warnes, Assistant Secretary, National Security Policy Branch Ph: s22(1)(a)(ii)

**Through** Ciara Spencer, Acting First Assistant Secretary, National Security and Law Enforcement Policy Division  
Ph: s22(1)(a)(ii)

**CC** Secretary  
Deputy Secretary Corporate and Enabling  
General Counsel

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**THE HON PETER DUTTON MP**  
**MINISTER FOR HOME AFFAIRS**

Ref No: MS19-003207

Senator the Hon Kristina Keneally  
 Deputy Labor Leader in the Senate  
 Shadow Minister for Home Affairs  
 Shadow Minister for Immigration and Citizenship  
 Senator for New South Wales  
 PO Box 6100  
 Senate  
 Parliament House  
 CANBERRA ACT 2600

Dear Senator

Thank you for your correspondence of 15 October 2019 about Australia's engagement with the United States to set up a bilateral agreement under its *Clarifying Lawful Overseas Use of Data Act 2018* (CLOUD Act).

I am pleased Labor supports a CLOUD Act agreement. As you note, the timely access to data held by communications service providers is essential to protect public safety and combat serious crime, such as terrorism, child sexual abuse offences, and organised crime. Successful negotiation of a CLOUD Act agreement is one of my highest priorities. A CLOUD Act agreement will greatly improve the efficiency of Australian law enforcement's access to the information they need to do their job.

Australia has engaged closely with the United States from the outset of the *Telecommunications and Other Legislation (Assistance and Access) Act 2018*, particularly in the context of the CLOUD Act. I look forward to working with Labor on progressing through Parliament implementing legislation for this agreement and would be pleased to provide a briefing on these matters upon introduction of legislation.

Yours sincerely

04/12/19

PETER DUTTON

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