

UNCLASSIFIED

Key Brief Number: PG-16

**Home Affairs Portfolio
Department of Home Affairs
Supplementary Estimates – October 2019**

KEY BRIEF**Topic: United States and Australia Cloud Act Agreement****Responsible Deputy:** Marc Ablong PSM**Key Points:**

- The *Clarifying Lawful Overseas Use of Data Act* (CLOUD Act) was passed by the United States Government in March 2018.
 - It creates a framework for the United States to enter into bilateral ‘executive agreements’ with qualifying foreign governments for reciprocal cross-border access to communications data, for the prevention, detection, investigation, or prosecution of serious crime.
- Australia commenced negotiations with the United States in August 2019 for a bilateral agreement under the CLOUD Act following months of detailed discussions between officials.
 - On 7 October 2019, Minister Dutton and United States Attorney General Barr issued a joint statement announcing the commencement of negotiations
- In October 2019, Minister Dutton said “Where the requests at the moment are being made and the agencies are waiting 12 months or so for receipt of that information, well there may be another child who suffers at the hands of that paedophile that they're investigating.”

Media reporting: interaction between the CLOUD Act and the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018

- On 4 October 2019, Chairman of the Committee on the Judiciary of the United States House of Representatives (“the Committee”), the Honorable Jerrold Nadler, wrote to Minister Dutton about work between Australia and the United States to negotiate a CLOUD Act agreement.
 - 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.
- In response to concerns regarding Mr Nadler’s letter, in October 2019 Minister Dutton said “We will have a look at those concerns but the Americans, the Brits and others are having a look at our legislation at the moment because they believe it is a significant step forward and they may well replicate it themselves in some form.”
- On 15 October 2019, Shadow Minister for Home Affairs, Senator the Hon. Kristina Keneally wrote to Minister Dutton, referencing Mr Nadler’s letter and concerns that

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Australia's Assistance and Access Act impeded Australia's ability to enter into a CLOUD Act agreement with the United States in a timely fashion (*Attachment D*).

- On 16 October 2019, Senator Keneally gave notice of a motion in the Senate calling on the Government to work productively with the Senate to ensure that Australia's legislation does not impede a CLOUD Act agreement.

Claims that the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 contain measures that are contrary to the criteria in the CLOUD Act

- The Department of Home Affairs has engaged extensively with the United States Department of Justice on the Assistance and Access Act.
 - No issues have been identified with the Assistance and Access Act that would prevent Australia from successfully negotiating a CLOUD Act bilateral agreement.
- The Assistance and Access Act establishes a framework for Government to work cooperatively with companies supplying communications services and devices within Australia, including United States corporations.
- The framework is not focused on compelling the production of communications content and non-content data from these companies and therefore will not constitute an order for the purposes of a CLOUD Act executive agreement.
 - Authority to access the content of communications must be subject to similar warrant authorisations, oversight and transparency as required under domestic access.

Benefit to having a CLOUD Act bilateral agreement

- Almost every crime type and national security concern has an online element – agencies require data not only for cyber investigations but for violent crimes, human trafficking and people smuggling, drug trafficking, financial crimes, terrorism and child sexual abuse.
- The exponential rise of global connectivity and reliance on cloud computing means that intelligence and evidence that was once stored onshore and available under a domestic warrant is now distributed over different services, providers, locations and jurisdictions.
- Often government-to-government assistance, such as mutual legal assistance, is required to obtain data in admissible form from foreign jurisdictions.
 - However, mutual legal assistance is often complex, lengthy, resource intensive and inefficient (response times average between 6 and 12 months).
 - The number of mutual legal assistance requests for electronic information held by service providers in the United States has increased dramatically in recent years, straining resources and slowing response times.

Related documents

- BPB-05 - Clarifying Lawful Overseas Use of Data Act. Clarifying Lawful Overseas Use of Data Act.

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SB19-001494

Page 2 of 2
As at 18 October 2019

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Australian Government
Department of Home Affairs

Submission

For decision

PDMS Ref. Number MS19-003207

To **Minister for Home Affairs**

Subject

s34(1)(c)

Timing

Please action by noon 4 November 2019 s34(1)(c)

Recommendations

That you:

s34(1)(c)

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**.
6. sign and date the letter to Senator the Hon Kristina Keneally relating to a bilateral cross-border access to data agreement with the United States, at **Attachment E**.

signed / not signed

signed / not signed

Minister for Home Affairs

Signature.....

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

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

Key Issues

s34(1)(c)

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s34(1)(c)

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.

s34(1)(c)

s33(a)(iii)

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s34(1)(c)



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

s34(1)(c)



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s34(1)(c)



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~~PROTECTED Sensitive: Cabinet~~**Attachments****Attachment A**

s34(1)(d)

Attachment B

s34(1)(c)

Attachment C

s34(1)(c)

Attachment D

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

Attachment E

Response letter to Senator the Hon. Kristina Keneally

Attachment F

s34(1)(c)

Attachment G

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

Attachment H

15 October 2019 letter from Senator the Hon. Kristina Keneally

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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Attachment A deleted – Exempt – section 34(1)(d)

Attachment B deleted – Exempt – section 34(1)(c)

Attachment C deleted – Exempt – section 34(1)(c)



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

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 to see your support for 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.

Please find enclosed a copy of my letter to Chairman of the Committee on the Judiciary of the US House of Representatives, Jerrold Nadler, whom has raised similar issues addressed in your letter. As you can see from my response to Chairman Nadler, the *Australia's Telecommunications and Other Legislation (Assistance and Access) Act 2018* is not incompatible with a CLOUD Act agreement. I look forward to working with Labor on progressing through Parliament implementing legislation for this agreement, which I will seek to introduce in 2020.

Yours sincerely

PETER DUTTON

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Attachment F deleted – Exempt – Section 34(1)(c)

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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

15 October 2019

Hon Peter Dutton MP
Minister for Home Affairs
PO Box 6022
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Minister

RECEIVED BY MO / AMO

- ☐ Reply by Minister / Asst Min
☐ Reply by Department
☐ Other

16 OCT 2019

Notes

I would like to congratulate the Government on its joint announcement with the United States on 7 October that you have entered into formal negotiations to secure a bilateral agreement under the US Clarifying Lawful Overseas Use of Data Act (the CLOUD Act).

Enacted in March 2018 by Congress, the CLOUD Act empowers the US Government to enter into agreements with foreign governments to radically speed up the time it takes foreign police and security agencies to access electronic data held in the United States for the purpose of investigating serious crimes like terrorism and paedophilia.

Given it can currently take up to two years for police or security agencies to access data held in the United States on platforms like WhatsApp and Facebook, the enactment of the CLOUD Act was incredibly important.

I can't even begin to imagine the incredible pain and suffering that victims and their families must feel as Australian police are hamstrung by these multi-year delays. And I am sure our police and security agency personnel must feel incredibly frustrated and helpless as they wait for up to two years to access the critical proof they need to put away a paedophile or to prosecute a terrorist.

I note that on 3 October, the week before you commenced negotiations with the US, the United Kingdom and the US announced that they had successfully concluded their negotiations and entered into an executive agreement under the CLOUD Act. The UK Government passed legislation in 2018 to assist with this agreement being met. This is a testament to the United Kingdom Government's proactiveness on this issue.

While I welcome the announcement on 7 October, I am deeply concerned that Australia has not been similarly proactive in its efforts to take advantage of the opportunity afforded to Australian law enforcement and security agencies by the CLOUD Act.

Firstly, I am concerned that it has taken the Australian Government over 18 months to even begin these negotiations with the United States. Secondly, I am concerned that – over the

last 18-months – actions taken by your Government have potentially compromised Australia's ability to secure an executive agreement with the US under the CLOUD Act.

As you know, the CLOUD Act includes a number of requirements that must be satisfied before the US Government can enter into an agreement with a foreign government, including that the foreign government's domestic laws must afford "robust substantive and procedural protections for privacy and civil liberties in light of the data collection and activities of the foreign government that will be subject to the agreement".

Labor has long held concerns that the Morrison Government's encryption laws (the Assistance and Access Act), which were rushed through the Parliament late last year by you and Prime Minister, do not include "robust substantive and procedural protections" and so do not satisfy the requirements of the CLOUD Act.

As the Shadow Attorney-General, the Hon Mark Dreyfus QC, said last year in the Parliament, "Labor members of the intelligence committee were very concerned that unless it is significantly amended the [Assistance and Access] bill could imperil Australia's chances of entering into a CLOUD Act agreement with the United States."

This is why Labor introduced amendments to your legislation in the Senate in December 2018, including a requirement that a judicial officer approve any technical assistance or capability notice. That particular amendment was modelled on the "double-lock" regime (a requirement for judicial and non-judicial authorisation) in the UK's *Investigatory Powers Act 2016*.

Labor was not alone in expressing serious concerns about your legislation. In addition to a number of your own backbenchers, such as Tim Wilson MP, technology and legal experts, large multinational technology companies and small Australian start-ups all expressed their fears that your legislation was not fit-for-purpose, would compromise Australia's ability to take advantage of the CLOUD Act and would also endanger jobs.

The Morrison Government rejected Labor's amendments in December 2018, which was our attempt to give effect to the bipartisan parliamentary committee recommendations. The Morrison Government did promise to progress these amendments in early 2019, but this promise was not kept when Parliament resumed in February.

Fast forward to this month, and no sooner had you announced the commencement of negotiations with the US, did the Chairman of the US House Judiciary Committee, Jerrold Nadler, send you a letter expressing grave concerns – and substantiating Labor's fears – about the absence of "robust substantive and procedural protections" in your Government's encryption laws. This is significant because, as you would know, the House Judiciary Committee will play a key role in approving any potential agreement between the US and Australia under the CLOUD Act.

The speed in which Congressman Nadler wrote his letter suggests that Australia may be a long way off from being able to access electronic data held in the United States to investigate serious crimes – especially if you and the Prime Minister maintain your steadfast opposition to supporting even minor amendments to your encryption laws.

Without an agreement between the US and Australia under the CLOUD Act, victims of vile crimes such as terrorism and paedophilia will continue to have to wait for up to two years for police to even to be able to get a good start on their case.

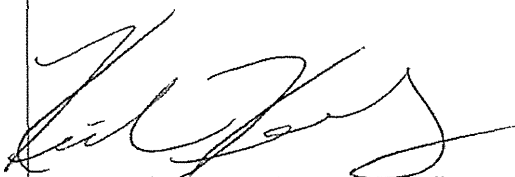
The police and security agencies of the United Kingdom now have a new tool in their toolkit to fight the most insidious crimes. Australian law enforcement agencies do not. It is now time for the Government to work with Labor to address any and all obstacles in the way of securing the best outcome for those agencies and the Australian people, including deficiencies in the Assistance and Access Act.

I do note that the Parliamentary Joint Committee on Intelligence and Security is now reviewing the Assistance and Access Act and I expect that Congressman's Nadler's comments, as well as consistent criticism from technology experts and wider society, will all be considered deeply by the Committee. However, there are improvements that could be made to the laws right now – beginning with the full implementation of the bipartisan recommendations that the Intelligence and Security Committee made in December of last year.

Labor is committed to playing a constructive role in securing the best possible outcome for Australian law enforcement and security agencies and the Australian people. To that end, we urge the Government to work with Labor to make all necessary improvements to existing laws, including the Assistance and Access Act.

If you would like to discuss this further, please contact my office on 02 6277 3512.

Kind regards



Senator the Hon Kristina Keneally
Shadow Minister for Home Affairs
Shadow Minister for Immigration and Citizenship
Senator for New South Wales

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HOME AFFAIRS
QUESTION TIME BRIEF (QTB)

s22(1)(a)(ii)

QUESTION:

s22(1)(a)(ii)

Does this mean Australia will not be able to enter into a CLOUD Act agreement with the United States?

KEY TALKING POINTS:

s22(1)(a)(ii)

- 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.
- This industry assistance framework does not, in and of itself, allow agencies to access communications data or the content of communications.
- To access communications data or the content of communications agencies must seek a separate warrant or authorisation from an independent authority.

s22(1)(a)(ii)

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QUESTION TIME BRIEF (QTB)

FOI Document #6

s22(1)(a)(ii)

If asked: Does the Assistance and Access Act impact Australia's ability to enter into a CLOUD Act agreement with the United States?

- 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.
- This industry assistance framework does not, in and of itself, allow agencies to access communications data or the content of communications.
- 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.

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HOME AFFAIRS
QUESTION TIME BRIEF (QTB)

s22(1)(a)(ii)

- A CLOUD Act bilateral agreement would not require service providers to decrypt client data.

s22(1)(a)(ii)

Lead Division

Contact: s22(1)(a)(ii), A/g Assistant Secretary
National Security Policy Branch
Division: National Security and Law Enforcement
Division

Phone: s22(1)(a)(ii)

s22(1)(a)(ii)

Action Officer: s22(1)(a)(ii)

Date first prepared: 3 December 2019

Date last Updated: 3/12/2019 - 1:42 PM

Originating Source: HA

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s22(1)(a)(ii)

Q&A Document - Additional

Contents

s22(1)(a)(ii)

CLOUD Act 7

18. Does the Assistance and Access Act impact Australia's ability to enact an agreement with the United States under the CLOUD Act? 7

s22(1)(a)(ii)

Pages 2-6 removed
irrelevant

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CLOUD Act

18. Does the Assistance and Access Act impact Australia's ability to enact an agreement with the United States under the CLOUD Act?

- The CLOUD Act is intentionally neutral on issues relating to encryption.
- The *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (the Assistance and Access Act) will not prevent Australia from successfully negotiating a CLOUD Act bilateral agreement with the United States.
- The Assistance and Access Act establishes an industry assistance framework, for Australian law enforcement and security agencies to seek technical assistance from companies which supply communications services and devices to Australian users.
 - This includes companies from the United States.
- This industry assistance framework does not, in and of itself, allow agencies to access communications data or the content of communications.
- To access communications data or the content of communications agencies must seek a separate warrant or authorisation from an independent authority.
 - For example a warrant under the *Telecommunications (Interception and Access) Act 1979* to access stored communications, such as the content of stored emails or text messages.
- Requests under a CLOUD Act agreement would relate to access to communications data or the content of communications.
 - These requests would have to be founded on a warrant or authorisation from an independent authority.
 - These requests could **not** be based on an industry assistance request or notice under the Assistance and Access Act.
- The use of all investigatory powers under a CLOUD Act agreement would be subject to independent review.

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irrelevant

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Australian Government
Department of Home Affairs

Visit to Ethiopia and United Arab Emirates

The Honourable Peter Dutton MP
Minister for Home Affairs

09-15 December 2019

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Jacqueline F. Beauchere, Chief Online Safety Officer, Microsoft

11/12/2019, 15:00, s22(1)(a)(ii)

Context and objectives

What we want

- To outline Australia's approach to s22(1)(a)(ii) the CLOUD Act.

• s22(1)(a)(ii)

•

•

What they want

- s22(1)(a)(ii)
- To see Governments enter Cloud Act agreements with the United States.

• s22(1)(a)(ii)

s22(1)(a)(ii)

s22(1)(a)(ii)

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CLOUD Act

- I see the 2018 CLOUD Act as an opportunity to allow Australia access to a framework for further direct cooperation with US communication service providers.
- I welcome Microsoft's support of the CLOUD Act in the February 2018 industry open letter to the US Senate.
- On average it takes ^{s33(a)(iii)} [REDACTED] for Australian agencies to access data (including content) held by communications service providers in the US using the mutual legal assistance process.
 - As of September 2019, the Australian Central Authority has 170 such requests that have been or will be made to the US. Of these, 123 relate to the access of data.
- Australia strongly supports efforts to reduce conflict of laws by permitting a select country under formal agreement with the US to request disclosure of communications data directly between agencies and US industry.
- As a likeminded country, Australia has robust laws pertaining to privacy, human rights and the rule of law, and as a result we are currently negotiating the next CLOUD Act cross-border agreement with the US.
- My officials look forward to working with Microsoft and other industry partners to ensure robust arrangements not only enhance crime cooperation, but also incorporate important and substantial safeguards for protecting privacy and civil liberties.
- No issues have been identified with the Assistance and Access Act that would prevent Australia from successfully negotiating a CLOUD Act bilateral agreement with the United States.
 - The Assistance and Access Act establishes a framework for Government to work cooperatively with companies supplying communications services and devices within Australia, including United States corporations. The Cloud Act is clear that it is encryption neutral.
 - The framework provided by the Assistance and Access Act does not replace the need for authorities to seek a warrant or authorisation from an independent authority to access communications data. No data can be accessed under a technical assistance notice, technical capability notice or technical assistance request.

s22(1)(a)(ii)


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s22(1)(a)(ii)



Background

s22(1)(a)(ii)



CLOUD Act

s22(1)(a)(ii)



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s22(1)(a)(ii)



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The CLOUD Act and 'Microsoft Ireland'

In 2016, Microsoft challenged a warrant in the US for access to communications that were held by Microsoft in Ireland. The US Second Circuit Court decided that Microsoft and other

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communications service providers are not subject to warrants that require them to produce data held offshore. The US Department of Justice (DoJ) challenged this decision, which was due to be heard by the US Supreme Court in June 2018.

Microsoft sought Australia's provision of an amicus curiae brief in support of their motion. Rich Sauer, Corporate Vice President & Deputy General Counsel for External Legal Affairs met with Ambassador Hockey on 14 November 2017. Australia did not provide an amicus curiae brief. The UK provided a neutral amicus curiae brief which would have supported a favourable outcome for the US DoJ. The European Union provided a neutral amicus curiae brief which would have supported a favourable outcome for Microsoft.

Concerned about the outcome of the Supreme Court decision, the US DoJ and Microsoft worked out a compromise agreement that was included in the CLOUD Act 2018. The CLOUD Act passed Congress on 23 March 2018. The CLOUD Act clarifies that data in the control of a company is subject to a warrant irrespective of its location.

The case remains before the US Supreme Court.

Point of contact

s22(1)(a)(ii)

**Lawful access to data;
CLOUD Act; Abhorrent
Violent Material**

s22(1)(a)(ii), Acting Assistant Secretary National Security Policy, National Security and law Enforcement Policy Division, s22(1)(a)(ii)

s22(1)(a)(ii)

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s22(1)(a)(ii)



CLOUD Act

The CLOUD Act was passed on 23 March 2018 as part of the Vehicle for Consolidated Appropriations Act 2018 (US). The CLOUD Act creates a framework for the US to enter into executive agreements with qualifying foreign governments for reciprocal cross-border access to data, and creates the conditions by which a country can be considered a qualifying foreign government. While the United Kingdom will be the first foreign government to obtain an agreement with the US, Australia is seeking to be the second country to obtain such an agreement.

The United States received a formal mandate to negotiate a CLOUD Act bilateral agreement with Australia in August 2019. Australia is only the second country, after the United Kingdom, to have received a mandate from the United States.

s22(1)(a)(ii)



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Australian Government
Department of Home Affairs

Parliamentary Question on Notice

For decision

PDMS Ref. Number PQ19-000228

To Minister for Home Affairs

Number Parliamentary Question on Notice 1005

Asked by Kristina Keneally

Date asked 11 December 2019

Timing *Tabling due by 10 January 2020*

Recommendation

That you:

1. Approve the response at Attachment A for tabling.

approved / not approved /
please discuss

Minister for Home Affairs

Signature.....

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

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

Purpose

To seek your approval to table the response to the Parliamentary Question on Notice asked by Senator Kristina Keneally concerning briefings on the United States Government's CLOUD Act.

Consultation – internal/external (Mandatory Field)

1. Attorney-General's Department and the Department of Foreign Affairs and Trade (whose Ministers received similar questions from Senator Keneally).

Attachments

Attachment A Response

Attachment B Minister for Home Affairs' response letter to Congressman Nadler

Authorising Officer Cleared by: Greg Miller A/g Deputy Secretary Policy Group Date: 3 January 2020 Ph: s22(1)(a)(ii)

Contact Officer s22(1)(a)(ii), A/g Assistant Secretary, National Security Policy Branch, Ph: s22(1)(a)(ii)

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UNCLASSIFIED**Attachment A**

Home Affairs Portfolio

SENATE QUESTION

(Question No. 1005)

Senator Kristina Keneally asked the Minister representing the Minister for Home Affairs, upon notice, on 11 December 2019:

1. How many briefings has the Minister for Home Affairs received regarding the United States Government's CLOUD Act.
2. How many of these briefings were requested by the Minister.
3. When did these briefings occur.
4. Specifically, how many briefings has the Minister received since:
 - a. 4 October 2019; and
 - b. 17 October 2019.
5. Did the Minister, his office, or any other member of the Government respond to the letter from Congressman Nadler dated 4 October 2019; if so, can a copy of this letter be tabled.
6. Specifically, in relation to the letter, did the Minister commit to any undertakings in his response to Congressman Nadler.

Senator Cash – The Minister for Home Affairs has provided the following answer to the honourable senator's question:

1. The Department of Home Affairs has provided information to the Minister for Home Affairs on the United States CLOUD Act and related matters on a regular basis since December 2017. Information has been provided verbally and in writing.
2. Information has been provided both in response to requests from the Minister for Home Affairs and to bring matters to the Minister's attention.
3. This information has been provided to the Minister of Home Affairs on a regular basis since December 2017.
4. The Department has provided the following written briefs to the Office of the Minister for Home Affairs that included information relating to the United States CLOUD Act:
 - a. 1 - between 4 October 2019 and 16 October 2019 inclusive; and
 - b. 11 - since 17 October 2019.
5. The Minister for Home Affairs responded to the letter from Congressman Nadler dated 4 October 2019. A copy of the Minister's letter to Congressman Nadler is attached.
6. See attached letter.

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**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

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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.

If asked: Has the United States expressed any concerns regarding a CLOUD Act agreement with Australia?

- US Attorney General Barr is pleased that we have commenced negotiations for such an important bilateral agreement.
- The US 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.

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QUESTION TIME BRIEF (QTB)
CLOUD ACT

- 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.
- 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.

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 16 October, Shadow Minister for Home Affairs, Senator the Hon. Kristina Keneally gave notice of a motion calling on the Government to work productively with the Senate to ensure that Australia's legislation does not impede a CLOUD Act agreement.

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)

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QUESTION TIME BRIEF (QTB)

FOI Document #12

s22(1)(a)(ii)

QUESTION:

s22(1)(a)(ii)

**Does this mean Australia
will not be able to enter into a CLOUD Act agreement with the United States?**

s22(1)(a)(ii)

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QUESTION TIME BRIEF (QTB)

s22(1)(a)(ii)



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QUESTION TIME BRIEF (QTB)

s22(1)(a)(ii)

If asked: Does the Assistance and Access Act impact Australia's ability to enter into a CLOUD Act agreement with the United States?

- 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.
- This industry assistance framework does not, in and of itself, allow agencies to access communications data or the content of communications.
- 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.
- A CLOUD Act bilateral agreement would not require service providers to decrypt client data.

s22(1)(a)(ii)

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s22(1)(a)(ii)



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QUESTION TIME BRIEF (QTB)

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s22(1)(a)(ii)

CLOUD Act

The CLOUD Act was passed by the United States Government in March 2018. The CLOUD Act creates a framework for the United States to enter into bilateral 'executive agreements' with qualifying foreign governments for reciprocal cross-border access to communications data, for the prevention, detection, investigation, or prosecution of serious crime.

On 7 October 2019, Home Affairs Minister Peter Dutton and United States Attorney General William Barr jointly announced the commencement of negotiations for an agreement between the United States and Australia under the CLOUD Act.

Orders under a CLOUD Act agreement would relate to access to communications data or the content of communications. The use of powers to access communications data under a CLOUD Act agreement would be subject to independent review.

The CLOUD Act is intentionally neutral on issues relating to encryption.

Lead Division

Contact: s22(1)(a)(ii), A/g Assistant Secretary
National Security Policy Branch
Division: National Security and Law Enforcement
Division

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