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By email

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Dear Christine

Public cloud computing and jurisdictional risk

Introduction and summary

1. The New Zealand government supports the adoption of public cloud computing and has adopted a “Cloud First” policy. Recent and current cloud-based projects include the proposed digital integrated case management service for Aotearoa courts and tribunals, and the national data platform for Te Whatu Ora - Health New Zealand.
2. A carefully calibrated set of rules has evolved to protect private and confidential information held by public authorities (for example, medical records and court files), and to determine who can have access to what official information and at what time.
3. A key element of any cloud-based project is ensuring that the storage of official information in “the cloud” does not upset the balances struck by these rules. In addition to technical security and availability risks, the introduction of a cross-border element introduces questions as to who can access governmental information outside of the current processes, under what law and in what circumstances.
4. This issue of jurisdictional risk is acknowledged in some public cloud computing tender processes by requiring vendors to:
 - (a) to meet general data sovereignty requirements (sometimes including Māori data sovereignty); and
 - (b) store, or be able to store, all governmental information in Aotearoa New Zealand with a potential exception for information that transits or rests in Australia.
5. You have sought my opinion as to whether this is an appropriate approach to data sovereignty and jurisdictional risks.

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6. In summary, in my view:
- (a) The only way to avoid jurisdictional risk is by holding governmental information exclusively in New Zealand and by a provider that is not a subsidiary, or otherwise under the control, of a foreign company.
 - (b) As such, in my view, the approach set out above is too narrow. Jurisdictional risk also arises where information is held exclusively in New Zealand but by a provider that has a foreign parent company. There are examples of legislation in place overseas which may enable a foreign government to extend its reach to a New Zealand provider through a parent company in its jurisdiction. This could occur without notice to the New Zealand government.
 - (c) I do not regard data held in Australia to be subject to lesser jurisdictional risk than data held overseas generally. Indeed, following the signing of the Australia-U.S. Cloud Act agreement, data hosted in Australia by an Australian company will be accessible by U.S. law enforcement agencies regardless of whether the provider has a U.S.-based parent company.
 - (d) The ability to effectively manage jurisdictional risk (for example through holding the data in trust or via New Zealand legislation) is very limited and unlikely to provide sufficient security.
7. I trust that this advice is of assistance, and I would be happy to discuss these issues further.

Data sovereignty and jurisdictional risk

8. Data sovereignty and jurisdictional risk are closely aligned concepts. Data sovereignty is the concept that data remains subject to the laws and governance structure of the country where it is collected.
9. Jurisdictional risk is the risk that an overseas law enforcement agency or other person may be able to obtain lawful access to data stored, processed or transmitted through servers and other infrastructure that are either: (a) located outside New Zealand; or (b) operated by a service provider with a presence outside New Zealand and that may be required to comply with directions by an overseas government or court in relation to that data.
10. The concept of Māori data sovereignty recognises the rights and interests that Māori have in relation to their data, which is considered a tāonga.¹ It refers to the inherent rights and interests that Māori have in relation to the collection, ownership, and application of Māori data.² The relevant principles have been articulated in the Te Mana Raraunga - Māori Data Sovereignty Network Charter

¹ Te Kāhui Raraunga - the operational arm of the National Iwi Chairs Forum Data Iwi Leaders Group (Data ILG)19 - have defined data as a tāonga.

² As a collective right, Māori and Indigenous data sovereignty (IDSov) are closely aligned with other Indigenous rights set out in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) specifically Articles 3, 4, 5, 15(i), 18, 19, 20(i), 23, 31, 32, 33, 38, and 42. The Waitangi Tribunal has recognised that mātauranga Māori includes Māori rights and interests in the digital domain and potential implications for the integrity of the Māori knowledge system.

which emphasises the importance of indigenous data remaining subject to the laws of the nation from which it is collected.³

11. The importance of the Crown taking a proactive approach to this issue was identified by the Waitangi Tribunal, explaining:⁴

We see as particularly problematic the failure to appreciate or understand the link between data and mātauranga Māori, a taonga also guaranteed to Māori under te Tiriti/the Treaty, and in respect of which the Crown has a duty of active protection.

12. Recognising its Te Tiriti obligations, the Government's Strategy for a Digital Public Service includes a commitment to ensure that Māori are involved in decisions relating to digital transformation of the public service.⁵ In practical terms, compliance with the concept of Māori data sovereignty means that a vendor will, among other things, need to have processes in place to ensure it has strong controls in place around the usage and sharing of such data, recognising its status as a tāonga.

Information held in a purely domestic cloud

13. As noted in the introduction, New Zealand law prescribes how information held by public bodies can be accessed, by whom, when and for what purposes. Jurisdictional risk opens the possibility that access to this information will also be granted by overseas courts or governments pursuant to their rules around the compulsory provision of information (for example, for law enforcement purposes or between parties engaged in litigation).
14. In the scenario where the information is held on computer servers that are physically located in New Zealand, the information does not transit outside of New Zealand, and the provider is not owned or controlled by a foreign company, no jurisdictional or data sovereignty risks should arise.
15. In other words, the mere fact that the information is in "the cloud" does not make it vulnerable to jurisdictional risk.

International aspects and jurisdictional risks

16. The position becomes more complicated once an international dimension is added to the hosting arrangements.
17. Suppose, for example, that governmental information is held in a foreign country by a company that is incorporated in that jurisdiction. Access to the information could now become exposed to a different set of rules under in the domestic law of

³ Te Mana Raraunga, *Māori Data Sovereignty Network Charter*. The Charter asserts further that 'Māori Data Sovereignty recognises that Māori data should be subject to Māori governance' and 'Māori Data Sovereignty supports tribal sovereignty and the realisation of Māori and Iwi aspirations'.

⁴ Waitangi Tribunal, *The comprehensive and progressive agreement for Trans-Pacific Partnership* (Wai 2522), 2021, at p 53.

⁵ New Zealand Government, *Rautaki mō tētahi Rāngai Kāwanatanga Matihiko Strategy for a Digital Public Service*, 2020, which sets a whole-of-public-service direction for inclusive digital transformation.

that country, including in relation to law enforcement, litigation and regulatory investigations.⁶

18. It is difficult to imagine how this second set of access rules could be avoided in this scenario. Any contractual restrictions on access to the information would be trumped by the host country's laws.⁷ Even if the New Zealand Parliament passed legislation purporting to prevent access under the host country's domestic laws it is very unlikely that this would be given effect to as a matter of private international law.⁸

19. These risks are recognised by the approach described in paragraph 4 above. However, this standard approach makes two implicit assumptions about the nature of jurisdictional risk which, in my view, are very questionable.

The standard approach wrongly assumes that jurisdictional risk only arises where data leaves New Zealand

20. First, the standard approach assumes that jurisdictional risk only arises when the information in question is located (at rest or in transit) outside of New Zealand.

21. However, in my view, where the information is held exclusively in New Zealand by a New Zealand company, jurisdictional risk still arises where the provider has an overseas parent. In this scenario, the parent's home country may assert jurisdiction over data that an entity holds or has control of in Aotearoa New Zealand. So, for example, the home jurisdiction of the parent may provide for discovery of information that is within the possession or control of the parent even though it is held by a subsidiary in New Zealand.⁹

22. A topical example of the home jurisdiction of the parent asserting extraterritorial jurisdiction over data held by subsidiaries around the world is the Clarifying Lawful Overseas Use of Data Act (United States) enacted in 2018 (**CLOUD Act**) which allows U.S. federal law enforcement to compel U.S.-based technology

⁶ This is because any application under foreign law to a foreign court to access the data would not be effective without proceedings in New Zealand. A New Zealand court would apply New Zealand law to an application under (for example) the Senior Courts (Access to Court Documents) Rules 2017, and it is difficult to see in what circumstances an application to access court documents pursuant to some other cause of action could be governed by foreign law: see generally Maria Hook & Jack Wass *Conflict of Laws in New Zealand* (LexisNexis, 2020) at 301-303.

⁷ The foreign court would have personal jurisdiction over the custodian, and arguably subject-matter jurisdiction given that the data was held there. An application for discovery in relation to court proceedings, for example, is a matter of procedure that would be governed by the law of the foreign country, even if the data related to proceedings in New Zealand: see Hook & Wass at [3.145].

⁸ For example, the court may (i) decide that the matter is not contractual, so any contractual restrictions do not apply, (ii) find that the contractual restrictions are not binding on the party seeking access to the information, or (iii) characterise its own access rules as overriding mandatory rules that apply regardless of what the applicable law provides: Hook & Wass at 278-291.

⁹ See *ibid.* Under New Zealand law a person cannot generally object to production of relevant documents on the basis that the place where the data is held would prohibit production: *Brannigan v Davison* [1997] 1 NZLR 140 (PC). This will depend on the interpretation of the laws of the parent's home country and whether they are intended to have extraterritorial or overriding effect.

companies¹⁰ to disclose data pursuant to warrant¹¹ regardless of where it is located.¹² The test for application of the CLOUD Act to data outside the US is that the data is within the US provider's "possession, custody or control". Where this test is met, U.S. jurisdiction is treated as applying to the off-shore data, without raising issues of comity.¹³ There is no requirement for notice to the entity whose customer or subscriber data is being sought or to the foreign government.¹⁴ This extraterritorial legislation has been subject to considerable academic criticism.¹⁵

23. A second example from the U.S. is the Foreign Intelligence Surveillance Act (FISA)¹⁶ which enables U.S. intelligence agencies to require cloud hosts to provide data they control, store, or manage, as well as encryption keys to decrypt that data relating to non-U.S. persons. While it does not have explicit extraterritorial reach, if the U.S. providers have the ability to remotely access servers hosted outside the US or to require subsidiaries to provide access, then the data stored there can be seized. FISA requests tend to be secret and do not require a warrant.

¹⁰ Being companies that provide electronic communication or remote computing services. The CLOUD Act applies to warrants.

¹¹ The CLOUD Act (by way of the Stored Communications Act (codified at 18 USC Chapter 121 §§ 2701–2712)) applies to warrants issued using the procedures described in the Federal Rules of Criminal Procedure (and equivalent procedures in the case of a State court or a court-martial). See USC § 2703(a)

¹² CLOUD Act section 103, amending the USC adding § 2713: A provider of electronic communication service or remote computing service shall comply with the obligations of this chapter to preserve, backup, or disclose the contents of a wire or electronic communication and any record or other information pertaining to a customer or subscriber within such provider's possession, custody, or control, regardless of whether such communication, record, or other information is located within or outside of the United States.

¹³ A key purpose of the CLOUD Act was to address barriers arising from the mutual assistance process that usually applies to the enforcement of law enforcement warrants between countries by enabling direct enforcement as if the data was subject to US jurisdiction. See, for example, sec 102 of the CLOUD Act, which sets out the Congressional Findings.

¹⁴ Under the Stored Communications Act 18 USC § 2703, disclosure pursuant to a warrant can be required without notice to the customer or subscriber notwithstanding the provider is not authorised to access contents other than for providing the storage of computer services USC § 2703(b). Under the CLOUD Act, the US provider is permitted (although not required) to give notice to an entity within the foreign country whose customer or subscriber information is being sought, where the customer or subscriber is a national of the foreign country. However, this only applies for a qualifying country, being one that has CLOUD Act agreement with the US. Such notice is permitted but not mandatory and the express permission suggests it may be unlawful to give notice in other circumstances.

¹⁵ See for example Sabrina A. Morris "Rethinking the extraterritorial scope of the United States' access to data stored by the third party" (2018) 42 Fordham Int'l L., J, 183, which identifies problematic aspects of the CLOUD Act and recommends amendments; Secil Bilgic "Something old, something new, and something moot: the privacy crisis under the CLOUD Act" (2018) 32 Harv. J.L. & Tech. 321 at 347 which opines that post-Snowden attempts by US technology companies to find ways to ensure data privacy abroad, for example by Microsoft created a data trustee system and others signed privacy contracts with foreign customers, were rendered moot by the CLOUD Act and concludes '[r]egardless of where data is located, as long as a US-based company [has possession, custody, or control] the US government will be able to access it'.

¹⁶ Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 (FISA), 50 United States Code [USC] § 1881a.

24. Another form of jurisdictional risk is where the parent company is compelled to provide information or documents through the parent country's rules of civil procedure (that is, discovery) or where a regulator in the parent country exercises compulsory information gathering powers. Information held by a New Zealand subsidiary which comes within the request may have to be provided as being within the control of the parent company.
25. Data trusts have been mooted as a model that might insulate a subsidiary against the extraterritorial jurisdiction of the parent country. This model posits a trustee managing the collection and use of data and controlling the encryption keys so that the data is not under the control of either the provider company or its foreign parent. However, I understand that this is not feasible in practice as the services required for public cloud computing services will require the provider to have access to decrypted data. The only way to achieve data opacity is for the public authority customer to only transfer encrypted data to the cloud provider and hold its own encryption keys. This, however, means that the applications must be run within the customer's own computing environment which defeats the purpose of moving to a cloud provider.¹⁷
26. As summarised in *Te Kāhui Raraunga Māori data sovereignty and offshoring Māori data* (July 2022, at p 11):

When evaluating jurisdictional risk, it is important to consider the issue more broadly than merely where the data centre is located. Such an evaluation over simplifies the challenge in the presence of legislation that exists in a number of relevant countries. For example, both the USA and China assert jurisdiction over data stored by companies headquartered in their respective countries. Much of the associated legislation is relatively new, contentious, or untested, and as such creates significant ambiguity in determining privacy risk of data stored on platforms run by companies headquartered overseas.

The standard approach wrongly assumes that jurisdictional risk in relation to Australia is manageable

27. Secondly, the standard approach assumes that jurisdictional issues are lesser in Australia than in other countries and can be managed. This is the basis for the potential exception to data remaining in New Zealand.
28. In my view, this assumption is also not correct.
29. Where the server is located in Australia, it will be subject to Australian access rules in terms of law enforcement and the compulsory provision of information in litigation and pursuant to powers of regulators.¹⁸ As discussed at paragraph 17 above, it is unlikely that New Zealand legislation which tried to prevent this outcome would be effective.
30. As well as Australia asserting jurisdiction over the data, there is also the risk of a third country accessing the information.

¹⁷ In this scenario, I note that the data is still vulnerable to a “harvest now decrypt later” attack where information is obtained now and decoded in the future as decryption technologies develop.

¹⁸ See paragraph 17 above.

31. Again, the CLOUD Act is instructive. In addition to its base provisions, the CLOUD Act provides for bilateral CLOUD Act Agreements to be negotiated. Once in place, these agreements will enable law enforcement agencies in the U.S. to obtain access to electronic data held by providers in the other country whether or not the provider has a U.S.-based parent company. The Australia-US CLOUD Act Agreement was signed in December 2021 and anticipated to come into force at the end of 2022.¹⁹
32. What this means is that in addition to having access to data held by an Australian company with a U.S. parent, from the end of 2022 U.S. law enforcement agencies will be able to utilise the Australia-US CLOUD Act Agreement to access data in Australia held by an Australian company *even where there is no US parent company*. That is, the Agreement enables direct enforcement of disclosure orders against providers in Australia irrespective of any US connection. In the context of public cloud computing, if the data is possessed or controlled by a provider incorporated in Australia (including through a subsidiary in Aotearoa New Zealand), the information is subject to the Australia-US CLOUD Act Agreement. Similar to the broader operation of the CLOUD Act explained above, there is no requirement in the Australia-US CLOUD Act Agreement to provide notice to the Australian government or the entity whose customer data is being sought.²⁰

Conclusion

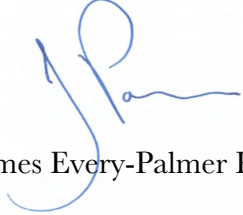
33. In my view, governmental information will be subject to jurisdictional risk where the cloud provider has an offshore parent and/or where the data transits or rests in any foreign country (including Australia). I have referred to the CLOUD Act as a topical example. But, the risk is broader than the CLOUD Act as it arises wherever a foreign country may assert jurisdiction over the information through a foreign parent or because the data is located in that foreign country. Future laws may also be more invasive than the CLOUD Act.
34. Accordingly, there is a material risk in relation to information held overseas or in New Zealand by the provider with an overseas parent. The risk is problematic in terms of trust in public bodies and is particularly problematic for Māori data sovereignty. In my view, it is very difficult to see how such risks could be managed effectively. I also note that, in relation to servers located overseas, it would be very

¹⁹ Agreement between the Government of Australia and the Government of the United States of America on Access to Electronic Data for the Purpose of Countering Serious Crime, Australia-United States (Signed 15 December 2021). It is given effect to by the Telecommunications Legislation Amendment (International Production Orders) Act 2021.

²⁰ Australia-US CLOUD Act Agreement. sets out various “protections”, but other than protections against targeting individuals among other things, these are limited to simply agreeing to apply the domestic law of the issuing authority (see for example Article 3, clause 4). The CLOUD Act also allows for a court to modify or quash a legal process where the following conditions are met: the disclosure would cause the provider to violate the laws of the qualifying foreign government; the interests of justice dictate that the legal process should be modified or quashed; and the customer or subscriber is not a US person and does not reside in the US. Of concern, these conditions indicate that, as a starting point, the warrant could be inconsistent with the law of the receiving country and apply to data of a non-US person. The requirement that the warrant would cause the provider to violate the laws of the qualifying foreign government also requires a law that specifically prohibits compliance (which many countries do not have). The “interests of justice” criterion also provides the US courts with a broad discretion as to whether to modify or quash.

difficult to provide for government oversight of key infrastructure in a way that oversight occurs in relation to telecommunications networks under the Telecommunications (Interception Capability and Security) Act 2013.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'James Every-Palmer', with a large, stylized initial 'J'.

James Every-Palmer KC