



FRESHFIELDS BRUCKHAUS DERINGER



## **Whitepaper**

# **The Cloud and Cross-Border Risks – Singapore edition**

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## What is the objective of the paper?

Ninefold has commissioned this paper by international law firm Freshfields Bruckhaus Deringer in collaboration with Rajah & Tann LLP to analyse the key risks associated with storing data in Singapore and to assist Australian businesses and government in taking a holistic, balanced and informed view of their data storage options.

The opportunities presented by improved global networks and the internet have allowed hosting service providers to offer Australian customers data storage in offshore jurisdictions through global or regional Clouds.

As some of the commercially available Cloud computing services are located in Singapore, this analysis compares Australian and Singapore laws and regulations to identify the relative advantages of storing your data in Australia.

While the potential cost benefit of shifting data storage overseas (or within a global Cloud) may appear simple to calculate, the risks of managing compliance and navigating the cross-border legal landscape are hidden costs not often considered in the business case.

Data is subject to the laws of the jurisdiction in which it is stored. For Australian customers considering a move to offshore data storage in Singapore, this has potentially wide ranging implications.

## Can your data be sent offshore?

Regulated entities and financial services institutions in Australia should pay particular vigilance to any regulatory restrictions which may limit their ability to transfer their data offshore for storage. For example, the Australian Prudential Regulatory Authority (APRA) requires authorized financial services institutions to notify the APRA of any transfer of data offshore and to demonstrate that appropriate risk management procedures are in place to protect the data. The institutions must also secure guarantees in their contracts with the hosting services providers to allow the APRA access and site visits to the services provider if required. Where the hosting services provider uses a number of offshore data centres to store the data, it may be reluctant to provide guarantees regarding data security and access of a sufficient standard to satisfy the APRA.

In some circumstances, there may be a blanket prohibition on the transfer and storage of data overseas. For instance, the Commonwealth of Australia Government Contract for IT Services forbids suppliers from transferring or storing their customer data outside Australia.

Following the offshoring of your data to Singapore, there are additional sector specific regulations on the security and disclosure of data which may apply. For example, if an Australian business is deemed a financial institution to which the Singapore Banking Act applies it will not be able to disclose any customer data that it receives, unless expressly provided for under the Banking Act.

## How do you effectively maintain compliance across multiple jurisdictions?

Data hosted in an offshore Cloud may be stored in several locations across multiple foreign jurisdictions, which may limit your visibility over your data at any particular time. This may create difficulties in ensuring your continued compliance with Australian law and regulatory requirements.

A lack of consistency in data privacy laws across jurisdictions makes continued compliance with Australian law particularly difficult to monitor. The problem is worsened by Singapore's lack of a unified and comprehensive regulatory regime for data protection. Without a comprehensive data protection law, storage of your data in Singapore may lead your customers to doubt the standards of data security and protection enforced by the authorities for their data. This may have serious reputational consequences and commercial implications for your business with customers. Whilst it may be possible to impose compliance reporting or audit provisions in your agreement with the offshore Cloud provider, the costs of this are likely to be passed on to you and your Cloud provider may not be able to guarantee compliance with Australian privacy laws. The Australian Government's recently released Exposure Draft, if enacted, will introduce even more stringent regulation of cross-border disclosures of personal information. Under the Exposure Draft, if a company holding "personal information" in Australia discloses that information to an offshore recipient, it may be vicariously liable for any misuse of that personal information by its offshore Cloud provider.

Failure to satisfy applicable Singapore laws and regulatory standards which govern data management in Singapore under consumer protection laws, employment laws, e-commerce, telecommunications regulations and sector-specific laws may have wide reaching penalties for your business, including fines, revocation of operating licences and other regulatory privileges, as well as adverse effects on your reputation amongst customers.

## Difficulties arising from storage of data in Singapore - lack of unified regulatory regime for Data Privacy in Singapore

Singapore's lack of a unified data privacy law to mirror Australia's privacy laws may seriously affect your ability to comply with Australian privacy law and regulatory requirements for your data.

Data stored in Singapore is subject to over 160 disparate, sector-specific statutes that regulate the use and disclosure of personal data in Singapore. However, the sector specific regulations and self-regulatory industry codes do not have the gravitas of a single, cohesive data protection law. In the event of a privacy breach, you risk being non-compliant with Australian privacy laws, and vicariously liable for breaches by the offshore Cloud provider.

## What are the tax consequences of hosting a transactional website in Singapore and the resultant data collection?

Hosting a transactional website on a server located in Singapore could expose you to Singapore income tax if the hosting arrangement amounts to a permanent establishment ("PE") where you are deemed to: (i) have a fixed place of business in Singapore; and (ii) carry on business activities (wholly or partly) through the fixed place of business.

The precise tax liability of the PE will depend on the relevant Singapore and Australian domestic income tax laws as well as the extent of any relief provided under the terms of the Singapore-Australia Avoidance of Double Taxation Agreement (“DTA”). Certain types of expenditure, such as software payments, may qualify for deduction or capital allowances, depending upon the circumstances.

Where an Australian entity conducts business in Singapore that involves making taxable supplies, it is required to register for Goods and Services Tax (GST) if the turnover of its goods and services in Singapore exceeds or is expected to exceed S\$1 million in any calendar year. Penalties will be imposed for failure to register. The supply of taxable services are chargeable to GST at 7%.

Service fees paid by an Australian business to a Cloud provider in Singapore may be subject to withholding tax. To the extent withholding is required, the Cloud provider could demand that it receive a net sum equal to the amount of its fees and that you gross up as necessary to cover any withholding tax.

## Will storing your data offshore subject you to the jurisdiction of the Singapore courts?

Australian businesses may fall under the jurisdiction of the Singapore courts where the Singapore courts find there is sufficient nexus established on the facts between the dispute and Singapore. The Singapore courts may also assert jurisdiction where you have agreed to submit to their jurisdiction in any contract between you and the Cloud provider.

The Singapore courts may grant leave to a Singaporean Cloud provider to serve the originating process on you in Australia, or elsewhere. Any judgment obtained against you in the Singapore Court can be enforced in any state or territory in Australia pursuant to the Foreign Judgments Act, provided that the judgment is final and for a money award. An arbitral award awarded in Singapore can also be enforced against you through the Australian courts under the International Arbitration Act.

## Will you be able to effectively enforce your rights against a Cloud provider in Singapore and what remedies are available to you?

There are inherent difficulties in effectively enforcing your rights against a hosting services provider in Singapore. You may not be able to avail yourself of the statutory rights and remedies arising under Australian law, as they would not necessarily have extra-territorial effect in Singapore. In Singapore, only foreign judgments which are for a fixed and ascertainable sum of money are enforceable under the Reciprocal Enforcement of Commonwealth Judgments Act (“RECJA”). The foreign judgment is not automatically recognized in Singapore, but needs to be registered with the courts in Singapore before it can be enforced. Prior to registration, the defendant may raise a number of defences against the recognition or enforcement of the foreign judgment. If any of the defences succeed, the foreign judgment will not be recognized or enforced in Singapore.

For all other Australian court judgments, (e.g. interim judgments, judgments not for fixed sums of money) new proceedings have to be filed in the Singapore courts, citing the Australian judgment as the cause of action. These new proceedings will incur additional expenses and there is no guarantee that you will be able to obtain a valid, enforceable Singapore judgment.

Similarly, there are also inherent difficulties in seeking to enforce an Australian arbitral award in Singapore. There are certain circumstances where the defendant may request that the enforcement of the Australian arbitral award be refused.

## Is data stored in Singapore at any greater risk of being accessed by government authorities than data stored in Australia?

Singapore law grants extremely wide-reaching powers of investigation to compel the disclosure of data, including encrypted data, to government bodies and law enforcement agencies for the purpose of criminal enquiries.

Under Singapore's anti-terrorism legislation, there is a duty to disclose information to the police where there is reason to believe that national security, public safety, order or interest are at issue.

Data transferred and stored in Singapore may therefore be at a significant risk of being accessed by the government and law enforcement agencies.

## What reputational risks will you assume by offshoring?

There are increasing concerns over data privacy in Australia and the security risks involved in offshore data storage.

Any proposal to transfer data overseas for storage would need to be supported by an effective PR and communications strategy in order to promote confidence and credibility amongst customers and refute any perceived security risks. The reputational consequences involved in transferring and storing your data to Singapore which lacks a comprehensive and overarching data protection regime and grants the Singapore police and government bodies wide powers of investigation and access to data should be carefully considered.



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## About Ninefold

Ninefold is Australian cloud computing with locally stored data, free local support, self service flexibility and low latency. This allows you to provision virtual servers and cloud storage quickly – scaling up and down when needed – and only paying for the resources you use.

Sign up in seconds. Start using in minutes. Benefit for years.

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