

Allens Arthur Robinson



The legal implications for carriers of putting their back office into the Cloud

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11 October 2011

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Overview

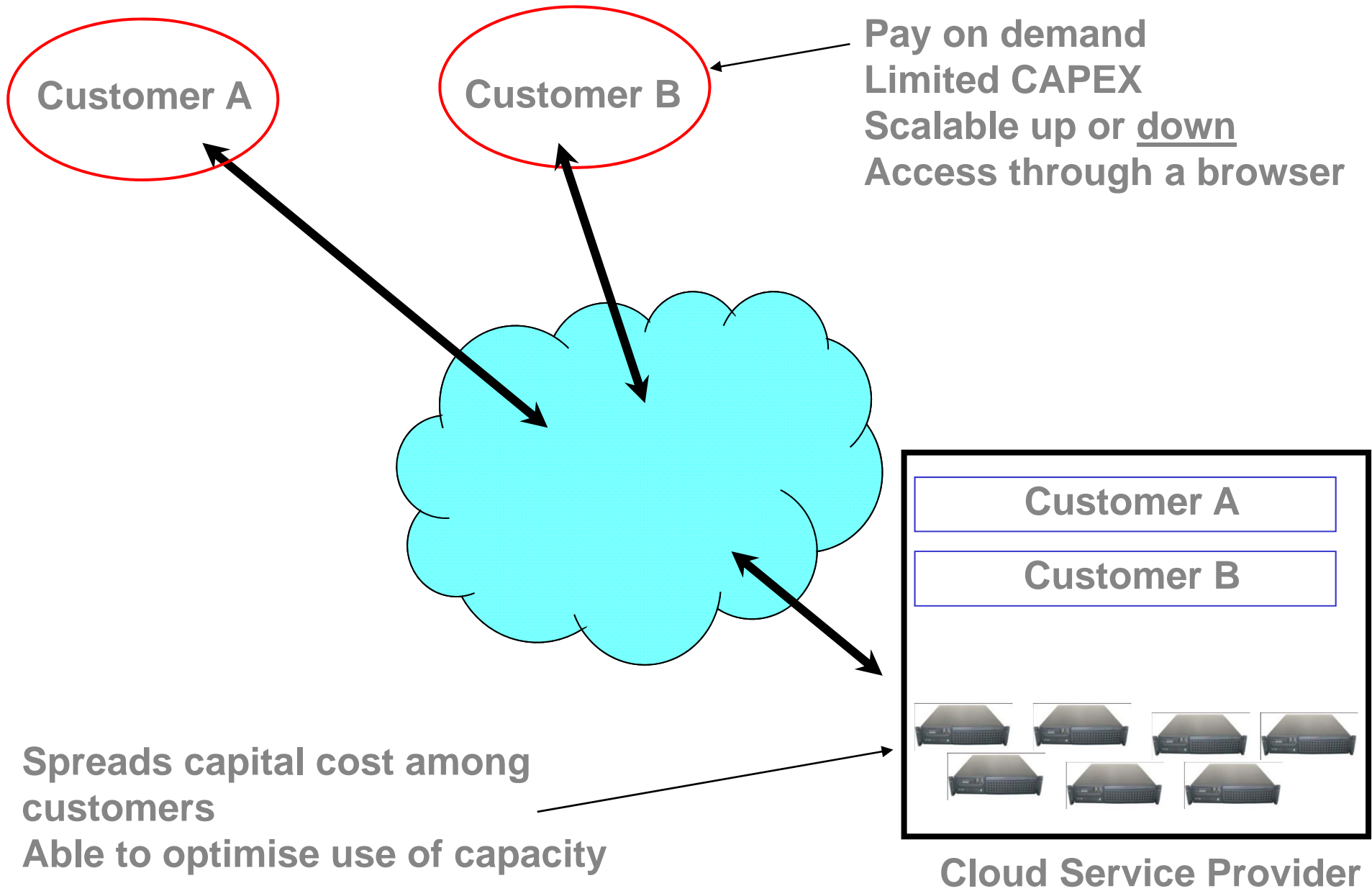
- What is Cloud Computing?
- Advantages
- Using the Cloud for a carrier's IT needs
- Legislation
- Risks – legislation and data
- How to manage the risks



What is Cloud Computing?

- A form of outsourcing
- Can be used for any or all of hardware, software or services
- Key is that the user can scale its demand up or down without limits and without warning
 - Pay only for what you use
- Accessed via the public internet or a private network
- Driven by lower cost infrastructure and resources – NBN





Types of Cloud Computing

- Public cloud
- Private cloud
- Community cloud
- Hybrid cloud



The advantages of cloud computing

- Significant reduction in CAPEX
- Reduced cost per unit of processing
- Pay only for what you use – great advantages in early stages of a project / business
- Rapid increase in available processing power to accommodate peaks in demand
- Ability to access the applications wherever there is a browser
- *Some* information security benefits



Possible applications of the Cloud for carriers

- Current applications, mainly back office: - Email
 - Calendar
 - Collaboration tools
 - Financial applications
 - Customer relationship management solutions
 - Operations Support Systems
 - Enterprise Resource Planning systems
 - HR management
- Rating engine and other more time critical applications are further away



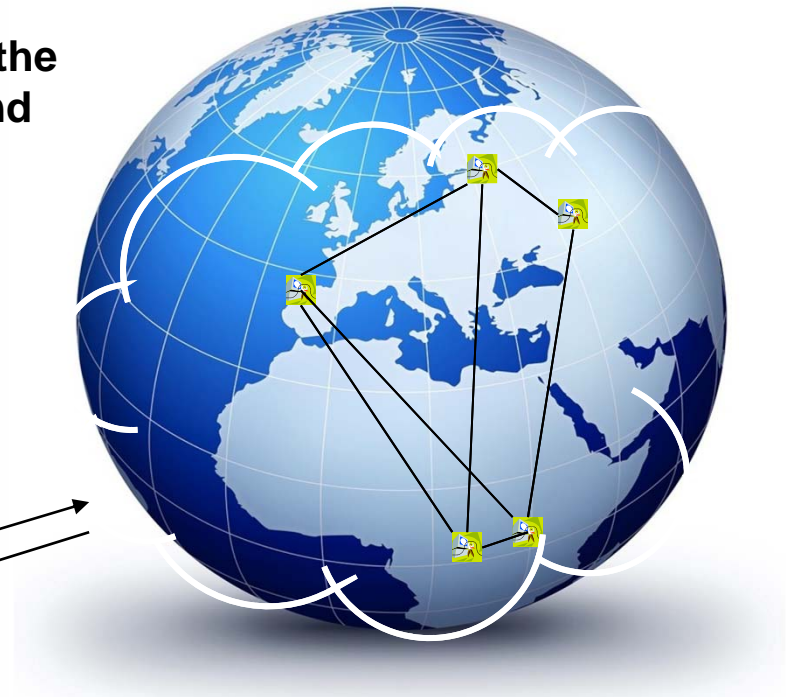
Some announced plans by Australian carriers

- **AAPT**
 - Using Gmail for email
 - Chosen IPscape's cloud based contact centre technology
- **Vodafone Hutchison Australia**
 - Considering consolidating data-centres into the cloud
- **Telstra**
 - Partnered with Salesforce.com to create online opinion forum to encourage staff interaction



The risks

The catchy term 'Cloud' hides the reality that ultimately the service is provided using physical boxes and cables which are located somewhere in the real world. Need to peer into the cloud to understand the full risks.



 Data Centre in "the cloud"



The legislation - Transborder Data Flows – *Privacy Act 1988 (Cth)*

- Privacy Act applies if putting personal information into the cloud
- **NPP 9:** An organisation in Australia may *transfer* personal information offshore *only* if:
 - the transferor reasonably believes the receipt is subject to a law...or contract which upholds principles...substantially similar to the NPPs; or
 - the individual consents to the transfer; or
 - [other exceptions]



Data Protection – *Privacy Act 1988*

- **NPP 4** – An organisation must take reasonable steps to protect the personal information it holds from misuse and loss and from unauthorised access, modification or disclosure



It gets worse! Proposed changes to *Privacy Act 1988 (Cth)*

- Proposed legislative changes recommended by Australian Law Reform Commission, particularly NPP 9
- Proposed APP 8 - The disclosing entity *must take such steps as are reasonable* in the circumstances to ensure that the overseas recipient does not breach the APPs
- Proposed section 20 – Even if does take such steps, the disclosing organisation will be accountable for breaches by the cloud provider
- Penalties will almost certainly be introduced into the Privacy Act
- Exceptions
 - entity reasonably believes that the recipient (cloud provider) is subject to a law substantially similar to the APPs **and** allows for individuals to take action directly against the recipient; or
 - express consent from the individual **after** been told that the entity will not need to take reasonable steps to prevent breach of the APPs

The Risks to Data

- Loss of data during the service
- Unauthorised disclosure of data to third parties (including other users of the cloud)
- Unauthorised retention of data after service has been provided
- Loss of data if service provider ceases to provide the services / exist
- Unauthorised use / disclosure / deletion by malicious employees of the service provider



Risks - other

- Dependence on public network links – reliability, bandwidth, latency, Denial Of Service attacks
- ‘Lock in’ risk to the one service provider
- Business continuity / Disaster recovery risk
- Unsatisfactory standard form agreements – broad exclusions of responsibility, inadequate protection of data
- Difficulty of enforcing claims against a foreign provider even if there is a breach
- Susceptibility to foreign legal process (eg, US Patriot Act)
- Ability to comply with Australian legal process



Managing the risks – choosing the right provider and structure

- Develop the Cloud Computing strategy with security of data and ability to obtain / retain all live data at the forefront of the strategy
- Minimise amount of confidential information disclosed or anonymise data if possible or use cryptography
- Consider using a private, community or hybrid cloud
- Conduct due diligence on supplier's security standards – physical, logical and personnel – mitigates risk and compliance with NPP4
- Conduct due diligence on supplier's technical infrastructure and access to the Internet – what arrangements does *it* have in place for guaranteed access and speed to the Internet



Managing the risks – obtain the best contract possible

- Issues include:
 - Express obligation of confidentiality
 - Security and data retention standards
 - Wording of service level exclusions
 - Open data formats to ensure portability
 - Location of data
 - Ownership of data and access rights
 - Audit and inspection rights, particularly if mandated by regulation
 - No sub-contracting
- Negotiate as best as can and then evaluate the outstanding risks



Conclusion

- A move to Cloud Computing will involve a degree of risk
- The risks are largely caused by the mode of accessing the service and the vulnerability of the data while in the service provider's possession
- In some cases, the risks will prevent the move
- In other cases, the risks will be able to be managed or liability for them transferred



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