

Authority submission

Meeting date: 19 January 2023

Agenda item no: (Authority Secretariat to insert number)

Title: Specification of additional conditions to a research authorisation.

Description: Decide whether to specify additional conditions to the authorisation granted in May 2019 to Crosby Textor Research Strategies Results Pty Ltd and Enterprise Marketing & Research Services Pty Ltd under the *Telecommunications Regulations 2021* for electoral matter research.

RECOMMENDATION

That the Authority:

- A) AGREE**, under paragraph 36(1)(a) of the *Telecommunications Regulations 2021* (the **Regulations**), to specify additional conditions set out at **Attachment A** to which the research authorisation granted to Crosby Textor Research Strategies Results Pty Ltd (**CT**) and Enterprise Marketing & Research Services Pty Ltd (**EMRS**) on 9 May 2019 is subject.
- B) AGREE** that, as soon as reasonably practicable, the following parties will be given written notice that the action has been taken:
- CT and EMRS, under subsection 36(3) of the Regulations
 - Telstra Corporation Limited (as the Integrated Public Number Database (IPND)] Manager), under subsection 36(5) of the Regulations.

TIMING

There are no statutory timing issues. However, the authorisation was granted more than 3 years ago, and we wrote to CT and EMRS on 24 August 2022, indicating the ACMA may consider specifying additional conditions if the authorisation had not commenced within three months.

COMMITTEE OR PROJECT BOARD CONSIDERATION

- | | |
|--|--|
| <input type="checkbox"/> Content Committee | <input type="checkbox"/> Compliance Priority (<i>please specify</i>) |
| <input type="checkbox"/> Spectrum Committee | |
| <input type="checkbox"/> Telecommunications and Consumer Committee | <input type="checkbox"/> Project Board (<i>please specify</i>) |
| <input type="checkbox"/> Compliance and Enforcement Committee | |

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File no.: ACMA2018/1138-10

Specification of additional conditions to a research authorisation

BACKGROUND

1. This paper recommends imposing additional conditions on a previous ACMA permitted research authorisation for CT and EMRS to obtain customer data from the IPND. The primary purpose is to limit the reasonable period the authorisation remains in effect.
2. On 9 May 2019, the Authority granted a research authorisation (the **authorisation**) at **Attachment B** covering CT and EMRS under regulation 5.11 of the *Telecommunications Regulations 2001* (the **2001 Regulations**), which were remade in 2021 as the Regulations.
3. Under paragraph 57(2)(a) of the Regulations, the authorisation has effect as if it had been granted under subsection 21(1) of the Regulations.
4. The authorisation permits CT and EMRS to access authorised unlisted mobile number information (**mobile information**) in the IPND for the purpose of permitted research being electoral matter research on behalf of a registered political party, the Liberal Party of Australia (**LPA**).
5. This was the first authorisation granted under the 2001 Regulations. No additional condition was attached to it concerning expiry of the authorisation, as we understood it would be commenced imminently by the entity. Subsequent authorisations have included a condition to the effect that, if an authorisation to access the mobile information is unused, usually within one year, the authorisation expires.
6. Subsection 22(3) of the Regulations requires an authorisation granted by the ACMA to specify that the authorisation begins when the IPND Manager first discloses the mobile information to an authorised research entity upon application. This was also the case under the 2001 Regulations.
7. Without a time-specific limitation imposed, an authorisation will effectively continue indefinitely where the mobile information is not disclosed to an entity. This poses a risk that the bases on which an authorisation was originally granted may have changed over time. Specifically, the applicant/s may no longer meet the conditions of the authorisation and/or comply with the Regulations (including in relation to its privacy and/or data security arrangements).
8. Under the Regulations, the ACMA has the power to specify additional conditions in writing to which the authorisation is subject. It can do so at the time the authorisation is granted (subsection 22(4)), or after the authorisation has been granted with effect from a specified date (paragraph 36(1)(a)).
9. On 24 August 2022, the line area wrote to CT and EMRS to:
 - a. seek detail about CT/EMRS' intentions regarding the authorisation;
 - b. state that if CT/EMRS commence the authorisation within three months of the letter, they must provide appropriate assurances regarding their ability to comply with the conditions of authorisation (given the time that has passed since it was granted); and
 - c. note the ACMA was considering whether to specify an additional condition causing the authorisation to lapse within a specified period (see **Attachments C and D**).

10. On 6 September 2022, CT indicated it was discussing with the LPA whether to commence the authorisation to conduct research ahead of the 2023 NSW election (scheduled for 25 March 2023), and that it would keep the ACMA updated. On 15 September 2022, it indicated the matter was still under consideration.
11. The IPND Manager told the ACMA on:
 - a. 28 September 2022, that CT had contacted the IPND Manager on 27 September 2022 to discuss the sample it required;
 - b. on 14 November 2022, that CT had signed Telstra's confidentiality agreement in mid-October 2022; and
 - c. 23 November 2022, that it had received a signed Data Access Agreement from CT on 22 November 2022.

DISCUSSION

Recommendation

12. Given the period that the authorisation has not been enlivened to date, and the ongoing uncertainty about whether the mobile information will be disclosed reasonably soon – despite recent activity by CT – we recommend that the ACMA use its power under paragraph 36(1)(a) of the Regulations to specify additional conditions causing the authorisation to lapse on 3 May 2023 if it has not been accessed by 2 May 2023 (see **Attachment A**). Note that if it is accessed before this date, the authorisation is then in force for 12 months from the date the information is disclosed.
13. Additionally, we recommend a condition to obtain senior assurance from the entities that the practices, procedures, processes and systems set out in the application dated 18 April 2019, upon which the ACMA formed its view to grant the authorisation, remain current, and to the extent they don't, what changes have occurred. This condition would only apply if the data is accessed.
14. If the proposals are accepted, we will provide written notice to CT, EMRS and the IPND Manager as required under subsections 36(3) and 36(5) of the Regulations. Subsection 36(3) requires that the ACMA provide written advice to each authorised entity stating:
 - a. the action taken
 - b. the reasons for taking the action
 - c. that the entity, or other affected person, may request reconsideration of the action (unless the action is to revoke a condition).
15. The notice must be given as soon as reasonably practicable after the action is taken and before the action is expressed to take effect. Accordingly, the additional conditions have been drafted so they take effect after the notification.
16. This approach to timing restrictions is consistent with the approach for all other authorisations granted after this authorisation under the Regulations.

Other options (not recommended)

17. Continue to engage with CT and EMRS to gauge the likelihood, and timing, of any commencement of the authorisation, and to seek information and assurances relevant to the authorisation.
18. Another option, if the authorisation commences, is to rely on the ACMA's enforcement powers. The ACMA could investigate and remove CT and/or EMRS

from the research authorisation under subsection 38(1) of the Regulations if it was satisfied that a condition of the authorisation had been breached (see **Attachment E** for an extract of all authorisation conditions in Subdivision C of Division 2 of Part 4 of the Regulations). Examples of such conditions include that the research entity:

- a. is covered by, and complies with, the Privacy Act;
 - b. only uses and discloses information for authorised purposes; and
 - c. has internal dispute resolution procedures.
19. Under this option there is a risk that harm may have already occurred by the time any breach of a condition is identified by the ACMA and investigated.
20. It is also open to CT and EMRS to voluntarily apply to the ACMA to remove themselves from the authorisation under subsection 39(1) of the Regulations. The Regulations do not expressly state the resulting status of a research authorisation when all authorised entities relating to that authorisation are removed. However, as the purpose of a research authorisation is to permit authorised entities to conduct research, we consider the removal of all authorised entities from the authorisation would, in effect, cause it to lapse.

RISKS/SENSITIVITIES

21. The recommendations primarily concern mitigating risks that the circumstances of the privacy and data security arrangements applicable to the authorisation may have changed since it was granted in May 2019. This risk, if realised in a worst-case scenario, could result in the public disclosure of mobile information (specifically mobile telephone numbers and postcodes).
22. Other entities that have authorisations are unlikely to have visibility that the CT/EMRS authorisation is currently effectively indefinite until accessed, and therefore that it is inconsistent with the conditions imposed on subsequent applications. Details about authorisations are published at a high level only on the ACMA's website, including when an authorisation ends (i.e. '12 months after disclosure occurs' in relation to CT/EMRS) (although CT/EMRS have been listed on the ACMA website for a number of years).

Reconsideration and merits review

23. Under sections 42 to 44 of the Regulations, a person dissatisfied by the ACMA's decision to specify an additional condition after the granting of a research authorisation can request that the ACMA reconsider the decision. The ACMA must reconsider, and then affirm, vary or revoke, the decision.
24. This right of reconsideration extends to 'any other person affected by the decision'.
25. Under section 45 of the Regulations, a person may apply to the Administrative Appeals Tribunal (AAT) for review of a decision mentioned in subsection 42(1) of the Regulations if the ACMA has affirmed or varied a decision under section 43 of the Regulations.
26. We believe the specification of the additional condition is reasonable and defensible given the circumstances involved, especially noting that any disclosure of mobile information within the contemplated timeframe would give the entities involved 12 months to access and use the data. We also foreshadowed this potential with the research entities in late 2022, who have informed us they have been communicating with the LPA.

27. CT/EMRS have not raised objections to date, noting that CT appears to understand the ACMA's reasons for the additional conditions and that they do not impact CT or EMRS's ability to apply again for IPND access in the future.
28. For these reasons, we believe a request for reconsideration is unlikely and an application for AAT review very unlikely.

CONSULTATION:

29. The ACMA may consult any person or body it considers appropriate before specifying additional conditions (subsection 36(2) of the Regulations). The ACMA has not formally consulted CT/EMRS, but our interactions with them late last year have served a similar purpose in making CT/EMRS aware that an additional condition might be specified, and noting it was open to CT/EMRS to raise concerns.
30. Legal Services Division (LSD) was reviewed this paper. The recommendations in the paper are consistent with the advice provided by LSD.

COMMUNICATIONS

31. Communications strategy required? No.
32. Ministerial briefing required? No. However, the Department of Infrastructure, Transport, Regional Development, Communications and the Arts will be advised.
33. Once applicable notifications have occurred, we will update the ACMA website as appropriate.

REGULATORY IMPACT ANALYSIS PROCESS

34. We have considered whether a regulatory impact analysis process is required and formed the view that the recommendation in this submission would not give rise to a regulatory change as defined by the Office of Impact Analysis (formerly the Office of Best Practice Regulation). Therefore, a regulatory impact analysis process has not been applied.

ATTACHMENTS

- A Proposed Additional Conditions**
- B ACMA letter to CT dated 9 May 2019**
- C ACMA letter to CT dated 24 August 2022**
- D ACMA letter to EMRS dated 24 August 2022**
- E Extract of Authorisation Conditions in the Regulations**