



Our reference: C11096:pg

Mr Roger Clarke
78 Sidaway St
CHAPMAN ACT 2611

Dear Mr Clarke

PRIVACY COMPLAINT AGAINST ROAM TOLLING PTY LTD

I refer to your letter to the Privacy Commissioner dated 31 May 2008 concerning your complaint against Roam Tolling Pty Ltd (Roam). The Privacy Commissioner has asked me to respond to you on her behalf.

By letter dated 15 May 2008 this Office wrote to you intending to decline your complaint under section 41(1)(a) of the *Privacy Act 1988* (Cth) (the Act). However you were invited to provide any additional information which might support your complaint by 30 May 2008.

In your letter of 31 May 2008 you have raised a number of issues. I will address these separately.

1. *You seek clarification of the meaning and implications of the reasons set out in our letter to you dated 15 May 2008 which advised that it was the intention of this Office to decline to investigate your complaint under section 41(1)(a) of the Privacy Act 1988 (Cth) (the Act), on the basis that Roam Tolling Pty Ltd (Roam) appears to be an organisation that is a contract service provider for a NSW state contract, and as such is exempt from the Act.*

The NSW Roads and Traffic Authority (RTA), Westlink Motorway Limited (Westlink), and WSO Co Ltd (WSO) are parties to the 2003 M7 Motorway Project Deed, under which WSO has obligations concerning the provision of tolling and customer management services for the M7 Motorway. The Project Deed also allows WSO to appoint an operator to provide tolling and customer management services, and in this regard has appointed Roam as the operator. Roam has advised that it has an agreement with WSO to comply with the obligations set out in the Project Deed to provide tolling and customer management services.

What this means is that the acts and practices of Roam, in the context of providing tolling and customer services to the RTA (a NSW government agency) under its agreement with WSO, are those of a contracted service provider performed for the purposes of meeting an obligation under the Project Deed. As a consequence, the activities of Roam, when providing tolling and customer services for the M7 Motorway, are exempt acts and practices under section 7B(5) of the Act.

Whilst the Act gives the Commissioner the power to investigate complaints about breaches of the Act, section 41(1)(a) gives her the discretion not to investigate a complaint if she is satisfied that the act or practice complained about is not an interference with privacy, as defined in the Act. The activities of Roam, in not letting you transact with it anonymously in relation to your use of the M7 Motorway, are exempt under section 7B(5) of the Act. This means that your complaint does not

appear to constitute a breach of the National Privacy Principles (NPPs) and accordingly I am declining to investigate your complaint.

If you are unsatisfied with the process used to make this decision

If you consider that the *process* which this Office used to make its decision was unfair you can either:

- Submit an application to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the AD(JR) Act); or
- Make a complaint to the Commonwealth Ombudsman (Ombudsman).

Appeals under the AD(JR) Act must be made within 28 days of the date of our final decision and usually incur an application charge. Please contact the Federal Court registry in your State or Territory for more information or visit www.fedcourt.gov.au/contacts/contacts.html.

The Ombudsman's services are free, and you can contact his office on 1300 362 072 or visit www.comb.gov.au.

2. *You have pointed out that Roam, in responding to your complaint and on its website, indicates that it is subject to the National Privacy Principles in the Act. You further state that if this is not the case then Roam is using the Privacy Act and the NPPs as a shield by making it appear that it is subject to privacy oversight by the Office of the Privacy Commissioner. You therefore seek either:*

- *a retraction of our opinion that the company is exempt, and resumption of the handling of your complaint; or*
- *our confirmation that this Office has issued an instruction to Roam to stop misleading the public, and immediately correct its erroneous communications to the public in its privacy notices, policy, Code etc.*

As indicated above it is the view of the Privacy Commissioner that the activities of Roam that are the subject of your complaint are exempt acts and practices and as such do not constitute an interference with your privacy.

The Act may apply to Roam if it engages in activities that are outside the context of its obligations in providing tolling and customer services under the Project Deed. In those circumstances, it may be that the NPPs apply to Roam.

We will raise this issue with Roam with the aim of assisting them to make their statement clearer.

3. *You indicate in your letter that you also understand that, some years ago, a complaint about the operation of the Melbourne City Link toll road was dealt with by the Privacy Commissioner after discussions with the Victorian Privacy Commissioner concluded that the respondent (which has the same parent company as Roam) was subject to the Commonwealth Privacy Act rather than the Victorian Information Privacy Act. You further indicate that*

unless there are other factors at play, it would now appear that this earlier case may have been handled incorrectly. You then seek confirmation that this Office will:

- draw our conclusions and their implications to the attention of our policy colleagues; and*
- in concert with them, undertake appropriate measures to ensure that all privacy oversight agencies and all private sector organisations providing services under State contracts are clear about the jurisdictional issues.*

Following receipt of your email enquiry concerning 'Identity as a condition of Road-Usage' dated 2 April 2004, which you also forwarded to Privacy NSW and Privacy Victoria, Timothy Pilgrim, Deputy Privacy Commissioner, responded by email dated 6 August 2004. In his email Mr Pilgrim stated:

When considering the application of privacy law, and its bearing on this matter, issues of jurisdiction are important. For example, while NSW Privacy legislation for the state public sector (PIPA) covers the NSW Roads and Traffic Authority, this legislation does not have an anonymity principle. Furthermore, if toll way operators are contractors to the state, and thus the National Privacy Principles in the Privacy Act do not apply, then operation of those toll ways is not subject to an anonymity obligation akin to NPP8. It may be important, however, to consider issues such as the necessity of the collection of identifying particulars in the context of these transactions.

For the purpose of this advice, we'll assume that the relevant private organisations are subject to the NPPs. The issues about which we want to know more (an issue previously identified by advocates and others) is how operators of toll ways currently consider they are delivering upon their NPP8 obligations, and how they will continue to do so.

Mr Pilgrim also indicated that this Office would be making contact with relevant organisations that operate such tollways, to raise with them obligations under the NPPs and seek information from them about how they are operating vis-à-vis NPP8. Those enquiries revealed that at the time, the organisations contacted provided an ability to enter transactions anonymously through a variety of means. Accordingly we concluded those enquiries without further considering jurisdictional issues.

- 4. You indicate that you are seeking confirmation that this Office will issue clarifying guidance on this jurisdictional issue, as a matter of importance and urgency, and necessarily in concert with the State Privacy Commissioners. You state that the public needs clear and simple advice about where they should address complaints, and how they should frame them. If large corporations and Privacy commissioners are confused about the law, what hope does the public have of understanding it.*

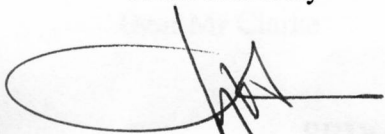
One of the functions of the Office of the Privacy Commissioner is to promote an understanding and acceptance of the NPPs. This Office provides guidelines and information sheets to assist a range of organisations and individuals to better understand their obligations and rights under the Act. Information Sheet 12 *Private Sector Information Sheet 12-2001 Coverage of and Exemptions from the Private Sector Provisions* can be found on the Office's web site at

http://www.privacy.gov.au/publications/IS12_01.doc. I have also enclosed a copy for your information.

The Privacy Commissioner has also asked me to inform you that she will undertake to discuss the jurisdictional issue you have raised at the next joint meeting of Australian Privacy regulators.

Thank you for bringing this matter to the attention of the Privacy Commissioner.

Yours sincerely



Mark Hummerston
Assistant Commissioner

16 June 2008