Federal Court of Australia

McEwan v Office of the Australian Information Commissioner [2023] FCAFC 137

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| Appeal from: |  |
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| File number: |  |
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| Judgment of: | **CHARLESWORTH, SARAH C DERRINGTON AND MEAGHER JJ** |
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| Date of judgment: | 18 August 2023 |
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| Catchwords: | **ADMINISTRATIVE LAW** – Privacy – appeal from dismissal of application to review decision of Australian Information Commissioner (AIC) not to investigate complaint – where appellant alleged officers within the Australian Taxation Officer made disclosures of protected information during an investigation contrary to the *Privacy Act 1988* (Cth) – whether disclosures authorised by Ch 5, Pt 5.1 Subdiv 355-B of Sch 1 to the *Taxation Administration Act 1953* (Cth) – whether officers performing duties “as a taxation officer”  **HIGH COURT AND FEDERAL COURT** – equitable jurisdiction of Federal Court of Australia to set aside a perfected judgment other than in the exercise of appellate jurisdiction – where appellant seeks to allege documents said to be before the Australian Information Commissioner were tampered with – where no fraud alleged before the primary judge – application of principles in *Clone Pty Ltd v Players Pty Ltd (in liq)* (2018) 264 CLR 165  **STATUTORY INTERPRETATION** – *Taxation Administration Act 1953* (Cth) (**TAA**) – where appellant alleged officers within the Australian Taxation Officer made disclosures of protected information during an investigation contrary to the *Privacy Act 1988* (Cth) – whether disclosures authorised by s 355-50 of Sch 1 to theTAA– whether officers performing duties “as a taxation officer” – whether those duties restricted to “collection and recovery of income tax and other liabilities” – whether meaning of “entity” in s 355-50 restricted to another taxation officer  **TAXATION** – power of taxation officer to disclose protected information under Ch5, Pt 5.1 Subdiv 355-B of Sch 1 to the *Taxation Administration Act 1953* (Cth) – where disclosure alleged to amount to breach of Australian Privacy Principles – where disclosure made in the context of an investigation by the Australian Taxation Office to a third party – whether officers performing duties “as a taxation officer” – whether those duties restricted to “collection and recovery of income tax and other liabilities” – whether disclosure otherwise authorised by law |
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| Legislation: | *Acts Interpretation Act 1901* (Cth) s 15AA  *Crimes Act 1914* (Cth) ss 3E, 3ZQU(1), 3ZQU(4)  *Income Tax Assessment Act 1936* (Cth) s 16(2)  *Privacy Act 1988* (Cth) ss 2A, 6, 14, 15, 41(1)  *Taxation Administration Act 1953* (Cth) Sch 1 ss 355-25, 355-50) |
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| Cases cited: | *Canadian Pacific Tobacco Company Ltd v Stapleton* (1952) 86 CLR 1  *Certain Lloyd’s Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378  *Clone Pty Ltd and Players Pty Ltd (In Liquidation) (Receivers & Managers Appointed)* [2018] HCA 12; (2018) 261 CLR 165  *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503  *Consolidated Press Holding Ltd v Federal Commissioner of Taxation* [1994] FCA 1367; 57 FCR 348  *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503  *Federal Commissioner of Taxation v Nestle Australia Ltd* [1986] FCA 479; 12 FCR 257  *Jordan, Commissioner of Taxation v Second Commissioner of Taxation* [2019] FCA 1602  *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355  *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362 |
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| Division: | General Division |
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| Registry: | Queensland |
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| National Practice Area: |  |
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| Number of paragraphs: | 39 |
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| Date of hearing: | 9 August 2023 |
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| Counsel for the Appellant: | The Appellant represented herself |
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| Counsel for the First Respondent: | Mr B McGlade |
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| Solicitors for the First Respondent: | HWL Ebsworth Lawyers |
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| Counsel for the Second Respondent: | Dr R Schulte with Mr S Walpole |
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| Solicitors for the Second Respondent: | Australian Government Solicitor |

ORDERS

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|  | | QUD 427 of 2022 |
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| BETWEEN: | MS JULIE MCEWAN  Appellant | |
| AND: | THE OFFICE OF THE AUSTRALIAN INFORMATION COMMISSIONER  First Respondent  THE COMMISSIONER OF TAXATION  Second Respondent | |

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| order made by: | CHARLESWORTH, SARAH C DERRINGTON AND MEAGHER JJ |
| DATE OF ORDER: | 18 August 2023 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first and second respondents’ costs to be assessed if not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1. Pursuant to provisions of the ***Privacy Act*** *1988* (Cth), Ms Julie McEwan complained to the Australian Information Commissioner (**AIC**) about the disclosure to third parties in the course of an investigation into her tax affairs by officers within the Australian Tax Office (**ATO**). The AIC declined to investigate Ms McEwan’s complaint being satisfied, under s 41(1)(a) and (da) of the *Privacy Act*, that there had been no interference with Ms McEwan’s privacy and an investigation was not warranted in all the circumstances.
2. The primary judge dismissed Ms McEwan’s application for judicial review of the AIC’s decision. It was common ground before the primary judge, at PJ[3], that the resolution of the application turned on whether the disclosures were authorised by s 355-50 of Sch 1 to the *Taxation Administration Act 1953* (Cth) (**TAA**). If they were so authorised, then:
3. the disclosures were permitted under the Australian Privacy Principles (**APP**) 6.2(b) of Sch 1 to the *Privacy Act*; and
4. the AIC’s satisfaction-based conclusion that there had been no unlawful interference with Ms McEwan’s privacy was not attended by error.
5. Ms McEwan appeals from the primary judge’s findings that the impugned disclosures were authorised under s 355-50(1) of the TAA (PJ[21]-[22]), and additionally authorised under Items 1 and 3 of s 355-50(2) (PJ[23]). Her grounds of appeal are as follows:

1. His Honour erred in agreeing with the First Respondent’s decision not to investigate pursuant to s41 of the Privacy Act 1988 s1(a) “the act or practice is not an interference with the privacy of an individual”; of which was based on s355-50 *Tax Administration Act 1953* (**TAA**) authorised a taxation officer to make the disclosure to John Mactaggart and Richard Hoult.

2. His Honour erred in finding that section 355-50 of the TAA operates to authorise a taxation officer to “**make a record of**” taxpayer protected information and “**disclose to**” the taxpayer protected information to anyone when performing their duties.

3. His Honour erred in finding that section 355-50 of the TAA operates to authorise a taxation officer to “**make a record of**” of taxpayer protected information and “**disclose to**” the taxpayer protected information **obtained by** **a warrant** and disclose it to anyone when performing their duties.

4. His Honour erred in finding that “Any Entity” as listed in the table in section 355-50 of the TAA means “anyone, any person, any taxpayer, any trust, any company”, the operation of s355-50 to be broad enough to allow a taxation officer to make records and disclose taxpayer information to “anyone (any entity)” when performing their duties.

5. There are inconsistencies within the judgment.

6. There has been a serious error at law and the error causes injustice.

7. His Honour failed to address and place any weight on tampered evidence relevant to the proceeding that was placed into the Court Application Book **page 639** by the First Respondent;

7.1 The relevant evidence to the proceedings was tampered with and materially changed and appears to be fraudulent, grounds for a retrial;

7.2 The appellant raised concerns of fraud and reasonable diligence was taken prior to the judgment to discover fraud;

7.3 The First Respondent has failed to act in good faith by verifying the authenticity of the evidence.

(Emphasis in original)

1. The gravamen of Ms McEwan’s complaint is her belief that the document at page 639 of the Court Application Book before the primary judge, described as the **Draft PV**, is fraudulent and/or has been tampered with such that it cannot be the true Preliminary View prepared by Mr Timothy Tanyous. The consequence, as submitted by Ms McEwan, is that the Commissioner did not have before her all the necessary materials for her to reach the required state of satisfaction prescribed by s 41(a) of the *Privacy Act* and that, in any event, the primary judge was wrong to have found that the disclosures were for the primary purpose of law enforcement because he misconstrued s 355-50 of the TAA.
2. For the reasons below, the appeal must be dismissed.

## The legislative framework

1. Section 15 of the *Privacy Act* obliges an “APP entity” not to do an act or engage in a practice that breaches an “Australian Privacy Principle”. Section 14 of the *Privacy Act* provides that the APP’s are set out in Sch 1.
2. An “APP entity” is defined by s 6 of the *Privacy Act* to mean an agency or organisation. In turn, s 6 provides that an “agency” means, materially, a department or a body, whether incorporated or not, established or appointed for a public purpose by or under a Commonwealth law. It is uncontroversial that the ATO is an agency and, thus, an APP entity.
3. Section 41(1) of the *Privacy Act* provides materially:

(1) The Commissioner may decide not to investigate, or not to investigate further, an act or practice about which a complaint has been made under section 36 if the Commissioner is satisfied that:

(a) the act or practice is not an interference with the privacy of an individual; or

…

(da) an investigation, or further investigation, of the act or practice is not warranted having regard to all the circumstances; or

1. It is also necessary to set out the material part of APP 6:

**6 Australian Privacy Principle 6—use or disclosure of personal information**

*Use or disclosure*

6.1 If an APP entity holds personal information about an individual that was collected for a particular purpose (the***primary purpose***), the entity must not use or disclose the information for another purpose (the ***secondary purpose***) unless:

(a) the individual has consented to the use or disclosure of the information; or

(b) subclause 6.2 or 6.3 applies in relation to the use or disclosure of the information.

Note: Australian Privacy Principle 8 sets out requirements for the disclosure of personal information to a person who is not in Australia or an external Territory.

6.2 This subclause applies in relation to the use or disclosure of personal information about an individual if:

(a) the individual would reasonably expect the APP entity to use or disclose the information for the secondary purpose and the secondary purpose is:

(i) if the information is sensitive information—directly related to the primary purpose; or

(ii) if the information is not sensitive information—related to the primary purpose; or

(b) the use or disclosure of the information is required or authorised by or under an Australian law or a court/tribunal order; or

(c) a permitted general situation exists in relation to the use or disclosure of the information by the APP entity; or

(d) the APP entity is an organisation and a permitted health situation exists in relation to the use or disclosure of the information by the entity; or

(e) the APP entity reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body.

Note: For ***permitted general situation,*** see section 16A. For ***permitted health situation***, see section 16B.

(Emphasis in original.)

## Grounds 2 and 4

1. It is convenient to deal first with Ms McEwan’s second and fourth grounds of appeal, which challenge the primary judge’s construction of s 355-50. Unless Ms McEwan succeeds on these grounds, the appeal must fail.
2. The proper construction of s 355-50 of Sch 1 to the TAAis dependent, first and foremost, on the text adopted by Parliament but also on the context in which that provision appears and the evident scope and subject matter of the provision in that context: see, in particular, s 15AA of the *Acts Interpretation Act 1901* (Cth); *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [69]; *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503 at [39]; *Certain Lloyd’s Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 at [25]-[26]; *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362 at [14].
3. It is therefore useful to set out not only the text of s 355-50 but also certain other provisions within Ch 5, Pt 5.1, subdiv 355-B, disclosure of protected information by taxation officers in Sch 1 to the TAA:

**Subdivision 355-B – Disclosure of protected information by taxation officers**

**Guide to Subdivision 355-B**

**355-20 What this Subdivision is about**

The main protection for taxpayer confidentiality is in this Subdivision. It is an offence for taxation officers to disclose tax information that identifies an entity, or is reasonably capable of being used to identify an entity, except in certain specified circumstances.

**Table of sections**

Operative provisions

355-25 Offence—disclosure of protected information by taxation officers

355-30 Meaning of *protected information* and *taxation officer*

355-35 Consent is not a defence

355-40 Generality of Subdivision not limited

…

355-50 Exception—disclosure in performing duties

355-55 Exception—disclosure to Ministers

…

**Operative provisions**

**355-25 Offence – disclosure of protected information by taxation officers**

(1) An entity commits an offence if:

(a) the entity is or was a taxation officer; and

(b) the entity:

(i) makes a record of information; or

(ii) discloses information to another entity (other than the entity to whom the information relates or an entity covered by subsection (2)) or to a court or tribunal; and

(c) the information is \*protected information; and

(d) the information was acquired by the first-mentioned entity as a taxation officer.

Penalty: Imprisonment for 2 years.

(2) An entity (the ***covered entity***) is covered by this subsection in relation to protected information that relates to another entity (the ***primary*** ***entity***) if:

(a) the covered entity is the primary entity’s registered tax agent or BAS agent; or

(b) the covered entity is a legal practitioner representing the primary entity in relation to the primary entity’s affairs relating to one or more taxation laws; or

(ba) the covered entity is a public officer (within the meaning of section 252 or 252A of the *Income Tax Assessment Act 1936*) of the primary entity; or

(c) the primary entity is an incapacitated entity and the covered entity is a representative of the incapacitated entity; or

(d) the covered entity is the primary entity’s legal personal representative; or

(e) the covered entity is the primary entity's guardian where the primary entity is a minor or suffers from mental incapacity; or

(f) the covered entity and the primary entity are members of the same\* consolidated group or MEC group; or

(g) the covered entity is a representative of the primary entity who has been nominated by the primary entity in the approved form to act on that entity’s behalf with respect to protected information; or

(h) the covered entity is the registered tax agent or BAS agent of another covered entity mentioned in paragraph (c), (d) or (e) in relation to the relevant primary entity mentioned in those paragraphs; or

(i) the covered entity is a legal practitioner representing another covered entity mentioned in paragraph (c), (d) or (e) in relation to the affairs of the relevant primary entity mentioned in those paragraphs relating to one or more taxation laws.

**355-30 Meaning of *protected information* and *taxation officer***

(1) ***Protected information*** means information that:

(a) was disclosed or obtained under or for the purposes of a law that was a taxation law (other than the *Tax Agent Services Act 2009*) when the information was disclosed or obtained; and

(b) relates to the affairs of an entity; and

(c) identifies, or is reasonably capable of being used to identify, the entity.

Note: Tax file numbers do not constitute protected information because they are not, by themselves, reasonably capable of being used to identify an entity. For offences relating to tax file numbers, see Subdivision BA of Division 2 of Part III.

(2) ***Taxation officer*** means:

(a) the Commissioner or a Second Commissioner; or

(b) an individual appointed or engaged under the *Public Service Act 1999* and performing duties in the Australian Taxation Office.

Note: This Division applies to certain other entities as if they were taxation officers: see section 355-15.

**355-35 Consent is not a defence**

It is not a defence to a prosecution for an offence against section 355-25 that the entity to whom the information relates has consented to:

(a) the making of the record; or

(b) the disclosure of the information.

**355-40 Generality of Subdivision not limited**

Except as provided by section 355-60, nothing in this Subdivision limits the generality of anything else in it.

Note: This means that each provision in this Subdivision (other than section 355-60) has an independent operation and is not to be interpreted by reference to any other provision within the Subdivision.

**355-50 Exception—disclosure in performing duties**

(1) Section 355-25 does not apply if:

(a) the entity is a taxation officer; and

(b) the record or disclosure is made in performing the entity’s duties as a taxation officer.

Note 1: A defendant bears an evidential burden in relation to the matters in this subsection: see subsection 13.3(3) of the Criminal Code.

Note 2: An example of a duty mentioned in paragraph (b) is the duty to make available information under sections 3C, 3E and 3H.

(2) Without limiting subsection (1), records or disclosures made in performing duties as a taxation officer include those mentioned in the following table:

| **Records or disclosures in performing duties** | | |
| --- | --- | --- |
| **Item** | **The record is made for or the disclosure is to ...** | **and the record or disclosure ...** |
| 1 | any entity, court or tribunal | is for the purpose of administering any taxation law. |
| 2 | any entity, court or tribunal | is for the purpose of the making, or proposed or possible making, of an order under the *Proceeds of Crime Act 2002* that is related to a taxation law. |
| 3 | any entity, court or tribunal | is for the purpose of criminal, civil or administrative proceedings (including merits review or judicial review) that are related to a taxation law. |
| 4 | any entity | is for the purpose of responding to a request for a statement of reasons under the *Administrative Decisions (Judicial Review) Act 1977* in relation to a decision made under a taxation law. |
| 5 | any entity | is for the purpose of:  (a) determining whether to make an ex gratia payment; or  (b) administering such a payment;  in connection with administering a taxation law. |
| 6 | any entity | is for the purpose of enabling the entity to understand or comply with its obligations under a taxation law. |
| 7 | the Secretary of the Department | (a) is of information that does not include the name, contact details or ABN of any entity; and  (b) is for the purpose of:  (i) the design of a taxation law; or  (ii) the amendment of a taxation law. |
| 8 | any board or member of a board performing a function or exercising a power under a taxation law | is for the purpose of performing that function or exercising that power. |
| 9 | a competent authority referred to in an international agreement (within the meaning of section 23 of the *International Tax Agreements Act 1953*) | is for the purpose of exchanging information under such an international agreement. |
| 10 | any employer (within the meaning of the *Superannuation Guarantee (Administration) Act 1992*) | is for the purpose of disclosing to that employer information included in a notice given to the Commissioner under subsection 32F(1) or 32H(1A) of that Act by an employee (within the meaning of that Act) of that employer. |
| 11 | a payer (within the meaning of Part VA of the *Income Tax Assessment Act 1936*) in relation to whom an individual has made a TFN declaration that is in effect | (a) is of a matter that relates to the individual’s income tax or other liability referred to in paragraph 11‑1(b), (ca), (cb), (cc), (cd), (da) or (db); and  (b) is for the purpose of assisting the individual to give a declaration under section 15‑50 to the payer; and  (c) is made as the result of a request made by the individual to the Commissioner |

(Emphasis in original)

1. Ms McEwan contends that the effect of s 355-50 was that it is permissible for a taxation officer to make a disclosure to another taxation officer who was an entity in the confined sense for which s 355-50 made provision, but not otherwise. The primary judge, correctly with respect, rejected that contention at PJ[21]. The text of the provision compels the conclusion that the reference to “entity” in s 355-50(1)(a) is just to the disclosing entity. As the primary judge said:

What follows from this is that it was permissible for officers of the Australian Taxation Office, entities within the meaning of s 355-50(1)(a), to make a record or disclosure without transgressing the offence provision in s 355-25 if the record or disclosure were made in performing the taxation officer’s duties as a taxation officer.

1. Ms McEwan sought to restrict the scope of a taxation officer’s duties to those relevant to the “collection and recovery of income tax and other liabilities”. Neither the text of the TAA nor the authorities support such a construction. The range of duties described in column 2 of the table of s 355-50(2) is illustrative of the breadth of duties performed by taxation officers.
2. In *Jordan, Commissioner of Taxation v Second Commissioner of Taxation* [2019] FCA 1602 at [56], White J observed that the predecessor provision to s 355-50 was s 16(2) of the *Income Tax Assessment Act 1936* (Cth), which precluded the disclosure by taxation officers of information “except in the performance of any duty as an officer”. As his Honour noted, that expression was considered in *Canadian Pacific Tobacco Company Ltd v Stapleton* (1952) 86 CLR 1. At first instance, Dixon CJ had said, at 6:

... I think that the words “except in the performance of any duty as an officer” ought to receive a very wide interpretation. The word “duty” there is not, I think, used in a sense that is confined to a legal obligation, but really would be better represented by the word “function”. The exception governs all that is incidental to the carrying out of what is commonly called “the duties of an officer’s employment”; that is to say, the functions and proper actions which his employment authorizes.

1. On appeal, McTiernan J, with whom Williams and Kitto JJ agreed, expressly endorsed that construction (at 10).
2. In *Federal Commissioner of Taxation v Nestle Australia Ltd* [1986] FCA 479; 12 FCR 257 at 261, the “performance of the duties as a taxation officer” was held to:

[E]xtend beyond the performance of work of an administrative nature such as processing returns, making assessments, considering and dealing with objections, conducting investigations into the affairs of taxpayers and matters of this nature. It includes the occasions on which he is required by the judicial process to produce documents or give evidence in courts, by affidavit or viva voce, concerning the affairs of some other person which he has acquired as an “officer”, where the proceedings are referrable to the imposition, assessment or collection of revenue. These include appeals to courts under Pt V of the Assessment Act, proceedings for the obtaining of revenue, applications challenging decisions of the Commissioner pursuant to s 39B of the Judiciary Act 1903 and applications for review of decisions of the Commissioner under the Judicial Review Actwith which this case is concerned.

1. Similarly, in *Consolidated Press Holding Ltd v Federal Commissioner of Taxation* [1994] FCA 1367; 57 FCR 348 at 353, the phrase was held to encompass:

[N]ot only collecting tax and recovering unpaid amounts, but resolving disputes for taxpayers, providing advice to taxpayers concerning their rights and obligations under the taxation laws of the Commonwealth, assessing the liability to taxation of taxpayers, auditing the financial affairs of taxpayers to establish their assessable and taxable incomes and deductions and prosecuting offenders under the taxation laws.

1. Given that the disclosures were made to prospective witnesses for the purposes of preparing witness statements in conjunction with the investigation of federal offences stemming from a taxation audit, they were self-evidently made “in performing the officers’ duties” (PJ[22]).
2. Further, it would be contrary to the text of s 355-50(2) to restrict the use of the word “entity” in the table to an entity that is also a taxation officer. First, s 355-50(2) is expressed to be without any limitation to subsection (1), and to be inclusive of records or disclosures made to, inter alia “**any** entity, court of tribunal” in performing duties as a taxation officer as mentioned in the table. It would result in an absurdity if “**any** entity” in s 355-50(2) were restricted to “**the** entity” in s 355-50(1). The statutory context indicates that it must be permissible to disclose to an entity that is not a taxation officer, not merely because the table itself refers, inter alia, to courts, tribunals, board members, competent authorities, employers and payers, but also because subdiv C, which deals with the consequences of disclosure of protected information, would have no work to do otherwise.
3. The primary judge’s conclusion in respect of the construction of s 355-50(1) was correct. As such, Grounds 2 and 4 must be dismissed. It is therefore strictly unnecessary to deal with the remaining grounds of appeal.

## Ground 3

1. Ms McEwan conceded below that the issue of whether s 355-50 authorised disclosure, in circumstances where the information was obtained pursuant to a warrant issued under s 3E of the ***Crimes Act*** *1914* (Cth), was not a separate issue. Section 3ZQU(1) of the *Crimes Act* imposes restrictions on the use or sharing of documents obtained pursuant to a warrant. Section 3ZQU(4), however, provides that sub-s 1 does not apply where use or sharing of material is authorised by another law of the Commonwealth. The disclosure of material obtained by warrant was, on the proper construction of s 355-50, thereby authorised. Ground 3 must be dismissed.

## Grounds 1 and 7

1. By Ground 1, Ms McEwan challenges the primary judge’s finding that, because the disclosures were authorised by s 355-50, the AIC could be properly satisfied, in accordance with s 41(a) of the *Privacy Act*, that there had not been an interference with Ms McEwan’s privacy and so the privacy complaint should be dismissed without investigation.
2. As was developed in her oral submissions, Ground 1 relies not merely on the construction of s 355-50 of the TAA, which was the primary focus of Grounds 2, 3 and 4, but also on the construction of s 41 of the *Privacy Act*. Ms McEwan submitted, quite properly, that the construction of s 41 is informed by the Objects of the Act, as stipulated in s 2A of the *Privacy Act*:

The objects of this Act are:

(a) to promote the protection of the privacy of individuals; and

(b) to recognise the protection of the privacy of individuals is balanced with the interests of entities in carrying out their functions or activities; and

(c) to provide the basis for nationally consistent regulation of privacy and the handling of personal information; and

(d) to promote responsible and transparent handling of personal information by entities; and

(e) to facilitate an efficient credit reporting system while ensuring that the privacy of individuals is respected; and

(f) to facilitate the free flow of information across national borders while ensuring that the privacy of individuals is respected; and

(g) to provide a means for individuals to complain about an alleged interference with their privacy; and

(h) to implement Australia’s international obligation in relation to privacy.

1. It will be apparent that there is some tension between and amongst the stated objects of the *Privacy Act* – most relevantly in the present context is the tension between promoting the privacy of an individual and balancing that with the interests of entities, such as the ATO, in carrying out their functions or activities. Neither is prioritised over the other.
2. The AIC is empowered to decide **not to investigate** if they are satisfied, relevantly in this case, that the act is not an interference with an individual’s privacy (s 41(1)(a)) or an investigation is not warranted having regard to all the circumstances (s 41(1)(da)). It is clear from the Commissioner’s decision that she was conscious of the role of the ATO in carrying out its duties, being the investigation of an “anomaly” in relation to a research and development tax offset refund, as well as the possibility that Ms McEwan’s privacy had been interfered with by the ATO.
3. To the extent that Ground 1 complains that the Commissioner’s state of satisfaction was erroneously reached because of s 355-50 of the TAA, the complaint is without foundation. The Commissioner formed the view that Ms McEwan’s personal information was collected “for the primary purpose of the [ATO’s] investigation.” As the Commissioner observed, the AIC does not administer the provisions of the TAA. Having concluded, correctly, that it was permissible for the ATO to disclose the “protected information” under s 355-50, the Commissioner reached a state of satisfaction sufficient for her to decide not to investigate.
4. However, Ms McEwan further complains that the Commissioner could not have reached the appropriate state of satisfaction required by s 41(1)(a) of the *Privacy Act* in the absence of having all the material that was before the AIC when she made the decision. By reason of the matters raised in Ground 7, Ms McEwan submitted that the Commissioner could not have had all the material before her when she made the decision not to investigate because she had only the Draft PV, which Ms McEwan alleges had been tampered with or was otherwise fraudulent, and the primary judge should have so found.
5. These are serious allegations made against the AIC. For that reason, the AIC sought and was granted leave to withdraw its submitting notice for the purpose of making submissions relating to Ground 7.
6. The alleged fraud is said to be manifested by discrepancies in two or more versions of the email header to the Draft PV, which was an attachment only to an internal email within the Commissioner’s office. No evidence was adduced as to how these discrepancies came about. There was, however, no difference in the substantive text of the Draft PV in any version before the Court. As was explained to Ms McEwan in an email dated 28 June 2022 from the solicitor for the AIC, the Draft PV was never sent because the Commissioner took a different view from that expressed in the Draft PV and decided not to investigate. Ms McEwan does not accept that explanation and maintains that there was more material (she does not say how or where) that must have been before the Commissioner when she made her decision and which has not been disclosed.
7. Ms McEwan did not allege fraud before the primary judge. Although she raised the discrepancies, it is apparent from the transcript below that any concern Ms McEwan had with the authenticity of the document was ultimately not pressed at hearing. The primary judge dealt with the matter in this way, at PJ[26]-[27]:

For completeness, I should mention that, at an anterior stage of the administrative processes within the Office of the Information Commissioner, a view different to that which came ultimately to be expressed on 6 April 2022 was formed. That became the subject of an internal communication, by email, as between a subordinate and the ultimate decision-maker within the Office of the Information Commissioner. Yet further one particular print of that email for a reason not readily apparent, came upon its retrieval and printing into hard copy to bear a year imprint 2001.

It is not for me either to investigate or speculate about how such an imprint came to occur, only to recognise that the views of the subordinate came not to be adopted. That is not to say that those views, for reasons which doubtless seemed good to the subordinate, may not have been shared at a consideration stage with Ms McEwan. It would be quite wrong, however, to form any conspiratorial view about the ultimate decision made by the Information Commissioner. There is not a scintilla of evidence whatsoever which would suggest that that decision was made other than in good faith. Further, for the reasons which I have expressed, that decision is not one where the satisfaction formed was infected by the error for which Ms McEwan contends.

1. There is no basis for Ms McEwan’s contention that the primary judge failed to place any weight on “tampered evidence” relevant to the proceeding. This is because there was no evidence that any evidence had been tampered with.
2. The allegation of fraud raised in this Court, for the first time on appeal, is not one that can be entertained. Ms McEwan asserted that the Commissioner had every opportunity to adduce evidence about the discrepancies in the headers to the documents but chose to stay silent. That submission cannot be accepted. An explanation was proffered in the email of 28 June 2022 referred to above. If Ms McEwan wished to challenge that explanation, her opportunity to do so was at the hearing before the primary judge.
3. Ms McEwan sought to invoke the principles in *Clone Pty Ltd and Players Pty Ltd (In Liquidation) (Receivers & Managers Appointed)* [2018] HCA 12; 261 CLR 165 in support of Ground 7. Those principles do not assist Ms McEwan. To the contrary, they establish, inter alia, that the appropriate procedure for seeking an order setting aside an earlier perfected judgment is by application in a new proceeding, and not by application in the proceeding in which the judgment was obtained (at [68]), or by extension on appeal where the matter has not been raised at first instance. Further, it is necessary to demonstrate actual fraud. Proof of misconduct, accident, surprise, mistake or lack of frankness will not suffice (at [55]-[56]).
4. In any event, the allegations go nowhere in circumstances where Ms McEwan accepts that any preliminary view which might have been expressed by a subordinate was overruled by the delegate who was the decision-maker. The Draft PV is, therefore, not the subject of this appeal and is of no relevance.
5. There is nothing before this Court that suggests that the AIC acted in bad faith, tampered with evidence or committed fraud.
6. Ground 7 must be dismissed.
7. It is unnecessary to deal with the remaining grounds of appeal.

## Disposition

1. For the reasons given, the appeal must be dismissed. There is no reason why Ms McEwan should not pay each of the respondents’ costs.

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| I certify that the preceding thirty-nine (39) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Charlesworth, Sarah C Derrington and Meagher. |

Associate:

Dated: 18 August 2023