SUPREME COURT OF QUEENSLAND

CITATION:	*R v Van Eps; Ex parte Commonwealth Director of Public Prosecutions* [2024] QCA 46
PARTIES:	**R** **v** **VAN EPS, Julie Marie** (respondent) **EX PARTE COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS** (appellant)
FILE NO/S:	CA No 269 of 2023 SC No 1855 of 2023
DIVISION:	Court of Appeal
PROCEEDING:	Reference under s 668A Criminal Code
ORIGINATING COURT:	District Court at Brisbane – [2023] QDCPR 103 (Smith DCJ)
DELIVERED ON:	3 April 2024
DELIVERED AT:	Brisbane
HEARING DATE:	16 February 2024
JUDGES:	Bowskill CJ and Morrison JA and Fraser AJA
ORDER:	**The points of law referred are answered as follows:**

Question 1: Where, before being charged with an offence, an accused was compulsorily examined by a taxation officer under s 353-10 of schedule 1 of the *Taxation Administration Act 1953* (Cth), can a taxation officer who is so authorised, lawfully disclose information obtained during the compulsory examination to:

(a) the Commonwealth Director of Public Prosecutions (the Prosecutor);

(b) the Department of Industry, Science and Resources (AusIndustry).

Answer: "Provided the assumptions identified in paragraph [4] of the reasons below are correct, yes".

Question 2: If such disclosure is lawful can the Prosecutor use the information to:

(a) consider whether to commence a prosecution;

(b) formulate charges;

(c) prepare the prosecution case for committal and trial.

Answer: "Provided the assumptions identified in paragraph [4] of the reasons below are correct, yes".

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – OTHER MATTERS – where the respondent was compulsory examined by a taxation officer under s 353-10 of schedule 1 of the *Taxation Administration Act 1953* (Cth) before being charged with any offence – where a transcript of the examination was provided to AusIndustry, a government entity, and the Commonwealth Director of Public Prosecutions – where the respondent was later charged with attempting to dishonestly obtain a financial advantage from a Commonwealth entity and an indictment presented in the District Court – where the respondent applied, pursuant to s 590AA of the *Criminal Code* (Qld), for an order to stay the prosecution against her, in part, on the basis that the distribution of the transcript of the compulsory examination was unlawful – where the question of whether such distribution was lawful has been the subject of conflicting intermediate appellate decisions of the Queensland Court of Appeal, in *R v Leach* [2019] 1 Qd R 459, and the New South Wales Court of Criminal Appeal, in *R v Kinghorn* (2021) 106 NSWLR 322 – where the CDPP requested that the District Court rule on the law that applies, before determining the respondent's application – where the learned primary judge ruled that *Leach* was the applicable law – whether the majority decision in *Leach* is correct and should be followed

CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – MISCELLANEOUS MATTERS – QUEENSLAND – CASE STATED AND REFERENCE OF QUESTION OF LAW – where the CDPP refers to this Court under s 668A *Criminal Code* (Qld) two questions for its consideration – where the first question asks whether information obtained by a taxation officer during a compulsory examination under the *Taxation Administration Act 1953* (Cth), of an accused not yet charged with an offence, can be disclosed to the CDPP and AusIndustry – where, on the assumption that such disclosure is lawful, the second question asks if the CDPP can use that information to consider whether to commence a prosecution, formulate charges and prepare the prosecution's case – whether the *Taxation Administration Act 1953* (Cth) authorises disclosure and use of information derived from a compulsory examination, prior to any charges having been laid, for the purpose of investigating and prosecuting charges

Criminal Code (Qld), s 668A
Taxation Administration Act 1953 (Cth), sch 1, s 353-10, s 355-10, s 355-25, s 355-50, s 355-70

R v Independent Broad-Based Anti-Corruption Commission (2016) 256 CLR 459; [2016] HCA 8, followed
R v Kinghorn (2021) 106 NSWLR 322; [2021] NSWCCA 313, followed
R v Leach [2019] 1 Qd R 459; [2018] QCA 131, not followed
R v Leach; Ex parte Commonwealth Director of Public

Prosecutions (2022) 10 QR 40; [2022] QCA 7, cited

COUNSEL: P E McDonald SC, with P Kinchina, for the appellant
The respondent appeared on her own behalf

SOLICITORS: Director of Public Prosecutions (Commonwealth) for the appellant
The respondent appeared on her own behalf

[1] **THE COURT:** The respondent is charged with one count of attempting to dishonestly obtain a financial advantage from a Commonwealth entity contrary to ss 11.1 and 134.2(1) of the *Criminal Code* (Cth). The offence is alleged to have involved lodging a false research and development tax offset claim. Prior to being charged with any offence, the defendant was compulsorily examined by an officer(s) of the Australian Taxation Office (**ATO**) pursuant to a power conferred on the Commissioner of Taxation under s 353-10 of schedule 1 of the *Taxation Administration Act 1953* (Cth) (**TAA**). A transcript of the examination was produced and subsequently provided to an entity within the Department of Industry, Science and Resources known as AusIndustry and also to the Commonwealth Director of Public Prosecutions (**CDPP**).

[2] The respondent was charged on 4 April 2019. An indictment was presented in the District Court on 18 September 2023.[1] The respondent applied, pursuant to s 590AA of the *Criminal Code* (Qld), for orders for disclosure and to stay the prosecution against her in that Court, in part, on the basis that the distribution of the transcript of the compulsory examination was unlawful.[2] That question is the subject of conflicting intermediate appellate decisions of the Queensland Court of Appeal, in *R v Leach* [2019] 1 Qd R 459 (***Leach***),[3] and the New South Wales Court of Criminal Appeal, in *R v Kinghorn* (2021) 106 NSWLR 322 (***Kinghorn***).[4] In those circumstances, the CDPP requested that, prior to determining the respondent's application, the District Court rule on the law that applies. The learned primary judge did that and, on the basis that he was bound by the decision of the Queensland Court of Appeal, ruled that "the reasons given in the majority judgment in *R v Leach* ... is the applicable law in this case".[5]

[3] Pursuant to s 668A of the *Criminal Code* (Qld), the CDPP has referred to this Court for its consideration and opinion the following points of law arising from the ruling of the primary judge:

> "1. Where, before being charged with an offence, an accused was compulsorily examined by a taxation officer under s 353-10 of schedule 1 of the *Taxation Administration Act 1953* (Cth), can a taxation officer who is so authorised, lawfully disclose information obtained during the compulsory examination to:

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1 Initially, the indictment contained seven counts, each alleged to have been committed on a separate date during the period from 24 August 2017 to 14 February 2018. It has recently been amended to refer to one count, spanning that time period.

2 The respondent has also sought the issue of subpoenas, directed at the production of information relating to the dissemination of the transcript of the compulsory examination. Those subpoenas are the subject of objections.

3 A majority decision of Sofronoff P and Philippides JA, with Applegarth J dissenting.

4 A unanimous decision of five members of the Court of Criminal Appeal, with reasons given by Bathurst CJ and Payne JA, Bell P, Ward CJ in Eq (as their Honours respectively then were) and Bellew J agreeing.

5 *R v Clarke (No 1)* [2023] QDCPR 103.

(a) the Commonwealth Director of Public Prosecutions (the **Prosecutor**);

(b) the Department of Industry, Science and Resources (AusIndustry).

2. If such disclosure is lawful can the Prosecutor use the information to:

(a) consider whether to commence a prosecution;

(b) formulate charges;

(c) prepare the prosecution case for committal and trial."

[4] These points of law are referred to this Court on the basis of assumptions that:

(a) the taxation officer conducting the compulsory examination was authorised to do so;

(b) the examination was conducted lawfully and for a proper purpose; and

(c) the dissemination of the material by the ATO was otherwise lawful (that is, apart from the issue raised by the majority decision in *Leach*).[6]

[5] The CDPP submitted that, in considering these questions, this Court should adopt the approach taken in *Kinghorn* and overturn the majority decision in *Leach*. The respondent, on the other hand, endorsed the reasoning of the majority in *Leach* and argued that the New South Wales Court of Criminal Appeal "got it wrong" in *Kinghorn*.

[6] For the following reasons, we are of the opinion that the answer to both questions posed for our consideration and opinion is "yes", provided the examination was lawful (on the basis of the assumptions identified in paragraph [4] above). As will become apparent, in reaching that conclusion, we respectfully disagree with the decision of the majority in *Leach* and consider that it should be overruled.

[7] It is important to record that this Court has considered only the points of law referred to it under s 668A of the *Criminal Code*. It is apparent from the materials before the Court, and the submissions made by the respondent, that in addition to the challenge to the lawfulness of the distribution of the transcript of the compulsory examination, the respondent also wishes to challenge the lawfulness of the exercise of the power to compulsorily examine her in other respects (including the factual bases for the assumptions set out in paragraph [4] above). Those issues remain for determination in the context of the respondent's pending application in the District Court proceedings. This Court's opinion in relation to the points of law referred to it under s 668A proceeds upon the *assumption* that the power to compulsorily examine has been lawfully invoked but does not decide that issue.[7] That is why we answer the questions "yes", provided the examination was lawful.

[8] The answer to the questions referred to this Court turns upon the proper construction of the relevant statutory provisions, to which we now turn.

Statutory provisions

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6 Paragraph 37 of the CDPP's written submissions filed 13 February 2024.

7 Cf *Strickland v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325, in which it was held that the examinations were unlawful (grossly unlawful, in the words of the plurality in *Commonwealth v Helicopter Resources Pty Ltd* (2020) 270 CLR 523 at [21]). See also *Kinghorn* at [126]-[127], distinguishing the circumstances in *Strickland*.

[9] Schedule 1 of the TAA contains provisions dealing with the collection and recovery of income tax and other liabilities.[8] Division 353 of part 5-1, chapter 5 of schedule 1, "gives the Commissioner powers to obtain information and evidence" (s 353-1). The Commissioner's power in this regard is set out in s 353-10, as follows:

> "**353-10**
>
> **Commissioner's power**
>
> (1) The Commissioner may by notice in writing require you to do all or any of the following:
>
> (a) to give the Commissioner any information that the Commissioner requires for the purpose of the administration or operation of a taxation law;
>
> (b) to attend and give evidence before the Commissioner, or an individual authorised by the Commissioner, for the purpose of the administration or operation of a taxation law;
>
> (c) to produce to the Commissioner any documents in your custody or under your control for the purpose of the administration or operation of a taxation law.
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> Note: Failing to comply with a requirement can be an offence under section 8C or 8D.
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> (2) The Commissioner may require the information or evidence:
>
> (a) to be given on oath or affirmation; and
>
> (b) to be given orally or in writing.
>
> For that purpose, the Commissioner or the officer may administer an oath or affirmation.
>
> (3) The regulations may prescribe scales of expenses to be allowed to entities required to attend before the Commissioner or the officer."

[10] This provision, taken with ss 8C and 8D, abrogates the common law privilege against self-incrimination.[9] That means a person served with a notice under s 353-10 must provide the information, or attend and answer questions, even if to do so would tend to incriminate them.

[11] A notice under s 353-10 was issued to the respondent on 15 January 2018, requiring her to attend and give evidence on oath. The respondent participated in a compulsory examination, as required, on 23 January 2018.

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[8] The provisions set out below are in the form they appear in compilation no. 162 of the TAA, registered on 15 April 2019. The provisions were unchanged in the period between 23 January 2018 (the date of the compulsory interview) and 4 April 2019 (when the prosecution was initiated). For completeness, it is noted that the provisions remain essentially in this form as at the date of this judgment (with only a minor change to note 2 below in s 355-50(1)(b)).

[9] *Deputy Commissioner of Taxation (Cth) v De Vonk* (1995) 61 FCR 564 at 566 and 583; *Binetter v Deputy Commissioner of Taxation* (2012) 206 FCR 37 at [30]; see also *Kinghorn* at [36].

[12] Division 355 contains provisions about the circumstances in which, and to whom, evidence or information so obtained may be disclosed. The objects of Division 355 are set out in s 355-10, as follows:

> "**355-10 Objects of Division**
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> The objects of this Division are:
>
> (a) to protect the confidentiality of taxpayers' affairs by imposing strict obligations on taxation officers (and others who acquire protected tax information), and so encourage taxpayers to provide correct information to the Commissioner; and
>
> (b) to facilitate efficient and effective government administration **and law enforcement** by allowing disclosures of protected tax information for specific, appropriate purposes."[10]

[13] As defined in s 355-30, "taxation officer"[11] 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.

[14] Subdivision 355-B deals with disclosure of protected information by taxation officers. As explained in s 355-20:

> "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."

[15] The relevant offence is created by s 355-25(1), which provides:

> "**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

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10 Emphasis added.

11 See also s 995-1 of the *Income Tax Assessment Act 1997* (Cth), where "taxation officer" is defined by reference to s 355-30.

(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."

[16] "Protected information" is defined in s 355-30 to mean information that was disclosed or obtained under or for the purposes of a taxation law, relates to the affairs of an entity and identifies or is reasonably capable of being used to identify the entity. It is accepted the information provided by the respondent in the course of the compulsory examination of her is "protected information".

[17] The legislation then provides for a number of exceptions to s 355-25 – that is, circumstances in which the disclosure of protected information is *not* an offence and therefore is permitted. One of the exceptions is contained in s 355-50, which provides:

"**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 and 3E.

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

[18] The table forming part of s 355-50(2) includes reference to a record or disclosure made to "any entity, court or tribunal":

(a) "for the purpose of administering any taxation law" (item 1); and

(b) "for the purpose of criminal, civil or administrative proceedings (including merits review or judicial review) that are related to a taxation law" (item 3).

[19] An equivalent phrase to "performing the entity's duties as a taxation officer", in s 16(2A) of the *Income Tax Assessment Act*, has been given a wide interpretation, extending to "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 [their] employment authorises".[12] The phrase extends to occasions on which the taxation officer is required by the judicial process to produce documents or give evidence in courts concerning the affairs of another person which the officer

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12 *Kinghorn* at [47]-[48], referring to *Canadian Pacific Tobacco Co Ltd v Stapleton* (1952) 86 CLR 1 at 6 per Dixon CJ.

has acquired as a "taxation officer".[13] As described by the Court of Criminal Appeal in *Director of Public Prosecutions (Cth) v Kinghorn; Kinghorn v Director of Public Prosecutions (Cth)* (2020) 102 NSWLR 72[14] at [98]:

> "The prosecution of contraventions of the tax legislation or criminal conduct that undermines the tax legislation, such as defrauding the revenue or perverting the course of a tax investigation, are essential to the proper administration of the ITAA. The provision of information to investigative and prosecutorial bodies in connection with the detection and prosecution of such offences falls squarely within the function of administering the ITAA (and the associated tax legislation). It is part of the "duties" of the Tax Commissioner and officers … who assist him or her to administer the ITAA."[15]

[20] Those observations apply equally to the TAA provisions and taxation officers.

[21] The CDPP contends that s 355-50 applies to the disclosure of the transcript to AusIndustry, as an "entity … for the purpose of administering any taxation law". In this regard, the Court understands that the ATO and AusIndustry jointly administered the relevant research and development tax incentive program, in respect of which it is alleged the offence(s) was committed. The information obtained from the compulsory examination is said to have been disclosed to AusIndustry "for the purposes of:

(a) administering the tax law, namely to notify AusIndustry of the outcome of the audit which resulted in the ATO denying payment of the R&D Claim; and

(b) AusIndustry's assessment of the veracity of the R&D Claim under the *Industry Research and Development Act 1986* (Cth) (as a result of the ATO's notification of the outcome of audit of the respondent's allegedly fraudulent R&D Claim which is now the subject of the charges)."[16]

[22] The CDPP contends the disclosure to AusIndustry was lawfully made, pursuant to s 355-50, because it was disclosure by a taxation officer in performing their duties as a taxation officer to an entity for the purpose of administering a taxation law.

[23] Section 355-50 is also relied upon as authorising disclosure to the CDPP "for the purpose of criminal … proceedings… that are related to a taxation law".

[24] Another exception is contained in s 355-70, which provides:

> "**355-70 Exception – disclosure for law enforcement and related purposes**
>
> (1) Section 355-25 does not apply if:
>
> (a) the entity is the Commissioner or a taxation officer authorised by the Commissioner to make the record or disclosure; and

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13 *Kinghorn* at [49]-[51], referring to *Commissioner of Taxation v Nestle Australia Ltd* (1986) 12 FCR 257 at 262 and *Yates v R* (1991) 102 ALR 673 at 677-678.

14 An earlier appeal decision in the *Kinghorn* proceedings, from a decision concerning claims of privilege made in respect of documents subpoenaed from the ATO, the AFP and the CDPP (see *Kinghorn* at [8]).

15 Referred to with approval in the later decision in *Kinghorn* at [54]-[55]. See also *R v Leach; Ex parte Commonwealth Director of Public Prosecutions* (2022) 10 QR 40; [2022] QCA 7 at [87(3)] per Bond JA, Fraser and Morrison JJA agreeing (a later decision in relation to Mr Leach).

16 Paragraph 45 of the CDPP's written submissions filed on 13 February 2024.

(b) an item in the table in this subsection covers the making of the record or the disclosure; and

(c) if the entity is not the Commissioner, a Second Commissioner or an SES[17] employee or acting SES employee of the Australian Taxation Office – one of the following has agreed that the record or disclosure is covered by the item:

(i) the Commissioner;

(ii) a Second Commissioner;

(iii) an SES employee or acting SES employee of the Australian Taxation Office who is not a direct supervisor of the 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: The Commissioner is required to include in an annual report information about disclosures made under this subsection: see section 3B.

(2A) The taxation officer is entitled to rely on the exception in subsection (1) even if the agreement referred to in paragraph (1)(c) has not been obtained in relation to the record or disclosure."

[25] The table forming part of s 355-70 includes reference to a record made for or disclosure made to "an authorised law enforcement agency officer, or a court or tribunal", for the purpose of:

(a) investigating a serious offence;[18] or

(b) enforcing a law, the contravention of which is a serious offence (item 1).

[26] As defined in s 355-70(4), "law enforcement agency" includes, inter alia, the Australian Federal Police (**AFP**), the police force of a State or Territory and the CDPP.

[27] The offence(s) the subject of the District Court indictment is a "serious offence", carrying a maximum penalty of 10 years' imprisonment.

[28] The CDPP contends this provision also expressly authorised the disclosure of the transcript of the compulsory examination to the CDPP for the purpose of enforcing the law. It is accepted that criminal prosecution is an aspect of the enforcement of the law.[19]

[29] The CDPP submits that, on the proper construction of s 355-50 and s 355-70, the TAA authorises disclosure to, and use by, the CDPP of the information obtained during the compulsory examination:

(a) for the purpose of a consideration of charges against the examinee;

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17 Senior Executive Service.

18 As defined in s 355-70(10), a serious offence is one that is punishable by imprisonment for a period exceeding 12 months.

19 *Kinghorn* at [120].

(b) for the purpose of the formulation of such charges; and

(c) for use in the preparation of the prosecution case in relation to such charges.[20]

[30] In both respects – that is, the disclosure to AusIndustry and the disclosure to the CDPP – the CDPP's contentions appear compelling, having regard to the plain words of the statutory provisions and the object of them, namely, to "facilitate efficient and effective government administration and law enforcement by allowing disclosures of protected tax information for specific, appropriate purposes" (s 355-10(b)).

[31] The question is whether those statutory provisions have displaced the fundamental principle of the common law that the onus of proof of a criminal offence rests on the Crown (also referred to as the "accusatorial principle") and its companion rule that the accused cannot be required to assist in proof of the offence charged. If they have not, the disclosure of evidence compulsorily obtained from the respondent accused may not be permitted. The respondent argues that this is the case here.

[32] In the interpretation of statutory provisions in this context, the principle of legality applies, namely, that such common law principles will not be taken by a court to have been displaced by legislation, save where the intention to do so is expressed with "irresistible clearness".[21]

[33] As already mentioned, the question whether provisions such as s 355-50 and s 355-70 should be construed in this way has been the subject of conflicting intermediate appellate decisions, to which we turn next.

Leach

[34] First, there is the (majority) decision of the Queensland Court of Appeal in *Leach*.[22] In this case, a notice was issued to the appellant under s 353-10, requiring him to give evidence and produce documents. The appellant complied and was questioned in March 2010. The transcript of his evidence was later, in September 2011, provided by the ATO investigator to officers of the CDPP and to prosecutors. The appellant was subsequently charged with offences of obtaining a financial advantage by deception and proceeded to trial on indictment before the District Court. The prosecution relied upon the transcript of the compulsory examination as evidence at the appellant's trial. An application for a stay of the prosecution, on the basis that the disclosure and use of that transcript was unlawful, was unsuccessful. On the appeal against his conviction of the offences, the issue was whether the disclosure to and use by the prosecution of this compulsorily obtained evidence was authorised. A majority of the Court of Appeal (Sofronoff P and Philippides JA, Applegarth J dissenting) held that it was not, on the basis that:

> "… the disclosure to the DPP of the evidence given under compulsion in this case, and its subsequent use by the DPP to prepare for the appellant's prosecution and its admission as evidence at the appellant's trial, conflicted with the 'fundamental principle of the common law' that the onus of proof rests on the

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20 Paragraph 50 of the CDPP's written submissions filed on 13 February 2024.

21 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 153 [158] per Kiefel J; *R v Independent Broad-Based Anti-Corruption Commissioner* (2016) 256 CLR 459 at 470-471 [40] per French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ.

22 *R v Leach* [2019] 1 Qd R 459; [2018] QCA 131.

> prosecution and conflicts with his 'companion principle' that the prosecution cannot compel an accused to assist it."[23]

[35] In reasoning towards that conclusion, the majority said that "there is no provision in any legislation which expressly authorises the disclosure to prosecutors of answers of an examinee given to questions administered under s 353-10 Sch 1 in order to help them formulate and then to prove criminal charges against that examinee".[24] His Honour was not persuaded there was any basis to necessarily imply such an authority to disclose to and use by the DPP of the content of a compulsory examination, from the statutory scheme including s 355-50. In addition, no distinction was made between the circumstances where an examinee had already been charged prior to the examination and where the examinee had not yet been charged.

[36] Each of these steps in the reasoning of the majority is problematic: the first, because it does not account for s 355-70, which does expressly authorise disclosure of answers of an examinee to an authorised law enforcement agency – the CDPP – for the purpose of enforcing a law (which necessarily includes, by formulating and then proving criminal charges, through prosecution of an examinee);[25] and the second, because it is contrary to the earlier decision of the High Court in *R v Independent Broad-Based Anti-Corruption Commission* (2016) 256 CLR 459 (***IBAC***) (discussed below) in which the plurality, in particular, drew a clear distinction between a compulsory investigative procedure pre-charge and post-charge in terms of the application of the fundamental principle and the companion rule.

[37] Justice Sofronoff took a very narrow approach to the application of the principle of legality in this context, saying:

> "[69] These authorities[26] leave open the question, **and I doubt**, whether an Australian legislature could validly pass a law to alter the criminal process so as to compel a person to give self-incriminatory evidence for the executive to use in order to formulate a criminal charge against that person and then as evidence to secure that person's conviction.
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> [70] But what the cases do make clear is that legislative authority for such a course of action requires the plainest manifestation in an Act."[27]

[38] As will be seen, both the High Court in *IBAC,* before *Leach,* and the New South Wales Court of Criminal Appeal in *Kinghorn,* after *Leach,* support the conclusion that the legislature can do precisely what Sofronoff P in *Leach* doubted it could. As the High Court has more recently said, in *Commonwealth v Helicopter Resources Pty Ltd* (2020) 270 CLR 523 at [22]:

> "… as this Court made clear in *R v Independent Broad-Based Anti-Corruption Commissioner,* if a compulsory investigative procedure is sufficiently authorised by statute, it may be invoked notwithstanding that, as a matter of practical reality, the result will fundamentally

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23 *Leach* at [97].
24 *Leach* at [38].
25 See also *Kinghorn* at [116] and [130].
26 *X7 v Australian Crime Commission* (2013) 248 CLR 92; *R v Seller* (2013) 232 A Crim R 249 (a decision of the New South Wales Court of Criminal Appeal); and *Lee v New South Wales Crime Commission* (2013) 251 CLR 196.
27 Emphasis added.

alter the ability of an accused to defend charges that may have been or may be laid against him or her."

[39] That was the conclusion reached by Applegarth J, in dissent in *Leach.* His Honour concluded that the disclosure and use of the compulsorily obtained information was authorised, saying:

> "[150] As the primary judge explained, s 355-70 Sch 1 is much broader in its terms than s 355-50 Sch 1, and permits disclosure of 'protected information' to a number of entities, including State police forces and a range of other law enforcement agencies for the purpose of investigating 'a serious offence', which is defined in s 355-70(10) Sch 1 as an offence against an Australian law that is punishable by imprisonment for a period exceeding 12 months. Disclosure under s 355-70 Sch 1 need not relate to a taxation law offence. Whereas s 355-70 Sch 1 refers to *investigating* a serious offence or enforcing a law, the contravention of which is a serious offence, s 355-50 Sch 1 relevantly refers to disclosure *for the purpose of criminal proceedings* related to a taxation law. It authorises disclosure not simply in relation to the investigation of offences. The primary judge was conscious that legislation must be explicit if it has the effect of interfering with the traditional rights of an accused. However, **the relevant provisions were explicit as to such an effect**. If the terms of s 355-50 Sch 1 were ambiguous, then recourse to extraneous material, namely the Explanatory Memorandum to the Bill which introduced the provisions in 2010, made clear that **the provision permitted disclosure to the CDPP in relation to proceedings related to a taxation law**. The Explanatory Memorandum gave an example of the ATO referring a matter to the CDPP for prosecution under a provision of the *Criminal Code* 1995 (Cth).
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> [151] Contrary to the appellant's arguments, the terms of s 355-50 Sch 1 were found by the primary judge to permit the disclosure of the information by the ATO when there were no criminal proceedings in existence. The term 'for the purpose of criminal … proceedings' included assessment of a prosecution and the preparation of criminal charges.
>
> [152] In summary, the appellant's submissions do not engage with the primary judge's detailed analysis of the statutory scheme. The primary judge applied established principles of statutory interpretation and was conscious of the principle that a provision which interferes with the traditional rights of an accused must be explicit. However, **the relevant provision is explicit in permitting the use of the material disclosed to the CDPP for the purpose of a criminal prosecution**. The primary judge did not err in his interpretation of the statutory scheme."[28]

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28 Emphasis added.

[40] Justice Applegarth concluded that the disclosure to the CDPP was for an authorised purpose, under s 355-50, as it was for the purpose of contemplated criminal proceedings related to a taxation law (at [153]). As his Honour also said:

> "[173] The essential issue raised by the first ground of appeal is whether s 355-50 Sch 1 TAA, in authorising the disclosure of compulsorily obtained evidence for the purpose of a criminal proceeding of the present kind, implicitly authorises the use of that evidence in such a proceeding against the examinee.
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> [174] There can be no doubt that such use alters a fundamental aspect of the criminal justice system because the prosecution is equipped with evidence obtained from the accused under compulsion which aids it to prove its case, and this impedes the course the accused might follow at trial, including the decision to give evidence and the kind of evidence he might give in his defence. The issue of statutory construction, however, is whether the use at trial of the evidence disclosed to the prosecution for the purpose of a criminal proceeding is implicitly authorised. In my view, it is.
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> [175] Such use **accords with the statutory purpose of facilitating law enforcement by allowing disclosures of protected tax information for specific purposes**. Unlike s 355-70 Sch 1, which relevantly is concerned with investigating certain serious offences, the relevant exception in s 355-50 Sch 1 in this case is concerned with the prosecution of certain taxation offences because the authorised recipient is the Commonwealth Director of Public Prosecutions. The fact that other kinds of prescribed 'protected information' may be disclosed does not diminish the fact that the disclosure to the CDPP of information compulsorily obtained under s 353-10 Sch 1 is authorised. The authorised disclosure is to the prosecution for the purpose of a criminal proceeding, and deploying evidence at trial is for such a purpose. I am not persuaded that the legislature authorised disclosure to the CDPP for the purpose of specified criminal proceedings, but did not intend the evidence to be deployed in those very proceedings. In my view, it clearly did.
>
> [176] The fact that there is no express provision which makes the evidence admissible is, in my view, unremarkable. If the evidence may be used in a prosecution for tax offences and is relevant, then it is prima facie admissible. Absent a provision which renders such evidence inadmissible, the admissibility of the evidence is determined by principles governing the admissibility of compulsorily obtained evidence.
>
> [177] The **relevant legislation creates a special exception for tax-related prosecutions, by which properly obtained evidence is disclosed to the Commonwealth prosecuting authority for the purpose of a criminal proceeding**. The fact that s 355-50 Sch 1 has other work to do does not alter the fact that one of the things it does is to authorise the disclosure of compulsorily obtained evidence to the prosecution for the purpose of a criminal proceeding of the kind which the

> appellant faced. The primary judge was correct to conclude that the legislature clearly intended to authorise the release and use of material so obtained on the trial of the examinee, and to thereby affect a fundamental entitlement of an accused.
>
> [178] In my view, **it is implicit that the evidence which the legislature authorised to be disclosed for the purpose of a criminal proceeding may be used in that very criminal proceeding**. This is, of course, subject to any separate basis upon which to contend that the prosecution constitutes an abuse of process, and subject to any common law rules or statute governing the admissibility of the evidence."[29]

The High Court's earlier decision in IBAC

[41] *Leach* was decided on 22 June 2018. The High Court had earlier considered the same question, albeit in a different statutory context, in *IBAC*.[30] It appears the Court in *Leach* was not referred to the High Court's decision in *IBAC* – for there is no reference to it in the reasons. That is unfortunate, for it may well have affected the result.

[42] The Court in *IBAC* was concerned with the construction of provisions of the IBAC Act which, like the provisions under consideration in this case, authorised the compulsory examination of a person for the purposes of an investigation – in that context, relating to police integrity. The privilege against self-incrimination was expressly abrogated by the Act (s 144(1)), although a limited use immunity was retained, so that any answer, information or document that might tend to incriminate the person was not to be admissible in evidence against the person except, inter alia, in proceedings for perjury or giving false information, an offence against the IBAC Act or a disciplinary process or action (s 144(2)). The argument in that case was not about *disclosure* of evidence compulsorily obtained, but more fundamentally as to whether the relevant provisions of the IBAC Act could be construed as permitting compulsory examination of a person reasonably suspected of a crime because that "would effect a fundamental alteration to the process of criminal justice"[31] by requiring that person to assist in his or her own prosecution (at [30]).

[43] In arguing that the IBAC Act did not authorise their examination, the appellants, who had not yet been charged with any offence, called in aid the common law accusatorial and companion principles and argued that the legislation did not manifest a clear intention to abrogate those rights. However, as the plurality[32] said, at [43]:

> "The companion principle is, as its name suggests, an adjunct to the rights of an accused person within the system of criminal justice. Its application depends upon the judicial process having been engaged because it is an aspect of that process. Thus, in *X7*, the joint reasons of Hayne and Bell JJ made it clear that the companion principle protects the position of 'a person charged with, but not yet tried for' a criminal offence."

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29 Emphasis added.

30 *R v Independent Broad-Based Anti-Corruption Commission* (2016) 256 CLR 459.

31 Referring to *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 140 [118].

32 Comprising French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ; Gageler J agreeing as to the result, in separate reasons.

[44] In the circumstances of that case, the companion principle was not engaged because the appellants had not been charged and there was no prosecution pending (at [48]). Importantly, in *IBAC*, it was accepted that the exercise of the compulsive power to examine was lawfully exercised.[33]

[45] One can immediately discern, from *IBAC,* a significant flaw in the reasoning process of the majority in *Leach* – because in *Leach*, there was likewise no prosecution pending at the time of the compulsory examination. That is also the case here.

[46] The appellants in *IBAC* urged the Court to extend the companion principle. The High Court refused to do so, on the basis that:

(a) to reformulate the principle as the appellants urged "would be to extend its operation beyond the rationale identified in the authorities, namely, the protection of the forensic balance between prosecution and accused in the judicial process as it has evolved in the common law" (at [48]);

(b) the appellants' formulation of the terms of the extension – shifting from "persons reasonably believed to have committed a criminal offence" to "a person the specific subject of an investigation" to "a person reasonably suspected of having committed a criminal offence" – was "eloquent of uncertainty as to the basis for, and operation of, the extension" (at [49]) and invited a query as to the person by whom the requisite suspicion is to be held (at [50]); and

(c) lastly, "… to apply the companion principle in anticipation of the commencement of criminal proceedings would be to **fetter the pursuit and exposure of a lack of probity within the police force, which is the object of the IBAC Act**. The subject matter of the IBAC's investigations covers a range of conduct, only some of which may constitute a criminal offence. Upon the appellants' construction, the IBAC, while investigating conduct of an examinee, might uncover information that makes a certain person a suspect in relation to a criminal offence, at which point the examination would have to cease, leaving issues which may affect the public interest unexplored."[34] (at [51]).

[47] Justice Gageler (as his Honour then was), in separate reasons, focussed upon the construction of the statutory provisions, observing that "whatever the temporal operation of the companion rule might be, the IBAC Act manifests an unmistakable legislative intention that a person summoned and examined might be a person whose corrupt conduct or criminal police personnel misconduct is the subject matter of the investigation" (at [73]). In Gageler J's view, the exclusion of a person whose corrupt conduct or criminal police personnel misconduct is the subject matter of an investigation from the reference to "a person" who might be summoned and examined in the course of an examination under the IBAC Act was "not only unjustified by the unqualified statutory purpose of the IBAC Act", but would also "undermine the principal statutory purpose of the IBAC Act by compromising the attainment of the express object of providing for the identification, investigation and exposure of serious corrupt conduct and police personnel misconduct" (at [74]). Further, in Gageler J's view, such a construction would "reduce to nonsense the IBAC Act's solemn abrogation of the privilege against self-incrimination" (at [75]).

[48] Justice Gageler concluded with the following observations:

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33 Cf again *Strickland v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325 at [96] – in *Strickland*, the compulsive power was found not to have been exercised lawfully.

34 Emphasis added.

> "[76] Legislation is sometimes harsh. It is rarely incoherent. It should not be reduced to incoherence by judicial construction. An interpretative technique which involves examining a complex and prescriptive legislative scheme designed to comply with identified substantive human rights norms in order to determine whether, and if so to what extent, that legislative scheme might butt up against a free-standing common law principle is inherently problematic. The technique is even more problematic if the common law principle lacks precise definition yet demands legislative perspicacity and acuity if it is not to create of its own force an exception to the scheme that is spelt out in the statutory language.
>
> [77] Be that as it may, any common law principle or presumption of interpretation must surely have reached the limit of its operation where its application to read down legislation plain on its face would frustrate an object of that legislation or render means by which the legislation sets out to achieve that object inoperative or nonsensical. The appellant's invocation of the companion rule to read down the IBAC Act would do both."

Kinghorn

[49] Conflicting with the decision of the majority in *Leach* is the more recent decision of the New South Wales Court of Criminal Appeal in *Kinghorn*,[35] which considered similar questions to those now referred to this Court in relation to the same legislative provisions (as well as others).

[50] The Court in *Kinghorn* did not follow *Leach,* although politely declined to say the decision of the majority in that case was plainly wrong[36] – instead observing that since there were differing decisions on the issue by various intermediate appellate courts,[37] the Court was not constrained by the principles laid down in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 and *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 to follow *Leach* unless convinced it is plainly wrong; distinguishing *Leach* in some respects because *Kinghorn* also considered different legislative provisions (including s 16(2A) of the *Income Tax Assessment Act*); pointing out that whilst Sofronoff P said in *Leach* there was no provision expressly authorising the disclosure to prosecutors of answers to questions given in an examination, in fact s 355-70 was such a provision; and lastly, because there was no reference to *IBAC* in *Leach* – which was not to say *Leach* was decided *per incuriam*, "but simply that if this court is of the view that *IBAC* compels a different result to that reached in *Leach* it must apply that decision" (at [117]).

[51] Mr Kinghorn was charged in July 2018 with offences of dishonesty under s 135.1(7) of the *Criminal Code* (Cth). About 12 years before the charges were laid, he was examined by the ATO under the provisions of what was then s 264 of the *Income*

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35 *R v Kinghorn* (2021) 106 NSWLR 322; [2021] NSWCCA 313.

36 *Kinghorn* at [113], [116]-[117].

37 Referring to *Leach*, an earlier decision of the New South Wales Court of Criminal Appeal in *Yates*, and the decisions of the Western Australian Court of Appeal in *Zanon v Western Australia* [2016] WASCA 91, a case of compulsory examination pre-charge, in respect of which the Court construed the relevant legislation as authorising the disclosure of the transcript to the DPP; and, likewise, *A v Maughan* (2016) 50 WAR 263.

Tax Assessment Act 1936 (Cth), which is equivalent to s 353-10 of the TAA. The transcript of the s 264 examination and related material were disclosed to the AFP and the CDPP on a number of different occasions between 2007 and 2018 (with different statutory provisions applying at various times). The full transcript was disclosed in 2010, well before any charges were laid, and all the disclosures occurred prior to Mr Kinghorn being served with a court attendance notice (see [20]-[30]). The charges relied, in part, on things he had said in the course of that examination.

[52] The critical issue in the appeal was whether the ATO was empowered to disclose the information arising from the compulsory examination to the AFP and the CDPP. The primary judge had followed *Leach*, to conclude that the relevant provisions of the *Income Tax Assessment Act* and TAA which applied at the time of the disclosures did not permit the disclosure.

[53] On the appeal, the Court considered a number of different statutory provisions, given the time period over which the disclosures were made, including s 355-25, s 355-50 and s 355-70 (at [58]). After detailed consideration, the Court expressly disagreed with the majority decision in *Leach,* including on the basis of disagreement with Sofronoff P's conclusion in *Leach* that it did not matter whether an accused was compelled to give evidence before or after charges have been laid (at [131]).

[54] The Court in *Kinghorn* concluded that, on the proper construction of the statutory provisions, the disclosure to the AFP and the CDPP was authorised:

(a) first, on the basis, as confirmed by the High Court in *IBAC,* that neither the accusatorial principle nor the companion rule operated to limit the power of disclosure conferred by, relevantly, s 355-70, in circumstances where the disclosure took place before charges were laid (at [137]; and

(b) secondly, on the basis that even if the accusatorial principle and the companion rule had any application pre-charge, provisions including s 355-50 exhibited the necessary intention to permit disclosure and use of compulsorily acquired material notwithstanding the accusatorial principle and the companion rule (at [138]).

[55] The Court in *Kinghorn* also rejected an argument that, even if the initial disclosure was lawful, no further <u>use</u> could be made of the material once charges were laid. This was because:

(a) first, there is nothing in the legislation which suggests such a limitation (on use) and, in fact, it is contrary to the express language of, inter alia, s 355-70, which states that the authorised purposes of disclosure include enforcement (including by prosecution) of a law, the contravention of which is a serious offence (at [140]);

(b) secondly, if no use could be made of the material disclosed:

> "…this would result in the improbable consequence that dissemination and use of material acquired in a compulsory examination could only take place in circumstances where the examinee could not thereafter be prosecuted in connection with that material. Investigating and prosecuting authorities would be prohibited from any continued use of information which they lawfully possessed and by which they lawfully investigated and formulated the criminal charges, upon the laying of those same

charges. Such a result would undermine the very purpose of the statutory information-gathering powers" (at [141]); and

(c) thirdly, such a conclusion was said to be inconsistent with persuasive intermediate appellate authority, namely, *Zanon v State of Western Australia* (2016) 50 WAR 1. As Bathurst CJ and Payne JA[38] said (at [144]-[145]):

> "144 … In *Zanon,* the Western Australian Court of Appeal considered the application of the accusatorial principle and companion rule after charges were laid, but in relation to material compulsorily obtained and disclosed before those charges. Referring to the High Court's decision in *IBAC*, McLure P said at [144]:
>
> '[144] There is no suggestion in the judgment in *R v IBAC* that if and when the appellants were later charged and prosecuted, the companion principle might then apply. If that was the intention, it is reasonable to expect that the High Court would have made that point, knowing the examination was to be in public. With a compulsory examination conducted in public, confidentiality in the source documents would be lost. It would be very odd indeed to apply the companion principle in those circumstances. Prima facie, the effect of *R v IBAC* is that the companion principle has no application to information obtained under compulsion prior to the commencement of the prosecution of an offence.'
>
> 145 To the extent it is suggested that such a result is fortuitous depending on whether the answers were compelled pre- or post-charge, the remarks made by Gageler J in *IBAC* at [76]-[77] are apposite [set out above, at paragraph [48]]."

[56] The first question posed for the Court's consideration in *Kinghorn* was:

> "Does the law as applied in *R v Leach* [2019] 1 Qd R 459, concerning the accusatorial principle, the companion rule and the application of those principles to answers compelled under taxation legislation, have the effect that investigative authorities and prosecuting authorities should not have disseminated and/or should not have had access to and/or should not have used the content of the accused's compulsory examination under s 264 of the *Income Tax Assessment Act 1936* (Cth), where the prosecution of the accused for offences contrary to s 135.1(7) of the Commonwealth Criminal Code may possibly occur or will occur and where the offences allegedly involve a course of conduct that included false or misleading statements made during the s 264 examination?"

[57] The Court in *Kinghorn* answered that question as follows:

> "The accusatorial principle, the companion rule and the application of those principles to answers compelled under taxation legislation, do not have the effect that investigative authorities and prosecuting

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38 With whom the other members of the Court agreed.

> authorities should not have disseminated and/or should not have had access to and/or should not have used the content of the accused compulsory examination under s 264 of the *Income Tax Assessment Act 1936* (Cth), where the prosecution of the accused for offences contrary to s 135.1(7) of the Commonwealth Criminal Code may possibly occur or will occur and where the offences allegedly involve a course of conduct that included false or misleading statements made during the s 264 examination."

[58] Disagreement with the majority decision in *Leach* is implicit in this answer.

[59] The second question asked was, "in respect of use by the prosecutor, is the content of the s 264 examination admissible in the trial of the accused". The Court answered that question "yes"; and, as to the limits on its use, that it could be used "to prove the fact that the representations particularised as made during the examination pursuant to s 264 … were made by the accused and the terms of those representations".

[60] An application for special leave to appeal the decision in *Kinghorn* was refused, on the basis that there was "no reason to doubt the correctness of the decision".[39]

A more recent decision involving Leach

[61] In a more recent decision, arising from the ongoing legal proceedings involving Mr Leach – *R v Leach; Ex parte Commonwealth Director of Public Prosecutions* (2022) 10 QR 40; [2022] QCA 7 (***Leach 2022***) – this Court (Fraser, Morrison and Bond JJA) considered whether the TAA and/or other legal principles made it unlawful for a taxation officer to disclose information derived from a compulsory examination under s 353-10, conducted prior to any charges having been laid, in an application for a search warrant. The Court held that s 355-50 applied to permit the disclosure of material derived from the compulsory examination to the Magistrate in the course of the application for the search warrant, because that disclosure was made by a taxation officer, in the course of performing her duties as a taxation officer (given the wide interpretation which should be given to that phrase). It was particularly noted, consistent with *IBAC,* that the companion principle had not been engaged, because Mr Leach had not yet been charged at the time of the disclosure.[40]

[62] The Court in *Leach 2022* also expressed doubt as to whether the primary judge was correct to conclude that disclosure by the taxation officer of the contents of the compulsory examination to potential witnesses in the course of the investigation was unlawful[41] – again, emphasising that this occurred before Mr Leach was charged. However, as that question was not before the Court on the appeal, it was not necessary to deal with it further.[42] The decision in *Kinghorn* was delivered after argument concluded in the *Leach 2022* appeal, but before the judgment was delivered. The Court referred in passing to *Kinghorn*, but as there was no challenge in that case to the correctness of the earlier *Leach* decision, found it was "not necessary to express a view on the contest between the approach to the construction of the relevant statutory provisions in *Leach* … and that expressed in ... *Kinghorn*…".[43] We would observe, however, that the conclusions reached by the

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39 *Kinghorn v The Queen* [2022] HCATrans 80.
40 *Leach 2022* at [86], [87(e)] and [96].
41 A conclusion reached by the primary judge applying the majority decision in *Leach*.
42 *Leach 2022* at [87(c)].
43 *Leach 2022* at [102].

Court in *Leach 2022*, referred to above, are not consistent with an acceptance of the correctness of the reasoning of the majority in *Leach*.

[63] The High Court dismissed an application by Mr Leach for special leave to appeal the decision in *Leach 2022*, observing that "[consistently] with the outcome in *Kinghorn v The Queen & Ors* [2022] HCATrans 80, the constitutional arguments of the applicant are not sufficiently substantial to warrant consideration by this Court".

Reconciling these decisions

[64] There is a public interest in uniformity of decisions as to the interpretation of Commonwealth legislation that applies nationally, such as the TAA.

[65] For that reason, it is accepted that an intermediate appellate court should not depart from a decision of another intermediate appellate court on the interpretation of Commonwealth legislation (or uniform national legislation or the common law of Australia) unless convinced that the interpretation is plainly wrong or, put differently, unless there is a compelling reason to do so.[44]

[66] There are related principles, in relation to the extent to which an intermediate appellate court should regard itself as free to depart from its own previous decisions. Those principles were recently discussed in *Lynch v Commissioner of Police* (2022) 11 QR 609 at [60]-[70] (in the reasons of Beech AJA, with whom Morrison JA and Bond JA agreed).[45] Relevantly, the Court should proceed cautiously, and only depart from an earlier decision of the Court when compelled to the conclusion that the earlier decision is wrong. When the decision concerns the construction of a statute, mere preference for another construction is not sufficient to warrant overruling a prior decision. However, where "the later Court is satisfied that the interpretation placed on the statute by the earlier decision was erroneous in the sense that it is opposed to the undoubted intention of the Parliament as enacted in the statute, it cannot adhere to the earlier error and refuse to apply the law as enacted".[46]

[67] We are, respectfully, compelled to the conclusion that the majority decision in *Leach* is wrong. The reasoning of the New South Wales Court of Criminal Appeal in *Kinghorn* should be accepted as correct. The dissenting opinion of Applegarth J in *Leach*, which is consistent with *Kinghorn*, should also be accepted as correct.

[68] As mentioned at the outset, the answers to the questions of law posed for our consideration and opinion depend upon the proper construction of the relevant statutory provisions, a process that involves the interpretation of the words of the provision, considered in their context, including the purpose or object of the provision.[47]

[69] The relevant provisions of the TAA give the Commissioner of Taxation the power to obtain information and evidence compulsorily (division 353, in particular, s 353-10). A person served with a notice under s 353-10 cannot refuse to attend, answer questions or provide information, including where to do so may incriminate them. The relevant provisions of the TAA also expressly deal with the circumstances in

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44 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [135]; see also *Hill v Zuda Pty Ltd* (2022) 275 CLR 24 at [25].

45 By reference, inter alia, to the decision of the High court in *Nguyen v Nguyen* (1990) 169 CLR 245 at 268-270.

46 *R v Lacey; Ex parte Attorney-General* (2009) 197 A Crim R 399 at [120], referring to *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 451-452 per Brennan J (as his Honour then was).

47 *R v A2* (2019) 269 CLR 507 at 520-522 [32]-[37] per Kiefel CJ and Keane J, with whom Nettle and Gordon JJ agreed (at 544 [148]).

which such evidence or information, compulsorily obtained, may be disclosed and used (division 355). The starting point is an obligation to protect the confidentiality of taxpayers' affairs (s 355-10(a) and the offence provision in s 355-25). However, that protection is qualified – it is subordinate to the statutory object of facilitating "efficient and effective government administration and law enforcement by allowing disclosures of protected tax information for specific, appropriate purposes" (s 355-10(b), and the exceptions provided for, inter alia, in s 355-50 and s 355-70).

[70] Section 355-50 of the TAA expressly authorises disclosure by a taxation officer to "any entity, court or tribunal" of protected information[48] "in performing [their] duties as a taxation officer". As that phrase has been widely construed,[49] those duties include the provision of information to investigative and prosecutorial bodies in connection with the detection and prosecution of contraventions of the tax legislation or criminal conduct that undermines the tax legislation. Under the express terms of s 355-50(2), the authorised disclosure may, relevantly, be for the purpose of administering any taxation law or for the purpose of criminal proceedings related to a taxation law.[50] These express provisions overlap, since it has been held that the prosecution of contraventions of the tax legislation or criminal conduct that undermines the tax legislation "are essential to the proper administration" of taxation law.[51]

[71] Likewise, s 355-70 expressly authorises disclosure by a taxation officer to a law enforcement agency officer, such as the CDPP, for the purpose of enforcing (including by prosecuting) a law the contravention of which is a serious offence. As noted by the Court in *Kinghorn* at [120], "the fact that one of the purposes [for which disclosure is authorised] is enforcement of such laws means that material can be disclosed for the purpose of a prosecution" and "the fact that the CDPP is a prescribed agency makes this clear".

[72] Indeed, it is apparent, from the explanatory memorandum to the Bill which became the Act, by which provisions including s 355-50 and s 355-70 were enacted, that this was an express purpose of the legislation. The explanatory memorandum includes the following:

> "5.85 One change made by the new framework is removing the limitation on the law enforcement agencies' use of taxpayer information. Under the new framework, law enforcement agencies will be able to access taxpayer information for both the investigation and subsequent enforcement (including prosecution) of serious offence provisions in the law. Moreover, as taxation officers are also authorised to disclose taxpayer information directly to a court or tribunal under the new framework, this will assist in the successful prosecution of serious offences.
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> 5.86 These changes have been made because the public interest in the disclosure of information for this purpose outweighs any corresponding loss of taxpayer privacy. Taxpayer information has proved to be a valuable source of

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48 That is, information disclosed or obtained under or for the purposes of a taxation law – including in the course of a compulsory examination under s 353-10 (see s 355-30).

49 See paragraph [19] above.

50 Items 1 and 2 in the table forming part of s 355-50(2).

51 See the earlier *Kinghorn* decision, *Director of Public Prosecutions (Cth) v Kinghorn; Kinghorn v Director of Public Prosecutions (Cth)* (2020) 102 NSWLR 72, referred to at paragraph [19] above.

> intelligence information for the investigation of activities such as money laundering and social security fraud. Furthermore, such information is also invaluable for and could form the basis of related prosecutions. This broadening of the disclosure also recognises the changing nature of crime and the need for flexible, whole-of-government responses. It will also ensure that law enforcement agencies can rely on the best evidence in a prosecution."[52]

[73] Having regard to the words used, and the object of the provisions, the legislative intention could not be clearer – notwithstanding the position at common law, the TAA expressly contemplates that a person may be compelled to provide to the Commissioner evidence or information, for the purposes of the administration (including enforcement) of the taxation law, and that evidence or information may be used to enforce the taxation law, including by prosecution of the person.

[74] To conclude, as the majority in *Leach* did, that provisions such as s 355-50 and s 355-70 do not authorise disclosure and use of compulsorily obtained material for the purpose of investigating whether there has been a contravention of a taxation law, considering whether to commence a prosecution, formulating a charge, and/or preparing such a case for committal or trial, because of a lack of clarity of legislative intention to displace common law principles such as the accusatorial principle and its companion rule, is to ignore the plain words of the statute, frustrates the object of the legislation and renders the means by which the legislation sets out to achieve that object inoperative.[53]

[75] The disclosure of the transcript of the compulsory examination (or, as it seems, parts of it) to AusIndustry, was expressly authorised by s 355-50 of the TAA. The disclosure to the CDPP was expressly authorised by both s 355-50 and s 355-70. On the basis of the reasoning of the plurality in *IBAC* and the Court in *Kinghorn*, the fact that the disclosures were made prior to any charges being brought against the respondent puts this conclusion beyond doubt. Indeed, in the case of AusIndustry, it seems neither the accusatorial principle nor the companion rule would have any application at all, as the disclosures were not in the context of any (existing or contemplated) criminal proceeding, but rather for the purposes of obtaining an assessment of the veracity of the research and development tax offset claim. We would also agree with the further reasoning of the Court in *Kinghorn*, which is consistent with the additional observations of Gageler J in *IBAC*, that even if the companion rule could be said to apply pre-charge (or, perhaps, to the subsequent post-charge *use* of material obtained pre-charge), the provisions including s 355-50 and s 355-70 exhibit the necessary intention to displace the companion rule and permit disclosure and use for the purposes identified.

[76] For those reasons, and with all due respect, we consider that the decision of the majority in *Leach* is wrong and should not be followed.

[77] Adopting the reasoning of the High Court in *IBAC* and the Court in *Kinghorn,* which is consistent with the dissenting view expressed by Applegarth J in *Leach*, each of the points of law posed for our consideration and opinion should be

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52 Explanatory Memorandum to the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2010*, which became the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Act 2010* (Cth), Act No 145 of 2010. See also para 5.20 (in relation to s 355-50).

53 See *IBAC* at [51] of the reasons of the plurality and at [76]-[77] per Gageler J (set out at paragraph [48] above); and *Kinghorn* at [141].

answered as follows: Provided that the assumptions identified in paragraph [4] above are correct, yes.

Pseudonym

[78] Lastly, the respondent requested that this Court adopt a pseudonym in lieu of her name as the respondent to this proceeding. The request was made on the basis that, first, the primary judge had agreed to do so; secondly, she was concerned about the dissemination of confidential information related to research she has been involved in; and thirdly, she was concerned about the impact of the proceedings on her reputation. We are not persuaded there is any basis for adopting a pseudonym for the respondent's name. The reasons why the primary judge acceded to the respondent's request for adoption of a pseudonym are not apparent but, in any event, are not binding on this Court; there is no question of disclosure of any confidential information in these reasons; and the possibility of reputational damage is simply a corollary of the principle of open justice.