

# TAX TALKS

Australia's Tax News Podcast - The Podcast for Australian Tax Professionals

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## 4 | Lifecycle of a Tax Dispute

Taking a step back and looking at the bigger picture, King Tan of [King & Wood Mallesons](#) walks you through the lifecycle of an ATO tax dispute – from pre-engagement, risk reviews and tax audits to tax debt management, objections and appeals.

What powers does the ATO have during a risk review or audit? Does the accountant's concession offer any protection? How to get under the umbrella of Legal Professional Privilege or LPP? What to do when documents are missing? And what means quashing the assessment? King does a wide sweep through the lifecycle of a tax dispute.

### Life Cycle of an ATO Tax Dispute

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The life cycle of a typical ATO tax dispute can run through nine stages:

1. Pre-engagement
2. Risk Review
3. Audit
4. Assessment
5. Tax Debt Management
6. Either quashing the assessment OR
7. Objection
8. Appeal by taxpayer
9. Further appeal by taxpayer or ATO

You need to approach this holistically. Not thinking ahead can severely diminish your or your client's prospects.

### Pre-Engagement

This is where you got time – all the time in the world. Money flows. Transactions occur. Stuff happens. You attend to your or your client's tax obligations – lodging returns, paying instalments, managing tax debts. While the ATO stands on the sidelines – watching, matching data through Austrac and gathering information.

This is where you can plan, prepare and prevent. To improve your chances in a future ATO tax dispute. The more you prepare, the better you can prevent the dispute from escalating.

- Identify possible tax issues
- Understand the risks.
- Get further tax or legal advice if required.
- Seek private rulings if in doubt.
- Minimise potential penalties. Easier said than done.

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- Collate evidence to support a position or intention.
- Consider Legal Professional Privilege

It helps to remember that you and not the ATO have the burden of proof (s14ZZO and ZZK TAA 1953). Reconstruction exercises are time-consuming and expensive.

### ATO Powers

The ATO got a lot of powers and knowing what they are allows you to better plan, prepare and prevent. The ATO can raid your office and demand information from anyone about any tax matter or tax affair of any taxpayer. It is an offence to not facilitate and assist with access to any relevant files (Div 353 Schedule 1 TAA).

The ATO can also require to produce documents stored overseas. If you fail to comply, you can't use these documents as defensive evidence in a hearing later on (s2544 ITAA 1936).

### Legal Professional Privilege

Legal professional privilege survives the ATO's raiding powers. The accountants concession doesn't. Legal professional privilege (LPP) protects your access to the justice system. It enables you to disclose to legal advisers without the risk of these communications being disclosed to others. Accountants can't put their entire work under the umbrella of LPP but consider pushing vital documents into the LPP umbrella, but how?

To get under the LPP umbrella buddy up with a lawyer. Any work or advice a lawyer receives to provide his own legal advice is protected by the lawyer's legal professional privilege. So a client instructs their lawyer who then instructs the client's accountant or tax adviser (assuming that they are not lawyers) to provide the relevant advice or work. And voila that advice or work is now sitting under the LPP umbrella.

LPP is the client's privilege. They decide whether something under LPP stays under LPP or can be disclosed. Tax professionals can advise but don't get to decide. This is important when something under LPP might compromise lawyers and advisers as well.

In *Krok v FCT* [2015], Mr Krok disclosed the gist, substance, effect, purpose and reasoning of advice covered by LPP. As a result he was taken to have impliedly waived his right to LPP and lost the protection. So if you got LPP, do not inadvertently waive it. Only waive it when it is intended.

### Backdating Documents

As you plan, prepare and prevent during pre-engagement or later, you might note that an important document is missing. It is tempting to just create and backdate this document. But backdating a document and pretending that it was signed at a certain date when it was not is tax fraud and hence a crime. The ATO can refer a taxpayer engaged in tax fraud to the Commonwealth Director of Public Prosecution (CDPP).

So if a document wasn't signed on time, don't backdate but prepare and date it as soon as you become aware of the issue. Mistakes happen – admitting these can be ok. But avoid all intentional acts of wrongdoing.

Accountants concession does not protect from CDPP investigations but legal professional privilege will.

## MORE

[Risk Reviews & Tax Audits](#)

[Objections & Appeals](#)

[Australia's Tax Residency Rules are Broken](#)

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