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Editorial

Robyn Nielsen, Australian Government Solicitor. Email: Robyn.Nielsen@ags.gov.au
Yvonne Hopkins, Mallesons Stephen Jaques. Email: Yvonne.Hopkins@mallesons.com

Hello again from Canberra and welcome to our first issue as the Australian Law Librarians' Association!

As each issue progresses we are developing an ever growing appreciation for the task—or obsession—of editing. One such obsession is brilliantly described in The Surgeon of Crowthorne[1] which relates the story behind the Oxford English Dictionary. The OED project, begun in 1857, took 70 years, 15,487 pages, hundreds of volunteers (one of whom gave the book its name) and more than half a million word definitions to complete. Sir James Murray, editor from 1878, was a prodigious, predominantly self taught scholar who set himself the target of "completing" 33 words per day, but often, because of the extremely detailed nature of compiling one definition, spent days on a single word.

So, when we feel inclined to despair about the ups and downs of putting together our modest 70 pages, we will remind ourselves of the huge OED editing project, and then imagine doing it, like Sir James, for more than forty years. It may help us keep things in perspective!

In this issue, we have amassed, not millions of definitions, but a small number of outstanding contributions. We have an article on the application of the federal government's WorkChoices legislation from Prue Bindon of Mallesons Stephen Jaques. Prue discusses the foreseen and unforeseen impact of provisions relating to a range of leave entitlements and working hours, and explores the concept of "reasonable working hours". Val Braithwaite, from the ANU's Regulatory Institutions Network, enlightens us about the world of formal and informal regulation and regulatory models. She draws upon research from the Centre for Tax System Integrity when discussing the concepts responsible regulators, such as the Australian Tax Office, need to understand and remember when implementing regulatory systems. The Commonwealth Parliamentary Library's Gaik Khong and Shirley White describe the experience of selecting and implementing RFID technology for the purpose of collection management at the Parliamentary Library. Dennis Warren, Law Librarian at Latrobe University, provides us with a practical comparison of two popular online case citators—Firstpoint and Casebase. He outlines the strengths and weaknesses of both products and gives helpful explanations of particular functions and features. Leanne Cummings, the 2006 ALLG and LexisNexis BIALL Study Scholarship recipient, summarises a selection of the papers she attended at the 2006 BIALL conference in Brighton. It sounds like a wonderful experience for Leanne, both professionally and socially, and she encourages other ALLA members to apply in 2007.

We welcome Sue Woodman's first report as the incoming National President, while saying goodbye to Peter Murgatroyd as a regular ALL columnist. Peter has been a stalwart over the past few years, diligently keeping us informed of activities and developments in the Pacific region. Good luck Peter, as you move to a new role in Samoa and many thanks for your wonderful contribution to the journal.

We also welcome the return of New Zealand News from Helga Arlington and Vanya Taylor; a cheerful summer letter from Ruth Bird in Oxford; the usual entertaining and informative behind the scenes information on what the Australian divisions are up to in the State News; Petal Kinder's conference roundup and some very informative book reviews compiled by Amanda Magnussen.

Congratulations to Di Thomson, recipient of the inaugural Law Librarian of the Year Award.

We have received great feedback about the symposium in Melbourne. Many of you would have met the new national executive and discussed our new name—which better reflects the nature of our membership. Our next issue will include a selection of Symposium papers, so those of you who missed out on attending will be able to enjoy some of the entertaining and informative presentations and papers.

Robyn Nielsen and Yvonne Hopkins

[1] Winchester, S. *The Surgeon of Crowthorne*, Penguin, 1998.

Ten Things You Need To Know About Regulation and Never Wanted to Ask

Valerie Braithwaite

Regulatory Institutions Network, Australian National University

For most people, "to regulate" means to control or direct others by rules, standards or principles. The term can carry negative baggage, particularly when attached to government. Rightly or wrongly, government regulation on occasion connotes authority "making" people do things they would not otherwise do, and generally interfering in people's lives in intrusive and wasteful ways. Taxation is a field of government regulation that has attracted such criticism, particularly amongst small business.

Regulation need not be this way. When regulation is understood as a social activity that includes persuasion, influence, voluntary compliance and self-regulation, the term "to regulate" takes on a whole new dimension. Regulation becomes something that we all engage in when we intervene purposefully in our social world. It can be holding a child's hand at a pedestrian crossing, encouraging a work mate to take recreation leave, or reminding a family member to put their dirty clothes in the laundry basket. At the Regulatory Institutions Network at the Australian National University, we understand regulation to apply to the broader social context, with an appreciation of the full gamut of activities that fall under the regulation umbrella. As Christine Parker and John Braithwaite (2003) put it, we regulate whenever we seek to influence the flow of events.

When we look at regulation from this perspective, people regulate each other, in the family, at work, in leisure pursuits, and on social occasions. The regulation that governments oversee is but the tip of the iceberg; the most formal admittedly, but in many ways the least sophisticated. When we consider regulation across informal and formal contexts, we gain a more complete intuitive grasp of the nature of regulation, the role of those with power and those without, and the ways in which regulation can either facilitate collective achievements or undermine hopes and initiative.

Regulatory Pyramids: A Broad Perspective on Regulation

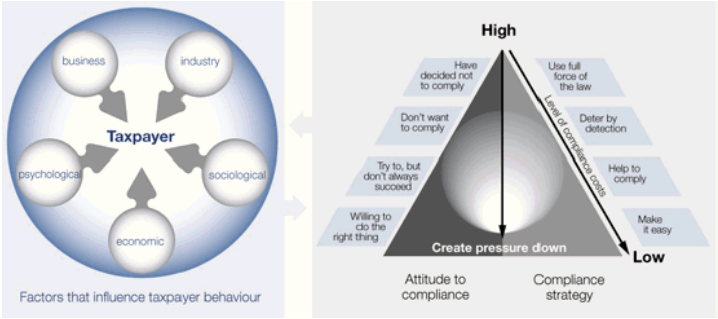
When we combine the knowledge we have of informal regulation with that which we have of formal regulation, the options for how we might go about influencing the flow of events multiplies. Given a multitude of options, regulators must ask themselves, "what do we use, and when?" One approach is to adopt a responsive regulatory model. Three basic principles underlie responsive regulatory models. In order to use them, we must first take note of the context, and consider all the informal and formal regulatory strategies for changing the flow of events that currently operate and that might be introduced into that context. The second principle is to make sure that the strategies can be organized into a hierarchy from the most minimally intrusive through to those that are maximally intrusive, with the regulatory preference being for the strategy that elicits compliance with least intrusiveness. This way, regulators don't over-react, creating unnecessary problems for themselves or others. The third principle is to create opportunities for dialogue about why regulation is necessary and elicit commitment to voluntary compliance in the future. In implementing this principle, rewards and benefits

have a role to play. The purpose is to strengthen informal regulatory processes, and most importantly, self-regulation.

In practice, responsive regulation takes shape through the construction of a regulatory pyramid. Ian Ayres and John Braithwaite (1992) developed the idea of regulatory pyramids almost two decades ago, on the basis of observations and interviews with regulators in many different fields (Braithwaite, 1985; Grabosky and Braithwaite, 1986). Regulatory pyramids have been adapted to a variety of contexts, from dealing with school bullying to corporate crime. The Australian Taxation Office (Commonwealth of Australia 1998) has been an innovator in this regard, developing a Compliance Model that has been exported to and adapted by other tax jurisdictions (The UK, New Zealand, Timor Leste, Indonesia, and within the US, Pennsylvania). A generic form of the Compliance Model from the ATO website appears below in Figure 1.

Figure 1

The Compliance Model is used within particular contexts to set out a series of options that a tax authority might use to win compliance. At the base, the options may include education campaigns, information brochures, helpful advice, and disclosure of the consequences of non-compliance. At the next level up, monitoring and checks may be escalated, followed by more intrusive auditing and investigations. At each level, penalties and the costs of failing to cooperate in the face of non-compliance increase. At the top of the pyramid may be the removal of a license to practice or imprisonment.



Most activity of the regulatory authority should occur at the base of the pyramid. The idea is that an authority that is legitimate and that is engaging seriously with the democratic will of the people does not need the coercion at the top of the pyramid to win compliance in most cases. Taxpayers are aware that coercive power exists and can be used, but generally will comply with persuasion and education. Even if there is escalation up the pyramid to elicit compliance, once cooperation is forthcoming, the Tax Office can de-escalate its intrusiveness.

Translating regulatory pyramids into practice can require regulatory agencies to change their ways of thinking and operating substantially. The trick to implementing a responsive regulatory model well is partly technical and partly psychological. The technical side involves having sound law and a good database so that regulators know what is going on, can identify illegalities and are able to track regulatory events for particular entities over time. The psychological aspect, readily apparent in the behaviour of any good regulator, is the willingness to embrace what they have in common with mothers and parish priests: the capacity to cajole, persuade, and sometimes coerce others into doing the right thing. Identifying what it means for a tax officer to influence taxpayers to ensure they are willing to pay their tax was part of the research agenda of the Centre for Tax System Integrity (CTSI), a 6-year research partnership between the Australian Taxation Office and the Australian National University. Drawing on the work of the staff of CTSI, there are 10 things that are part and parcel of a responsive regulator's "should do list." Each is discussed briefly below. While the research focus of CTSI has been on taxation, these ideas can be extended to other areas of regulation as

well. Indeed, much of our work has benefited from the insight of scholars of regulation in other fields.

Should Do List: Item 1

Understand that people view a regulatory authority as a potential threat to freedom and well-being. This threat exists for both those who break the law and those who don't.

The power of the Tax Office to "deal" with ordinary taxpayers who don't cooperate is rarely in dispute. In our national surveys over five years, the tax authority was uniformly regarded as a powerful agency: Only about 9% reported that the tax authority could not do much if an ordinary taxpayer decided to defy it.

There are a number of ways in which we cope with the power of an authority that can intrude on our lives. The most common approach is to adopt the role of "honest and law-abiding taxpayer" and stay out of the firing line. Because we are "good," we convince ourselves we have nothing to fear: The psychology of this response is that we turn something that is potentially threatening into something that is benign. In our work, we find 90-93% of taxpayers identifying as moral, tax-paying citizens.

We can't always comfort ourselves in this way, however. The tax authority can be an adversary in so far as it genuinely threatens our wellbeing, such as when it is claiming so much of our income that we can't do the things we want to do. Tax can become oppressive to us, and 73% of respondents reported that they identified the tax system as oppressive to some extent.

Being a victim, however, is not our only option. We can fight back if we can become adept enough or rich enough to engage in clever tax minimization schemes. Complex tax law has contradictions, loopholes and importantly, lacks a moral base in principles of tax equity and fairness (Picciotto, 2005). As a result, game-playing with tax law can be an attractive option. This fight back mentality proved attractive to 13-16% of survey respondents.

These different ways of coping with taxation are available to all of us. Depending on the circles we move in and what is happening to us, some will appeal more than others. The effective regulator recognizes all these selves in each of us and skilfully tries to draw to the fore that which is most likely to be cooperative: the honest and law-abiding taxpayer. This is not to assume that our actions are honest and law-abiding. We may well be cheating the system. The important point is that when we play the role of an honest and law-abiding taxpayer, we are most open to wanting to cooperate, to do the right thing, and to sort out any problems we are having with the tax authority with the minimum of fuss. An effective regulator will reward this self, and will discourage our seeing our situation as that of victim or as one in which we have been so wronged that we are justified in game-playing. The outcome that the effective regulator hopes to achieve is to move us from being adversarial to cooperative, to move us from the top of the regulatory pyramid in Figure 1 to its base.

Should Do List: Item 2

Know the regulatory objective: Is it to punish or is it to elicit compliance in the future?

Both can be legitimate, depending on the objective of the regulatory agency at the time. What is important to note, however, is that punishment and improving compliance do not necessarily go together.

Tax authorities will apply heavy penalties and prosecute cases when their goal is to make a public statement about the unacceptability of certain activity. Punishment becomes the regulators' vehicle for capturing the community's attention and influencing community standards. Punishment can be an act that signals renewed vigour in keeping the bar high and insisting that taxpayers jump it.

The effectiveness of punishment for signalling community standards is rarely disputed. What is disputed is the effectiveness of punishment in getting individuals to change their ways. The reasoning put forward by regulators for why punishment should increase compliance is irrefutable in the minds of some: If individuals feel no punishment as a result of cheating on tax, they will cheat again. If they are punished, however, they will factor in the costs of cheating and will shy away from taking that risk and opt instead for being law-abiding.

What the evidence tells us is that more is happening in the minds of individuals than this neat calculation suggests. Many of us are not so rational and not so dispassionate in assessing possible gains and losses. Furthermore, in real life, it is not a given that individuals graciously concede to government authorities. The term "reactance" is used by psychologists to describe a response that is the opposite to that which authority wants – it's a response of thumbing one's nose at authority and asserting one's freedom. The more general psychological point here is that the self that we put forward to the tax

authority is ours to give and will not be imposed on us by an authority. The self that we put forward filters how we see the tax authority, what we take in and how we use the information we have. If an authority gets our back up, our cost-benefit analysis is likely to look very different to us than regulators believe it should look.

There is considerable merit in considering the goal of eliciting future compliance as a separate enterprise from punishment. Eliciting future compliance involves simultaneously addressing a number of issues: debating and persuading of the rightness of the compliant action, showing how compliance can be achieved and uncovering incentives for compliance. Incentives take the form of bedding down the desire to do the right thing. At the same time, we should not overlook the fact that knowledge of possible punishment further up the pyramid may serve to make us more receptive to appeals for commitment and acceptance of the regulations at the lower levels.

Should Do List: Item 3

Be open to cases of hardship: Is this individual's life being limited or compromised in an unexpected way by regulation. Can anything be done to help ease the pressure?

Much is made of taxpayers acting in their self-interest, with a focus generally on how regulators can increase the costs of non-compliance so that the pursuit of self-interest is abandoned. While this model can be appropriate in some instances, it is not in others. In the life of operational tax staff, ritualistically taking such a course of action can mean pushing a struggling business to bankruptcy when connections with a good accountant, the development of a sensible business plan, and a payment plan for back taxes could restore the business and provide the owner with a future. When regulators use their

inspections and audits to try to get to the bottom of non-compliance, they are uniquely positioned to add value to the life of the business and not just recoup lost taxes. They are also uniquely positioned to witness first-hand shortcomings in their own regulatory demands and perhaps even unfairness in tax law. The versions of the Compliance Model adopted by the Australian Taxation Office and (even more so) New Zealand Internal Revenue show how forming partnerships with the business community can benefit both regulators and regulatees. At the heart of these partnerships is the very important insight that comes with understanding how tax law in the abstract plays out in practice to affect the livelihood of individuals.

Should Do List: Item 4

Deliver procedural justice to regulatees by treating individuals with respect, ensuring procedures are clear and transparent, and provide a reasonable and fair hearing.

Research findings from CTSI and elsewhere suggest that if there is one thing that regulators can do to improve their capacity to regulate it is to abide by principles of procedural justice. Procedural justice reflects formal processes that are impartial, transparent and accountable, but the aspect of procedural justice that appears to transcend all these things is respect for the person being regulated. Treating taxpayers with respect and having taxpayers report that they have been treated respectfully by the tax authority is a critical element in setting up a cooperative relationship between taxpayers and the tax authority. Cooperative relationships allow constructive regulatory conversations about taxation, its purpose and its principled base to take place.

Should Do List: Item 5

Engage constructively with dissenting voices.

In surveys conducted in 2000 and 2005, Australians were asked about the state of their democracy. Some 85% reported feeling at least some level of cynicism or disillusionment, with many claiming democracy in Australia had lost its original meaning and had become a “dollar democracy.”

These findings raise an important point about the role of dissenting voices, in government generally and government-led regulation specifically. There is no perfect blueprint for regulation with which everyone will agree and thus no reason for supposing that a regulatory blueprint can be effectively imposed on a community from the outside. Australians do not view authority as all-knowing, all-wise, or all-benevolent. They do, however, recognize the legitimate authority of regulators, the Tax Office for example. Many regulators reading this will say, ”That’s all we want. If they recognize authority, they’ll respect us and do what we want.” That may be true, but there is a down side to the authoritarian imposition of rules. Those being regulated may simply develop strategies for working around them. Many will do only the basics that can be monitored and act without thinking about whether their actions meet the broader goals of the regulatory system. We call this regulatory ritualism, where people or businesses choose actions which look good to avoid regulatory interference instead of actions which really make a difference and maximise positive outcomes.

To be effective, regulators often need the cooperation of people in the regulatory community. Cooperation involves motivating people to step up to be part of the

regulatory enterprise and to contribute good will, effort and knowledge to make it a success. In order to achieve this result, a regulator must listen to and learn from different voices, even dissident voices. Voices of dissent give rise to dialogue, creating problem solving and innovative regulatory approaches, such as the Cash Economy Taskforce's Compliance Model (Commonwealth of Australia 1998).

Should Do List: Item 6

Engage with dissent in terms of social justice: Do the outcomes of the regulation benefit everyone? Are the costs and benefits of regulation born disproportionately?

The work of the Centre for Tax System Integrity explored justice at different levels: justice for individuals, justice for groups and justice for society as a whole. Questions of justice can refer to whether outcomes are fair, or whether the processes are fair, or whether the penalties and punishments are fair. Because there are so many kinds of justice, often working in different directions and affecting people differently, it is difficult to put one kind of justice on a pedestal above another and to see how these different kinds of justice work to promote or undermine compliance. What we can say with certainty is that Australians most commonly and most passionately point to the lack of fairness in the system. In particular, Australians believe that middle-income earners carry the tax burden while the rich are allowed to get away with paying little tax. In fact, a staggering 77% of Australians believe the very wealthy don't pay their share.

One of the most interesting aspects of the CTSI work was to discover how unfairness could insidiously eat away at the system. There was nothing as straightforward as "you have treated me unfairly, therefore I will treat you unfairly." Australians showed

enormous resilience, in so far as they complained overwhelmingly about a system that they believed gave the rich preferential tax treatment but kept proclaiming allegiance to doing the right thing and paying their taxes. The evidence that the experience of unfairness took its toll came to our attention in a surprising context. In our work on graduates who had taken out a HECS loan to pay for their tertiary education, we found evidence that students who were dissatisfied with their education felt less of an obligation to repay their debt. This weakening of the obligation to pay HECS was linked to a weakening of obligation to pay tax. Our work has shown that weakened obligation to and dismissiveness of the tax authority are risk factors for future tax evasion and avoidance.

Should Do List: Item 7

Engage with dissent on moral grounds: Is it right to change the flow of events in this way?

Morality is not always divorced from government-led regulatory interventions. In the HIH debacle, in industrial accidents that claim human life, in environmental disasters that destroy wildlife and our natural heritage, issues of moral conduct (or the lack of it) loom large. Morality, however, is not a term that is linked with tax evasion and avoidance in the financial pages of our major newspapers. This absence among financial leaders and commentators is not reflected in the views of Australians. Evidence comes from three sources.

First, in our 2001 national survey we concluded with two open-ended questions: “What is your responsibility to the Tax Office?” and “What is their responsibility to you?” The

responses were overwhelmingly concerned with honesty and fairness on both sides. We saw in these responses that the endless newspaper reports on questionable schemes to minimise tax and use tax law for wealth creation were not reflections of the Australian psyche. Australians took their taxpaying responsibilities seriously and they expected the Tax Office to take its collection responsibilities, including enforcement, just as seriously.

Second, in our survey work a high 92-95% believed that they and others should contribute willingly to the tax system and that the tax system is an institution which advantages everyone and helps the government do worthwhile things. Over 70% believed it was morally wrong to cheat on tax. However, many respondents also expressed a belief that others did not share their views, with some 85% saying they thought others doubt the benefits of paying tax. The fact that personal norms for honesty were far stronger than perceptions of the norms of others reflects a need to sure up the confidence of community members in each other rather than personal failings in moral obligation to pay tax.

The third source of support for the argument that tax officials need to engage with compliance on moral grounds comes from the international literature on tax compliance. The most consistent predictor of compliance has been tax morality – simply, the belief that it is morally wrong to cheat on one's tax. Recently, Sol Picciotto (2005) published a working paper with CTSI that makes the point that none of us really has a good grasp of the principles of equity and fairness that underlie the development of tax law. Picciotto argues that as hard as it may be, this is a conversation we have to have if tax systems are to be sustainable in the globalised economy.

Should Do List: Item 8

Provide hope for the future through recognizing and praising strengths openly.

The importance of incentives is only beginning to be understood in regulatory contexts. There seems little doubt that recognition of effort and praise for improvements in compliance related activities go a considerable way to building commitment to the regulatory regime and future cooperation with regulators. It is part of the process of showing respect for others and valuing their contributions. Using incentives successfully for sustainable compliance requires a delicate touch. Bruno Frey (1997) uses “crowding out theory” to describe the way we can tell ourselves that “we are just doing this for the reward” and divorce our action entirely from commitment to the system. Just like the ritualism described earlier, if there is no internalised desire for improved compliance and we do things for rewards without care for how our actions connect with the bigger regulatory objectives, incentives can prove a costly measure for changing the flow of events.

Rewards, therefore, need to be introduced in such a way as to generate awareness of how compliant actions serve the bigger picture, how actions solve the problems that led to the regulation being introduced in the first pace. Rewards need to strengthen a person’s internal resolve to achieve the goals of the regulatory system. For example, taxpayers should feel proud of having tax ethics that are stronger than those of people around them. It would be of limited value to offer rewards for compliance unless they built internal commitment and pride in paying one’s tax over time.

Should Do List: Item 9

Return to the scene of non-compliance and re-engage with regulatory intervention

Non-compliance in taxation can come about through ignorance, a lack of know-how, a lack of self-discipline, or wilful disobedience. Whatever the reason, repeated incidents of non-compliance can be expected. When regulators become locked into a punishment mindset, their solution to repeat offending tends to be one of increasing punishments. This course of action may well be the most appropriate, but regulators can create an unnecessarily heavy and confrontational workload for themselves by failing to look more broadly for a solution.

Building a repertoire of strategies is at the heart of using regulatory pyramids like the Compliance Model. Such strategies need to range from light-touch to heavy-handed interventions, and the repertoire is best developed at the operational level through bringing together experienced inspectors who can share their stories of how they turned a persistently non-compliant taxpayer into a compliant one. Regulators should feel able to draw on the knowledge and experience of others and take professional pride in persisting with cases that are challenging. Rigidity of investigative protocols and a reluctance to be responsive to circumstances and past compliance history hampers regulators who wish to improve compliance.

Effective regulators, whatever the field, are talented people: They know their trade, are observant, courageous, can think on their feet, take initiative, have emotional intelligence, and well developed social skills. We are often asked “what if we don’t have such people? Isn’t it best to stick with set scripts and predetermined protocols - isn’t this the best way to make sure nothing goes too wrong?” The more important question to ask

is what is going right in these circumstances. Regulators can do more harm than good by destroying good will, dampening hopes and ruining initiative. The answer for regulatory agencies is to find people with potential and train them to carry out their duties responsibly and competently. As regulation enters a period of massive growth, a question worth asking is whether poor regulatory practices feed upon themselves, creating more and more problems that require more and more poorly trained regulators to solve.

Should Do List: Item 10

Direct energy to building networks within the regulatory community to gain a broad-based capacity for eliciting compliance.

In many areas, basic issues associated with regulation are unclear, forever changing and may even appear contradictory. It is not unusual for questions to be raised from all quarters in the regulatory community: What is the purpose of the regulation? Do the regulatory requirements address the problem or just move the problem somewhere else? How do we know if the requirements have been met? Regulation is complex, so complex that government regulators are only part of the web that ensures that regulatory regimes work. In the context of taxation, for instance, the Tax Office could not function without the support of tax agents, accountants and lawyers in private practice, nor could they function without the courts, judges and expert legal opinion on the interpretation of tax law.

Increasingly, regulators are working collaboratively with other regulatory agencies, professional associations, business groups, consumer groups, political representatives, and academic communities. Sharing knowledge and practices, coordinating operations,

and building networks are all part of modern-day regulatory practice. As the power of networks has come to be recognized, strategic decision-making and resource-allocation to prioritise the extension and development of some networks over others has also been important.

In this process, which is well underway in many regulatory contexts, there has been a tendency to put to one side a fundamental point of contact. Too often, regulatory authorities lose touch with the voice of the people. In many ways, this voice is taken for granted as being expressed through elected representatives and as a support base for the regulatory pyramid, one that regulators can count on regardless. The costs of thinking in this way are high. Without contact with the people and without their input on regulatory initiatives, authorities cheat themselves of an understanding of the moral underpinnings of their regulatory power, the very understanding on which their legitimacy is based.

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The Centre for Tax System Integrity was funded from 1995 to 2005 as a research partnership between the Australian National University and the Australian Taxation Office. The purpose of the Centre was to understand how voluntary taxpaying cultures can be sustained and what is happening to boost or erode taxpayer compliance. This paper brings together the author's view of the major findings of the Centre and is not a reflection of the view of the Commissioner of Taxation. All survey findings and publications from the Centre are available to the public through the CTSI website http://ctsi.anu.edu.au