Tax Law, Compliance and Punishment: A Social Construction

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Abstract

Significant amounts of research has been conducted into taxpayer compliance, taxation administration and interpretation of the tax law. These topics have been studied from various perspectives predominantly on the basis that they are objective phenomena and that solutions to noncompliance, for example, may be found through empirical rational investigation. Philosophical developments during the late 20th century such as structuralism, post-structuralism and postmodernism can provide another perspective by questioning whether objective knowledge is obtainable and arguing that knowledge is socially constructed. This paper applies these philosophical perspectives to Australia's tax system by the consideration of various events from a historical perspective. These aspects include the way laws are written and interpreted, how the Australian Taxation Office (ATO) administers these laws and determines who is compliant and noncompliant and to what extent it punishes those who are noncompliant. It finds that there is reasonable historical evidence to argue that many aspects of the tax system are strongly influenced, and created, by social forces. This may make objective study of these aspects difficult, but it is important to increase our understanding of the social construction of these aspects to achieve equitable reforms for all of society rather than for the dominating class only.

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1.0 Introduction

Since the 1970s, there have been considerable changes to the tax landscape from a legal and administrative perspective. The 1970s saw the rise of tax avoidance and *Bottom of the Harbor* schemes in Australia (Sutton 1989). As a response, a new general anti-avoidance rule was enacted and self-assessment was introduced. Simultaneously, the courts moved away from literal to more purposive interpretations of the law. Later, during the 1990s, in response to the first government review into the administration of the tax system, the Australian Taxation Office (ATO) expanded its public rulings system and the income tax legislation was re-written into plainer English thought the Tax Law Improvement Project (TLIP), although that project remains unfinished (Commonwealth of Australia 1993; Sawyer 2013). Finally, in response to various pressures over the preceding decade, the ATO introduced two versions of the compliance model, one for the cash economy and one for the Large Business and International market segment (Whait 2012, 2014, 2015). Throughout this time, the penalties for noncompliance changed (Pearson 1994). Thus, from the 1970s, there have been significant changes to the tax law, the means of achieving compliance and how and what punishments should be meted out for noncompliance.

The purpose of this paper is to consider the implications of late 20th century philosophical developments such as structuralism, postmodernism and poststructuralism on tax law, compliance and punishment. There has been very little work, especially in the Australian context, regarding these issues from a philosophical perspective. These philosophies allow for different perspectives to be uncovered, specifically, to illustrate the influence that society has on these matters which have previously been studied predominantly as objective phenomena under the influence of a modernist standpoint. This paper argues that there is significant social influence on these matters where interpretations of law, methods of interpreting laws and determining appropriate punishments change from one generation to the next making objective study of these concepts difficult. Despite the difficulty, it is necessary to appreciate the social construction of these concepts to deliver equitable reforms for all of society.

Postmodernism is difficult to define (Jamieson 1991; Smart 1993; Thomas 2001). Some commentators describe it as a theory while others argue that it cannot be a theory, but rather it is merely a cultural trend (Agger 1991; Jamieson 1991; Smart 1993). It is often described by way of contrast with modernism, that postmodernism is a rejection of modernism (Inglehart 1997). Despite this, there is general agreement on postmodernism's core ideas (Buschman &

Brosio 2006). Thomas (2001, p. 1502) summarises postmodernism on three broad levels, 'a movement in the arts away from accepted genres; a general temperament in advanced industrial economies reflecting greater cultural variety and economic indeterminacy and as a critical philosophical response to doctrines grounded in Enlightenment thinking.' He also argues (p. 1503) that the role of postmodernism involves 'debunking, de-centering, relativizing, and contextualizing social practices, institutions, and theories that appeal to universal and infallible foundations'. With respect to the law, compliance and punishment, postmodernism seeks to expose assumptions behind traditional thinking to invite diverse and innovative views (Thomas 2001).

The postmodern and post-structuralist method of deconstruction developed by French philosopher Jacques Derrida is one method to achieve these aims (Thomas 2001). Schanck (1989, p. 823) describes deconstruction as taking the 'orthodox interpretation or understanding of a text and first exposing the implicit, often unrecognised assumption(s) or premise(s) underlying that interpretation, They demonstrate that the hidden assumption is not a timeless, universally accepted principle, but a socially and culturally derived, contingent, contestable proposition.' Yet, postmodernism is not only about deconstruction. Other postmodernists, such as Michel Foucault, are more concerned with how a particular discourse becomes accepted versus other discourse which does not as a result of power relationships and struggles within society and the methods through which people are made subjects (Danaher, Schirato & Webb 2000). Reference to power relationships can explain how certain legal discourses propagate while others do not.

Most legal scholarship, including that conducted in taxation, begins with the legislation and attempts to derive the unambiguous meaning of that text. Post-structuralism argues instead that a text does not have any such meaning within itself, only a meaning imposed or imputed onto it by the reader (Belsey 2002). Importantly, the reader cannot, and generally does not, impute just any meaning that he or she likes, since the reader will have learned the conventions and operation of language throughout his or her lifetime. Thus, a reader's interpretation of a text is not their own, but one derived from society (Belsey 2002). If this is the case, then there are implications for tax law simplification and interpretation of general anti-avoidance provisions. This in turn has implications for what it means to be compliant or non-compliant. In brief, poststructuralism exposes the role that society and culture play in the construction and interpretation of taxation laws and their administration.

The importance of philosophical questions to law and the challenge presented by postmodernism to law is a profound one (Bryan 1997). After a brief literature review that considers the influence of postmodernism and post-structuralism on legal scholarship and issues of objective interpretation more broadly, the paper will outline the philosophical basis for post-structuralism and the implications to produce objective knowledge.

2.0 Literature review

Since postmodernism may be regarded in part as a cultural movement, a few commentators have discussed such influence on legal culture including the profession and the judiciary, an influence which some scholars regard as unavoidable and already taking place (Kennedy 1991; Balkin 1992). Owing to postmodernism also being a philosophical movement, other commentators focus on how the law ought to be interpreted and developed (Kennedy 1991; Wicke 1991). This latter aspect has garnered some controversy with some commentators being welcoming of postmodernism's influence on law interpretation and development while others remained skeptical as to whether it would be positive (Boyle 1991; Frug 1991; Kennedy 1991; Wicke 1991).

One body of literature focuses on the abilities of individuals (usually the judiciary) to interpret statutes and the various methods they use to do so. Some commentators are skeptical of the judiciary's ability to arrive at an objective interpretation. The problem is not so much the ambiguity of language, but that the law's interpretation relies on fallible individuals (Duncan 1994, Thomas 2001; Sunstein & Vermule 2002/03a, b). Thus, the law may produce unjust and arbitrary outcomes, sometimes reinforcing dominant (usually male) perspectives (Duncan 1994; Thomas 2001).

Other commentators are confident that despite the limitations of language and its inherent ambiguity that the personal attributes, skill and training of the judiciary will lead them to the most appropriate interpretation (Schanck 1989, 1991; Jamieson 1991; Stamatis 1994; Posner 2002/03). Additionally, they argue that while postmodernism and post-structuralism and the multiple perspectives and interpretations they produce is desirable in the arts and in literature, these philosophies have no place in the legal context due to the need to find a timely and pragmatic outcome to settle a dispute (Wicke 1991; Schank 1991; Fish 2005). These philosophies merely promote nihilism and relativism (Patterson 2003). Many of these commentators simultaneously argue that the key to producing the appropriate interpretation is

to have regard to either the purpose of the legislature or the will of the legislator (Schanck 1989, 1991, Posner 2002/03; Frickey 2006). An alternative approach involves referring to the intention of the author in producing a text since it is only through this intention that the texts, including legal ones, have any meaning at all (Fish 2005; Frickey 2006). The postmodern notion that meanings in texts (and speeches) are determined by the reader (listener) are rejected (Fish 2005).

Another, smaller, body of literature recognises that the law itself may create issues with its interpretation since the law is a text like any other and there is no reason why it ought to be regarded differently (Minda 1991, Sandu 2010). Successive judgments do not necessarily lead to 'some higher synthesis of truth or knowledge' as a modernist might expect, since judgments may be based on partial and incomplete knowledge (Minda 1991, p. 603). Instead, from a postmodern perspective, the law is constructed as society changes as people try to understand the world in which they live (Sandhu 2010).

Another debate focuses on the extent to which institutional factors influence statutory interpretation. Sunstein and Vermeule (2002/03a, b) argue that debates about legal interpretation (for example, literalism versus purposivism) cannot be addressed by appealing to abstract ideals regarding democracy, legitimacy, authority and constitutionalism. They argue that many interpretive theorists have ignored institutional effects and dynamic effects of approaches to interpretation. If these were considered it would be much easier to understand what underlies many interpretive disagreements in law and find a solution to these disagreements. Issues such as 'how well judges are able to execute the suggested approach and how other persons and institutions will react to it' have not been explored (Sunstein and Vermeule 2002/03a, p. 900). Posner (2002/03) agrees that institutional factors are important but disagrees that these have been neglected by theorists. This disagreement highlights that the factors that influence statutory interpretation are many and varied. One such institutional factor is power relations among the branches and the political, economic and social institutions of the society (Posner 2002/03).

This brief review reveals the ongoing tension between modern and postmodern views of the law. The law may be reliably interpreted since it embodies an intention or purpose which the judiciary can determine through its skill and training. Even if many interpretations were justifiable philosophically, pragmatism dictates that an expedient, appropriate solution be found to settle a dispute. On this basis, postmodern philosophy and the nihilism it may produce

has no place in the law. Such a view assumes that the law is teleological, that with successive judgements the law achieves increasing levels of clarity and certainty, perhaps a certain degree of truth. The alternative to this modernist view is the postmodern view, that successive judgments do not lead to increased clarity, certainty or truth and if any is apparent it is merely an illusion or temporary.

This literature focuses on judicial interpretation, but the judiciary is not the only group which needs to interpret the law. Many areas of law, such as taxation, require individuals and corporate decision makers to interpret and apply the law to their affairs on a regular basis. Australia's self-assessment system means that taxpayers are encouraged to voluntarily comply with the law with the ATO intervening only when a risk assessment of a taxpayer's affairs warrants it. While many taxpayers use tax agents to help with managing their tax affairs, many taxpayers are, nevertheless, making regular decisions about what might be deductible and what might not be. Thus, there are many potential interpretations of the taxation law that coexist in society as a by-product of the taxation system, many of which will go unchallenged rather than one official interpretation of the court predominating. Furthermore, decisions, by the judiciary or otherwise, are not made in a vacuum, but influence real people who may regard the decision as unjust for a variety of reasons. It is important to consider as to how taxpayers might react to a particular decision since it may have ramifications for future compliance (Commonwealth of Australia 1998; Sunstein & Vermule 2002/03a).

Some of the tension in the literature is due to misunderstandings by modernists of postmodernism itself or a lack of recognition of the diversity of views held by postmodernists. One important misunderstanding relates to the relativism or nihilism that is thought to result from Derrida's deconstruction and most of postmodern philosophy (Patterson 2003; see also Schanck 1989, 1991; Posner 2002/03; Fish 2005). According to Appignanesi and Garratt (1999), Derrida does not argue that deconstruction would lead to an infinite number of meanings, but rather that there is never only one meaning and that a socially constructed meaning is just as real as anything else. That we do not observe nihilism has been considered by one of Derrida's contemporaries, Michel Foucault. As will be discussed in the theoretical framework section below, Foucault was interested in why out of all the potential meanings and discourse that could be expressed, that some discourses prevail while others whither. He argued that discourses prevail due to those behind such discourses having the power to ensure that they propagate by excluding others. In the legal context, it may be argued that certain interpretations prevail due to those espousing them having the power to exclude all other discourses.

Such questions are important for policy reform. While it may seem obvious that the courts have the power to interpret the laws without constraint, it might be worthwhile considering the limitations of the courts on what they can say. As will be discussed below, Foucault has formulated power differently than other theorists. In addition, it is pertinent to consider the effect of power relationships on these interpretations and on compliance and punishment more broadly.

The literature discussed above originates predominantly from the United States. While the discussion of postmodernism and the law has not been as extensive in Australia, there has been some discussion regarding the extent to which the law is influenced by society (Tomasic and Pentony 1990; Potas 1993; Devos 2004; Whait 2015). Generally, a similar disagreement exists over the extent to which the law is socially and/or politically constructed. Thus the debate regarding the law and its construction is ongoing. This paper will not be able to resolve the disputes raised in this literature review. Instead it will attempt to shed light on these disagreements in the Australian context with the help of a theoretical framework. To facilitate this purpose, a more thorough, but still relatively brief, account of postmodernism and post-structuralism will be explained below.

3.0 Theoretical Framework

Postmodernism is difficult to define and some commentators argue that nobody, including postmodernists, knows what it is or what it means (Jamieson 1991; Thomas 2001). Despite this, there are some commonly agreed tenets of each. This section will briefly explain these tenets and then discuss the theoretical foundations for postmodernism as a philosophical (as opposed to cultural) movement. This will entail a brief outline of structuralism and how this evolved into post-structuralism. After this, the section will discuss the relationship between power and knowledge and how the ideals of the Enlightenment were sacrificed. The purpose of this section is to lay theoretical foundations for application of this philosophy to tax law, compliance and punishment that takes place thereafter.

While the term ‘modern’ can be traced back to earlier times, it is most commonly associated with the Enlightenment and the Enlightenment project (O’Farrell 1999; Hee 2003; Patterson 2003). These are concerned with the idea that human reason can solve all the problems faced by humanity through rational investigation of empirical data producing objective knowledge and truth in the process (Cooper & Burrell 1988). Problems include political, social and

scientific ones. For example, crime and criminal behaviour could be eradicated through rational investigation and an improved understanding of the causes of crime. Over time, humanity progresses with the gaining of more knowledge eventually reaching a state of complete emancipation. Historical studies assumed such a progression was taking place to the exclusion of other possible explanations of the past. This led to the development of grand narratives outlining the inevitable progression of society from primitive to advanced peoples (O'Farrell 1999). One example of a grand narrative is so-called Whig history, that Western Civilisation is on an inevitable path of upward progression (Howell & Prevenier 2001). Another, competing grand narrative, is that only Communism leads to emancipation of the population (Belsey 2002). Such grand narratives were portrayed as objective truth to be vigourously defended (Belsey 2002).

During the 20th century, and especially after World War II, many questioned whether modernism had achieved its goals (Appleby, Hunt & Jacob 1994). It was observed that in many respects the modernisation project had failed as, for example, significant inequality of wealth and income remained and totalitarian regimes associated with communism and various dictatorships still existed (O'Farrell 1999). While modernism offered great rewards and made many promises, these came at a cost as industrialisation, for example, increases productivity but imposes inhumane working conditions (Inglehart 1997; Hee 2003). Furthermore, efforts by political parties and leaders to defend what were regarded as objective truths had claimed many millions of lives and created significant human suffering leading many to doubt the veracity of these truth claims (O'Farrell 1999; Belsey 2002). Even the scientific method of knowledge production came under criticism and began to be recognised as socially constructed rather than objective to a greater or lesser extent (Patterson 2003). Philosophers in France experienced the negative aspects of grand narratives first hand as demonstrations, strikes and bloodshed accompanied the fall of the French government in 1968. Students and academics were involved in this political unrest which was a reaction to 'oppression and unjust excesses of mainstream 'establishment'' (O'Farrell 2005, p. 29).

Consequently, modernism's grand narratives and theories lost their authority and began to be replaced by 'a whole range of competing small stories' (O'Farrell 1999, p. 13) under postmodernism and a 'greater tolerance for ethnic, cultural and sexual diversity and individual choice concerning the kind of life one wants to lead' (Inglehart 1997, p 23; see also Agger 1991). Consequently, many in society have become disinterested in working purely for economic gain as the accumulation of wealth ceased to be a key goal of life for many (Inglehart

1997). Grand narratives are still evident, however, and have not been completely replaced (Inglehardt 1997). This is particularly evident in the legal context (see, for example, Patterson 2003).

With the shifting of attention away from grand narratives and theories, postmodernism can investigate new horizons and possibilities using new methodologies (Agger 1991; O'Farrell 1999). It uncovers and exposes the reasons why long held truth claims and their justifications have prevailed (Minda 1991; O'Farrell 1999). This does not render empirical social science redundant, instead it adds to our understanding leading potentially to innovative solutions to old problems (Agger 1991; Minda 1991; Bryan 1997; Thomas 2001).

For example, a postmodern view would reject the view that there is one, totalising grand narrative around taxpayer compliance. More specifically, rather than achieving tax compliance through the threat of audit and penalties alone and seeing taxpayers merely as economic utility maximisers, a postmodern view would recognise that taxpayers may be motivated to comply through any number of factors including cultural, psychological and social ones in addition to economic ones. This recognition has already taken place through the adoption of the ATO's Compliance Model (Commonwealth of Australia 1998). An implication of this, that will be explored later in the paper, is that there is not necessarily one means of punishment for non-compliance, an aspect that is also recongised by the ATOs compliance model.

At this stage, it might be pertinent to ask how language is relevant to the shift from modernist grand narratives to postmodern diversity? The development of postmodern and post-structuralist thought from a philosophical (as opposed to cultural) perspective was due to a consideration of how language conveys meaning. The next section will explain how this transition took place by explaining the core ideas of structuralism and post-structuralism. To be succinct, the explanation may be regarded as somewhat superficial as structuralism and post-structuralism are quite diverse (Young 1981). Nevertheless, the core tenets are summarised. The purpose of this discussion is to lay the foundations for a later discussion which shows how law, compliance and punishment are socially constructed.

3.1 Structuralism

Structuralism is an term that describes a diverse range of practices that are all based on the linguistics of Ferdinand de Saussure (Young 1981, p. 1). It challenged the view that language represents and helps us to understand the reality that is all around us by naming things and

explaining the relationships between different things (Bignell 1997). Rather than communicating meaning, structuralism argues that language creates meaning (Belsey 2002).

Saussure argued that communication occurs not only through words and languages, but through signs and sign systems which may include, for example, pictures and sign language for the blind (Brown 2005). Since Saussure was a product of traditional Western thought, he tended to hold phonocentric ideas, that is, he prioritised speech over written text and the other signs (Sarup 1993; Belsey 2002; Brown 2005). He broke the sign down into its constituent parts being the signifier (the sound) and the signified (the concept that springs to a person's mind when he/she hears the sound).

Importantly, Saussure observed that different languages use different signifiers for the same concept, for example, the concept of a dog maybe expressed by 'dog' in English or 'Hund' in German (Belsey 2002). Additionally, the same signifier may express different concepts or signifieds, for example, mouse may refer to a small rodent or a computer input device (Brown 2005). Therefore, there is no special relationship between the signifier and the signified, between sound and concept. This relationship is completely arbitrary (Young 1981; Belsey 2002; Brown 2005). Since signs refer to abstract or mental concepts only, they do not refer to any objective reality (Thwaites, Davis & Mules 2002; Brown 2005). Meaning resides only in the sign with the concept or idea being constructed socially as people learn how to use signifiers for communication (Howell & Prevenier 2001; Belsey 2002; Brown 2005).

Since signs do not refer to an abstract reality, they only attain meaning and become useful for communication through comparison to other signs (Young 1981; Sarup 1993; Danaher, Schirato & Webb 2000). Structuralism regards language as differential rather than referential. For example, one only understands what is meant by 'man' when it is related to 'woman' and vice versa (Danaher, Schirato & Webb 2000; Brown 2005). Structuralists study the construction of knowledge via these relationships or structures in the hope of finding the universal structure for the phenomenon under investigation (Belsey 2002; Brown 2005). The structures lie behind language, are real and are permanent (Brown 2005). For example, Lévi-Strauss, an anthropologist, sought to find the universal structure of various aspects of human culture such as myth production (Belsey 2002; Moore 2009). He wondered how myths among different cultures and regions could display significant diversity while at the same time be very similar (Lévi-Strauss 1955). In a manner consistent with structuralism, he argued that myths were structured on the binary opposites of life and death; agriculture and hunting, herbivores

and beasts of prey, and ravens and coyotes (Lévi-Strauss 1955). In arguing that agriculture and herbivores are related to life and hunting and beasts of prey are related to death, he arranged these binary pairs into a geometric pattern akin to an arrow or triangle to illustrate the structure of a myth (Lévi-Strauss 1955, p 440). Numerous other structures were described and combined into a common, universal structure of a myth (Lévi-Strauss 1955). The higher purpose of this was to argue that if myths were structured in this manner, despite their apparent arbitrariness, then all human thought may be structured too (Lévi-Strauss 1983). This is how the structures of language 'precede and structure experience' (Howell & Prevenier 2001, p. 105) and are learned through such experience (Brown 2005). Language therefore creates the order of the world; it creates knowledge rather than being an expression of it (Howell & Prevenier 2001; Thwaites, Davis & Mules 2002; Brown 2005).

The key point with respect to structuralism and the law is that any meaning of the law is contained within the law itself. If this philosophy has any merit, it renders meaningless any discussion and debate surrounding literal, purposive or intentional interpretations of the law, such as those discussed in the literature review above, since meaning and ideas are created by language and the structures of binary opposites rather than being a cause of language.

As with much philosophy, particularly within the Western tradition, structuralism has come under significant criticism, especially from the late 1960s after the philosophy had been applied to specific contexts (Young 1981). A new philosophy, post-structuralism, was born out of this criticism meaning that some philosophers who were regarded as structuralists, such as Jacques Derrida, Roland Barthes and Michel Foucault, came to be regarded as post-structuralists (O'Farrell 2005; Brown 2005). The next section will summarise two key criticisms of structuralism to show how it progressed into post-structuralism and then describe the relevant tenets of post-structuralism and how they are relevant to social construction of law, compliance and punishment.

3.2 Post-structuralism

Structuralism was initially regarded as a promising new way to understand the world, but scholars began to critique the structures in various ways. The structures were regarded as ahistorical since they described cultures at a point in time rather than over time (Appignanesi & Garratt 1999). They were also regarded as immoral, illogical and deterministic since if the structures guided all human thought, how were individuals able to break free to think and act for themselves (Brown 2005). This criticism was illustrated by the French protests of 1968

discussed above (O'Farrell 2005). This section will focus on criticisms developed by Jacques Derrida, Ronald Barthes and Michel Foucault respectively.

Derrida argued that the desire to find a universal structure betrayed Saussure's view, consistent with traditional Western thought, that speech was more important than writing, so-called phonocentrism. In traditional Western scholarship, it was believed that the present is more knowable than the past or the future since it is immediate, with the past and the future being beyond our reach (Sarup 1993). This is known as the metaphysics of presence (Young 1981; Sarup 1993). Speech was prioritised over writing since it was more immediate with writing simply being transcribed speech. This bias toward speech was contained in Saussure's own writings (Young 1981). Saussure also believed that if one could develop a 'perfectly rational language that perfectly represents the real world' (Appignanesi & Garratt 1999, p. 78) a person could speak about the world with absolute certainty. This view is known as logocentrism and it prioritises ideas (the signified) over the signifier. Derrida argued that the search for a universal structure betrayed Saussure's logocentrism, a desire to find a grand universal explanation, concept or idea that would explain the world. Saussure referred to this grand concept as the 'transcendental signified' (Derrida 1976; Young 1981; Sarup 1993; Belsey 2002).

Derrida recognised that the search for a transcendental signified exposed a contradiction within structuralism as structuralism argues that signs gain their meaning from their differential relationship to each other rather than some external reality or reference point such as the transcendental signified (Young 1981; Sarup 1993). Thus, one could never be sure which sign system accurately reflects reality (Belsey 2002). Barthes went one step further, arguing that discovering the structure of narratives ignores the differences among narratives thereby stripping them of meaning. Instead, differences ought to be the focus, as a core tenet of structuralism advocates (Barthes & Duisit 1975; Barthes 1990; Belsey 2002).

These critiques of structuralism are also a critique of reason and modernism. Derrida could critique reason and the appeal to grand narratives of modernism by showing that 'there was no transcendental signified such as God or Reason that could lay claim to the truth' (Belsey 2002, p. check quote). In the process, he showed that no theory, no science or political system rests entirely on rational foundations and that no overarching theory or narrative is possible (O'Farrell 1999; Howell & Prevenier 2001).

As part of his critique of Lévi-Strauss, Derrida showed that speech 'is not exempted from the negative qualities attributed to writing' (Belsey 2002, p. 77) and therefore they ought to be considered equal. Raising the level of writing was important because writing continues to signify after the writer has died thereby placing greater emphasis on the reader of the text in interpreting its meaning. A similar view was espoused by Barthes (1967) as he declared the author dead. In elevating the authority of writing, Derrida and Barthes shifted emphasis from the signified (concept or idea) to the signifier (speech or words) (Sarup 1993) thereby reinforcing the view that meaning is an effect of language instead of a cause of it (Belsey 2002).

It is possible that some literature in statutory interpretation also contains a phonocentric and logocentric bias (see, for example, Schanck 1989, 1991; Fish 2005). Arguments advocating that the judiciary bear in mind the purpose of the law or the legislator or its intentions may be regarded as portraying such a bias with such a bias being written into Australian law through various *Acts Interpretation Acts*. The written law in the form of statutes is regarded as not being the law itself but merely a transcription of it. Instead, the law is contained in some transcendental sphere where purpose and intention reside. Such arguments are seductive, especially when an apparently arbitrary, incorrect or unjust decision has been made by the judiciary. The panacea for the drafting of statutes, therefore, is to find the perfect rational language that expresses the purpose or intention contained in that sphere. In the absence of such a language, appeal is made to purpose or intention of the legislature instead. For example, in interpreting Australia's general anti-avoidance rule in Part IVA of the *Income Tax Assessment Act 1936* (Cth), an appeal is often made to Hon. John Howard's second reading speech where the rule was intended to strike down schemes that are 'blatant, artificial and contrived' (Boucher 2010). Whether Part IVA has been interpreted in a manner consistent with that is debatable.

If writing were to be placed on the same level as speech, as Derrida argues it should, then the reader of the law becomes more prominent, particularly as the reader becomes further removed from its authorship by the legislature. Rather than try and determine the author's intention, a legal equivalent of the transcendental signified, it is arguable that emphasis should be placed on the reader. Indeed, one could argue that many taxpayers reading tax law do not have the author or legislature in mind at all when reading it. While the legislature continues to exist as a body of people democratically elected, the legislators who wrote the statutes being interpreted may be deceased or may not have clearly expressed any intention. If this is the case, then it has

implications for the meaning of the law and for who is and who is not compliant. Such implications will be discussed in the section following this theoretical overview.

Derrida is often accused of relativism and nihilism and prioritising subjectivity over objectivity since many readers of texts can lead to numerous simultaneous interpretations. Such criticisms are potentially based on a misunderstanding of Derrida's philosophy since Derrida did not argue that there would or should be infinite interpretations, but rather that there is more than just one interpretation. He was also not against reason, but rather the use of reason to justify certain truths as timeless; truths which at times led to violence and deaths of many innocent people (Appignanesi & Garratt 1999). Relativism and nihilism are avoided since a person is not free to interpret a text in any manner which they see fit, since communication relies on everybody adhering to the same rules of language which are learned through socialisation (Belsey 2002). Thus, interpretations of texts are the product of societal norms, beliefs and values rather than being at the whim of the reader. But post-structuralism also argues that individuals are free to alter meanings to a certain extent, if others adopt the changes made (Belsey 2002).

Such arguments imply that legal concepts and principles, such as tax avoidance and tax compliance, are also socially constructed. This possibility has already been somewhat recongised by Tomasic and Pentony (1990) who argue that compliance is a construct between the law and legal institutions, but others are not convinced as to whether law may be viewed in this manner (Potas 1993; Devos 2004). While compliance may be regarded as compliance with the law, and tax compliance may be regarded as paying the tax due under the law (Braithwaite, J 2002), there is considerable disagreement as to who's view of the law ought to prevail – the Court's, the Commissioner's, the Parliament's, or the Commissioners view of Parliament's (Burton 2007).

If the number of interpretations that exist is limited rather than infinite, how does society determine which interpretations exist? How does society determine what is knowledge and what is not? This question can be addressed by another philosopher, Michel Foucault who undertook historical studies of systems of knowledge and he found, in a manner consistent with Derrida, that the structures that determined knowledge are not permanent or everlasting, but are also socially constructed (Foucault 1970). Uniquely, however, he argued that the social construction only becomes apparent when examining how knowledge is created over time, that is, by using historical methodology (Danaher, Schirato & Webb 2000, Brown 2005; O'Farrell

2005). Crucially, this led to the recognition that there may be many different constructions of knowledge at different stages in human history. Such a view reinforced the rejection of objective knowledge, upward human progression through time, and an overarching theory that could explain everything through the structures.

The preceding sections may be summarised to argue that rather than objective truth, knowledge and understanding consisting of one grand narrative that is intrinsic in the world waiting to be discovered through a rational process, is instead constructed socially via many small and competing stories or discourses (Cooper & Burrell 1988; O'Farrell 1999). Thus, it may be argued that compliance does not exist in the world, waiting to be discovered, but is created through discourse and language. Understanding of compliance and new methods to deal with it merely represent the construction or order of knowledge that exists at a particular time and does not necessarily represent an improvement over prior methods as the modernist tradition would argue.

At this point, the paper turns to focus more on the philosophy of Michel Foucault due to his interest in the relationship between power and knowledge and the way in which discourse was used for social control. The purpose of this discussion is to show how, out of the numerous discourses that might exist in society, those who have power can exclude competing discourses thereby controlling the production of knowledge. The following sections will briefly discuss the relationship between power and knowledge and then how knowledge is used for social control.

3.3 Relationship between power and knowledge

Philosophers have been debating theories of knowledge, epistemology, for millennia. As discussed above, some late 20th century philosophers argue that knowledge is transferred by language and discourses and since the rules of language are constructed and agreed upon by society, the knowledge is also constructed socially. Foucault theorised that discourses prevail due to those behind them having the power to ensure that competing discourses are excluded, rather than the discourse being an expression of some objective truth or reality (Danaher, Schirato & Webb 2000; Foucault 1981; Mills 2003, 2004). This means that all our knowledge is a result of power struggles over discourse rather than it being a result of a rational process (Mills 2004). This connection between power and knowledge is often referred to as power/knowledge (Foucault 1977; Mills 2004; O'Farrell 2005). One of the ways in which

people obtain power to exclude discourse is through the role that they occupy, for example, as a judge or as the Commissioner of Taxation (Danaher, Schirato & Webb 2000).

Traditional views of power regard it as being held by an entity for the purposes of dominating and controlling another person's actions and thoughts (Lukes 1974; Weber 1978). Such a view has been influential in the global business regulation and tax compliance models such as the ATO's compliance model (Braithwaite & Drahos 2000) and in many economic and psychological studies of compliance behaviour (Allingham & Sandmo 1972; Kirchler, Hoelzl & Wahl 2008). This type of power may be called sovereign power because it has traditionally been associated with royalty (Schwan & Shapiro 2011).

Foucault's view of power is neatly illustrated in the first section of his study of the birth of the prison system in France (Foucault 1977). He described how in the *Ancien Regime,* brutal, public executions were conducted to demonstrate the power and vengeance of the Sovereign since a crime was regarded as being a crime against the Sovereign directly. Brutal, public executions also reinforced the link between the punishment and the crime. Prior to execution, the criminal was made to declare their guilt in a public speech, referred to as a 'gallows speech'. Often these were written down, copied and distributed among the public. Foucault described how the executed person often became a folk hero through public distribution of the gallows speeches and garnered sympathy from the public because of the execution's brutality. He argued that this undermined the purpose of the executions leading to resistance as the poorer citizens thought they were being targeted for relatively minor crimes while those in the establishment were not held accountable for greater crimes. Foucault then contrasted these executions with a different regime of punishment instituted less than a century later where criminals in a prison dutifully adhere to a strict daily routine (Foucault 1977). Foucault's point is that the greater exercise of power led to greater levels of resistance among the population. Resistance was reduced when power was exercised in a subtler manner as part of the prison system (Foucault 1977; Schwan & Schapiro 2011).

Foucault's view of power contrasts with the traditional view since he regards it as not being held by entities or if it is, it is held only fleetingly. This view arises from his historical investigations where he argued that a leadership vacuum arose after sovereign rule and the influence of the Church was swept aside during the Enlightenment (Foucault 1977). Foucault regards power as a set of forces which establishes positions and ways of behaving that influence people in their everyday lives and knowledge from the social sciences is tied up with

establishing and maintaining it. Foucault's view of power regards it as a social phenomenon; power is held within society and is transmitted via discourse. Since power is not held by entities knowledge is not held either. There is no one ultimate authority to turn to for providing such truth. Instead, truth and knowledge are constructed socially with various truth claims competing against each other to achieve status as truth (Foucault 1977; Danaher, Schirato & Webb 2011).

If power is held throughout society, then how is government possible? It seems obvious that the government and its institutions have the power to make laws and punish those who disobey. It could be argued that power in a democracy is held by voters, but Foucault would argue that power is held by no group or person, least of all the public (Danaher, Schirato & Webb 2000). Even though power cannot be held, it may still be used by those who know how to achieve certain outcomes. The next section continues with Foucault's philosophy with respect to how the governments uses his form of power to maintain control, though what he termed 'biopower' and 'governmentality'. This is relevant to this paper since it will be later discussed whether tax compliance and punishment is achieved and meted out in a similar manner. Such a discussion is important since a postmodern view, guided by the theory of Michel Foucault, can highlight aspects of law, compliance and punishment that have not been hitherto considered thereby improving our understanding of these concepts and phenomena.

3.4 Biopower and governmentality

In the post-Enlightenment period, the focus of the State shifted from giving glory to the Sovereign and provide welfare to citizens as an end to improving its own wealth and health. Citizens became viewed as the means for the State to improve its wealth and power via citizens' productivity (Foucault 1977; Danaher, Schirato & Webb 2000; Schwan & Shapiro 2011). To ensure that citizens were as productive as possible, their lives became regulated through an administrative apparatus which utilised knowledge gained from the social sciences which were established to study humans in an 'objective' manner in the modernist tradition for social control (Danaher, Schirato & Webb 2000). For example, Foucault (1977) argues that the shift from spectacular executions to prisons as punishment was not done for humanitarian reasons, as is often argued, but instead to dominate and mold citizens for production in the new industrial economy. Executions came to be regarded as a waste of a human body that otherwise could be put to productive work, therefore punishment centered on rehabilitation for such work. Foucault's term for this type of power is 'biopower' (Foucault 1978).

The use of citizens as resources for the State and the regulation of it via the social sciences and the administration resulted in what Foucault called the 'vampirisation of the Enlightenment', whereby Enlightenment ideals of truth, justice, liberty freedom etc were de-emphasised in favour of domination of the people in a subtler manner (Danaher, Shirato & Webb 2000). A key question is, 'how did this occur?', and answering this question was the driving force behind Foucault's work.

> The goal of my work during the last twenty years has not been to analyze [*sic*] the phenomenon of power, nor to elaborate the foundations of such analysis. My objective, instead, has been to create a history of the different modes by which, in our culture, human beings are made subjects (Foucault 1984b, p. 7 as cited in Danaher, Schirato & Webb 2000, p. 116).

In brief, the 'vampirisation of the Enlightenment' occurred since the Enlightenment was so effective at 'evacuating' power that it essentially went underground with different groups vying for authority. Power retreated to being hidden from view where is can operate relatively unchallenged and in the process, it may become more effective in operation. However, there are always opposing groups who resist power leading to struggles over it due to the various competing discourses that operate in society. These power struggles occur among groups because there is no one group that can lay claim to being the ultimate authority. Instead, power shifts between groups as each vies for authority without ever permanently achieving it. While some people may appear to have more power than others, these people are also products of biopower, thus the notion that some groups or individuals are more powerful than others is an illusion to a certain extent. Power acts on everybody – the dominated as well as the dominant, rather than its being held by entities, to produce self-regulating entities. All citizens are products of biopower and consequently their thoughts and actions are not entirely their own (Danaher, Schirato & Webb 2000). Despite this, where there is power, there is also resistance, therefore while biopower attempts to dominate individuals, they have the capacity to think and act for themselves (Foucault 1977, 1978; Belsey 2002).

The implication is that rather than power resting with government or the judiciary or even a revenue authority, it exits in a field of social relations and is evident in those relations. Over time the process of governmentality involved a move from government by the State to self-government such that each member of the community might be equipped with various techniques that might make them effective and valued (normal) members of the community. The techniques were termed 'technologies of the self'. Each member was to reflect on their selves and adjust behaviour to as to become proper members of society. Those who violated

the norms were treated in prisons and disciplined to become productive members of society (Foucault 1977; Danaher, Schirato & Webb 2000; Schwan & Shapiro 2011).

Methods of government and governing is one which is highly relevant to taxation. Laws are enacted to ensure the State collects revenue to fund public goods and services, however taxation is regarded as an interference by corporations and individuals who regard themselves as paying too much. Thus, governing and government involves striking a balance between providing incentives for people through low taxation to increase investment and employment which must be balanced against the need for the State to provide basic services. Governmentality ties in with Foucault's more general concern with the ways in which power and its practices are linked to the processes of what he calls 'subject formation' and how an understanding of these processes can help an individual to gain a certain amount of freedom and personal autonomy (Foucault 1991; Danaher, Schirato & Webb 2000).

Like many of his contemporaries, Foucault does not see a progression in knowledge through rational thought, but rather knowledge is produced through a series of contingencies and accidents of history (Curtis 2014). In a manner consistent with structuralism (and post-structuralism) there is also no 'alternative' discourse that is 'out there' waiting to be discovered through empirical, rational investigation (O'Farrell 2005) since there is no inherent truth or order that exists independently of the various competing discourses (Mills 2004). Instead, what is investigated is how power produces and excludes knowledge (O'Farrell 2005). A modernist perspective regards new developments as being an improvement over what came previously, but a Foucauldian perspective highlights that this is not necessarily the case, that these new developments, knowledge and truth are a result of power struggles.

This description of the theoretical framework has discussed how knowledge is not objective but is socially constructed. With languages being a sign system made up of the signified and the signifier and with no relationship between the signified and signifier (and vice versa) there is no direct correspondence between words (and our knowledge that arises from it) and objective reality. This has implications for the law which have been foreshadowed above but will be explored in more detail in the next section which will discuss aspects of tax law, compliance and punishment that illustrate the role that society has in developing these 'concepts'. Following Foucault, it will take a historical approach and show how these concepts have evolved over time due to various accidents of history.

4.0 Discussion

The purpose of this discussion is to use the history of tax administration from the 1970s to illustrate the impact society has in tax with respect to tax laws, compliance and punishment. This section will discuss the social construction of law, compliance and punishment respectively. The histories presented in this section will not necessarily be presented in chronological order. Reference will be made to postmodern and post-structural philosophy where relevant.

4.1 The social construction of tax law

This section will discuss the social construction of law using illustrations regarding general anti-avoidance, the development of tax rulings, and attempts to simplify the tax laws respectively. These illustrations are most pertinent to Australia, but conclusions may be applied to all jurisdictions.

4.1.1 Anti-avoidance

It is generally regarded that in the 1960s, 1970s and early 1980s paying tax was optional for the wealthy leaving the tax burden to salary and wage earners and small business owners (Wheelwright 1980; Sutton 1989; Grabosky & Braithwaite 1986). The prevailing view is that the proliferation of tax avoidance was due to a combination of the High Court's literal interpretation of Australia's general anti-avoidance rule, relatively high inflation and relatively high personal tax rates (Krever 1987; Sutton 1989; Boucher 2010, Xynas 2010; McKerchar & Coleman 2012; Pearce & Geddes 2014; Whait 2014, 2015). Sir Garfield Barwick was the Chief Justice of the High Court during this period and he has received significant criticism for the High Court's decisions (Pearce & Geddes 2014). There were two broad ways in which the wealthy escaped tax, one was through tax avoidance schemes and the other was through fraud associated with the *Bottom of the Harbour* schemes (Bright 1978; Wallschutzky 1985). These two are related since the former helped fuel the latter (Sutton 1989).

Through a post-structuralist lens, it may be argued that the literal interpretation of the High Court, as a reader of the text of the general anti-avoidance rule (GAAR) as enacted at that time, merely reflected the pre-existing culture. Since the author does not precede a work, there is no intention or purpose embodied within it. On this basis, the High Court and Sir Garfield Barwick should not be criticised for reading the text of the GAAR in the way they did since its interpretation reflects one already existing in society. On the other hand, it may also be argued

that the Commissioner's and the ATO's interpretation of the text was the one that was more reflective of society. This argument is evidenced by the media attention and anger in the community that resulted from the High Court's decisions (Wheelwright 1980; Sutton 1989; Boucher 1996, 2010). The media were particularly critical of the High Court's literal interpretation of the GAAR in the *Income Tax Assessment Act* 1936 (Cth) (Heraghty 1982) and despite the government combatting specific schemes through the introduction of specific legislation, a new GAAR was required as a catch all (Mannix 1981). Society saw it differently once the scale of avoidance became known (Sutton 1989) but the language of the first GAAR created tax avoidance as a concept so a new GAAR was required to reconceptualise tax avoidance. The second GAAR, however, was moulded on society's discourse as how tax avoidance should be conceptualised.

This shift in the discourse on tax avoidance represented a shift in the power relations between the Court and the ATO and among various groups in society. Discourse reflects the dominant class of society. If this is the case, then the High Court's views therefore would reflect those of the dominant class of society. This is evidenced by the tax avoidance at the time being conducted by the wealthy who could take advantage of schemes as opposed to salary and wage earners who were not able to do so (Wheelwright 1980; Sutton 1989). Indeed, Sutton (1989, p. 3) argues that the High Court disregarded the Commissioner's arguments since he 'had no right to make substantive judgment on whether particular transactions had any "real" basis other than tax avoidance. Instead the Tax Office should confine itself to determining whether the letter of the law had been obeyed'. A Foucauldian perspective sees the High Court operating in a manner consistent with the Commissioner's role. At that stage the ATO was operating under full assessment where each tax return was checked. Thus, the Commissioner had already created a role for himself and the ATO as a mere checker of returns rather than a custodian of the law. Thus, the High Court did not regard the Commissioner's discourse on tax avoidance to be true since it was inconsistent with the role he and his office had already established. While the High Court held the power over the discourse of tax avoidance, it was held fleetingly. The Commissioner was successful in resisting the High Court's power since his view of tax avoidance was accepted by general society. Foucault recognises that the order of discourse or the rules for proliferation of discourse in each era are invisible to those living within it. Consequently, what was regarded as appropriate compliance behaviour in one era or episteme is regarded as inappropriate in another (Foucault 1972, 1981; Tomasic and Pentony 1990).

4.1.2 Rulings

The era of tax avoidance led to many changes within the ATO in response to the criticism it received. Perhaps the most important of these changes is well known, the shift from full assessment to self-assessment. An important implication for taxpayers is that they had to understand and apply the law without the safety net of the ATO assessing their return in full. Concerns about this were not raised until the early 1990s by the Joint Committee of Public Accounts ('JCPA') inquiry into the administration of the tax system (Commonwealth of Australia 1993). The JCPA stated that it cannot be assumed that the taxpayer understands and has the capacity to apply the law and that it was the duty of the ATO to provide the necessary information to taxpayers to enable them to comply in the form of brochures and pamphlets.

The JCPA also regarded public rulings as an important part of educating taxpayers on 'how the Commissioner of Taxation [would] exercise the various discretions conferred upon him' and 'how the Commissioner will interpret the Acts or explain the ramifications of court decisions' (Commonwealth of Australia 1993, p. 99). The first ruling was issued on 6 December 1982 and subsequent rulings were released as taxpayers could obtain them through freedom of information requests anyhow (Commonwealth of Australia 1993). The JCPA recommended that various panels and groups identify issues to be dealt with in rulings and that Exposure Draft Rulings be released to the public for comment (Commonwealth of Australia 1993). Indeed, the JCPA recognised the importance of consultation and discussion to the preparation of rulings, particularly when a ruling provides an interpretation of the law. It also pointed out that the Commissioner ought to be more willing to seek legislative clarification on ambiguous aspects of the law rather than imposing a doubtful interpretation on taxpayers (Commonwealth of Australia 1993).

The JCPA and an earlier Senate Standing Committee in (1987) was concerned about the perception that public rulings had taken on the status of quasi law. This view was justified by the penalties which could apply for taxpayers who failed to follow a ruling and by taxpayers' inability to challenge them, especially since adherence to a ruling was taken into account in determining penalties as an indication as to whether the taxpayer had a reasonably arguable position. There was also concern that rulings were being used as a means to effectively re-write the law, either established principles or to remedy errors, deficiencies or inadequacies (Commonwealth of Australia 1993). Despite protestations by the ATO that rulings are not law, the perception that had been built up over time by taxpayers is that rulings had to be followed

to avoid penalty. These aspects elevated rulings to a higher status than any other adviser, interpretation or opinion and the JCPA was of the view that the system 'penalised any taxpayer who challenged the Commissioner's interpretations regardless of the intent behind that challenge' (Commonwealth of Australia 1993, p. 108). This led the JCPA to recommend that all rulings be approved by the Australian Taxation Commissioner prior to their release, a recommendation that the Commissioner was resistant toward (Commonwealth of Australia 1993).

It could be argued that the issues raised by the JCPA regarding rulings arose in order to give the ATO's views of the law more authority since its interpretation and application of the GAAR were not regarded by the High Court as discussed above. Even though the Commissioner cannot make law, it proved that its views of the law were reliable during the era of tax avoidance and as such they ought to be heeded. The comments regarding rulings by the JCPA were raised in the context of the ATO having too much power and that changes to administration need to be made to restore a balance of power between the ATO and taxpayers (Commonwealth of Australia 1993; McLennan 2003). This is a common thread throughout the entire JCPA report. However, it may be argued that rather than restoring the balance of power in Australia's tax administration, the JCPA gave more power to the ATO in this instance, albeit of a subtler type as Foucault envisaged. This is because the JCPA gave credence to the ATO's discourse on the law and although it does not originate from the courts, the JCPA officiated it by turning an informal system of rulings into a formal one. While the JCPA was concerned about taxpayer's regarding rulings as quasi law, it is difficult to see how the situation has changed since the JCPA made these recommendations.

Of note is the input of the public in producing rulings and recognition that this was highly desirable. Given that many taxpayers and tax agents follow rulings as a matter of general practice, it is perhaps self-evident that society constructs its own meaning and interpretation of the law. On this basis, it is arguable whether tax law simplification projects such as those advocated by the JCPA were necessary or likely to succeed. This aspect will now be discussed.

4.1.3 Tax Law Simplification

There are potential implications for the social construction of law for the tax law simplification projects. During the 1980s the tax system became significantly more complex with the enactment of laws introducing capital gains tax, fringe benefits tax, dividend imputation and foreign tax credits among others (Grbich & Woellner 1987). By the time of the JCPA report, a

plain English rewrite of the tax law was regarded as an imperative. The JCPA stated that it received many submissions urging a rewrite of the *Income Tax Assessment Act 1936*. These views were supported by the Chief Justice at the time as well as the Commissioner. One of the JCPA's recommendations was to re-write the *Income Tax Assessment Act 1936* in simpler language without changing the meaning of the law so that existing cases continued to be authoritative. This task was also undertaken in other jurisdictions such as the UK and New Zealand (Sawyer 2013). In Australia, this became known as the Tax Law Improvement Project.

Is it possible that merely changing the wording can reduce complexity and make the law simpler, more easily understood and less complex? A post-structuralist perspective would suggest that these projects were unnecessary and doomed from the start. On the one hand, changing the wording of the Act will necessarily change the law since meaning is contained within the wording of the law itself and the discourse of the law already exists prior to any author who circulates it. To be understood, the author must be writing a message already known to the reader (Brown 2005). This means that with respect to the Australian project, the re-writers were faced with an impossible task. On the other hand, the meaning of the law is in the eye of the reader of the text as the law continues to signify after those who wrote it have left the scene. But readers are not free to merely read into the law whichever interpretation they wish. All readers would have already learned the conventions and myths of the tax system, the tax 'lore' as opposed to the tax law, leading a limited number of possible interpretations despite the many millions of readers (Belsey 2002).

The tax law is undoubtedly complex with numerous technical details, ambiguities, gaps and inconsistencies. In Australia, it is also extremely voluminous. But the discourse between the ATO and taxpayers has led to general agreement regarding its more common elements. It is interesting that calls for simplification of Australian tax law were loud and numerous (Commonwealth of Australia 1993). It has been argued that instead of merely re-writing existing law, legislators ought to have addressed 'complex concepts and substantial policy issues in conjunction with any rewriting process' (Sawyer 2013, p. 4). Perhaps an appreciation of postmodern and post-structuralist theory might have saved significant time and money by not embarking on the project or, instead, choosing to focus on reform. Postmodern theory would argue that any reforms would likely have served the dominant class of the time and are unlikely to have had a lasting impact as future generations seek to implement reforms in accordance with their world view.

This section has argued based on postmodern and post-structuralist theory that the law may reasonably be considered a social construct. It is often thought that people obey the law due to it being somehow legitimate (Tyler 1990), but arguments presented herein suggests that people obey the law since it already reflects their views as to how the laws ought to be. Social construction of the law represents only one side of the equation, with the other being the social construction of compliance, a matter to which this paper now turns.

4.2 The social construction of tax compliance

The period of tax avoidance in Australia's tax history led to the next phase of tax administration. Because of the lack of ATO success in the Courts and its maladministration of the tax system, several competing discourses (or truth statements) arose which would have a profound effect on how the ATO would administer the tax system henceforth. One key change was the appointment of a new Commission of Taxation, Trevor Boucher, from 1983 (Commonwealth of Australia 1993). Early in his appointment, he stated that the ATO would focus on noncompliant taxpayers only on the basis that most taxpayers were voluntarily compliant (Boucher 1985; Commonwealth of Australia 1993). To achieve this, the ATO introduced self-assessment, risk management and focused on increasing its operational efficiency (Commonwealth of Australia 1993). This section will discuss the social construction of compliance by considering the effects of self-assessment and risk management respectively.

4.2.1 Self-Assessment

Self-assessment implies at the outset that compliance is constructed by taxpayers, but the ATO also plays a role. This section will discuss how this occurs. As discussed above, systemic issues surrounding the ATO's administration of the tax system with respect to full assessment were partly to blame for the emergence and proliferation of tax avoidance schemes including *Bottom of the Harbour* in the 1970s and early 1980s. The ATO's resources were tied up with administering full assessment and the numerous objections that resulted. Fixing this problem required some structural changes and the first key change introduced was self-assessment. The new Commissioner stated that he expected that self-assessment would 'substantially cut down dispute volumes' (Boucher 1985, p. 62).

But self-assessment would not be introduced until July 1986 (Boucher 1985) and from 1983/84 objections remained high and were in fact increasing (Boucher 1985). Many of the objections were frivolous and for small amounts, yet the cost of handling them was enormous (Boucher

1985). The new Commissioner hoped that new substantiation rules introduced by the Treasurer would help and some in the profession recognised that the rules were designed to improve it (Boucher 1985; KPMG Peat Marwick Hungerfords 1988). The Commissioner is presumably referring to Keating (1985, p. 39) that outlined changes to substantiation requirements to commence 1 July 1986 where 'an expense will be regarded as substantiated only where a taxpayer is able to produce a receipt, invoice or other documentary evidence that shows the amount, date and essential character of the expense.' However, certain expense claims would be excluded from this requirement. The relevant one for this history is where annual claims for work-related expenses (other than expenses relating to domestic travelling allowances and overtime meal allowances) do not exceed $300. Previously, the law did not specify what proof is required to substantiate claims for employment related expenditure. This deficiency needed to be addressed since 'excessive claims for work-related expenses was a significant area of tax evasion' (Keating 1985, p. 39).

At the same time, Boucher (1985) said that the system of self-assessment depends on voluntary compliance, which he regarded as being high. This claim is questionable given Commissioner Boucher's other comments regarding the increasing levels of disputes and objections. Indeed, these levels were so high that Commissioner Boucher thought it might derail the introduction of self-assessment itself.

> If the rate of disputation were to continue to escalate this year in the manner of the recent past, then this would seriously impact on our ability to successfully move to self-assessment beginning in July 1986 (Boucher 1985, p. 61)

That there were so many objections just prior to the introduction of self-assessment, and that they were increasing, does not appear consistent with a claim that there were high levels of voluntary compliance. That many objections were frivolous and for small amounts suggests that the exemption from the substantiation requirements for expenditure less than $300 was put in place to remove such claims. It is arguable on that basis that voluntary compliance is a construct of the self-assessment system rather than being a foundation for self-assessment. Rather than voluntary compliance existing as an objective reality, it has been manufactured in a manner consistent with the post-structuralist views discussed above. While it is theoretically arguable that voluntary compliance refers to compliance with the tax laws, it is also arguable that the tax laws have been altered via substantiation rules to render many taxpayers as being voluntarily compliant who would have otherwise objected to their assessments.

This is not the only manner that voluntary compliance may be created by the ATO. It may also be created via the ATO's risk assessment and management practices. While this will be discussed further in section 4.2.2 directly below, it is pertinent to say in this section that taxpayers with claims less than $300 will be expected to produce substantiation on audit, however, frivolous claims may still escape scrutiny where the taxpayer is not regarded as a risk to the revenue. This has led to many salary and wage taxpayers being able to make frivolous and unsubstantiated claims of up to $300 in work related expenditure and be considered compliant.

Self-assessment created new categories of noncompliance. Prior to its introduction, during the era of tax avoidance and *Bottom of the Habour* schemes, noncompliance was regarded as a willful act where taxpayers gambled on the audit lottery (Boucher 1985), but after self-assessment, noncompliance was mostly attributed to errors or genuine misunderstandings of the law (Anderson 1993; Boucher 1993). Therefore, the type of assessment system directly affects the nature of noncompliance.

Officiated compliance by one agency also affects compliance with other agencies. For example, in determining whether a taxpayer has paid appropriate levels of child support, the Child Support Agency will simply take the income figure from that taxpayers return without question. As far as the Child Support Agency is concerned, the amount of taxable income provided by the ATO on behalf of a taxpayer is unquestionable regardless of the risk to the revenue it may pose. If one divorced party suspects that the other is understating taxable income, there is little hope of recourse unless the other party is assessed as a risk to the revenue by the ATO and subsequently audited. In this and other respects, the compliance of a taxpayer depends to a very large extent on the ATO's risk assessment practices. The paper will now discuss these and how compliance is socially constructed through them.

4.2.2 Risk Management

The introduction of self-assessment required the ATO to develop methods to determine who was compliant and who was not (Wickerson 1994a). This history has been discussed elsewhere (Whait 2012, 2014, 2015) but the post-structuralist considerations have not. Briefly, under self-assessment, the ATO needed to develop procedures to detect noncompliance and to enable the ATO to allocate its limited resources to target it. Criticism of their handling of the tax avoidance and *Bottom of the Harbour* schemes of the 1970s and early 1980s directly influenced ATO practice as focus shifted to those who were not compliant. Some techniques involved data

matching but others were more sophisticated and relied on norms of financial data being developed based on taxpayer industry where each taxpayer would be compared to the norm and assessed as a risk to the revenue where the taxpayer strayed too far from it (Donoghue & Barry 1993; Wickerson 1993, 1994b, 1995). Norms are now developed for every label in a tax return with numerous other data financial and non-financial data being collected and analysed as part of a comprehensive computer aided risk management process.

Even though many taxpayers may not be aware of the specific norms that the ATO uses, and the ATO may change its tolerances from one year to the next, a Foucauldian perspective suggests that taxpayers can come within such tolerances on a trial and error basis or from gaining information from others in the taxpayer's industry. If this is the case, then the risk management systems used by the ATO construct compliance as each taxpayer maneuvers to stay within the norms to avoid ATO attention. One example of this process in operation is where taxpayers lodge returns through 'MyGov', Australia's new Internet based tax return and lodgment system, and are asked to reconsider the level of deductions when seeking claims that are higher than the norm.

Norms and associated lodgment systems may be regarded as a technique of the self that helps taxpayers to self-regulate in a manner described by Foucault (1978; see also Danaher, Schirato & Webb 2000). This creates a feedback loop whereby the norms and the level of deviation by taxpayers adjusts to a level agreed upon by taxpayers over time. Such self-regulation is necessary since the ATO is only able to audit a small percentage of taxpayers (Wickerson 1995). These risk assessment systems are developed and continuously improved to determine the risk to the revenue (Wickerson 1994a) but a post-structuralist perspective calls into question whether the risks to the revenue can be objectively determined.

Research on the history of the ATO's compliance model showed that it's adoption by the ATO had its basis in risk management (Whait 2012). It has been suggested above that this model of compliance and risk represents a more postmodern view since it considers the diversity of the taxpayer and various motivations to comply other than ones that maximise economic gain. More specifically, it does not regard the taxpayer in terms of the simple compliant-noncompliant binary opposite that a command and control model does, but it introduces another, less extreme binary opposite, capitulation-resist (Braithwaite, V 2002, 2007). While the ATOs recognition of this diversity is welcome since it enabled the ATO to develop more responses to taxpayer noncompliance, ultimately, these extra binary opposites must be

considered social constructs too, since there is no universal structure, rather than an objective truth.

Recently, the ATO has begun issuing compliance certificates and risk ratings to particular taxpayers and is encouraging these taxpayers to discuss its risk rating with the ATO meaning that the taxpayer has a more direct influence on its risk profile. Presentations from ATO officials have indicated that taxpayers have been requesting these developments and the ATO has offered to improve its services to taxpayers. Whether the taxpayer is successful in changing its risk profile will depend on the power relationship between the taxpayer and the ATO. The ATO has the power, partly by the JCPA since it endorsed the ATOs efforts at risk assessment (Commonwealth of Australia 1993; Wickerson 1994c) to determine where the risks to the revenue are located and the accompanying risk profiles of taxpayers. These risks become truth due to the ATO having this power. However, it is not an objective truth since despite all attempts to do so, its systems do not have the capacity to capture and analyse all relevant data in a perfect manner. The risks to the revenue are therefore created by the ATO through its risk management systems meaning that it is always open to challenge by taxpayers who are not satisfied with their assessment. Thus, the risks to the revenue are created by the ATO from the application of its risk assessment and management systems and because of the power struggles between it and taxpayers.

The ATO is hampered in its efforts to administer the tax system by a desire by politicians and the public for it to operate efficiently. The ATO's current approach to tax administration is largely determined by the need to use its limited resources in the more efficient manner possible while collecting the tax that is due (Wickerson 1994a). Imagine how tax compliance would be if the ATO had more, even unlimited, resources. Would the ATO use these resources appropriately? Such imaginings are perhaps fanciful, but where ATO is criticised for apparently wasting money chasing certain taxpayers including high wealth individuals and large corporations, it is possible that such criticism is a ploy to divert the ATO's attention away from those making such criticisms.

This section has discussed how compliance is constructed by society with power struggles between the ATO and taxpayers. Noncompliance usually attracts some form of punishment. Traditionally, punishments have taken the form of monetary penalties, however responses to noncompliance have become more diverse over time. The next section discusses how punishments are also socially constructed.

4.3 The social construction of punishment

This section will discuss the social construction of penalties for tax noncompliance through consideration of the how the government and the ATO exercised its powers to enforce penalties and how taxpayers resisted such penalties. It will be shown, in a manner consistent with Foucault (1977), that taxpayers resist more strongly when the ATO punishes more overtly.

By 1984, the ATO was seeking to introduce self-assessment and new enforcement measures were introduced to support it (Boucher 1985). These were regarded as draconian (KPMG Peat Marwick 1988). They were specifically designed to deter taxpayers from playing what Commissioner Boucher called the 'audit lottery' (Bocuher 1985). He stated, 'We have a very clear message from the Parliament that stronger penalties for non-compliance are a necessary part of tax administration and are to be applied' (Boucher 1985, p. 58). In making this statement, he acknowledged that there was some discomfort with the higher penalty levels including whether they were appropriate. Since Australia had just emerged from the era of tax avoidance and *Bottom of the Harbour* schemes, there was an implicit assumption that any noncompliance was deliberate and wilful and this deserving of harsh punishment.

By 1993, the JCPA had questioned whether this penalty regime was appropriate, particularly whether an administrative arm of government should hand out culpability penalties which required a demonstration of intent. By that stage it had become more apparent that simple errors or a genuine lack of agreement about the law led to most noncompliance, rather than a wilful desire to evade. As discussed above, this type of compliance was a product of self-assessment.

A later review conducted by the Senate Economics References Committee ('SERC') (2000) noted that poor conduct of ATO auditors manifested itself with respect to how penalties were applied. These issues began to appear in the early 1990s due to a modified penalty regime that was to apply from the year ended 30 June 1993 (Coleman & Freeman 1994a, b; Nethercott 1994, 1995; Pearson 1994). While the new regime was designed to take personal circumstances into account through the concept of reasonable care, some commentators were concerned that the concept would lead to some unjust results (Nethercott 1994, 1995; Pearson 1994). For example, taxpayers who took advice from tax agents would be considered as not having taken reasonable care where the agent was at fault (Nethercott 1994, 1995; Pearson 1994). Ironically, the Explanatory Memorandum accompanying the new penalty legislation recommended engaging a tax agent as one means of taking reasonable care (Pearson 1994). Some commentators were of the view that the ATO applied penalties with little empathy (Burgess

1995; Oats 1996; Williams 1996). Overall, commentators were concerned that penalties were either being inflexibly or inappropriately applied, especially since taxpayers bore the onus of proof that they had been compliant (Pearson 1994). The fears of Nethercott (1994, 1995) and Pearson (1994) were later realised as instances of taxpayers being penalised on an inconsistent basis due to shortcomings in ATO systems and bearing the brunt of penalties after taking tax agent advice came to light (Senate Economics References Committee 2000).

One group of taxpayers who felt they were treated harshly and blamed unfairly for taking advice from their agents were those involved in mass marketed schemes. The ATO cracked down on many involved, perhaps remembering its inadequate response to the tax avoidance schemes of the 1970s and 1980s. Many involved in the schemes were ordinary people who had taken advice from their accountants and consequently considered the action of the ATO to be too harsh (Murphy 2004; Braithwaite, Murphy & Reinhardt 2007). Taxpayers caught up in these schemes believed that their prior good record was ignored when the ATO determined the penalty and considered themselves harshly treated (Senate Economics References Committee 2000). The JCPA, SERC and the Commonwealth Ombudsman revealed the public's dissatisfaction with the ATO's treatment of these taxpayers. Therefore, the discourse of the public was channelled through that media and it became truth.

Earlier, the JCPA noted the ATO had been given 'exceptional powers' to administer the system and emphasised the importance of 'establishing an administration which is fair, equitable and sufficiently flexible to manage the individuality of taxpayers' (Commonwealth of Australia 1993, p. vii). The JCPA sought to restore balance to the ATO's administration that had 'grown to ignore the people that it serves' (Commonwealth of Australia 1993, p. vii). Thus, the JCPA emphasised the importance of an equitable tax administration and the ATO had to improve its performance in that regard by using its powers more appropriately (Williams 1996; McLennan 2003). Similar concerns were raised at the SERC (2000) which agreed that government agencies invested with wide powers ought to discharge those powers properly and fairly. Therefore, the political risk for the ATO lay in the potential loss of power yet having to perform the same duties and achieve the same, or better, outcomes.

During the mid to late 1990s, two contrasting views of the ATO developed. One view regarded the ATO as a progressive organisation devoted to service improvement and professional conduct. Another view saw the ATO as a harsh and inflexible organisation driven by procedure (Senate Economics References Committee 2000). The ATO needed to change the latter

perception so that the majority saw the ATO as the former. The challenge for the ATO therefore lay in utilising its powers in a more effective and appropriate manner to maintain its legitimacy over tax administration. The SERC's comments show that many in the ATO were doing this, but the activities and approach of these ATO officers needed to become more widespread.

The desire for a softer, more flexible approach to penalties influenced the ATO to adopt its Compliance Model at the turn of the 21st century. This model allows for a range of punishments to be meted out (or no punishment at all) for certain forms of noncompliance. As discussed with respect to Foucault's philosophy above, reducing the perceived intensity of punishment also reduces the level of resistance to it making a subtler use of power potentially more effective (Foucault 1977). It was regarded as more beneficial to keep a taxpayer in the system and foster future compliance through a lesser punishment than to punish harshly and potentially keep the taxpayer offside for many years to come. One of the key advantages of the more flexible approach to punishments advocated by the Compliance Model was that harsher penalties become justifiable to the taxpayer and government committee's once more gentle punishments had been tried to improve compliance first (Commonwealth of Australia 1998). More recently, the ATO has been considering a policy where taxpayers would have no penalty at all applied for their first instance of noncompliance. Presumably the aim of this is to also foster voluntary compliance. Whichever the reason, the reduced punishments are a response to potential resistance from taxpayers who see harsh punishments as being inappropriate despite noncompliance with the tax system being a breach of the law.

This section has argued how punishment for tax noncompliance is a social construction on the basis that taxpayers will resist punishment that it does not regard as appropriate. This construction has not been considered by researchers who have studied tax compliance. Early economic compliance models such as that produced by Allingham and Sandmo (1972) assumed that taxpayers would simply accept any punishment meted out and only respond by not engaging in any more noncompliant behaviour. Later fiscal psychology models such as those produced by Kirchler, Hoelzl & Wahl (2008) use a different definition of power to that theorised by Foucault (1977). It is important to recognise that Foucault recognises that sovereign power still exists, but that disciplinary power may be more effective at achieving compliance due to the reduced resistance produced in response to it (Foucault 1991). It might be appropriate for future studies to incorporate Foucault's view of power to aid in our understanding.

6.0 Conclusion

This paper has discussed how tax law, compliance and punishment may be considered social constructs based on postmodern and post-structuralist theory. More specifically, it has argued that the law cannot be objectively interpreted, compliance cannot be objectively studied and the type of punishment depends on what society is willing to endure. The construction arises through power struggles that occur throughout society as authors interpret texts in accordance with the conventions learned during their upbringing.

Postmodernism does not deny there is a reality, it rather recognises the weaknesses in methodologies and perspectives that attempt to capture it. It also illustrates that knowledge is regarded as true because it is officiated or propagated by those who have the power to do so. Therefore, consideration of tax law, compliance and punishments through a postmodern lens allows the critiquing of established methods and techniques to define it, improve compliance with it and devise punishments in response to noncompliance with it. Instead, it allows the development and adoption of new and innovative ones that have developed for all taxpayers rather than the dominant group in society. Rather than postmodernism having a negative impact on the law, it may potentially have a positive impact, especially where it exposes certain discourses that favour the dominating classes, thereby helping to achieve equitable reforms for all in society.

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