



## **Surveillance and Self-Assessment: Foucault and Latour in the Australian Taxation System**

### **Author**

Deem, Jacob, van Doore, Kathryn

### **Published**

2021

### **Journal Title**

Curtin Law and Taxation Review

### **Version**

Version of Record (VoR)

### **Downloaded from**

<http://hdl.handle.net/10072/407868>

### **Link to published version**

<https://businesslaw.curtin.edu.au/our-research/publications/curtin-law-taxation-review/>

### **Griffith Research Online**

<https://research-repository.griffith.edu.au>

# SURVEILLANCE AND SELF-ASSESSMENT: FOUCAULT AND LATOUR IN THE AUSTRALIAN TAXATION SYSTEM

JACOB DEEM\* AND DR KATHRYN E VAN DOORE\*\*

## ABSTRACT

*Building on previous research, this article explores possible avenues for reform by approaching the Australian Taxation Office's powers through Foucault and Latour's respective theories of surveillance and disciplinary power. It discusses the problem of making the taxpayer 'visible', which was recently placed under scrutiny by the Standing Committee on Tax and Revenue's inquiry. First, it considers the body of the taxpayer, and how the micro-physics of power in taxation administration creates an identity in the person obliged to pay tax. Second, it turns to Foucault's idea of panopticism, and Latour's alternate oligopticism, discussing the ways in which the ATO's auditing powers can be understood as systems of surveillance and explaining how the self-assessment system of tax administration is not only possible, but goes beyond what Foucault himself would have ever imagined. Finally, having demonstrated the links between the ATO's functioning and surveillance theories, this article explores how this new understanding can be used to guide substantive reform, primarily suggesting that compliance can be increased by helping taxpayers re-see the tower of the Panopticon.*

---

\* Dr Jacob Deem is a Lecturer in Law at Central Queensland University's College of Law, Justice and Criminology.

\*\* Dr Kathryn E van Doore is a Senior Lecturer in Law at Griffith University.

## I INTRODUCTION

The Australian Taxation Office ('ATO') is undergoing a process of reinvention and substantive change, in an effort to improve the relationship between taxpayers and the ATO, in turn increasing compliance and reducing the costs associated with enforcing taxpayer obligations.<sup>1</sup> These changes come after a recent parliamentary report revealed that taxpayers have suffered immense financial, emotional and mental strain in lengthy audits and legal disputes with the ATO.<sup>2</sup> The Committee noted that, while the ATO generally does a good job, there is certainly room for improvement.<sup>3</sup> In particular, it noted claims of the ATO engaging in 'bullying and unprofessional conduct', behaving like 'zealots', holding 'a presumption of guilt that the taxpayer is hiding something', and carrying out 'audits [that] are conducted like "fishing expeditions" rather than with a specific focus'.<sup>4</sup> In its response, the government recognised a need for change,<sup>5</sup> but generally ruled out legislative or other major avenues for reform. In the absence of legislative reform, it is therefore necessary to consider how fairer outcomes can be achieved, while still operating within the constraints of the current system. In this article, we consider this question through two lenses. First, we consider Michel Foucault's theories of surveillance and disciplinary power.<sup>6</sup> Second, we supplement these insights by considering

<sup>1</sup> See, eg, Chris Jordan, 'Reinventing the ATO' (Speech, Tax Institute of Australia 29<sup>th</sup> National Convention, 27 March 2014) <<https://www.ato.gov.au/Media-centre/Speeches/Commissioner/Commissioner-s-address-to-TIA/>>; Geoff Leeper, 'Tax Administration Transformation: Reinventing the ATO' (Speech, National Tax Practitioner Conference, 18 June 2014) <[https://www.ato.gov.au/Media-centre/Speeches/Other/Tax-administration-transformation--Reinventing-the-ATO/?page=1#Reducing\\_\\_or\\_even\\_eliminating\\_\\_the\\_administrative\\_burden\\_for\\_individuals\\_with\\_simple\\_tax\\_affairs](https://www.ato.gov.au/Media-centre/Speeches/Other/Tax-administration-transformation--Reinventing-the-ATO/?page=1#Reducing__or_even_eliminating__the_administrative_burden_for_individuals_with_simple_tax_affairs)>; David Hughes, 'ATO Communication Improving? Fingers Crossed' (Speech, Small Myers Hughes Tax & ATO News, 24 February 2014) <<http://www.smhtaxlawyers.net.au/blogs/Tax-ATO-News-Australia-1>>.

<sup>2</sup> Commonwealth of Australia, *House of Representatives Standing Committee on Tax and Revenue: Tax Disputes* (Final Report, Commonwealth of Australia, 2015) ('*Tax Disputes Report*'). See also Nassim Khadem, 'Parliamentary Inquiry Told of ATO's Unequal Treatment of Small Business', *Sydney Morning Herald* (online, 25 November 2014) <<http://www.smh.com.au/business/parliamentary-inquiry-told-of-atos-unequal-treatment-of-small-business-20141124-11slto.html>>.

<sup>3</sup> Tax Disputes Report (n 2) 6–7.

<sup>4</sup> Ibid 9.

<sup>5</sup> Ibid.

<sup>6</sup> See, eg, Michel Foucault, *Discipline & Punish: The Birth of the Prison*, tr Alan Sheridan (Random House Inc, 1995) ('*Discipline & Punish*'); Michel Foucault, *Society Must Be Defended: Lecture at the College de France 1975-1976*, tr David Macey (Picador, 2003) ('*Society Must Be Defended*').

Bruno Latour's oligopticon.<sup>7</sup> While Latour is best known for his actor-network theory, his less famous challenge to Foucault's Panopticon is equally important. These perspectives provide an insight into the ATO's actions and powers, and highlight mechanisms for reform. We must note at the outset that we do not necessarily seek to criticise or defend the ATO for taking an approach favouring administrative reform. Rather, we take a pragmatic approach, attempting to improve the system within its current parameters by using theory to explain the present and optimise the future.

Applying Foucault's theories to tax administration is not without risk. Foucault himself stated that taxation was not a form of surveillance, as it did not meet his requisite for continuity.<sup>8</sup> Additionally, we undertake our inquiry cognisant of the dangers of extracting Foucault's work from the context in which it was developed, and of applying it where it should not be applied. In this respect, Koopman and Matza caution against a 'straightforward application of Foucault'.<sup>9</sup> In particular, they are critical of many projects which treat Foucault's highly context-specific concepts as universal.<sup>10</sup> However, Koopman and Matza do not argue against 'push[ing] Foucault beyond Foucault';<sup>11</sup> indeed they suggest it 'poses numerous opportunities'.<sup>12</sup> Several scholars around the world have seen the opportunity posed by applying Foucault to tax administration, and have identified important parallels between modern tax systems and Foucauldian ideas of surveillance and discipline.<sup>13</sup> In the Australian context, Robert Whait recently used a Foucauldian perspective to explain the ATO's co-operative compliance model. We build on Whait's work by adding legal and social psychological perspectives to the application of Foucault to Australian taxation. We also draw

<sup>7</sup> Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network Theory* (Oxford University Press, 2005); Bruno Latour, Emilie Hermant and Patricia Reed, *Paris: Invisible City* (Online Project, 2006) <<http://www.bruno-latour.fr/virtual/EN/index.html>>.

<sup>8</sup> Foucault, *Society Must Be Defended* (n 6) 36.

<sup>9</sup> Colin Koopman and Tomas Matza, 'Putting Foucault to Work: Analytic and Concept in Foucauldian Inquiry' (2013) 39(4) *Critical Inquiry* 819.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid 835.

<sup>12</sup> Ibid 820.

<sup>13</sup> See, eg, Robert Whait, 'Exploring Innovations in Tax Administration: a Foucauldian Perspective on the History of the Australian Taxation Office's Compliance Model' (2014) 12(1) *eJournal of Tax Research* 130; Karen Boll, 'Shady Car Dealings and Taxing Work Practices: An ethnography of a Tax Audit Process' (2014) 39 *Accounting, Organizations and Society* 1.

on Boll's recent study of the Danish tax system. Boll used an ethnographic study of the Danish Tax and Customs Administration to demonstrate how Foucault's panopticon and Latour's oligopticon can be used together to explain tax administration in practice. We develop this idea, applying it in an Australian context to better understand problematic behaviour by the ATO.

We then take these theoretical insights and use them to identify ways in which the system can be improved. Given the government's expressed preference for administrative rather than legislative remedies, we take this as the focus of our proposals. We pay particular attention to strategies for increasing voluntary compliance and awareness of the legal system; the rationale there is that greater rates of compliance will reduce the burden on the already strained ATO, enabling the Tax Office to engage in auditing practice that is less zealous.

We begin by identifying and explaining the key problem for tax administration: what knowledge does the ATO have about a taxpayer's affairs, and what can they reasonably be expected to uncover? This serves as a foundation for our discussion of panopticism and oligopticism, two theories that address how state actors can use knowledge and surveillance as power. From this theoretical discussion, we then build on Whait and demonstrate how the tax system in general uses Foucauldian techniques to encourage tax compliance. However, we also highlight how Latour's oligopticon also offers useful insights, and suggest that many of the ATO's conduct problems stem from tensions between administrators acting as 'all-knowing' in the Foucauldian Panopticon, when in reality their actions better align with the narrower view of the oligopticon. Finally, we explore how the understandings gained by examining the Australian taxation system in light of Foucault and Latour's theories can be used to guide reform. In particular, we suggest that increasing the perception of surveillance in the minds of taxpayers will increase compliance, and in turn reduce the cost of enforcing tax law, but that at the same time the ATO must acknowledge that it is not truly panoptic in its audits. We offer a number of possible ways this could be achieved, drawing on social psychological research and media techniques.

## **II GAZING AND REVENUE RAISING: HOW TO MAKE THE TAXPAYER VISIBLE?**

The timeless problem for tax collectors and auditors is identifying the monies owed to the state, a task made all the more difficult because 'citizens employ considerable creativity both in developing sly concealment operations and in trying to make their taxable activities

invisible'.<sup>14</sup> The task for tax administrators, including the ATO, is to render the taxpayer visible.<sup>15</sup> The ATO has a range of techniques available to it in this regard (which are discussed in the next section), varying from the relatively unobtrusive data-mining of risk management, to intense audits and litigation processes. In applying these techniques, the ATO must create the impression that, where taxpayers seek to conceal any wrongdoing, this will be discovered. However, in doing so, especially in an audit, they must admit to the taxpayer that they do not have the full story. To manage this tension, auditors will use the information they have to set themselves up in a position of power, and then push the explanatory obligations onto the taxpayer.

This was highlighted for Boll in her ethnographic study of the Danish tax system. Sitting in on an interview with John, a taxpayer suspected of failing to report income made from used-car sales, Boll observed the tax inspector say: ‘There is one person at this table who is best placed to remember [she looks at John]. I’ve marked the central cash deposits. For these I want an explanation. It is you who can give me the best explanations’.<sup>16</sup>

While this example comes from Denmark, rather than Australia, the reasoning is very similar to that employed by the ATO (*you* are best placed to know, therefore *you* must provide the information). Further, the ATO is supported by a troubling feature in the Australian legal system: when reviewing or appealing a tax assessment made by the ATO, the taxpayer bears the onus of proving that the assessment was incorrectly made.<sup>17</sup> In many respects, the taxpayer may therefore be considered guilty until proven innocent, a notion that is uncomfortably at odds with broader ideals of justice in Australian law. In *Gauci v Federal Commissioner of Taxation* (1975) 135 CLR 81,<sup>18</sup> Mason J confirmed that in a taxpayer’s appeal against an assessment, the ATO has no obligation to produce evidence to support its position, and that instead the onus is on the taxpayer:

---

<sup>14</sup> Boll (n 13).

<sup>15</sup> See, eg, Penelope Tuck, ‘The Changing Role of Tax Governance: Remaking the Large Corporate Taxpayer into a Visible Customer Partner’ (2013) 24 *British Journal of Management* S116, on making the British corporate taxpayer visible.

<sup>16</sup> Boll (n 13) 13 (emphasis in original).

<sup>17</sup> *Taxation Administration Act 1953* (Cth) ss 144ZZK, 14ZZO.

<sup>18</sup> *Gauci v Federal Commissioner of Taxation* (1975) 135 CLR 81.

The Act does not place any onus on the Commissioner to show that the assessments were correctly made ... The implication of such a requirement would be inconsistent with [the predecessor to s 14ZZO] for it is a consequence of that provision that unless the appellant shows by evidence that the assessment is incorrect, it will prevail.<sup>19</sup>

If the taxpayer is to meet this burden of proof, they must meticulously keep records about their tax affairs. This was a problem that the recent Parliamentary Report identified, and it recommended that in some cases this reverse onus be removed.<sup>20</sup> The government did not support this recommendation.<sup>21</sup>

The problem for Australian tax administration is that the ATO, in trying to make the taxpayer visible and negate the difficulty of such a task, has taken an overzealous approach to its use of power. What should be a reasonable investigation can often descend into a ‘fishing expedition’ where the ATO holds ‘a presumption of guilt that the taxpayer is hiding something’.<sup>22</sup>

How, then, are we to reconcile and explain how the ATO can be considered both all-knowing and fallible, and how can we improve outcomes for both taxpayers and the Tax Office? The answer lies in consideration of the works of Foucault and Latour. Our discussion begins by providing an overview of the major contributions of these theorists. Then, we demonstrate how these theories can be applied to taxation administration in Australia by looking at the ATO’s powers over the ‘body of the taxpayer’ through the registration of Tax File Numbers (‘TFN’) and through auditing powers, and at how panopticism and oligopticism can explain taxpayers behaviour in self-assessment of tax responsibility and in reviewing the ATO’s assessment.

### **III THE BODY OF THE TAXPAYER: THE DISCIPLINARY POWER OF TAXATION**

In *Discipline & Punish*, Foucault presented an analysis of the way power in the criminal justice system was transformed from open and bloody displays of sovereign power in the form of public executions to the more discreet but pervasive disciplinary power of the prison system.<sup>23</sup> The key to this shift, Foucault argued, was a change in the way the state surveyed and gained

<sup>19</sup> Ibid 89 (per Mason J).

<sup>20</sup> *Tax Disputes Report* (n 2).

<sup>21</sup> Ibid.

<sup>22</sup> Ibid 9.

<sup>23</sup> Foucault, *Discipline & Punish* (n 6) 3–6.

knowledge of subjects.<sup>24</sup> Indeed, the rise of disciplinary power was associated with, even predicated on, an increase in surveillance and observation, and the knowledge of subjects that came with it.<sup>25</sup> In *Discipline & Punish*, Foucault takes Bentham's Panopticon,<sup>26</sup> the perfect prison, and explains how it can be used as a model for society, and to examine how surveillance and disciplinary power interact. Bentham designed the Panopticon as a prison where cells are arranged in a circle around a central tower so that the prison warden, standing in the tower, can easily observe any prisoner in any cell at any time, but the prisoners cannot observe one another, nor can they see into the tower themselves.<sup>27</sup>

Foucault's later lecture 'Governmentality', sought to address some of the critiques of *Discipline & Punish* that emerged.<sup>28</sup> In particular, this 'rationality of government'<sup>29</sup> provided an account of the importance of 'economy' in governance, and the shift from the family unit as a model for governance to a means to attaining knowledge.<sup>30</sup> While these additional insights may be useful to our observations on the Australian tax system below, we generally avoid applying 'Governmentality' in this paper because, with few exceptions,<sup>31</sup> the existing literature on Foucault and taxation to which we seek to contribute, has primarily focused on *Discipline & Punish*. We therefore aim to establish our argument within the confines of current research, and leave it to future studies to explore the insights of Foucault's later works.

The key aspect of *Discipline & Punish* (which was not contradicted in 'Governmentality') is Foucault's description of how the panoptic model of surveillance, applied to prisons, schools, factories and hospitals, resulted in a new form of power and control.<sup>32</sup> The key to this control

<sup>24</sup> Ibid.

<sup>25</sup> Ibid 192. See also Gerard Delanty, 'Michel Foucault' in Anthony Elliot and Larry Ray (eds), *Key Contemporary Social Theorists* (Wiley-Blackwell, 2002) 123.

<sup>26</sup> Jeremy Bentham and Miran Bozovic, *The Panopticon Writings* (Verso, 1995).

<sup>27</sup> Foucault, *Discipline & Punish* (n 6) 200.

<sup>28</sup> Michel Foucault, 'Governmentality' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press, 1991) ('Governmentality'). See also Colin Gordon, 'Governmental Rationality: An Introduction' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press, 1991) 4.

<sup>29</sup> Gordon (n 28) 3.

<sup>30</sup> Foucault, 'Governmentality' (n 28).

<sup>31</sup> Tuck (n 15).

<sup>32</sup> Foucault, *Discipline & Punish* (n 6) 203.

was the permanent visibility of the subject.<sup>33</sup> Reality is often far removed from this ideal, however. Conscious and critical of this limitation, Latour proposed the ‘oligopticon’ which, as the Greek ‘oligo’ designates, provides a limited or narrow picture. Latour stated that ‘from oligoptica, sturdy but extremely narrow views of the (connected) whole are made possible’.<sup>34</sup> For Latour, the oligopticon is a fragile construct that relies on a series of connections and transformations that link the real and its representation. Take, for example, the organisation of school or university timetables.<sup>35</sup> Rooms, lecturers, students and hours of the day are transformed into grids and cells on a sheet of paper so that an administrator (or nowadays a computer program) can seamlessly organise the movement of people and facilitate learning. The entire goings on of the institution are rendered visible to the administrator, but only if they are transformed and reduced into marks on a page. This departs from what Latour calls the paranoia and megalomania of the panopticon,<sup>36</sup> where the subject is visible in its entirety. The entire body of students and staff of the university cannot be visible if they are physically present in the administrator’s office,<sup>37</sup> while the inmates of the panoptic prison must always be physically observable by the warden.

Both Foucault and Latour’s works have been applied to tax administration, and indeed some scholars have used the two theories in conjunction.<sup>38</sup> We find the combined approach to be the most useful. To avoid misapplying Foucault’s analysis of discipline by removing it from the very specific historical development Foucault outlines, we first highlight some of the history of taxation. In doing so, we reveal that despite operating in very different contexts, taxation and punishment have several distinct parallels. We therefore begin, as Foucault does in *Discipline & Punish*, by comparing two scenarios, one historical and one modern, in order to highlight changes in the administration of taxation and how power has been exercised over time. First, we have a passage from the Palermo Stone, an Ancient Egyptian artefact, describing the ‘following of Horus’:

<sup>33</sup> Ibid 196.

<sup>34</sup> Latour (n 7) 181.

<sup>35</sup> Latour, Hermant and Reed (n 7).

<sup>36</sup> Latour (n 7) 181

<sup>37</sup> Latour, Hermant and Reed (n 7).

<sup>38</sup> Boll (n 13).

The ‘following of Horus’ is most likely to have been a journey taken by the king or his officials at regular intervals for the purpose of tax collection ... It has been suggested that the biennial royal progress allowed the king to exercise his judicial authority, perhaps deciding important legal cases, as well as permitting the detailed assessment and collection of tax revenues ... It provided a regular forum in which the common people could pay homage, both personal and fiscal, to the ruler and his circle.<sup>39</sup>

Tax collection in Ancient Egypt was a public spectacle, not unlike the execution described by Foucault in *Discipline and Punish*.<sup>40</sup> The people came to catch a glimpse of their Pharaoh, and pay the revenue owed to him. Moreover, the tax was collected in the literal sense of the word; taxation was assessed and collected completely externally to the taxpayer, whose only obligation was to pay the tax due on demand.

This stands in stark contrast to the ATO’s stated approach to tax collection:

Our system of self-assessment allows you to assess the amount you must pay or are to be refunded through the lodgement of the relevant return for the reporting period. This applies when you lodge your income tax return ... Even though we accept the return it may still be subject to review at a later stage.<sup>41</sup>

Tax administration has now taken on a far more internal nature: the taxpayer assesses their own tax liability, while the collector is relegated to supervising and reviewing the collection. Fundamental to Foucault’s discussion in *Discipline & Punish*, is his observation of the inversion of the private and public aspects of criminal procedure. Historically, ‘the entire criminal procedure, right up to the sentence, remained secret’,<sup>42</sup> while the sentence itself was necessarily a public spectacle. However, as the hold over the body lessened, the trial and sentencing became public, while the carrying out of the sentence became private.<sup>43</sup> A similar observation may be made in taxation administration. Where historically tax was a very public affair (as exemplified by the following of Horus), assessment is now intrinsically private and performed by the taxpayer, often in the confines of their own home. It is clear, therefore, that

<sup>39</sup> Toby Wilkinson, *Early Dynastic Egypt* (Routledge, 1999) 189.

<sup>40</sup> Foucault, *Discipline & Punish* (n 6) 8.

<sup>41</sup> Australian Taxation Office, *Compliance in Focus 2013-14* (Report, 2013).

<sup>42</sup> Foucault, *Discipline & Punish* (n 6) 35.

<sup>43</sup> Ibid 35.

a transformation in the administration of tax occurred that mirrors the transformation in the penal system.

On its own, this observation is perhaps trite. However, just as Foucault argued that the transformation in the penal system corresponded with a shift in the way power operated on the criminal (or indeed, all citizens), it is argued that power also manifests differently in the self-assessment system compared with historical notions of taxation. Consider Foucault's description of the 'micro-physics of power' in *Discipline & Punish*: 'this power is not exercised simply as an obligation or prohibition on those who 'do not have it'; it invests them, is transmitted by them and through them'.<sup>44</sup>

The power of taxation was invested in the body of the taxpayer, and in doing so the disciplinary power of taxation was born.

#### **IV PANOPTICISM AND OLIGOOPTICISM IN THE TAX SYSTEM**

##### **A *Registration and Returns: Surveillance Through Tax File Number***

According to Foucault, for surveillance to operate effectively as a means of ensuring discipline, it must be grounded in 'a system of permanent registration'.<sup>45</sup> In the Australian taxation system, taxpayers are registered through a TFN,<sup>46</sup> a unique numeric sequence given to an individual<sup>47</sup> that allows them to be identified quickly and efficiently.<sup>48</sup> The TFN helps to create the identity of the taxpayer as discussed above. Though it would be rare for a taxpayer to even be able to readily recite their TFN, the fact that they have one strengthens their identification with the system itself. However, the TFN system also demonstrates Foucault's argument that power is not negative (in the sense of exclusion or absence); rather it produces reality, and the individual belongs to this production.<sup>49</sup> On issuing an individual with a TFN,<sup>50</sup> the Commissioner realises

<sup>44</sup> Ibid 27.

<sup>45</sup> Ibid 196.

<sup>46</sup> *Income Tax Assessment Act 1936* (Cth) pt VA ('ITAA 1936').

<sup>47</sup> Ibid s 202A.

<sup>48</sup> Ibid s 202.

<sup>49</sup> Foucault, *Discipline & Punish* (n 6) 194.

<sup>50</sup> ITAA 1936 (n 46) s 202BA.

the relationship between the individual and a simple number sequence. The taxpayer *becomes* their TFN.

Conversely, the TFN system might also be understood through Latour's theory. The reduction from individual taxpayer to TFN is similar to the use of student ID numbers in producing timetables, or a driver's license being used as creation and proof of identity.<sup>51</sup> This is crucial because, just as the school administrator cannot actually control whether the lecturer will arrive at their assigned room on time, the ATO cannot exercise the same physical control over the body as the warden can over the prisoner.<sup>52</sup> The ability of the ATO to create the taxpayer identity through the TFN is thus very important. Further, in some ways this form of registration is more powerful than mere bodily control, as the TFN system allows the ATO to easily monitor individuals as they transition through different occupations and forms of income, and even follow them as they move overseas or have no income for a period.<sup>53</sup> The taxpayer is therefore in a state of permanent registration, at all times identifiable by the ATO. It is therefore already apparent that Australian tax administration is both panoptic and oligoptic. On the one hand, the system of permanent registration is fundamental to Foucault's characterisation of the Panopticon as 'a system of individualising and permanent documentation';<sup>54</sup> like the offender, the taxpayer becomes an individual to know, and is the object of possible knowledge.<sup>55</sup> On the other hand, the TFN renders taxpayers visible to an ATO agent from the comfort of their office, without the taxpayer being physically visible.

Further, it is worth exploring Foucault's distinction between the offender (the body to whom the facts of the offence are attributed) and the delinquent (the object of biographical investigation, of which the offence is but one part).<sup>56</sup> The TFN helps the ATO to establish the biography of the taxpayer. It becomes possible to trace the individual's history, to detect

<sup>51</sup> Latour, Hermant and Reed (n 7) panel 13.

<sup>52</sup> Departure Prohibition Orders are a limited exception here.

<sup>53</sup> See, eg, *Data-matching Program (Assistance and Tax) Act 1990* (Cth).

<sup>54</sup> Foucault, *Discipline & Punish* (n 6) 250.

<sup>55</sup> Ibid 251.

<sup>56</sup> Ibid 252.

anomalies in returns, to see career and even lifestyle changes. To paraphrase Foucault, ‘it establishes the [taxpayer] as existing before the [return] and even outside it’.<sup>57</sup>

### B *The All-Seeing Eye: Audit Powers of the ATO*

Of course, registration is but a minor part in Foucault’s overall consideration of panopticism. The true power of the Panopticon lies in the complete visibility of the subject, in the watcher’s ability to observe anyone at any time.<sup>58</sup> To some extent, the Australian taxation system achieves this through tax returns, which are arguably administrative cells in which the taxpayer is ‘alone, perfectly individualised’ and in which their tax affairs are ‘constantly visible’,<sup>59</sup> in the sense that the ATO can, at any time, choose to access and examine the file of a particular individual.<sup>60</sup> Whait argues that the ATO’s practices of market segmentation and risk analysis based on taxpayer occupation are further examples of defined spaces of observation.<sup>61</sup> The key to this observation, and panopticism, is surveillance. The ATO has a number of methods for watching taxpayers. Whait focussed his discussion on risk management techniques, especially data gathering procedures.<sup>62</sup> Advances in Information Technologies and increased use of electronic lodgement of tax returns has made data-matching an increasingly powerful method of detecting tax avoidance.

To these methods, we also add discussion of the ATO’s investigative and auditing powers. These grant the Commissioner broad observation abilities. Section 263 of the *Income Tax Assessment Act 1936* (Cth) states that the Commissioner, or an authorised officer, ‘shall at all times have full and free access to all buildings, places, books, documents and other papers’.<sup>63</sup>

<sup>57</sup> Ibid.

<sup>58</sup> Ibid 200.

<sup>59</sup> Ibid. See also Clare O’Farrell, *Michel Foucault* (Sage Publications, 2005); Anne Schwan and Stephen Shapiro, *How to Read Foucault’s Discipline and Punish* (Pluto Press, 2011).

<sup>60</sup> While the ATO can ordinarily only audit and amend taxpayers’ returns for up to two to four years from the date of assessment: *ITAA 1936* (n 46) s 170(1). If the Commissioner is of the opinion that the taxpayer engaged in fraud or evasion, these time limits do not apply. Thus, the individual is always visible; even their past cannot be hidden from the gaze of the ATO.

<sup>61</sup> Whait (n 13)149.

<sup>62</sup> Ibid.

<sup>63</sup> *ITAA 1936* (n 46) s 263(1) (emphasis added).

Essentially, the ATO has the power to observe any taxpayer (or non-taxpayer, in the case of tax avoidance) at any time.

The powers under s 263 were spectacularly and dramatically demonstrated in 1988, when thirty-seven officers, including a locksmith, raided Citibank premises in search of documents related to an alleged tax avoidance scheme.<sup>64</sup> While the legal proceedings that followed concerned whether legal professional privilege could apply to some documents, the actual use of the power was never in dispute.<sup>65</sup> Even more crucially, however, s 263 does not require the officer to know precisely what documents they are looking for, allowing the ATO to engage in fishing expeditions in a search for any evidence of non-compliance.<sup>66</sup> This is a broader power than even a police search warrant, which must at least describe the kind of evidence sought.<sup>67</sup>

At first, these powers are reminiscent of Foucault's sovereign authority, as they are direct and visible. Recent accusations of heavy-handedness by the ATO revealed in the parliamentary inquiry support such a view.<sup>68</sup> However, Boll prefers to explain tax audits as a combination of panopticism and oligopticism.<sup>69</sup> Throughout the process, auditors present an image of holding a 'god's eye' view over the taxpayer; being in a state of permanent registration means that documents and details of the taxpayer's private life are immediately accessible to the auditor. Thus, Boll observed a Danish inspector, 'with her papers scattered over the table in front of us, we can see John's bank statements, the dealt cars, copies of letters, the Inverted Invoices from the auction house and case minutes...provokes the references to Foucault's work'.<sup>70</sup> This desire to present a panoptic image of omniscience and omnipotence was also revealed by the inquiry into the ATO's handling of audit processes. One taxpayer recalled an auditor saying 'I am the sheriff and I am the law', and even when that omniscience was called into question (the taxpayer proved that they did not own a 'tinny boat', contrary to the ATO's view), the auditor

<sup>64</sup> *Deputy Federal Commissioner of Taxation v Citibank Ltd* (1988) 93 FLR 469 ('Deputy FC of T v Citibank Ltd'); Robert O'Connor, 'Commissioner's Access under s263' (1988) 23(5) *Taxation in Australia* 277.

<sup>65</sup> *Deputy FC of T v Citibank* (n 64).

<sup>66</sup> Robert Williams, 'Income Tax – Discipline or Revenue?' (Working Paper No 31, University of Wollongong, 1992).

<sup>67</sup> See, eg, *Police Powers and Responsibilities Act 2000* (Qld) s 156(1)(c).

<sup>68</sup> *Tax Disputes Report* (n 2).

<sup>69</sup> Boll (n 13) 15.

<sup>70</sup> Ibid.

sought to maintain an image of power, claiming that ‘a tinny might be all you have left by the time I am finished with you’.<sup>71</sup>

Against this panoptic view, Boll presents an oligoptic aspect, departing from ‘the majority of Foucauldian-inspired tax studies in that these tend not to show this blind and fragile side of the state’.<sup>72</sup> She makes two core arguments here. First, her observations of the Danish auditors’ meetings show that tax inspectors are not all-seeing, and they must instead narrow their view to clearly identifiable and measurable tax activities (in her study, the broad issue of taxpayers underreporting profits made from selling used cars was narrowed to detecting taxpayers not reporting cars sold at auction houses by studying Inverted Invoices from the auction houses). Second, Boll sees the sturdiness and narrowness of the oligoptic image as a precondition for discipline, as piecing together the individual slices of a taxpayer’s affairs through the audit process allows the tax inspector to step into the ‘central tower’ of the panopticon. While this oligoptic practice can produce robust visions where they are connected, Latour notes that while ‘nothing it seems can threaten the absolutist gaze of panoptica...the tiniest bug can blind oligoptica’.<sup>73</sup> In other words, if the auditor’s vision is wrong, their ability to discipline may be compromised.

### C *Self-Assessment of Tax: The Victory of Panopticism*

Bentham’s Panopticon was a piece of architectural and political ingenuity, and its mechanism for surveillance promised to reform morals, preserve health and invigorate industry.<sup>74</sup> However, its most revolutionary feature was that the observer could not himself be observed,<sup>75</sup> and the effect this had on the subject,<sup>76</sup> be that prisoner, student, worker or, for present discussion, taxpayer. The prisoner in their cell, at all times visible, could never see the watcher,

<sup>71</sup> Khadem (n 2).

<sup>72</sup> Boll (n 13) 16.

<sup>73</sup> Latour (n 7) 181.

<sup>74</sup> Bentham and Bozovic (n 26).

<sup>75</sup> Ibid.

<sup>76</sup> Foucault, *Discipline & Punish* (n 6) 201.

could never know if or when they were being watched.<sup>77</sup> According to Foucault, this causes the prisoner to watch themselves:

He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection.<sup>78</sup>

By internalising the surveillance, the subject regulates themselves, and power functions automatically.<sup>79</sup>

The operation of self-surveillance and self-regulation is exemplified perfectly in Australia's self-assessment system of taxation. As discussed at the beginning of this article, taxpayers calculate their tax obligations themselves, with very little input from the ATO. To the historical model of power, of the imposition of the sovereign (and tax), such a system is unfathomable. However, with the rise of disciplinary power, the creation of the taxpayer identity, and the ATO's intimidating auditing powers, the self-assessment system is not only possible, but it (generally) operates effectively. Foucault's theory of panopticism explains why this is the case. Like the prisoner in the Panopticon, who is aware that they can be observed at any time, but has no way of knowing if they are actually being observed; the taxpayer is aware that they could be audited for any tax year, but do not know if they will be audited. Thus, prisoner and taxpayer act as if they are being watched at all times; 'the surveillance is permanent in its effects, even if it is discontinuous in its action'.<sup>80</sup> The victory of panopticism is therefore its efficiency. This is especially so in the taxation system, where the sheer volume of returns would make it impossible to audit every taxpayer or calculate their returns for them. In 1984, prior to the introduction of the self-assessment system in Australia, the average salary return received about one minute of scrutiny from assessors.<sup>81</sup> As it stands, the ATO audits very few taxpayers, and rarely makes use of the powers afforded to it under section 263. In fact, of over 12 million

<sup>77</sup> Ibid; Bentham and Bozovic (n 26).

<sup>78</sup> Foucault, *Discipline & Punish* (n 6) 202–203.

<sup>79</sup> Ibid 201.

<sup>80</sup> Ibid.

<sup>81</sup> Treasury, Commonwealth of Australia, *Report on Aspects of Income Tax Self Assessment* (Report, August 2004) 2; Michael Dirkis and Brett Bondfield, 'ROSA's Last Gasp: The Final Steps in Self Assessment's 21 Year Journey' (2008) 3(2) *Journal of the Australasian Tax Teachers Association* 202.

taxpayers<sup>82</sup> in Australia, less than 750,000 were audited or reviewed in the 2012-13 financial year, with the substantial majority (~449,000) being simple data-matching reviews.<sup>83</sup> Thus, while in reality the chances of being audited are quite low (about 8 per cent), most taxpayers will comply with their tax obligations, acting as if they were under constant surveillance.

#### **D *Beyond Foucault: Self-Surveillance in Review***

Interestingly, the taxation system goes further than even Foucault contemplated by actually relying on the taxpayers' self-monitoring in the event of a review or objection. This is a significant development of Foucault's ideas, and an important extension to Whait's discussion. Of course, Foucault never had to consider such an eventuality, as the penal system is quite different from administrative law. Further, Foucault did not consider that the prisoner might have a right of recourse against the warden.<sup>84</sup> Instead, the only guarantee against the prison degenerating into tyranny was ever expanding spheres of surveillance; just as the prisoner is monitored by the warden, the warden may himself be the subject of surveillance through unexpected inspections.<sup>85</sup> In administrative law, however, the taxpayer does not have to rely on external inspectors to protect them: they themselves have rights of review, provided by *Taxation Administration Act 1953* (Cth).<sup>86</sup> To some degree, then, the see/being seen dyad that is so crucial to the Panopticon is destroyed; the taxpayer can render the ATO visible.

However, even when the taxpayer seeks administrative review and brings the ATO into their gaze, the system forces the taxpayer to self-observe. As previewed above, sections 14ZZK and 14ZZO of the *Taxation Administration Act 1953* (Cth) place the onus of proof on the taxpayer in a review of or appeal against the Commissioner's decision. This is, in some ways, a logical requirement: if anyone is to have proof of an aspect of the dispute, it will be the taxpayer. However, to put this in a Foucauldian example, this would be like the warden saying to the prisoner 'I wasn't watching, prove to me you were not misbehaving'.

<sup>82</sup> Both individuals and legal entities.

<sup>83</sup> Australian Taxation Office, Commonwealth of Australia, *How We Check Compliance* (2013) <<https://www.ato.gov.au/General/How-we-check-compliance/>>.

<sup>84</sup> Foucault, *Discipline & Punish* (n 6) 207.

<sup>85</sup> Ibid.

<sup>86</sup> *Taxation Administration Act 1953* (Cth) pt IVC.

In *Discipline & Punish*, Foucault describes how panopticism was used in education to monitor students. While students regulated their own behaviour under surveillance, it was the role of the teacher to record the student's aptitude and progress. The disciplinary system in the school not only 'guaranteed the movement of knowledge from the teacher to the pupil, but it extracted from the pupil a knowledge destined and reserved for the teacher'.<sup>87</sup> In the tax system, this is transformed. The taxpayer is no longer simply the object of knowledge; now the taxpayer must keep records of that knowledge. The knowledge of one's tax affairs, normally destined and reserved for the ATO, now becomes something the taxpayer must record themselves. They monitor themselves, not only because the ATO *might* be watching, but because the ATO *might not* have been watching at the time.

## V REFORM: TOWARDS A COMPLETE AND AUSTERE INSTITUTION

The above account of the ATO's power creates the impression that tax administration is complete. In reality, such an image is under attack from all angles. On the one hand, while taxpayers are permanently visible through registration and TFNs, the ATO will not be able to observe (by audit) every subject all the time. While IT advances through data-matching and the dissociation of the see/be seen dyad helps to some degree by making the subject act as if they are being watched even when they are not, there will always be those who are willing to gamble on not being seen. Indeed, thousands of cases of tax evasion and fraud are uncovered each year, while many more likely go undetected. On the other hand, the recent Parliamentary Report revealed serious problems with the ATO's current practice, highlighting instances where tax officers acted in a heavy-handed manner, or where their panoptic view of a taxpayer's affairs was wrong or incomplete.

These observations demonstrate the need for reform of ATO practice. In this section, we draw on the theories presented above to suggest possible avenues for reform. It is important to note two constraints at the outset, however. First, as our discussion has shown Foucault's model of disciplinary power is well suited to tax administration; it has the benefit of being both efficient and generally accepted. The problem, then, has been in its application. In exploring reform options, we are therefore careful to avoid undermining the panoptic ideal; in our view it is crucial that the self-governance of taxpayers be preserved where possible. Accordingly, we

---

<sup>87</sup> Foucault, *Discipline & Punish* (n 6) 186.

propose changes that will address current concerns about the ATO's behaviour but that do not weaken its surveillance powers or public perceptions of those powers.

Second, we develop these reform options within the constraints of the current legal system. The government has already rejected recommendations of legislative change,<sup>88</sup> so we instead seek administrative and cultural reform within the ATO itself. Additionally, it is useful to note Foucault's observation that mercantilism in the seventeenth century was blocked because 'the instruments of mercantilism used were laws, decrees and regulations: that is to say, the traditional weapons of sovereignty. The objective was sovereign's might...which by its very nature stifled them'.<sup>89</sup> Thus, even if legislative reform had not been taken off the table, it may be an undesirable avenue.

In light of these constraints, we pursue non-legislative reform that will maintain or increase the perception amongst taxpayers of the ATO as all-knowing (thus encouraging compliance), but that protects taxpayers against zealous behaviour on the part of the ATO. The solution, as we see it, lies in the theories of Foucault and Latour. Our discussion above has demonstrated how tax administration can be interpreted as both panoptic and oligoptic. The problem has been that, in many cases, the ATO has only seen itself as panoptic, as omniscient and all-powerful. In doing so it has, to paraphrase Latour, bought into the megalomania of the Panopticon.<sup>90</sup> To address this issue, the ATO must, internally, recognise that it is not as all-knowing as it would like to believe, and that instead its practices might be better understood as oligoptic rather than panoptic, especially during the audit process. At the same time, it must encourage taxpayers to see the ATO as panoptic, in order to increase self-regulation and voluntary compliance. Accordingly, we call for reform to ATO practices that are panoptic when dealing with taxpayers broadly, and oligoptic when dealing with taxpayers at an individual level (i.e. in the audit process). Doing so will maximise the benefits of Foucault's disciplinary theory, whilst avoiding or minimising current behaviours in the ATO that are problematic.

In terms of the ATO acting in a way that, internally, acknowledges that it is not all-knowing, there is little that we can suggest beyond pointing out the theoretical insights of Latour and

<sup>88</sup> *Tax Disputes Report* (n 2).

<sup>89</sup> Foucault, *Discipline & Punish* (n 6) 98.

<sup>90</sup> Latour (n 7) 181.

Boll. Additionally, it was noted in the Parliamentary Report that ‘the ATO is undergoing a process of cultural change’,<sup>91</sup> and one tax law practitioner giving evidence to the report noted that ‘if the current commissioner stays for a long tenure, then the culture will change over time’.<sup>92</sup> Accordingly, the rest of our focus in this section is dedicated to the former suggestion for reform: increasing the impression of panopticism in the minds of Australian taxpayers.

Here, there are two possible solutions. The first is to increase the ATO’s actual surveillance; to increase the number of auditors, and to make greater use of information gathering powers. The reasoning behind such a solution is that the ATO will be able to monitor greater numbers of taxpayers, and therefore increase its chances of detecting tax evasion. However, this solution is unsatisfactory for a number of reasons. Firstly, recent political debate on government debt has emphasised significant reductions to government spending, with public service squarely in the firing line.<sup>93</sup> The ATO in particular has been the target of personnel cuts, with 2,100 officers set to lose their jobs.<sup>94</sup> Therefore, there is no scope in the current economic climate to increase the ATO staff by the amount that would be required to give effect to this proposal (or at all). Secondly, the integrity and ability of some ATO officers has been called into question by the Parliamentary Report;<sup>95</sup> indeed, the ATO’s reinvention process is aimed at addressing improper conduct.<sup>96</sup> Thus, increasing the ATO’s physical presence may not necessarily overcome the problem, and may in fact worsen the situation. Finally, the ATO may be unwilling to exercise its power to the full extent. This is understandable, as excessive use of these extreme powers may be perceived as over-the-top or heavy-handed, and breed further distrust in an already unpopular institution. Indeed, the adoption of a co-operative compliance model was designed

<sup>91</sup> *Tax Disputes Report* (n 2) 79.

<sup>92</sup> *Ibid.*

<sup>93</sup> See, eg, Noel Towell and Phillip Thomson, ‘ATO Braces for More Work, Less Money’, *Sydney Morning Herald* (online, 14 May 2014) <<http://www.smh.com.au/national/public-service/ato-braces-for-more-work-less-money-20140514-zrbz9.html>>.

<sup>94</sup> Australian Broadcasting Commission, ‘More Than 2,500 Jobs Axed at ATO, Foreign Affairs Department’, *ABC News* (online, 14 May 2014) <<http://www.abc.net.au/news/2014-05-14/dfat-ato-jobs-cut/5453146>>.

<sup>95</sup> *Tax Disputes Report* (n 2). See also Greg Hoy, “‘Draconian’ ATO Accused of Bullying Taxpayers”, *ABC News* (online, 1 November 2012) <<http://www.abc.net.au/news/2012-11-01/draconian-ato-accused-of-bullying-taxpayers/4344720>>; Chris Seage, ‘What Are Your Rights With the Taxman? Call to Clean up ATO “Disgrace”’, *Crikey* (online, 19 July 2013) <[http://www.crikey.com.au/2013/07/19/what-are-your-rights-with-the-taxman-call-to-clean-up-ato-disgrace/?wpmp\\_switcher=mobile](http://www.crikey.com.au/2013/07/19/what-are-your-rights-with-the-taxman-call-to-clean-up-ato-disgrace/?wpmp_switcher=mobile)>.

<sup>96</sup> Jordan (n 1); Leeper (n 1).

to move away from such force.<sup>97</sup> Thus, while we recognise that increasing the use of the ATO's surveillance powers should, in theory, improve compliance, we do not consider this a viable avenue for reform.

The second reform option draws more heavily on Foucault's theory than the first, seeking to maximise the effects of panopticism and self-monitoring. Essentially, the idea is to increase the *perceived* surveillance, and to make taxpayers think they are more likely to be caught if they do not comply with their obligations. To put this in Foucauldian terms, taxpayers need to re-see the dark tower of the Panopticon;<sup>98</sup> to be reminded that they are being watched. Thus, taxpayers will be encouraged self-monitor without the need to actually increase the ATO's actual capacity to observe. Such reform is not without risk: Foucault noted that increased visibility of the state's power can lead to increased resistance from subjects. Thus, there is a fine balance to be struck between highlighting the ATO's powers to increase compliance, and overstating these powers such that taxpayers resist them.

The question remains, however, as to how this balance could be achieved in practice. The answer may lie in social psychology. The application of psychological theory to Foucault's work is not a surprising one; Foucault's analytics of ethnology and genealogy are social sciences, into which psychology also fits.<sup>99</sup> Thus, we use psychology as a lens through which to examine surveillance and discipline in practice, allowing us to bridge the gap between Foucault's theory and applying it in a modern setting. Further, although the law has historically held a disdain for experimental psychology,<sup>100</sup> there is an emerging trend for policymakers to consider the insights offered by psychological research.<sup>101</sup> Psychological science therefore has much to offer in guiding reform.

Within the field of psychology, the phenomenon known as the 'availability heuristic' may be particularly relevant to our current endeavours. The availability heuristic suggests that people

<sup>97</sup> Whait (n 13).

<sup>98</sup> Foucault, *Discipline & Punish* (n 6) 207.

<sup>99</sup> Koopman and Matza (n 9) 830.

<sup>100</sup> Hugo Münsterberg, *On the Witness Stand: Essays on Psychology and Crime* (Doubleday, Page & Co, 1908).

<sup>101</sup> See, eg, Gerd Gigerenzer and Christoph Engel (eds), *Heuristics and the Law* (MIT Press, 2007).

tend to overestimate the likelihood of an event occurring if it is recalled more easily.<sup>102</sup> Thus, if an event is distinctive or easily remembered, people will think that event is more likely to occur than it does in reality. The classic example used is a shark attack. While a person is far more likely to have a motor vehicle accident on the way to the beach than they are to be attacked by a shark, the ease with which the details of shark attacks are recalled causes people to vastly overestimate their chances of being attacked. Similarly, a plane crash is a distinctive event, and is more readily recalled than the millions of flights that arrive safely at their destinations. Thus, when people think about flying, it is cognitively much easier to recall examples of airline fatalities than innocuous safe flights, which in turn leads people to overestimate the chances of a plane crashing and can create a fear of flying.

In theory, the availability heuristic could apply to taxation as well. As with plane crashes or shark attacks, the odds of a taxpayer being audited are quite slim. An ATO audit is therefore a potentially distinctive event. By harnessing the power of availability heuristics, it should therefore be possible to cause people to overestimate their chances of being audited. Then, returning to Foucault, this increased perception of being audited (or, watched) would lead to greater self-monitoring and tax compliance. Indeed, there is already some evidence that it can work: Whait describes how public seminars to the taxi industry dramatically improved compliance in that sector.<sup>103</sup>

These findings may be utilised more broadly in the context of ATO compliance activity. If greater awareness of an event contributes to greater perceived risk of that event occurring, it should be possible to influence behaviour by increasing media attention to an issue. The first, if unreliable avenue, is to encourage media coverage of the ATO successfully discovering instances of tax evasion; doing so is likely to increase taxpayers' perceived chances of being detected (and in turn increase compliance). Currently, the media generally only focuses on

<sup>102</sup> See, eg, Kathleen Galotti, *Cognitive Psychology: In and Out of the Laboratory* (Thomson Wadsworth, 4<sup>th</sup> ed, 2008) 467; Norbert Schwarz et al, 'Ease of Retrieval as Information: Another Look at the Availability Heuristic' (1991) 61(2) *Journal of Personality and Social Psychology* 195; Amos Tversky and Daniel Kahneman, 'Availability: A Heuristic for Judging Frequency and Probability' (1973) 5(2) *Cognitive Psychology* 207; Graham Vaughan and Michael Hogg, *Social Psychology* (Pearson Australia, 6<sup>th</sup> ed, 2011) 77.

<sup>103</sup> Whait (n 13) 150.

cases of huge corporate evasion, or ‘Celebrity Tax Cheats’.<sup>104</sup> This creates the impression that only the rich and famous will be caught by the ATO, and may even cause everyday taxpayers to underestimate their chances of being detected if they seek to avoid their obligations. Thus, the availability heuristic would lead taxpayers to overestimate the chances that they too would be caught by the ATO if they do not pay their taxes. This would be a highly cost-effective method of increasing compliance, as any expense would largely be borne by the media industry. Of course, such an approach is risky, as it relies on the media covering mundane issues of tax evasion. In an era where the media increasingly exists to entertain and make profit, there may be little incentive to engage with such stories. Accordingly, other options must be considered.

A slightly more involved technique would be to engage in media campaigns around the end of the financial year, highlighting the ATO’s information gathering powers, penalties for non-compliance, and emphasising recent ATO successes in prosecuting tax evasion. To some extent, the ATO already engages in this activity through online media releases. However, these are often highly technical, and do not usually reach out to most citizens. We therefore propose a more direct use of mainstream and social media, for example through advertising. This would not only facilitate the availability heuristics described above, but may also actively change taxpayer behaviour. Again, social psychology offers some insight into the potential effectiveness of such a campaign. Research shows that media campaigns are more likely to change behaviour if they promote episodic or one-off behaviours (rather than ongoing behaviour), are time limited, are not competing with product marketing, and if the behaviour is complemented by available services or policies.<sup>105</sup> A compliance campaign conducted by the ATO would meet many of these criteria. Completing tax returns correctly is generally an episodic behaviour (especially in cases where the temptation is to over-claim deductions or under-report income), would be limited to a time period surrounding the end of financial year, and would be complemented by the harsh penalties for failure to comply. This kind of technique was recently implemented in the UK, which conducted an Orwellian advertising campaign,

<sup>104</sup> See, eg, Elizabeth Black, ‘In Honor of Tax Day: The 12 Sexiest Celebrity Tax Evaders Ever!’, *VH1+ Celebrity* (online, 12 April 2012) <<http://www.vh1.com/celebrity/2012-04-12/in-honor-of-tax-day-the-12-sexiest-celebrity-tax-evaders-ever/>>.

<sup>105</sup> Melanie Wakefield, Barbara Loken and Robert C Hornik, ‘Use of Mass Media Campaigns to Change Health Behaviour’ (2010) 376 *Lancet* 1261.

complete with ‘watching eye’ graphics and slogans such as ‘New technology, access to data and extra staff means we can find tax dodgers easier than ever before’.<sup>106</sup> As we have highlighted above, this practice may cause its own issues, as it may lead taxpayers to resist the ATO’s powers. Accordingly, it would be important to learn lessons from the UK’s experience with its campaign.

A final option for increasing the perceived level of surveillance would be to create an ATO-centred reality television program, in the same vein as shows such as *Border Security*,<sup>107</sup> which documents administrative bodies in action. Admittedly, detecting tax evasion does not hold the same viewing appeal as busting international drug syndicates, and accused tax frauds may be unwilling to have the details of their tax affairs broadcast on national television. However, as the *Citibank Case* demonstrates, the ATO is more than capable of engaging in the dramatic raids conducted by other government agencies, and *Border Security* seemingly has little trouble finding subjects willing to be filmed despite its equally sensitive subject matter. Additionally, Boll’s ethnographic study of tax investigations in the Danish used car industry would be a prime candidate for an episode, highlighting the ‘behind the scenes’ process from identification of an issue to successfully tracking down tax evaders.<sup>108</sup> Therefore, it is not outside the realms of possibility for a tax-based reality show to take off.

In his book analysing the public relations industry, Bob Burton considers the effectiveness of *Border Security*, describing both its commercial success, and the public image benefits for the Department of Immigration and Multicultural and Indigenous Affairs.<sup>109</sup> Part of the success of the show was to allow the viewing public to see Australian Customs officers in an enforcement role, something that most members of the public would rarely encounter in ordinary life.<sup>110</sup> The

<sup>106</sup> Her Majesty’s Revenue and Customs, ‘HMRC is Closing the Net on Tax Dodgers’ (Web Page) <<https://www.gov.uk/sortmytax>>.

<sup>107</sup> *Border Security: Australia's Front Line* is an Australian factual television program on commercial television depicting the enforcement work of the Australian Customs and Border Protection, the Australian Quarantine and Inspection Service, and the Department of Immigration and Citizenship.

<sup>108</sup> Careful editing would ignore the part where the Danish tax office ultimately concluded that this particular investigation was not cost-effective: see Boll (n 13).

<sup>109</sup> Bob Burton, *Inside Spin: The Dark Underbelly of the PR Industry* (Allen & Unwin, 2007) 194.

<sup>110</sup> Australian Customs Service, Australian Government, *Annual Report 2004-05* (Report, 4 October 2005) 121.

show provides example after example of Customs officers operating effectively; successfully detecting drug traffickers, illegal immigrants and other instances of non-compliance.

However, Burton is critical of the Department's veto power in its contract with Channel 7, arguing that the post-production editing allows the government to remove any footage of officers acting improperly, making mistakes, or being the subject of unfavourable judicial review.<sup>111</sup> Additionally, the show does not show the inevitable cases that officers fail to detect; the drug traffickers that slip through the cracks. For Burton, approaching the issue with a view to exposing an out-of-control Public Relations industry, this is a real problem, as it creates an inflated illusion of effectiveness of the Department and Customs Service.<sup>112</sup> In a discussion of government accountability and transparency, Burton is certainly correct in raising these concerns. However, from the perspective of Foucault's theory, and with a view to increasing compliance through increased perceptions of surveillance, Burton's concerns serve to reinforce the workability of this solution.

There are also, of course, broader ethical questions about surveillance and manipulating citizen perceptions and attitudes. One of the key failings in Foucault's work is that it does not account for individual rights or privacy. To some extent, this is understandable; in the context of criminal justice, prisoners' rights are a notoriously low priority. Foucault presents his theory of surveillance simply as a description of what is, rather than what ought to be. When discussion turns to the surveillance of ordinary civilians, of taxpayers, there is a greater expectation that individual rights will be protected.

As discussed earlier, taxpayers have some recourse against maladministration through the administrative review process. However, as was pointed out, even this protection has been subverted by the disciplinary power of surveillance. Furthermore, there is some criticism that the current legislation strikes the wrong balance between the ATO's need to gather information and citizen's rights. It is argued that taxpayers are completely vulnerable to arbitrary assessments and that they should not be put in a position where they have to seek review of a decision just to protect their rights, especially when the cost of challenging an assessment can

<sup>111</sup> Burton (n 109) 195–196.

<sup>112</sup> Ibid.

be prohibitive. Why, if the ATO itself admits that it needs to seriously reconsider its practices, should citizens trust it with greater surveillance power, perceived or actual?

We contend that increasing the perceived power of the ATO will have the result of increasing compliance. An increase in compliance would result in a reduction for the need for the ATO to exercise their powers. It would also allow the ATO to allocate further resources to their auditing processes thus minimising the risk of making mistakes, and those mistakes being visible to the public. With less exposure of vulnerability, the perceived effectiveness of the ATO is increased thereby creating even greater compliance. We can view this as an actualisation of the hypothetical, idealised world of Foucault's theory, where the cycle eventually results in one hundred per cent compliance.

## VI CONCLUSIONS

The ATO's recent focus on reform and reinvention opens discussion into how the Australian taxation system can be administered more effectively. Such a discussion takes place in the context of a stated need to increase compliance, but without the resources to satisfy the cost of doing so. This article has built on Whait's recent work<sup>113</sup> and approached the question of reform from a novel perspective, considering how Foucault's theories of surveillance and discipline might sit alongside Latour's oligopticon to inform reform options. In order to do so, we first dealt with the preliminary issue of understanding how the taxpayer is rendered visible by the ATO. To highlight the parallels between *Discipline and Punish* and the Australian tax system, the article then described the way that differs to the way tax is administered in modern society, mapped closely to Foucault's observations about changes to punishment and the penal system over time.

Having demonstrated the disciplinary power of taxation in the current system, the article then turned to Foucault's ideas regarding surveillance and panopticism, extending Whait's discussion of Foucault in the ATO's co-operative compliance model. In particular, we noted that Tax File Numbers place taxpayers in a state of permanent, individual and biographical registration, and also contribute to their identity as taxpayer, and that the ATO's considerable powers of observation under the *Income Tax Assessment Act 1936* (Cth), are analogous to

---

<sup>113</sup> Whait (n 13).

surveillance in the Panopticon. Crucially, section 263 gives the Commissioner and his officers the ability to observe taxpayers at any time. It was argued that this causes taxpayers to watch themselves, and is thus a prime example of panopticism at work. Alongside these insights, we demonstrated how Latour's oligopticon offers an alternate interpretation of these powers, and argued that the ATO's practice is best understood with reference to both theories. We also observed that Australia's taxation system goes even further than Foucault thought that panopticism would operate. By placing the onus of proof on the taxpayer in a review, the taxpayer watches himself and keeps records, not only because the ATO might be watching, but in case the ATO might not be watching and the taxpayer will have the burden of proving their case.

Using these observations, we explored possible solutions to the ATO's issues with detecting non-compliance and the counter-issue that the ATO has recently been accused of zealous and heavy-handed practice. We proposed that these problems could be addressed by changing the culture of the ATO, such that they encourage perceptions that the ATO is all-knowing when dealing with taxpayers at large, but acknowledge that they are in fact more oligoptic when dealing with individual taxpayers in the audit process. Focussing on the ATO's panoptic image, we dismissed the possibility of increasing actual surveillance by hiring extra audit officers as inefficient, especially in light of the current economic climate. Instead, we relied heavily on the theories behind panopticism to propose that compliance could be increased by raising taxpayers' perceptions of surveillance. We argue that any of the reform options discussed would be likely to lead taxpayers to overestimate the ATO's ability to detect non-compliance, which would in turn lead to greater taxpayer compliance. While we recognise that there are valid ethical arguments against these reforms, and that citizens quite rightly have little reason to trust a Tax Office in damage control, we contend that the increased compliance would allow the ATO to use its limited resources more effectively, thus fostering community trust in the taxation system. In describing the completeness of disciplinary power in society, Foucault asked: 'Is it surprising that prisons resemble factories, schools, barracks, hospitals ...?'<sup>114</sup> As we have observed, one might easily add the taxation system to this list. Taxation in Australia is a truly disciplinary mechanism, so one would do well to pay their taxes, lest the ATO be watching.

---

<sup>114</sup> Foucault, *Discipline & Punish* (n 6) 228.