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# **Tax practitioners and tax avoidance: gaming through authorities, cultures and markets**

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## Abstract

Tax practitioners, otherwise referred to as tax agents, tax preparers, tax accountants and tax lawyers, play multiple roles in our tax and financial planning systems. They are gatekeepers to the tax system for those who know they need to engage but want someone else to take care of it for them. Empirical work collected from taxpayers and practitioners supports the idea that practitioners, like other professionals, are responsive to influences from many sources - clients, tax authorities, professional associations, governments, international bodies, and the organisations and cultures in which they work. Tax practitioners operate with imperatives that are not necessarily compatible: to attract clients, meet taxpayer expectations, meet performance standards set by firm partners, build reputation, abide by professional obligations and any associated regulatory standards, and operate in accordance with the rules set down by the tax authority. Tax practitioners have always been considered important as intermediaries of transactions between taxpayers and tax officials. In recent decades their role has become more complicated with recognition that they, not taxpayers hold the special knowledge required to facilitate tax avoidance, or what Lipatov (2012) calls sophisticated as opposed to simple tax evasion.

To understand how to curb the growing acceptance of tax avoidance and the threat it poses to tax systems, the tax practitioner – taxpayer relationship must be understood within a broader social and cultural context. This chapter proposes that the tax practitioner – taxpayer relationship is a micro social process to deliver tax compliance. Three models of the tax practitioner and taxpayer experience are reviewed and research on the role of the tax practitioner is discussed within these frameworks. Finally, new data are presented on how tax practitioners operate within the tax preparation market, with full knowledge of

oversight by the tax authority. The findings are based on a survey of over 1,000 practitioners preparing and lodging returns for clients with the Australian Taxation Office (Wurth 2013). Drawing on lessons learnt from these three models, an integrated model is provided to broaden the landscape against which we view and study developments in the tax avoidance industry.

## Keywords

tax avoidance, tax practitioners, tax compliance, regulation, tax system

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*WORKING PAPER***Tax practitioners and tax avoidance: gaming through authorities, cultures and markets****Elea Wurth and Valerie Braithwaite\*, School of Regulation and Global Governance (RegNet), Australian National University**

Tax practitioners play multiple roles in our tax and financial planning systems (Devos 2012; Klepper, Mazur and Nagin 1991). They are gatekeepers to the tax system for those who want someone else to take care of their tax affairs. Tax practitioners function as enforcers, trying to dissuade clients from actions that will likely create problems with tax authorities, either through protracted conflict or penalties. Tax practitioners also adopt the role of enablers (or exploiters), identifying financial planning arrangements that minimise tax or avoid it altogether. An established tax practitioner will have had exposure to all of these roles, either as observer or participant (Marshall, Smith and Armstrong 2010; Niemiowski and Wearing 2003; Tan 1999).

This working paper proposes that the tax practitioner–taxpayer relationship is a micro social process to deliver tax compliance (or semblance thereof) as outlined by Tan (1999, 2014) in her tax practitioner-client role model. This relationship, however, is not insulated from broader social forces. These social forces are represented in the integrated model presented later in Figure 3 as cyclical markets in tax avoidance, the tax cultures with which the practitioner has contact, and governance by local and global authorities.

In order to bring these elements together, three models of the tax practitioner and taxpayer experience are reviewed and research on the role of the tax practitioner is discussed within these frameworks. The first two models have been developed and discussed elsewhere and will be reviewed only briefly for purposes of showing the cultural, legal and market influences on tax practitioners. First, the Wheel of Social Alignments summarises the drivers of compliance and conceives of tax practitioners as alternative authorities to tax officials (Braithwaite and Wenzel 2008; Braithwaite 2009a). Cyclical markets in vice place tax practitioners within global and local markets where they must compete for their share of business, attracting sufficient clients for a sustainable practice, or meeting employer performance benchmarks (J. Braithwaite 2005). Finally, new data are presented on how tax practitioners operate within the tax preparation market, with full knowledge of oversight by the tax authority. The findings are based on a survey of over 1,000 practitioners preparing and lodging returns for clients with the Australian Taxation Office (Wurth 2013). Drawing on

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\* The original data presented in this paper was collected and analysed as part of Dr Elea Wurth's PhD thesis, undertaken at the School of Regulation and Global Governance (RegNet) and supported by the Australian Taxation Office Commissioner's scholarship.

lessons learnt from these three models, an integrated model is provided to broaden the landscape against which we view and study developments in the tax avoidance industry.

### **The embedding of tax practice**

Empirical work collected from taxpayers and practitioners supports the idea that practitioners, like other professionals, are responsive to influences from many sources - clients, tax authorities, professional associations, governments, international bodies, and the organisations and cultures in which they work (Ayres, Jackson and Hite 1989; J. Braithwaite 2005; Braithwaite and Wenzel 2008; Cruz, Shafer and Strawser 2000; Gracia and Oats 2012; Hite and McGill 1992; Picciotto 2007; Roberts 1998; Shafer and Simmons 2011; Tan 2011; Yetmar and Eastman 2000). Tax practitioners operate with imperatives that are not necessarily compatible: to attract clients, meet taxpayer expectations, meet performance standards set by firm partners, build reputation, abide by professional obligations and any associated regulatory standards, and operate in accordance with the rules set down by the tax authority (Attwell and Sawyer 2001; Marshall, Armstrong and Smith 1998; Niemiowski and Wearing 2003; Shafer and Simmons 2011; Tan 2011; Walpole and Salter 2014).

A mass of data has accumulated on the types of tax advice given and why it is given. Research on whether tax practitioners or taxpayers drive decisions converges on the conclusion that this is a contextual matter (Roberts 1998; Tan 1999; Devos 2012), but few doubt that tax practitioners can influence outcomes due to their superior knowledge and status in tax matters (Hite and McGill 1992; Jackson and Milliron 1989; Tan 1999; Niemiowski and Wearing 2003; Parnaby 2009). Tan (2011, 2014) explains the variation in advice given and accepted by taxpayers in terms of the tax practitioner-client role model. The services that a tax practitioner offers to a taxpayer are in the form of knowledge and options: That which is provided and accepted is negotiated through iterative exchanges within their relationship. Tax practitioner and client constitute a unique dyad and the decisions made within that dyad are constructed by both of them. This notion is consistent with the Bourdieusian view offered by Oats and Gracia (2012) in their work on negotiating the boundaries of licit and illicit tax conduct. The dyad is held together by trust, technical proficiency and capacity to provide aggressive advice (Tan, Braithwaite and Reinhart 2014).

Generally, the quality of the advice can be summarised in terms of two basic concepts, degree of technical proficiency and degree of aggressiveness (Sakurai and Braithwaite 2003; Tan, Braithwaite and Reinhart 2014). Programs to improve the technical knowledge of tax practitioners as well as taxpayers have evolved out of the body of research on tax practitioners and their clients (Hashimzade 2015; Masken 2014; Niemiowski and Wearing 2003). Curbing aggressiveness has proven more problematic. The body of research on the reasons why aggressive advice is given, and to whom needs to extend beyond individualistic notions of risk taking and be integrated into a theoretical model that reflects the contemporary complex social role of the tax practitioner in revenue systems. Tax practitioners have always been considered important as intermediaries of transactions between

taxpayers and tax officials. In recent decades their role has become more complicated with recognition that they, not taxpayers hold the special knowledge required to facilitate tax avoidance, or what Lipatov (2012) calls sophisticated as opposed to simple tax evasion. That knowledge, however, is not acquired nor acted upon in a social vacuum. Tax practitioners marshal networks of support, for instance, to dispute Lipatov's argument for describing avoidance as evasion.

To understand how to curb the growing acceptance of tax avoidance and the threat it poses to tax systems (Ordover 2010), the tax practitioner–taxpayer relationship must be understood within a broader social and cultural context. As tax practitioners take instructions and give advice to clients, how they use their specialist knowledge is tempered by pressures from multiple sources: governing bodies and tax authorities that make and enforce tax laws and rules; taxpaying communities; other practitioners, professional bodies and workplaces; and the ever changing markets that present opportunities for avoidance (see Gracia and Oats 2012 for a similar view from a Bourdieusian perspective).

### **Competing cultures, competing authorities: the wheel of social alignments**

The Wheel of Social Alignments is a model (see Figure 1) that describes the interactions that take place between taxpayers, tax authorities and significant others, such as tax practitioners, business advisers, lobby groups and other significant players in the tax system, locally and globally. All are active agents in establishing a compliant and cooperative taxpaying culture. This is not to say that everyone in the system will comply or be cooperative. Resistance in the system will always be present, and often is the feedback needed for change and improved functioning (Braithwaite 2009a,b). The Wheel of Social Alignments is not a model of consensus but describes the dialogic process that must take place to establish a base level of cooperation to collect tax effectively and ride out and manage cycles of aggressive tax planning and avoidance.

<INSERT FIGURE 1 ABOUT HERE>

The middle band of the Wheel of Social Alignments represents taxpayers who must engage with the tax system, as individuals, small businesses or large corporate entities. The tax system is represented in the outer band and comprises tax authorities and administrators with their laws, rules, and practices that guide how they collect tax and the demands and constraints they place on taxpayers. Deterrence measures are part of this outer band as are taxpayers' charters. Of particular relevance when thinking of tax avoidance are the policies and directives of parliament and the government of the day, also best represented as part of the outer band.

How taxpayers in the middle band engage with the tax system in the outer band, that is, whether they comply or cooperate with tax and government officials, varies across the population and across time (Braithwaite 2009a, 2009b). The vast literature on tax compliance points to multiple determinants of tax cooperation and compliance that can be summarised in terms of three conceptual levers: benefits,

fairness and moral obligation (Braithwaite and Wenzel 2008; Braithwaite 2009). These three types of levers are represented as segments of the middle band. When all are functioning optimally, tax administrators have the greatest chance of having the system operate efficiently with taxpayers willing and able to pay the tax that they should be paying. In other words, the wheel is primed to move forward.

Taxpayers cooperate more when they see benefits for themselves, or their family, or the collective. Taxpayers make such judgments of benefits adopting any number of different identities from the highly individualised to the highly collectivised (Wenzel 2003). Government policy and performance affects perceptions of benefits. Taxpayers are also more likely to cooperate if the system is fair. Again fairness may be assessed from the perspective of the individual or the group. It may refer to fairness of process (procedural justice in Tyler's (1990) terms; see Murphy 2010) or fairness of outcome (distributive justice as in the question: Are others paying their fair share of tax or am I and people like me paying more than my fair share? See Wenzel 2002, 2003). Finally, the third lever for taxpayer cooperation is moral obligation. Taxpayers are social beings and as such are exposed to a legal sensibility: They have lifelong learning that laws are to be obeyed and adverse consequences are likely to follow from disobeying authority. At the heart of all well-governed societies is respect for law and an internalised sense of moral obligation. Repeatedly it has been shown that moral obligation is a stalwart buffer against tax evasion and avoidance (Braithwaite and Wenzel 2008; Braithwaite 2009a, 2009b; Braithwaite and Reinhart 2013).

These three factors of benefits, fairness and moral obligation shape how taxpayers react to the tax authority's expectations of compliance. The process of 'sense making' around benefits, fairness and moral obligation is ongoing, and is influenced by other people and alternative authorities that put forward their own interpretations and seek to influence taxpayer decisions. The inner band represents these other forces. They may be local or global. They include lobby groups (pro and anti-tax), political leaders, family and friends. Hasseldine, Holland and van der Rijt (2011) point to the 'Big Four' as having a major influence on the tax policies of individual countries. Their voice is heard not only in the corridors of power but also through the media, thereby shaping tax discussions across the community. International organisations such as the OECD and various other global non-state organizations with an interest in tax policy also exert their influence (Ring 2010). The actors in the inner band can exert their influence on both the middle band of taxpayers and the outer band of tax administrators and policy makers.

Included in the inner band are tax practitioners. Tax practitioners enter into a professional relationship with taxpayers. They also have professional relationships with the outer band (tax administrators and policy makers) and others in the inner band (financial planners, business consultants, lobby groups and professional associations to name a few). Tax practitioners are highly networked actors in the tax system, holders of knowledge and resources, and importantly of contacts through whom tax avoidance contagion is triggered. For this reason, tax practitioners are at the centre of any discussion

about tax avoidance and the eliciting of taxpayer cooperation. The wheel will not be socially aligned to move forward without their support.

When taxpayers approach a tax practitioner to provide a service or they return to the same practitioner year after year, as is most often the case (Tan et al 2014), they enter a relationship in which each brings a set of expectations and needs. Each practitioner-client relationship has its unique features. Yet research findings point to overarching trends and consistent sources of variation. Most taxpayers want their tax practitioner to keep them out of trouble with the tax authority (Hite and McGill 1992; Sakurai and Braithwaite 2003). They want to believe that they are honest taxpayers. To this extent there is alignment between taxpayer moral obligation and the expected service they receive from the tax practitioner.

Along with being honest is the desire to save tax: Taxpayers do not want to pay more than is necessary (Sakurai and Braithwaite 2003; Niemirowski and Wearing 2003). Niemirowski and Wearing (2003) have proposed that taxpayers resolve the tension between being honest and saving tax by passing responsibility to tax practitioners. Tax practitioners protect the taxpayer's view of themselves as honest and respectable, while playing aggressively backstage on their behalf. The evidence suggests tax practitioners try to be responsive to client's needs (Bobek and Radtke 2007; Cloyd 1995; Schisler 1994), but are also mindful of possible sanctioning by the authority. Tax practitioners are likely to adopt the role of enforcer when tax law is unambiguous, but are more likely to adopt the role of exploiter when tax law is ambiguous (Klepper et al 1991). In other words, tax practitioners are more likely to stay within the law when it is clear in its intent and purpose, but are more likely to test the boundaries when loopholes and ambiguities permit.

A not insignificant number of taxpayers also are not honest in dealings with their tax practitioner, failing to fully disclose their tax related activity (Attwell and Sawyer 2001; Niemirowski and Wearing 2003). This may be careless or deliberate. Whatever the case, tax practitioners are aware that taxpayers differ in their attitudes to taxation and their expectations of them, and that they must manage their clients and earn their trust if they are to be retained as their service provider (Tan 2011; Tan et al 2014). For the tax practitioner, convincing their clients that they are managing their client's tax affairs in a proper and fair way is necessary for a sustainable practice, and if they can add aggressive tax planning advice to those who want it, their market share can be consolidated (Tan et al 2014). Tax practitioners have reason to establish their authority in their relationships with their clients.

Authority is enhanced in the public eye through the tax practitioner's affiliation with high status professional associations. Some evidence suggests that membership of professional bodies such as being a qualified CPA (certified public accountants) is associated with more aggressive tax planning (Ayres et al 1989; Erard 1993; Shafer and Simmons 2011). Working for the large global accountancy firms also has been linked with giving clients more aggressive tax planning advice (Marshall et al 2010). This may reflect the fact that high status and well-networked practitioners are better positioned

to know what options exist for tax avoidance and the risks they attract.

Tax practitioners working within large accountancy firms are subject to further pressures to 'capture' clients. Those seeking tax advice are encouraged to integrate tax advice with financial planning, while business owners are encouraged to use the firm's business consultancy services (Blackburn, Carey and Tanewski 2010). The effects on tax practice can be significant. For example, the lack of auditing rigor by Arthur Andersen, formerly one of the 'Big Five' accounting firms, was the result of conflicting business arms of the organisation (Coffee 2006:28). Arthur Andersen offered an auditing service, which promised an independent examination and verification of company accounting documents. Auditing, however, became a means of entry into businesses. Auditing staff were trained to market more lucrative consultancy services. It was this emphasis on cross-selling that impaired the independence of auditors' professional examinations (Coffee 2006).

As well as obligations that arise in relation to professional networks are the obligations that tax practitioners hold as a result of their personal ethics (Cruz et al 2000). Work environments can give rise to tensions among obligations to the firm, obligations to the client, and ethical obligations (Shafer and Simmons 2011). Bobek, Hageman and Radtke (2010) found that non-partners in accounting firms have a less positive view than partners of the ethics of the work environment. Doyle (2013) has made a case for poor moral reasoning in the tax practitioner context and Blanthorne, Burton and Fisher (2013) have argued that tax practitioners are disconnected from moral reasoning when advising clients. These researchers make the case for why tax practitioners may function as an alternative authority that undermines the capacity of tax authorities to elicit taxpayer cooperation.

The Wheel of Social Alignments reminds us that the tax practitioner is part of a rich social network in the tax system and inevitably is influenced by and influences other actors. Importantly, the wheel is a reminder that tax practitioners are also taxpayers who are not immune to the influences of perceived benefits, fairness and moral obligation when it comes to deciding whether or not they will be cooperative players in the tax system and whether or not they will facilitate processes of evasion or avoidance through their professional knowledge and skill. The narratives they adopt around the legitimacy of tax evasion and avoidance, once shared and espoused by powerful interest groups, can derail tax systems (Addison and Mueller 2015).

### **Markets in vice and virtue: the cyclical nature of tax avoidance markets**

The majority of tax practitioners are unlikely to purposefully engage in illegal conduct that puts their practice at risk. Yet, in a rapidly changing tax environment, there are many 'conversations' had by tax practitioners with clients, other advisors, and tax authorities that change their thinking, open their mind to new possibilities and shape the advice given to clients. The Wheel of Social Alignments does not adequately capture the change process in the financial and tax-planning environment. John Braithwaite's (2005) model of cyclical markets in vice and virtue helps fill this gap.

Tax practitioners cannot avoid being aware of cycles in the aggressive tax planning and avoidance market. The cycle is defined by fluctuations in supply and demand (J. Braithwaite 2005). Aggressive tax schemes emerge first in niche markets as highly sophisticated products for wealthy elite clients. They are designed to weave through tax law to suit the client's specific circumstances. The success of the schemes does not remain a trade secret. The idea is repackaged for mass marketing, often in a less nuanced way. The schemes offered to ordinary taxpayers catch on and there is herding or contagion in the market. Variations of the schemes do not sidestep the law as neatly as the tailor made originals. When tax schemes lose their sophistication on mass supply and slip from the grey area of avoidance to clearer territory of evasion, a tax crackdown becomes easier. Enforcement also may be aided through a change in law or legal interpretation or legal precedence, but often the contagion means that a serious enforcement-swamping problem has set in by the time the tax authority acts (J. Braithwaite 2003a, 2005). Crackdowns become highly visible and sometimes highly punitive (Hobson 2004; Murphy 2003, 2005). Avoidance is temporarily dampened in the population at large. Demand and supply of aggressive tax planning will swing up again when new avoidance measures are developed, successfully exploited and mass-marketed, that is until the tax authority effectively takes enforcement action once again. The spread of tax avoidance measures among tax practitioners and taxpayers is not static, but cyclical.

The model is based on the simple proposition that markets are normatively neutral. Therefore while it is expected that we will have markets in 'goods' (for example, producing efficiency in finding a trustworthy practitioner to organise our taxpaying accurately), we will also have markets in 'bads' (that is, efficiency in finding a practitioner who will get us out of paying the tax required of us). Evidence suggests that both markets exist in the tax preparation industry (Bankman 1999; Karlinsky and Bankman 2002; Sakurai and Braithwaite 2003).

While markets in vice and virtue co-exist, they are not equally strong at the same time. Aggressive tax schemes that spread in a contagion spawn a tax environment where moral obligation to pay one's fair share of tax is put on hold: Too much moral obligation is not adaptive during such times (Braithwaite 2009b; Braithwaite and Reinhart 2013) and in an aggressive cycle, taxpayers take their cue as to what is right by doing what others are doing, particularly when there is no fear of retribution from the tax authority (Wenzel 2004). The signals received by taxpayers from players in the tax avoidance market provide new social norms about the appropriate behaviour for the new circumstances. When tax authorities crack down on avoidance they risk criticism of being arbitrary and unfair, and too slow to respond (Hobson 2004; Murphy 2003, 2005). A crackdown needs commitment and collaboration from government, civil society, business, and tax practitioners. John Braithwaite (2003a, 2005) has argued that tax authorities must then follow through with a concerted effort to flip a market in vice to a market in virtue. Registering tax practitioners, holding scheme promoters accountable, introducing and demonstrating how anti-avoidance principles are to be used, introducing expanded tax returns, strengthening intelligence-gathering capacities in financial markets, and signalling enforcement intent early and openly together offer possibilities for flipping markets. These measures become more

acceptable in the community at large when the public turns against markets in vice and clamours for the re-emergence of a market in virtue. In other words, tax avoidance is best reined in with a strengthening sensibility that tax avoidance is harmful for democracies and governments more generally, and seriously undermines the legitimacy of national tax systems (arguably this has occurred in the aftermath of the global financial crisis). For this project, political leadership is necessary, though not sufficient without follow-through with effective regulatory measures.

Many levers are needed to rein in tax avoidance because the tax environment is complex and not as amenable to direct control by national governments as they would wish. The tax environment comprises global networks of interests, often conflicting. In an article titled 'Who is Making International Tax Policy', Diane Ring (2010) highlights the number of non-state actors influencing tax policy and administration internationally: the International Fiscal Association, International Bureau of Fiscal Documentation, International Tax Dialogue, International Chamber of Commerce, Business and Industry Advisory Committee, and the OECD. There are also international tax justice networks, taxpayer advocacy groups, and bodies that bring national governments together such as the G20. The tax environment affects tax practitioners, indeed it affects all three bands in the Wheel of Social Alignments in Figure 1. The magnitude of the leadership challenge facing governments has grown not only with the number of influential actors and their capacity to organise globally, but also with a change in the ways tax avoidance is practiced. The boundary between aggressive tax planning and cautious minimising of tax has increased in its blurriness with both seeking legitimacy under the responsible umbrella of financial planning.

The conversation required to rein in tax avoidance today is necessarily a political one and has been initiated internationally by the OECD Forum for Tax Administration and the G20. Reining in tax avoidance requires concerted efforts not only at the macro level but also at the micro level in the form of cooperation from tax practitioners and the firms to which they belong. The 'Big Four' accounting firms are publicly proclaiming the need for a responsible approach to taxation ('responsible tax for the common good' is promoted by KPMG (2016)). Turning such declarations into action will require cooperation from the multinationals and large corporations. Given the public interest in tax avoidance by the 'big end of town,' the media will undoubtedly keep the public engaged in how well actions meet the rhetoric of corporate social responsibility.

Needless to say, outside scrutiny and understanding tax cultures and the tax environment do not explain completely what is happening in private practices. Tan's (2014) tax practitioner-client role model underlines the complexity of interactions in the preparation and submission of an income tax return to the authority. Research described above on the tax practitioner – taxpayer relationship suggests no certainty around who is the instigator, promoter and final decision maker of taking aggressive tax positions. Individual audits may get to the bottom of how decisions are made on a case-by-case basis. From a policy perspective, however, containing tax avoidance may be more effectively achieved by looking for regularities in the way in which a tax practitioner engages with his

or her client base. Elea Wurth's (2012) Propensity and Opportunity Model of Tax Practitioner Behaviour provides insights into the form that engagement with a client base takes.

### **Tax practitioner market segmentation: the propensity and opportunity model**

Wurth (2012) focused on non-compliance in the set of income tax returns prepared and submitted on behalf of clients by individual tax practitioners. The unit of analysis was the tax practitioner's self-reports on the legitimacy of the set of items that made up the income tax return (across the client base). There were 21 income tax return items. The first step was to identify types of tax practitioners based on regularities in the way tax practitioners reported on the legitimacy of their preparation for the 21 different income tax return items.

Once patterns were detected and clusters of tax practitioners were found, the next step was to identify the defining features of each cluster. The theoretical framework for doing so was based on Nagin and Paternoster's (1993) work on propensity and opportunity in criminal behaviour: Could the clusters of tax practitioners be differentiated in terms of the characteristics of the tax practitioner (propensity) and the characteristics of the environment (opportunity)? Nagin and Paternoster (1993) showed empirically that propensity (for example, lack of self control) and opportunity (easy pathways for illicit gain) worked in combination to predict criminal activity. From the literature, Wurth grouped predictors of tax practitioner non-compliance in terms of propensity or opportunity. Propensity encompassed individual differences in risk taking, tax ethics, wealth and status aspirations and professional identity. These are the personal characteristics, socially and psychologically acquired over the course of a person's life experience, that shape how that person makes sense of and acts upon the events happening in their world.

Opportunity captures environmental conditions, or what the person perceives the situation as offering in terms of tax minimization. Opportunity incorporates perception of audit and penalty rates (more generally deterrence measures), legal loopholes and ambiguity regarding tax treatment of particular items for a tax return. A large volume of research points to the importance of deterrence measures and ambiguity in tax law in explaining tax practitioner involvement in evasion and avoidance.

The centrally important finding of this research was that tax practitioners clustered into four different groups in terms of their confidence that the income tax return items had been prepared and submitted accurately. The distinctive compliance groups of tax practitioners emerged from a cluster analysis of 1,373 individuals<sup>1</sup> who were mailed a survey and asked to report on the legitimacy of the income tax

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<sup>1</sup> The sample of practitioners who were sent the mail survey was selected from the Australian Taxation Office's database. Practitioners who responded to the survey were largely male, had a mean age of 53 years and had been practicing for a mean of 20 years. They were predominantly at the head of their organisation (sole practitioners, partners and company directors). Respondents were involved in tax preparation either directly or in an associated role. The final sample size of usable responses was 1,373 (response rate 25%).

returns that they prepared for their clients. As might be expected, the vast majority of tax practitioners reported that in general the income tax returns they lodged on behalf of their clients were legitimate. This suggested that tax practitioners on average were behaving honestly and professionally. Yet differences emerged and these differences proved insightful into how tax practitioners operate under conditions where they experience conflicting compliance pressures.

The 21 income tax return items varied in visibility. Dividends, salary and wages, government pensions and lump sum payments were subject to third party reporting and were highly visible items. Less visible were items such as work related expenses, rental deductions, business income and deductions, personal services income, capital gains and foreign income. The question was: How legitimate were the returns you submitted for your clients on item 1, then item 2 and so on to item 21. Responses were made on a rating scale from 'absolutely confident they were all legitimate' to 'pretty sure most are not completely legitimate'.

Consistent with tax administration reports (Australian Taxation Office 2009; also consistent with Internal Revenue Service 1996), practitioners expressed greater confidence in their preparation decisions around the visible items than the less visible items. Differences emerged, however, in the degree to which confidence dropped around less visible items. These differences were captured statistically through a cluster analysis that grouped practitioners who had a similar pattern of confidence in the preparation legitimacy of the 21 items. Sharpening the differences between groups involved applying the propensity and opportunity variables. Wurth described the four clusters that emerged from this analysis as a teardrop (see Figure 2).

<INSERT FIGURE 2 ABOUT HERE>

### **Dutious tax practitioners**

At the bottom of the teardrop were dutious tax practitioners (22% of the sample). They reported that the vast majority of their submitted returns were absolutely legitimate. Their confidence was slightly less on foreign income, but even so dutious tax practitioners most consistently hovered around absolutely confident about the legitimacy of the items they submitted for their clients.

When the dutious group were interrogated as to their propensity and opportunity for avoidance and evasion, they were distinctive in their emphasis on adopting a cautious style. Their commitment to the tax system was high as was their commitment to business best practice and tax competence. They did not see great opportunity for non-compliance. Nor did they see the preparation of individual tax returns as involving decisions that were especially ambiguous. The dutious were distinctive in their commitment to doing all parts of their job well and doing the right thing.

### **Contingent tax practitioners**

In the middle of the teardrop were contingent tax practitioners (63%). They were similar to dutious

practitioners in relation to preparation for clients on high visibility tax return items. They professed less confidence that submitted tax items were absolutely legitimate in relation to low visibility items and foreign income. They appeared to have greater acceptance of possible non-compliance than the dutious group.

Propensity and opportunity indicators bore this interpretation out. The contingent tax practitioners were greater risk-takers with a sense of agency or power that they could influence outcomes within the tax system. Contingent practitioners perceived a greater level of ambiguity in the tax affairs of their clients and saw opportunity to get away with non-compliant practices if they so wished. Interestingly these practitioners defined their style of preparation as being not as cautious as the dutious, but they shied away from defining their style as aggressive.

### **Aggressive tax practitioners**

The group of tax practitioners second from the top were the aggressive group (14%). Their declarations of absolute legitimacy weakened from visible to less visible items, then weakened further with foreign income. Most importantly, the aggressive group were less confident than the contingent or dutious groups. They were less sure of the legitimacy of all income tax items, regardless of the item's level of visibility.

Tax practitioners in the aggressive group were distinguished by an increased propensity to compromise their preparation ethics and exploit the opportunity afforded by ambiguity within their clients' tax affairs.

### **Disengaged outliers**

The very small top group in the teardrop, the outliers (.88%), followed the overall pattern of the aggressive group of practitioners, but were far more extreme in their responses. They were distinctive in scoring their submitted tax items as likely to be on the illegitimate side across all income items.

In terms of propensity and opportunity, the findings were intriguing. Initially suspected of being an especially egregious group, further analyses with the propensity and opportunity factors pointed to a different interpretation. These practitioners were most clearly defined by self-reported lack of competence and a sense of powerlessness. As well as admitting to preparing client returns of extremely low compliance, they considered the likelihood of detection for such practices as high. These characteristics suggest a state of disengagement (Braithwaite 2009b). Disengagement could possibly reflect a point-in-time crisis. More than half of this group said they would choose another career if given a chance. Possibly this group of tax practitioners had failed to adjust to an extended period of legislative and technological change in the taxation system. The outlier cluster may represent those practitioners who McKerchar (2005) found were 'overwhelmed' by the demands made on them.

The teardrop model explains some of the gaps and puzzles of the tax practitioner literature. First, both propensity (willingness) and opportunity (pathways) are relevant to the bulk of preparation decisions made by a tax practitioner. But the balance of propensity and opportunity factors differs across groups. For duteous tax practitioners, a sense of what is professionally, ethically and legally correct prevails to an extent that opportunistic pathways are not on their radar. Importantly, for duteous taxpayers there is no tension between having a successful business and being an ethical professional. Duteous tax practitioners have alignment in how they manage clients and the tax environment. For aggressive tax practitioners, on the other hand, opportunity dominates any sense of moral obligation. Instead a risk-taking disposition ignites interest in tax avoidance schemes. Aggressive tax practitioners will turn to new pastures for practicing tax avoidance on behalf of their clients once a crackdown of a current scheme is mobilised by the tax authority.

This leaves the majority group of contingent tax practitioners. They have capacity to vacillate between cautious and aggressive positions. From the perspective of cyclical markets in vice, contingent taxpayers are adaptive, moving toward more aggressive positions when that appears to be what others are doing and it is safe to do so because tax authorities are tolerating such activity. This means that when a tax authority is trying to flip a market in vice into one in virtue, it is the contingent tax practitioners who are the key target group: They will be the most responsive to pressure and therefore likely to move. They will notice and heed tax authority warnings and crackdowns on what is deemed unacceptable practice.

### **Synthesis of the three models**

The Wheel of Social Alignments sets up at a macro level the complex webs of cooperation that must be in play to steer the flow of events<sup>2</sup> to make a tax system sustainable and effective. Markets in vice and virtue show how these webs of relationships are washed over by market forces, with some strengthening and tightening while others weaken. Contagion for tax avoidance spreads through these webs right down to affect tax practitioners and taxpayers. The propensity and opportunity model shows how tax practitioners carve out a market that suits them and attracts clients who want the services they offer. Some will choose to operate in a 'duteous' sphere with networks that support their outlook. Some will choose an 'aggressive' sphere with networks that are well informed and supportive of their operations. The majority will claim a contingent space, choosing to remain 'adaptive' and tuning into networks that will tell them which way the wind is blowing regarding avoidance, evasion and enforcement by the tax authority.

The major departure of this approach from the tax literature is that the tax practitioner is no longer seen as an individual processing incoming information and making rational decisions. The tax practitioner rather is seen as a member of a set of networks: the small two person dyad with a client; the workplace network; professional networks; citizen networks; family networks; friendship networks;

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<sup>2</sup> The definition of regulation given by Parker and J. Braithwaite (2003) is to steer the flow of events.

and commercial networks. Social pressures from all these networks shape what happens when tax practitioners and their clients are making tax decisions. This suggests neither that the tax practitioner is devoid of responsibility for the advice given, nor that the taxpayer (influenced by similar sources, see Braithwaite and Wenzel 2008) is not responsible for his or her tax return to the authority. The thesis is that individuals are responsible for their decisions, but that an individualistic model takes attention away from the social-relational and market forces contributing to the tax avoidance problem.

In order to understand and steer tax preparation away from avoidance and evasion, tax authorities need to understand and be able to negotiate with and manage the many sets of networks that influence outcomes. In a democracy this should be handled through reasoned argument, persuasion, effective law and competent enforcement, in accordance with the revenue authority's taxpayers' charter. Unfortunately, over-reliance on an individualistic way of analysing the problem invariably leads to domination in the tax system of politically weaker players held up as examples of moral decay. In the meantime, the system leading to such outcomes remains unexamined and the more serious promoters and carriers of avoidance measures avoid scrutiny (see examples described by Murphy 2003, 2005 and Hobson 2004, and more recently in the Guardian, UK (Rawlinson 2014)).

<INSERT FIGURE 3 ABOUT HERE>

A schematic representation of the tax practitioner-client dyad as a node within sets of connected networks appears in Figure 3. The institutional influences discussed in this paper are captured through the concepts of (a) authorities, (b) cultures and (c) markets. Authorities include the government's revenue collection agency with capacity to coerce compliance through audits and deterrence responses. Deterrence can take the form of penalties, shaming, and something that is often overlooked particularly for first-time offenders, the threat of legal action. John Braithwaite (2003a) describes the phenomenon of the taxpayer wanting 'peace of mind'. Persistent stress on the accused and families undergoing long drawn out audits and court processes, prosecutions and appeals carries weight psychologically and socially above and beyond penalties applied by the revenue authority.

Authorities in Figure 3, therefore, include the courts and its officers, as well as barristers and others with standing in the community who can credibly support the use of particular tax avoidance measures. Defenders of avoidance schemes may extend to the 'Big Four' accounting firms and other professional bodies. At the level of firms, the pressures that partners place on non-partners to perform certain tasks to increase income streams can also be seen as the exertion of authority on tax practitioner advice and decision making. It would be reasonable to assume that the practices of the 'Big Four' accounting firms set standards that are attractive to many other firms aspiring to increase their market share in the financial sector. In sum, in Figure 3 there are many authorities that compete for influence. Some authorities aim to contain tax avoidance, others will promote it.

Markets in Figure 3 represent the economic pressures on tax practitioners to enter the market of

aggressive or contingent tax advice when cycles of tax avoidance gain momentum and spread through the tax community. The pressure may be felt through interactions with taxpayers, professional colleagues or employers. To the extent that a narrative of personal benefit and lawfulness develops around tax avoidance schemes, tax culture changes to promote such schemes as standard business practice. Stories of waste of taxpayers' money and bad government add to the appeal of the message of tax avoidance promoters. The executive branch of government is ideally placed to show leadership in changing the tax avoidance narrative through their capacity to direct tax policy and deliver good government, while backing up their revenue authority's efforts to uncover avoidance schemes and take action to contain them or close them down.

Flipping markets in vice to markets in virtue (also part of the story of markets in Figure 3) involves making an effort to re-define tax culture. Tax cultures, the third concept represented in Figure 3, involve a variety of norms, beliefs, attitudes and practices about taxation and the revenue authority that collects it. Government sets the stage for discussions of tax culture, the business community contributes its views, as do international organizations (Ring 2010). At the heart of how culture influences compliance and cooperation with revenue authorities are the concepts of benefits, justice and moral obligation from the wheel of social alignments. Stories abound of the benefits of paying tax as well as the deficits associated with wastage and economic loss through the tax system. Tax culture also can be characterised by narratives of unfairness and resistance as told through the work of Murphy (2003, 2005) and Hobson (2004). And finally tax culture manifests itself through the all important sensibility of moral obligation, whether it is a moral imperative for the tax practitioner as is the case for those in the 'duteous' cluster, whether it depends on the clarity of the law as with the 'contingent' group, or whether it is at risk of becoming irrelevant, as is the case with those practitioners in the 'aggressive' cluster.

## Implications

When tax authorities start to flip a market in tax avoidance, they need a suite of mechanisms that engage productively with tax practitioners who may be duteous, contingent, aggressive or outliers. The propensity and opportunity model explains why deterrence works in some contexts and not others and why framing around moral obligation and/or social norms can be effective, but will not necessarily be so. For duteous tax practitioners, professional ethics and commitment to their profession is paramount. Duteous tax practitioners will respond positively to being the shining light held up to contingent taxpayers: They will have their identity affirmed as the revenue authority treats them respectfully and pursues less 'honest' practitioners. This strategy is unlikely to work with aggressive tax practitioners. Aggressive tax practitioners will respond to blocked pathways and a credible risk of penalty, albeit while searching for new ways around the law. A revenue authority that threatens a crackdown on tax avoidance will likely not dissuade aggressive tax practitioners as much as contingent tax practitioners. Contingent tax practitioners will play it safe, taking note of warnings from the revenue authority, observing what is being condoned and sanctioned, and adjusting their

actions accordingly.

The difficulty for revenue authorities is in identifying their target population accurately. Taxpayers differentiate honest no-fuss advice from cautious minimising advice and aggressive advice (Sakurai and Braithwaite 2003; Tan and Braithwaite 2014), and tax practitioners can be identified as dutiful, contingent or aggressive (Wurth 2012). In practice, taxpayers find it difficult to clearly separate those offering cautious minimising advice from those offering aggressive advice (Sakurai and Braithwaite 2003). Partly this is because what is cautious and aggressive is unclear to a non-expert. The teardrop model in Figure 2, however, provides further insight into the confusion. Most tax practitioners occupy the 'contingent' zone and can therefore cater within limits to the differential risk capacities of their clients, moving from the cautious to more aggressive ends of the spectrum depending on the tax environment, ambiguity of the law, and visibility of income tax return items. Taxpayers could well be reporting honestly when they declared their tax practitioner as giving both cautious and aggressive advice. Should a revenue authority target contingent practitioners, there is risk that honest taxpayers, cautious minimisers and aggressive taxpayers will all be caught in the web. Many of the taxpayers prosecuted in Australia's mass marketed scheme crackdown in the late 1990s depicted themselves as honest and law-abiding and as the victims of unfair treatment by the tax authority (Braithwaite, Murphy and Reinhart 2007).

The goal is to have a net positive impact on cooperation and compliance, reining in non-compliance where necessary with enforcement action without adversely affecting non-targeted groups. Focused enforcement action needs to be made credible and legitimate through being embedded in a suite of mechanisms about which there is a central and coherent narrative. This narrative geared to discouraging particular avoidance activities needs to be shared by many authorities (government, revenue authorities, professional associations and tax practitioner boards). The narrative needs to explain why the avoidance activity is damaging (not producing benefits for the community), unfair (leading some taxpayers to carry more of the burden than others with the same income) and why the responsible action for the taxpayer is to pay the tax he or she is expected to pay.

Messaging and persuasion with the community on unacceptable tax behaviour always needs to be followed up with enforcement that is signalled openly and demonstrated firmly through the willingness of a revenue authority to escalate the severity of an intervention and where appropriate its scope. One-off heavy-handed blitzes or amnesties are unlikely to change tax culture without a foreshadowed set of escalating interventions from desk audits, to partial and full audits, penalties, prosecutions and de-registration if non-compliance persists. A responsive regulatory approach of this kind incorporates educating the public, persuasion, the signalling of acceptable pathways and deterrence of unacceptable pathways (Braithwaite 2003, J. Braithwaite 2003a,b, 2005). Responsive regulation is consistent with the central idea of Figure 3 that there are multiple sources of influence on behaviour, with the result that there are multiple motives for avoiding tax. A revenue authority therefore has to have at its disposal multiple strategies and tools to elicit compliance. It makes sense to respect the

commitment of the dutiful through using the least intrusive sanctions should problems of avoidance or evasion arise. But it also makes sense to ratchet-up levels of intrusiveness and deter the more aggressive practitioners who are not responsive to the more light touch messaging from the tax authority.

Taxpayers' readiness to comply has traditionally been represented in a compliance pyramid with its base populated by honest and cooperative taxpayers who willingly defer to tax authority (Ayres and J. Braithwaite 1994; see Braithwaite 2003a for the Australian Taxation Office's Compliance Model). Other jurisdictions have followed the Australian Taxation Office's Compliance Model. Tax practitioners, however, present differently to tax authorities. Earlier work with tax practitioners who served high wealth individuals suggested that involvement in tax avoidance distorted the pyramid shape to an egg shape (J. Braithwaite 2003b). Wurth's much larger sample of tax practitioners serving Australian taxpayers takes the next step to proposing a teardrop for the tax practitioner population more generally.

The implications for tax enforcement are significant. Bringing contingent tax practitioners on board is the highest priority, but it must be done without undermining professionalism. Indeed professionalism in the form of respect for the spirit of the law needs to be strengthened since contingent tax practitioners need to join the dutiful to form the base of the pyramid to sustain cooperation. Tax authorities too often make the mistake of pursuing their target while communicating lack of trust in those who take pride in doing the right thing, generating unnecessary resistance from those who feel unfairly treated (see Braithwaite, Murphy and Reinhart 2007). The base of the pyramid weakens rather than strengthens.

A number of approaches would check movement toward more aggressiveness, while appreciating the role played by dutiful tax practitioners. Registration of tax practitioners with a tax board, having penalties for scheme promoters and strengthening communication networks among professional associations and tax authorities nationally and internationally are necessary first steps to ensure that all tax practitioners are part of a conversation with tax officials around enforcement priorities. A blueprint that maps out enforcement priorities, while at the same time addressing a prioritised list of requests for clarification and certainty from tax practitioner bodies, is a sensible mutually advantageous 'mental meeting place' to begin to rein in tax avoidance (Masken 2014 provides an account of IRS interventions of this kind). Building a shared and informed view of acceptable and unacceptable practice can only emerge from pooling intelligence and problem solving capacity (Braithwaite 2003a, 2005).

Ambiguity in tax law has long been recognised as central to the problem of tax avoidance. But equally important is a diminished sense of moral obligation to pay a fair share of tax to support national governments: Large corporations have made it very clear that the interests of shareholders rank higher than the interests of taxpayers and governments. There is little to be gained in debating

ambiguity without debating moral obligation. As shown with duteous tax practitioners, ambiguity is a far greater problem for those whose moral obligation has waned than for those with a strong commitment to the tax system and the community it serves.

Along with an agenda of conversations to change culture are steps to make enforcement action more predictable and reasonable. Finding the right balance of the rules-based system with the principles-based system to counter the growth and exploitation of tax law ambiguity is on-going (J. Braithwaite 2002; Picciotto 2007; Freedman 2010, 2012). Here the role of tax practitioners is paramount. In a hybrid system, rules must be secondary to overarching principles. Rules provide guidance on the most common transactions of business arrangements in a complex field of taxation. However, rules are used only to assist in applying the principle. In a contest between a rule and an overarching principle, it is the principle that is binding on taxpayers. In a hybrid system such as this, practitioners take on the role of enforcers for transactions of certainty while diminishing the 'penumbra' of ambiguity exposed to exploitation.

The successful implementation of a hybrid system of rules and principles based regulation is dependent on sustaining the dominance of principles and preventing them being converted or reduced to rules that are gamed. Reduction of principles and resurgence of rules can occur through demands for guidance on how principles will be applied in specific contexts (McBarnet & Whelan, 1999) or through the build-up of legal precedent (Clayton Utz, 1999). This can be neutralised through sophistication in crafting. Elegant principles must be matched to smart rulings, press releases and bright line rules, with clarity and consistency in the relationship between principles and rulings. Badly designed principles with uncertain or confusing rules or confusion in the proffering of conflicting interpretations will exacerbate rather than resolve ambiguity. It is here that collaboration between tax practitioners, tax officials and drafters of legislation provides real benefits. The degree to which successful partnering occurs between practitioner and tax officials varies globally (see Visser 2016 on tensions in South Africa; Daly (2013) on collaboration in Ireland; Smith 2004 and Walpole and Salter 2014 on collaboration in Australia). Judith Freedman (2015) has argued for considering new institutional frameworks that can assist all players in managing the complexity that has become intrinsic to tax law. This suggests the allocation of significant resources to stay on top of the tax avoidance game. John Braithwaite (2003a) hints at the need for resources in his analysis of the challenge facing revenue authorities:

If revenue is escaping out of four open windows, closing three of them might simply see more flowing out the fourth, or a fifth window being prized open. This is not to say that it is impossible to achieve improved levels of taxpaying through a combination of measures. (J. Braithwaite, 2003a, p. 266)

## Conclusion

The thesis of this working paper is that tax practitioners are central in the practice of tax avoidance and evasion. This has long been acknowledged but researchers have persisted in an individualistic

model of how tax practitioners influence tax reporting. Research has focused on the 'battle' that takes place between tax practitioners and taxpayers to attribute responsibility for tax avoidance and evasion. A social and economic relational model of the kind presented here addresses this imbalance to uncover the many forces shaping tax practitioner behaviour and point to the multiple levers that can lead to change in that behaviour. Tax avoidance becomes less attractive to the tax practitioner-taxpayer dyad when public narratives support paying tax, when ambiguities are discussed and resolved through explained application of principles over rules, when enforcement intent is signalled, explained and justified, when there is follow through on non-compliance with readiness to sanction, and when professional practitioner networks are willing to cooperate with revenue authorities to build shared understandings of legitimate as well as suspect ways of reducing tax.

Little has been said in this working paper about international regulatory mechanisms such as BEPS, disclosure of profits and other transparency measures, whistle blowing and leaks as evidenced by the Panama Papers and LuxLeaks. The contribution of the 'Big Four' accounting firms to world wide avoidance of tax has been widely discussed in mainstream media in recent times (see for example, West (2016) in [thenewdaily.com](http://thenewdaily.com)), as governments pursue large corporations like Google and Facebook for unpaid back taxes. The US, the UK, Indonesia, Italy, and France are just some of the countries taking this route. Whether the fight-back of these nation states and most recently of the EU serves to inspire and guide smaller nations remains to be seen. Tax has become a highly politicised issue, this time globally. Tax practitioners occupy a front seat in watching these political tussles play out and will come to their own conclusion no doubt as to whether tax avoidance is in vogue or not.

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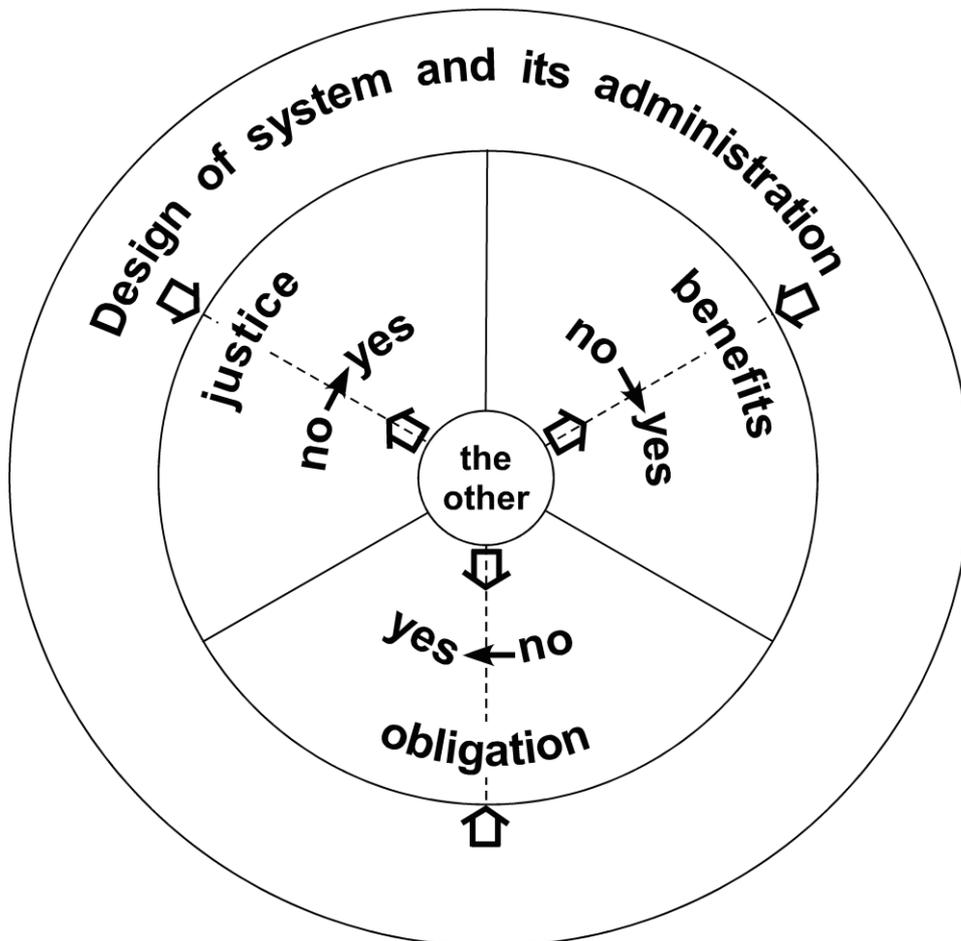
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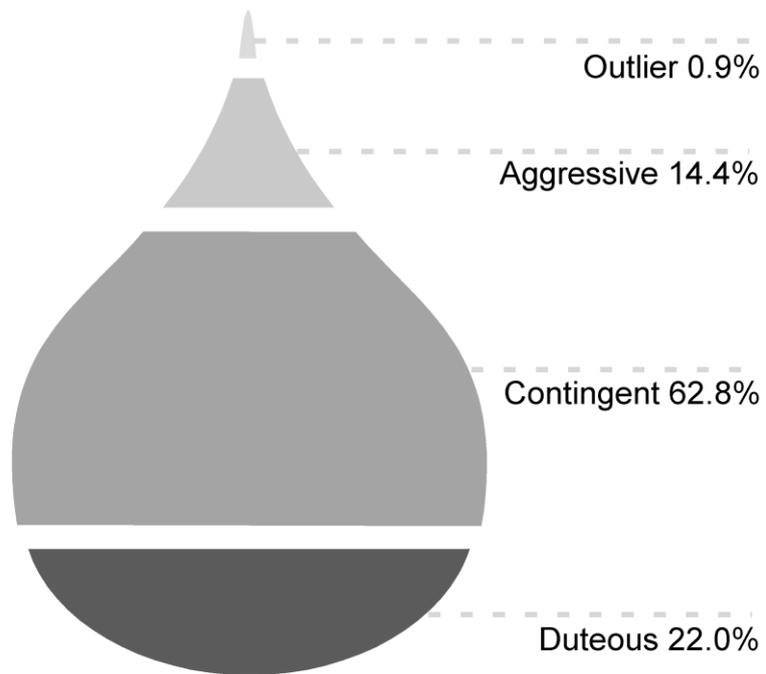
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**Figures**

**Figure 1:** The Wheel of Social Alignments for Taxpayer Cooperation and Compliance (Braithwaite 2009a)



**Figure 2:** The teardrop of tax practitioner compliance with the revenue authority's expectations (Wurth 2012)



**Figure 3:** A social and economic relational model of the forces that shape the roles of tax practitioner and client and their transactions

