

# To Shame or not to Shame: That is the question<sup>1</sup>

## 1 Introduction

This article evaluates the approach that the media, activists and parliamentarians take to the manner in which large Australian corporations and multinationals structure either themselves or individual transactions to ensure they limit their liability to tax. Their response is to name and shame the entities concerned. These attacks are generally directed towards multinational corporations that divert income from one jurisdiction to low or no tax jurisdictions.

This paper evaluates the naming and shaming option and concludes that it is unhelpful, counterproductive and may be based on a misconception of the law. It may also be a call for directors to breach their obligations to the corporation's shareholders and other stakeholders. The paper argues that the only effective response to the tax planning techniques of these corporations is for Parliaments to enact effective laws that capture all the income sought to be taxed. Without such laws there can be no liability for tax. As Lord Wilberforce put it:

A subject is only to be taxed on clear words, not on 'intendment' or on the 'equity' of an Act.<sup>2</sup>

Implicit in the naming and shaming response is the suggestion that these corporations are in some way acting illegally or breach the anti-avoidance rules in so limiting their liability for tax. The problem, however, appears to be that legislatures have been unable to draft effective tax laws that capture the incomes or at least large portions of the income of these corporations which may be derived within their jurisdictions.

In naming these entities there is a constant reference to 'tax avoidance' which phrase as used by the media is becoming a phrase of indefinite meaning both in Australia and internationally. Tax avoidance now encompasses the obligation of these corporations to pay

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<sup>2</sup> *W T Ramsay Ltd v Inland Revenue Commissioners, Eilbeck (Inspector of Taxes) v Rawling*, [1982] AC 300, [1981] 1 All ER 865.

what is often described as ‘a fair share of taxes’<sup>3</sup> or some other open ended means of calculating an entities liability for tax.

This extended meaning of tax avoidance is made even more confusing when regulators in Australia and other jurisdictions refer to it as following the letter, but not the spirit, of the law; or as not following the policy of the law; or as being a scheme that undermines the integrity of the tax system.<sup>4</sup> According to Hasseldine and Morris, references to the ‘spirit of the law’ imply ‘the existence of some form of shadowy parallel tax code to which only a privileged few have access while everyone else has to make do with the ‘letter’ of the law’.<sup>5</sup> Freedman argues that proper consideration has to be given to the actual legal position, rather than focusing on vague and unenforceable notions.<sup>6</sup> If corporations pay all the tax required by law, the integrity of the system presumably cannot be impaired in any way. The contrary would appear to be the case. Irrespective of the forgoing it is this extended and indeterminate meaning of ‘tax avoidance’ that is used to name and shame these corporations.

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<sup>3</sup> Fisher notes ‘[A]ntiavoidance advocates already have begun to use modern platforms in pursuit of change, rallying support with the claim that ‘big corporations need to pay their fair share of taxes.’ *Jasmine M Fisher, Fairer Shores: Tax havens, Tax Avoidance, and Corporate Social Responsibility*, (January 2014) 94 (1) *Boston University Law Review* 337.

<sup>4</sup> In *Bropho v Human Rights and Equal Opportunity Commission* 204 ALR 761 [93], Justice French describes the ‘spirit of the law’ in these terms:

In a statutory setting a requirement to act in good faith, absent any contrary intention express or implied, will require honest action and fidelity to whatever norm, or rule or obligation the statute prescribes as attracting the requirement of good faith observance. That fidelity may extend beyond compliance with the black letter of the law absent the good faith requirement. In ordinary parlance it may require adherence to the ‘spirit’ of the law.

<sup>5</sup> John Hasseldine and Gregory Morris, ‘Corporate Social Responsibility and Tax Avoidance: A Comment and Reflection’ (2013) 37(1) *Accounting Forum* 1, 11.

<sup>6</sup> Judith Freedman, ‘Responsive Regulation, Risk and Rules: Applying the Theory to Tax Practice’, (2012) 44(3) *University of British Columbia Law Review* 627, 648–51.

Before commencing our discussion a number of facts should be borne in mind. The first is that the all regulators accept tax planning is a legitimate function of taxpayers.<sup>7</sup> Second avoidance<sup>8</sup> in Australia has usually been understood to be a breach of either the general anti-avoidance rule or specific anti-avoidance rules contained in the tax laws. This is generally the case in all counties although some countries rely on the courts to devise methods to restrain avoidance.<sup>9</sup> If a transaction complies with the other provisions of the tax laws and cannot be challenged under the avoidance provisions it is unobjectionable and legally valid. Third the late Justice Hill noted that the obligation of the regulator is ‘to collect tax in accordance with a correct assessment, that is to say, to collect the correct amount of tax, no more and no less.’<sup>10</sup> One would have expected the view of Justice Hill would be axiomatic. Unfortunately the contrary appears to be the case.

The scheme of this paper is as follows. Section 2 considers what constitutes naming and shaming and how, in theory it operates. Section 3 refers to the problems that may be encountered when naming and shaming techniques are utilised. Section 4 considers the case of Alphabet Incorporated, formerly Google Incorporated (Google) in the UK and Australia. Google was and still is the subject of a concerted campaign of being named and shamed. Section 5 sets out the author’s conclusions.

The article now turns to what is naming and shaming.

## **2 Naming and Shaming**

According to Pawson the purpose of naming and shaming is to transform ‘under-performance’ or ‘deviant behaviour’ through a process of:

- Identifying and classifying that behaviour;

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<sup>7</sup> See for example: Michael Carmody, ‘Managing Compliance’ (Speech delivered at the Tasmanian Chamber of Commerce and Industry, Tasmania, 3 September 2003).

<sup>8</sup> Matthew Valencia, Storm Survivors, *Economist*, 16 February 2013.

<sup>9</sup> *W T Ramsay Ltd v CIR* [1981] 1 All ER 865. The *Ramsay* principle requires a court to interpret legislation purposively and then to apply that finding to the facts found as a composite whole and viewed realistically.

<sup>10</sup> *Brown v FCT* 99 ATC 4516, (51).

- Naming the party involved and describing the behaviour to which complaint is made;
- The community responds to this disclosure (the act of shaming); and
- As a result the respondent changes its behaviour.<sup>11</sup>

When shaming occurs there is some form of conscious manipulation of an entity with the purpose of obtaining some desired but different result to that about which complaint has been made.<sup>12</sup> Pfaeltzer is of the view that even though many large corporations can hide behind the façade of the corporation 'shaming works on them largely because they are concerned with reputation and as such feign shame for reputational and commercial reasons.'<sup>13</sup>

John Braithwaite and Drahos believe directors' reputations may also be at risk. Owing to this, they suggest that naming and shaming may cause corporations to take steps to determine personal responsibility and '[put] things right'.<sup>14</sup> According to them this is a relatively cheap remedy and it could reflect society's moral outrage at the conduct.<sup>15</sup> They contend if the corporation is named, then internal compliance systems go to work to define personal responsibility for putting things right.

Morse suggests that where reputation is important, it is possible to cast compliance as reputation enhancing; however, it is necessary to target the leaders of the corporation because they influence the views of the remainder of the organisation.<sup>16</sup>

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<sup>11</sup> Pawson Ray, Evidence and Policy and Naming and Shaming, (2002) 23(3) *Policy Studies* 211.

<sup>12</sup> Elizabeth L. Rosenblatt, Fear and Loathing: Shame, Shaming, and Intellectual Property, (2013-2014) 63(1) *DePaul Law Review*, 9.

<sup>13</sup> Juliette J.W. Pfaeltzer Naming and Shaming in Financial Market Regulations: A Violation of the Presumption of Innocence? (January 2014) 10(1) *Utrecht Law Review* 134.

<sup>14</sup> John Braithwaite and Peter Drahos, 'Zero Tolerance, Naming and Shaming: Is There a Case For It With Crimes of the Powerful?' (Paper delivered at the Australian and New Zealand Society of Criminology Conference, Perth, 30 September 1999).

<sup>15</sup> For a review of issues around shaming, see: David A Skeel Jr, 'Shaming in Corporate Law' (June 2001) 149(6) *University of Pennsylvania Law Review* 1811, 1814.

<sup>16</sup> Susan C Morse, 'Tax Compliance and Norm Formation under High-Penalty Regimes' (2012) 44(3) *Connecticut Law Review* 675, 695-9.

As will be seen from the example of Google below there can be considerable damage to a company's reputation if it is named and shamed. If a party is named and shamed, the regulator is not precluded from challenging the taxpayer utilising the remedies granted to it under the tax laws.

Grabosky and Shover, although referring to criminal conduct consider that the refusal to acknowledge the criminality of conduct is one of the sharpest distinguishing characteristics of white-collar criminals. Ways of mobilising public indignation to combat this is something worthy of consideration, to induce those targeted to acknowledge their wrong and to take steps to make amends.<sup>17</sup>

Shame can occur without the publicity of being publicly named. Grasmick and Bursik describe shame as the feeling of guilt one feels after having committed a wrong; it is a self-imposed punishment.<sup>18</sup> The greater the wrong committed, the greater is the prospect and extent of the feeling of shame.<sup>19</sup> Grasmick and Bursik found, after surveying a number of respondents, that the prospect of feeling shame inhibited tax cheating.<sup>20</sup>

Kahan and Posner suggest that, because shaming shows moral condemnation of the relevant conduct, it has an advantage over imposing fines, which are either not publicised or if

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<sup>17</sup> Peter Grabosky and Neal Shover, 'Forestalling the Next Epidemic of White-Collar Crime: Linking Policy to Theory' (August 2010) 9(3) *Criminology & Public Policy* 641, 645.

<sup>18</sup> Harold G Grasmick and Robert J Bursik Jr, 'Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model' (1990) 24(3) *Law & Society Review* 837. See also, Kristina Murphy, 'Procedural Justice, Shame and Tax Compliance' (Working Paper No 50, Centre for Tax System Integrity Research, School of Social Sciences, Australian National University, Canberra, ACT, November 2004).

<sup>19</sup> Grasmick and Bursik *Ibid*, 840.

<sup>20</sup> For discussion on theories behind shaming see, John Braithwaite, Eliza Ahmed and Valerie Braithwaite, 'Shame, Restorative Justice, and Crime' in Francis T Cullen, John Paul Wright & Kristie R Blevins (eds), *Taking Stock: The Status of Criminological Theory. The Advances in Criminological Theory* (Transaction Publishers, 2008).

publicised do not receive the same attention as does naming and shaming.<sup>21</sup> Naming and shaming can destroy a company's reputation and influence the decisions of customers, suppliers, financiers and other stakeholders doing business with the corporation. A monetary fine generally does not do this. This damage may, in monetary terms be greater than any fine a court could impose.<sup>22</sup> This issue is of great concern to directors because they have an obligation to promote the company's reputation. It is often difficult for a company that is publicly named and shamed to respond to or to ensure that their response receives the same attention as the original adverse publicity.<sup>23</sup>

According to Kahan, regulators adopt the approach that taxpayers who have faith in the willingness of others to pay the tax imposed on them will reciprocate by doing the same. Thus, regulator's calls for entities to pay a 'fair share of tax' may be aimed at persuading those who do not pay the taxes imposed on them to do so, presumably to reinforce the willingness of others to comply. Kahan refers to this as the 'logic of reciprocity'.<sup>24</sup>

Skeel says naming and shaming occurs when 'the enforcer expresses moral outrage at the offender, expecting that the intended audience will respond with similar moral disapproval'.<sup>25</sup>

Shaming, according to Buell, may not be the same as reputational damage, although there are elements of this present. Buell suggests that reputational damage occurs where criminal charges have been laid and made public because the public ascribe real meaning to cases in which criminal conduct is alleged by the state. This has particular resonance in the US, where corporations may be obliged to waive legal professional privilege and accede to the

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<sup>21</sup> Dan M Kahan and Eric A Posner, 'Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines' (1999) 42 *Journal of Law & Economics* 365, 368.

<sup>22</sup> See for example R Macrory and G Britain, *Regulatory Justice: Making Sanctions Effective* (London, November 2006).

<sup>23</sup> David F Williams, 'The Concept of Tax Governance' (Paper presented at the KPMG Tax Business School, UK, 2007).

<sup>24</sup> Dan M Kahan, 'Logic of Reciprocity: Trust, Collective Action, and Law' (2003–2004) 102 *Michigan Law Review* 71.

<sup>25</sup> Skeel above n 15.

wrongfulness of their conduct with a view to a limitation of possible consequences.<sup>26</sup> However, as the example of Google (discussed in section 4 below) reflects, there need not be a criminal process or even a challenge by the regulator for reputational damage to occur. Leighton, writing on the US experience on naming and shaming, says:<sup>27</sup>

Several states have had success with publicizing the names of individuals and corporations that have the largest unpaid tax bills, which is a strategy that might substitute for the publicity of the criminal prosecution noted by Levi.

In a European context Van Erp<sup>28</sup> notes that ‘more and more, public regulators are disclosing names of sanctioned companies or experimenting with naming and shaming, in the expectation that this will enhance the impact of their enforcement strategies on compliance.’ In the EU and US naming generally occurs where a taxpayer has had some penalty imposed either by the regulator or courts or has failed to pay an assessed amount or failed to submit a return.

A key issue with naming and shaming is whether the audience believe the behaviour is worthy of moral outrage. According to Kahan shaming expresses moral condemnation of conduct, albeit to a lesser extent than do criminal sanctions.<sup>29</sup> Morse suggests that to be effective, there must be a link between the listener’s values and the story.<sup>30</sup> With regard to naming and shaming, the secrecy provisions of the tax laws may impede drawing an accurate link between the listener’s values and the story.<sup>31</sup>

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<sup>26</sup> Andrew Weissmann and David Newman, ‘Rethinking Criminal Corporate Liability’ (Spring 2007) 82(2) *Indiana Law Journal* 411.

<sup>27</sup> Paul Leighton ‘Fairness Matters—More Than Deterrence: Class Bias and the Limits of Deterrence’ (August 2010) 9(3) *Criminology & Public Policy* 525, 526–7.

<sup>28</sup> Judith van Erp, Reputational Sanctions in Private and Public Regulation 2008 (1) 5 *Erasmus Law Review* 145; Pfaeltzer above n 13.

<sup>29</sup> Dan M Kahan ‘What Do Alternative Sanctions Mean?’ (Spring 1996) 63(2) *University of Chicago Law Review* 591, 635.

<sup>30</sup> Susan C Morse, ‘Narrative and Tax Compliance’ (University of California Hastings Research Paper No 14, 24 September 2013) 9–10.

<sup>31</sup> *Taxation Administration Act 1953* (Cth) Division 355.

Pawson makes the point that ‘shaming sanctions will only become adequately public and therefore bite if the media deem the information sufficiently ‘newsworthy’.<sup>32</sup> The role of the media and their need to publish stories that sell is often overlooked when considering naming and shaming. Without the media the necessary publicity required to make known the conduct complained of would not be present. The role of the media requires some consideration.

Kohn notes ‘since the latter part of the 20th century, humiliation has become amplified through the mass media in the name of crime control and entertainment’<sup>33</sup> Skeel referring to the financial press in the USA states:

*Business Week* and its peers, by contrast, have a huge reputational stake in the accuracy—or at the least, the objectivity—of their reports. Readers buy the magazines because they offer sophisticated, inside looks at the business world.<sup>34</sup>

Silverman says the publication by the media on some issues at best, creates a permissive climate for intolerance and, at worst, for vigilantism.’

Compared to employees and other individuals the media:

Enjoy better protection when revealing corporate wrongdoing. For instance, in the U.S., freedom of the press is guaranteed in the First Amendment of the Constitution, and in many countries, the legal protection afforded to journalists prevents firms from suing them for defamation.<sup>35</sup>

Actions for damage’s resulting from the publication of untrue statements concerning corporations take years to complete but the report to which objection has been taken remains

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<sup>32</sup> Pawson above n 11 at 223.

<sup>33</sup> Steven A Kohm, Naming, shaming and criminal justice: Mass-mediated humiliation as entertainment and punishment, August 2009 (5)2 University of Winnipeg, Canada Crime Media Culture, 188-205.

<sup>34</sup> Skeel, above n 15.

<sup>35</sup> El Ghoul, Sadok and Guedhami, Omrane and Nash, Robert C. and Patel, Ajay, *New Evidence on the Role of the Media in Corporate Social Responsibility* (January 7, 2016) <<http://ssrn.com/abstract=2712239> or <http://dx.doi.org/10.2139/ssrn.2712239> >.

extant. Further the proceedings are subject to public attention resulting in the possible repeating of the defamatory material. Further corporations have significant evidential hurdles to overcome to be successful making such actions rare. As Mark Twain famously said:

It is a free press — a press that is more than free — a press which is licensed to say any infamous thing it chooses about a private or a public man, or advocate any outrageous doctrine it pleases... There are laws to protect the freedom of the press's speech, but none that are worth anything to protect the people from the press. A libel suit simply brings the plaintiff before a vast newspaper court to be tried before the law tries him, and reviled and ridiculed without mercy.<sup>36</sup>

Tulberg argues that corporations are vulnerable to media power and that the solution is one of appeasement to avoid being a target and to protect the value of the company brand.<sup>37</sup> According to Tulberg, there is an absolute right or wrong and the media and activist groups are the sole arbiters on these issues, irrespective of whether their views are correct. It is often difficult to respond to such attacks in a way that resonates with the public. Tulberg continues that there is a shortage of empirical evidence to determine that positive reports result in more sales and negative reports have an opposite effect.

The reality is that there would appear to be little or no accountability on the part of the media as to the accuracy and truth of what they publish.

Silverman, referring to the media states:

Then there is the question of accountability. Kipling's resonant description of the press as the wielder of "power without responsibility – the prerogative of the harlot throughout the ages" needs no updating to depict accurately much of today's media.<sup>38</sup>

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<sup>36</sup> Mark Twain, Monday Evening Club at Hartford, titled , *License of the Press*, March 31, 1873.

<sup>37</sup> Jan Tulberg, 'Reflections upon the Responsive Approach to Corporate Social Responsibility' (2005) 14(3) *Business Ethics: A European Review* 261.

<sup>38</sup> Jon Silverman, The shaming in naming, (March 2003) 14 *British Journalism Review* 49-53.

An example of how damaging media reports can be even where there is a finding of guilt appear from the following. ASIC published many disparaging remarks at the time of commencing proceedings and during the process of those proceedings against a high-ranking company executive by the name of Fysh.<sup>39</sup> He was found guilty by the court of first instance, which sentenced him to a term of imprisonment. The matter went on appeal, pending which Fysh was incarcerated. The court of appeal found that Fysh had no case to meet and he was released from gaol after having been incarcerated for seven months. It is reported that Fysh, in submissions to a Senate enquiry, asked '[d]id ASIC's early rush to publicise successful pursuit of a high ranking overseas oil company executive and freeze his assets colour ASIC's judgment?' In response, ASIC noted that 'the media will inevitably escalate any hint of an investigation, naming names, drawing inferences and beating up the story-and this can affect any future legal action'. This report should be a salutary lesson to all those who seek to name and shame.

Irrespective of what the press disseminates the vast majority of persons will not know or understand or accept that, irrespective of what the media states and the amount of tax reflected as being payable, the company may be fully compliant with its tax obligations. A program of disparagement should not be commenced without first determining, at the very least, that there has been some legally actionable non-compliance.

The media should be careful to verify the facts, and if necessary the law, on which they base their attacks. Vague notions of fairness or morality not based on a proper application of the facts to the tax laws should be discouraged. The media have significant influence on community attitudes and a concomitant responsibility to report accurately. The consequences of a failure to do so can potentially cause significant damage to a corporation. The media relies on some vague notion of fairness to name and shame these entities.

The objectivity required from the media on most occasions when referring to how these corporations deal with tax issues appears to be absent.

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<sup>39</sup> Gareth Hutcheons, 'Damage done in the rush to go public' *The Sydney Morning Herald, Weekend Edition, Weekend Business*, 18–19 January 2014, 7.

The House of Lords has acknowledged that naming and shaming is arbitrary and difficult to justify when the transaction is within the law. The House of Lords suggests that if a scheme is not accepted, imposing penalties by the courts is a better option.<sup>40</sup> This suggestion does not appear to have been accepted by the media.

Finally on what constitutes naming and shaming, how it operates and the role of the media is the apparent cynical attempt by the Australian Parliament to encourage naming and shaming by enacting legislation<sup>41</sup> directing the Commissioner to publish certain information without comment about the tax affairs of large corporate entities (with income in excess of \$100 million).<sup>42</sup> This information is the company's name, its Australian Business Number, its total income, taxable income and tax payable.<sup>43</sup> The requirement to publish information is not because of some alleged wrong committed by the corporations. There is no obligation on the ATO either to verify the accuracy of the information made public or to determine whether the amount of tax payable is as prescribed by law. There is a range of reasons that entities, even in the same business line, could pay different rates of tax.<sup>44</sup> Since its enactment the legislation has been amended to limit the scope of these provisions on Australian private companies.

When originally enacted the objective of this legislation was inter alia said to be:

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<sup>40</sup> House of Lords, *Select Committee on Economic Affairs, 1st Report of Session 2013–14, Tackling Corporate Tax Avoidance in a Global Economy: Is a New Approach Needed?* (31 July 2013) [50], [69]–[80].

<sup>41</sup> *Tax Laws Amendment (2013 Measures No 2) Act 2013* (Cth).

<sup>42</sup> The idea for this legislation may be found in Marjorie E Kornhauser, 'Doing the Full Monty: Will Publicizing Tax Information Increase Compliance' (2005) 18 *Canadian Journal of Law & Jurisprudence* 95.

<sup>43</sup> All corporations must file a return reflecting their income, claimed deductions and the amount of tax payable on the assessable income reflected in the return. The return is deemed to be an assessment: *Income Tax Assessment Act 1936*: Section 166A.

<sup>44</sup> Glenn Jackson, 'Tax Governance and Tax Transparency' (KPMG Business Advisor, Edition 3, 2013). The reasons giving rise to different effective tax rates is beyond the scope of this research.

To discourage large corporate tax entities from engaging in aggressive tax avoidance practices.<sup>45</sup>

The purpose alluded to above cannot be achieved by a mere perusal of the return. It is doubtful that anyone can determine from a tax return alone whether the taxpayer is fully compliant with the tax laws; has entered into an avoidance scheme or is a participant in some tax crime; or even whether there has been some inadvertent omission or addition to the return. To achieve the aim of the legislation requires an in-depth understanding of the tax laws and an investigation and understanding of how and why certain transactions are structured in a particular way and how the tax laws apply to these transactions.

It would seem the reason for this legislation is in large measure to encourage the media to name and shame some or all of these corporations into paying more tax than they currently do, or at least to encourage the media to name and shame those corporations which, in the media's opinion, do not pay a 'fair share of taxes.'<sup>46</sup> The fact that these companies may be fully compliant with their tax obligations seems to be irrelevant. If this view is correct it is an indictment on Parliament to seek by extra legislative and judicial means to impose taxation on corporations when the law is unable to do so.

A majority of the Senate Economics Legislation Committee support the views expressed above when considering possible amendments to this disclosure legislation. Heather Ashton reports that they are of the view that:

The transparency law had the potential to result in the publication of taxation information of privately owned companies that could be misused, misinterpreted or

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<sup>45</sup> Explanatory Memorandum, *Tax Laws Amendment (2013 Measures No 2) Bill 2013* (Cth) Schedule 5 [5.6].

<sup>46</sup> Datt argues that the call to pay a 'fair share of taxes' is meaningless and constitutes empty rhetoric: Kalmen Datt, Paying a fair share of tax and aggressive tax planning—A tale of two myths, (Nov 2014) 12 (2) *eJournal of Tax Research* 410-432 <<http://search.proquest.com/docview/1674651839?accountid=12763>>.

mislead due to poor understanding of the relationship between gross accounting turnover and net taxable income.<sup>47</sup>

The views expressed above are of application to all corporations.

Further, albeit implicit, support again appears from a consultation paper on a Tax Transparency Code issued by The Board of Taxation on 15 December 2015 which states:<sup>48</sup>

*The business tax system and tax accounting for businesses are complex areas not easily accessible to non-expert readers of financial statements and other tax disclosures. The public interest in tax disclosure will be best served if there is a concerted and ongoing effort to raise the level of understanding of business taxation.*

Businesses and industry associations have a particularly important role in educating the community. The Board notes, for example, that the Chamber of British Industry recently prepared a document to brief the public on the British company tax system and to address nine misunderstood concepts that lead to confusion about how much tax a business should pay.<sup>49</sup> Many of the misconceptions identified are equally relevant to the Australian business tax context.

*One common misconception that could usefully be addressed through public education concerns the reasons why effective tax rates may be lower than the headline tax rate. For example, many governments provide tax incentives to businesses which invest in designated research and development activities. Recoupment of prior year losses, exposure to foreign exchange fluctuations and conducting overseas operations are other factors which may have the effective of reducing the effective tax rate.(My emphasis).*

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<sup>47</sup>Heath Ashton, Public doesn't understand taxation well enough for companies to publish tax contributions: Senate committee, *Sydney Morning Herald*, 13 October 2015.

<sup>48</sup> Board of Taxation. "consultation paper on Tax Transparency Code", 15 December 2015..

<sup>49</sup> 'Tax and British business — Making the Case', *Chamber of British Industry*, 2015

<[www.cbi.org.uk/media/1456721/tax\\_and\\_british\\_business\\_making\\_the\\_case.pdf](http://www.cbi.org.uk/media/1456721/tax_and_british_business_making_the_case.pdf)>.

The only basis to make a determination of non-compliance or breach of the anti-avoidance rules is with expert knowledge of the tax laws and a careful consideration of all the facts. The media is not so constrained.

Corporations cannot ignore being named and shamed by the media. The prospective publication of some company tax returns in Australia will no doubt facilitate such scrutiny in Australia. Adverse reports can be devastating that corporations need their own media and public relations consultants to advise them on how best to disclose information and handle adverse reports if necessary. As the example of Google shows, apparent attempts at being fully compliant are not a safeguard against being targeted.

The recent BEPS documentation issued by the OECD and the response of various countries such as the UK Diverted profits Tax<sup>50</sup> and the Australian Multinational Anti Avoidance Law (MAAL)<sup>51</sup> appear to be attempts to ensure income derived in a country is taxed in that country and not diverted to some none or low tax jurisdiction. These are attempts to draft effective legislation that targets the income sought to be taxed. Such an approach is the only effective way to counter what is described in the media as ‘avoidance’.

The forgoing shows that the concept of ‘avoidance’ has taken on an indeterminate and open ended meaning. What constitutes avoidance in the media bears no relationship to the interpretation that term has in the both legislation and the common-law.

The reasons for naming and shaming include identifying unacceptable behaviour and seeking by publication of this behaviour to change it. Tax can only be imposed by law and any deviant behaviour in a tax context must be found in the law. To name and shame without a legal foundation for the deviant behavior being found would appear to be an anathema to the

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<sup>50</sup> This tax is designed inter alia to address arrangements which avoid a UK permanent establishment (PE) and comes into effect if a person is carrying on activity in the UK in connection with supplies of goods and services by a non-UK resident company to customers in the UK, provided that the detailed conditions are met.

<sup>51</sup> *Tax Laws Amendment (Combating Multinational Tax Avoidance) Act 2015 (Cth)*.

assertion we live in a fair and just society. When corporations are named and shamed it can have significant consequences for their reputations.

There can be no issue with a corporation that manages its tax affairs to ensure it pays no more than the law requires. This is what all tax regulators accept as being permissible conduct. It is known as ‘tax planning.’

This article now turns to evaluate problems that may arise when a party is named and shamed and its effectiveness or otherwise.

### **3 Issues with naming and shaming**

Possibly the most fundamental issue with naming and shaming is that an entity should not be deemed to be blameworthy unless there is some robust legal test based on fact that assigns such blame. Aligned to this issue is the fact that the alleged offender has no or little recourse against those doing the naming and shaming.<sup>52</sup> This can result in innocent entities being shamed, with potentially catastrophic results for the victim. Naming and shaming presumably only occurs where there is knowledge of how much tax is paid. Those taxpayers whose information remains confidential may be immune from this type of sanction.

Shaming is regarded by some as an aspect of punishment. Blank, in dealing with the case where governments name and shame says few punishments are as dramatic and spectacular as naming and shaming. He continues:

When the government imposes a shaming sanction, it condemns the offender in full view of the community for engaging in a socially repugnant act. By resorting to shaming, the government invites the community to take part in the punishment process.<sup>53</sup>

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<sup>52</sup> Seth F Kreimer, ‘Sunlight, Secrets, and Scarlet Letters: The Tension between Privacy and Disclosure Constitutional Law’ (November 1991) 140(1) *University of Pennsylvania Law Review* 1, 5–12, 117–26, 137–8.

<sup>53</sup> Joshua D Blank. ‘What’s Wrong With Shaming Corporate Tax Abuse’ (2009) 62 *Tax Law Review* 539.

Pawson identifies other areas of concern with naming and shaming.<sup>54</sup> These are:

- the performance or behaviour in question is classified inappropriately (often the case when avoidance is alleged);
- the disclosure is poorly managed by sparse or excessive publicity;
- the wider public apply measures that go beyond ‘shaming’ – such as humiliation, deprivation, vigilantism, defamation, banishment, etc. *or* fall short of shaming – such as disapproval, stoicism, apathy, sympathy, collusion; and
- the individual or institution under sanction reacts to ‘shaming’ by accepting the label and amplifying deviant behaviour, or by ignoring/rejecting the label and continuing existing behaviour.

This article argues that those who name and shame corporations for breaching their tax obligations may be acting on a mistaken view of the law, the facts or both. This mistaken view may be deliberate. The fact that corporations pay no or little tax in a country does not mean that it has breached any of those countries’ tax laws. Those who name and shame in these circumstances are *prima facie* seeking community outrage against what may be blameless conduct. If the media or regulator or the public believe tax should be paid for certain transactions but none is it is the function of Parliament to ensure the appropriate legislation is passed and for the regulator to enforce such laws. It is not for the media to be the sole arbiter of blame/guilt when alleging avoidance based on some subjective, indeterminate and non-legislated basis known only to them. The media is not capable of making complex legal distinctions between compliance and non-compliance and it is certainly not their role to punish extra-curially without any legal basis for assigning blame/guilt.

The obligation to pay tax should be based on a liability created by legislation and not be an *ex gratia* payment or attempt to appease what may be unjustified, uninformed and vociferous criticism. For corporations to act in the way required by the media may require directors to

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<sup>54</sup> Ray Pawson, Above n 11.

breach their common law and legislative obligations to the corporation and its stakeholders.

This in fact occurred in the UK, when a spokesperson of Starbucks was reported as stating:

We listened to our customers in December and so decided to forgo certain deductions which would make us liable to pay £10m in corporation tax this year and a further £10m in 2014. We have now paid £5m and will pay the remaining £5m later this year.<sup>55</sup>

Conduct such as that set out above demeans the rule of law. The following can be inferred from the above extract:

- Starbucks was tax compliant in the past;
- It would not apply the law of the land and claim deduction to which it was entitled so as to appease some unstated demand by customers;
- The law is of secondary importance when a corporation is named and shamed.; and most importantly
- It is the corporation's reputation and goodwill that must be protected; and
- Whether the corporation was blameless or not is irrelevant to the campaign of naming and shaming by the media..

In protecting a corporation's goodwill directors may be acting in the interests of the corporation. However, if they are fully compliant, the attacks on the corporation's reputation should not occur. Unfortunately these attacks are common.

.Naming and shaming should be used in situations where there has been some deviant behaviour such as a dishonest breach of the tax laws so as to manipulate that entity into acting in a non-deviant manner. If there is no breach or no breach as the media contends then these attacks on the reputation of corporations should not occur. The media appears to be at large in determining whether a corporation is blameworthy when discussing their tax affairs.

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<sup>55</sup> Terry Macallister, 'Starbucks pays corporation tax in UK for first time in five years' *The Guardian* (online) 24 June 2013

<<http://www.theguardian.com/business/2013/jun/23/starbucks-pays-corporation-tax>>. See also House of Lords, above n 47, [68].

No regard appears to be given to what the law requires in publishing articles about corporations where it is contended they are ‘guilty’ of tax avoidance. The deviant behaviour identified by the media is some indeterminate, non-legislated basis on which the media is the sole arbiter of what is right or wrong.

Naming and shaming is now used as a means of punishment by law enforcement bodies. It is not the role of the media to determine blame and punish without first establishing a justifiable legal basis for such actions. A policy of appeasement by corporations from these vociferous and seemingly unjustified attacks demeans the rule of law.

This article now turns to the example of Google to illustrate the impact and possible abuse of naming and shaming and the care that must be taken by those that use it or encourage its use as a tool to compel some corporations to pay more tax than they currently do.<sup>56</sup>

#### **4.Google**

Google earned significant monies in the UK, but paid little tax on these earnings. In response, the media, activists and parliamentarians embarked on a sustained campaign against Google, arguing inter alia that because it earned large amounts of money in the UK, it should pay UK tax on this income. Examples from this campaign in the media follow.

*The Telegraph* on 2 January 2013 reports the following about Google:

Google funnelled £6 billion through Bermuda last year, halving its 2011 tax bill and paying £1 billion less to government coffers.

The company paid £6 million in UK tax last year, funnelling 80 per cent of its global revenue through the tiny island of Bermuda, twice as much as three years ago.<sup>57</sup>

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<sup>56</sup> There are many other examples, particularly with large multinational corporations. These include Amazon, Starbucks and Apple.

*BBC News Magazine* on 21 May 2013 reports:

In a report published on Monday, the committee's chairwoman Margaret Hodge said the level of tax taken from some multinational firms was "outrageous" and that HM Revenue and Customs needed to be "more aggressive and assertive in confronting corporate tax avoidance".<sup>58</sup>

*The Register* of 14 June 2013 states:

British MPs have demanded that the government act to revamp the tax structure after damning revelations about Google's corporate payments structure in the country.<sup>59</sup>

*The Telegraph* of 28 June 2013 reports:

Google's reputation in Britain has taken a heavy blow as a result of criticism over its avoidance of taxes, a major survey of consumer attitudes suggests.<sup>60</sup>

Google has also been criticised in Australia for the same reasons as in the United Kingdom. For example *ABC News* on 9 April 2015 reports a Google representative on being challenged on the amount of tax it pays in Australia before a senate enquiry said:

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<sup>57</sup> Matt Warman, 'Google's £6 billion Bermuda tax shelter' *The Telegraph* (online) 2 January 2013

<<http://www.telegraph.co.uk/technology/google/9775216/Googles-6billion-Bermuda-tax-shelter.html>>.

<sup>58</sup> Vanessa Barford & Gerry Holt, *BBC News Magazine*, 21 May 2013

<<http://www.bbc.com/news/magazine-20560359>

Google, Amazon, Starbucks: The rise of 'tax shaming' >.

<sup>59</sup> Brid-Aine Parnell, 'MPs demand UK rates revamp after Google's "extraordinary tax mismatch"' *The Register* (online) 14 June 2013

<[http://www.theregister.co.uk/2013/06/14/mp\\_google\\_tax\\_report/](http://www.theregister.co.uk/2013/06/14/mp_google_tax_report/)>.

<sup>60</sup> Christopher Williams, 'Google brand damaged by tax row' *The Telegraph* (online) 28 June 2013

<<http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/10146737/Google-brand-damaged-by-tax-row.html>>.

"I guess my answer to that one is that fundamentally, Google does not structure itself based on tax, it structures itself based on being competitive, right?," Ms Carnegie said.

"We are not opposed to paying tax. What we're opposed to is being uncompetitive."<sup>61</sup>

Matt Wade on the same day reports:

Apple's Tony King, Google's Maile Carnegie and Microsoft's Bill Sample each said their company complied fully with Australian tax laws and drew attention to the way Australia benefited from their products and services. Mr King said Apple believed in "leaving the world a better place" and Ms Carnegie said she was "proud of Google's contribution to Australia".<sup>62</sup>

The basis for naming and shaming Google is that presumably it unlawfully and intentionally did not pay the tax in the UK or Australia that was properly assessable under their respective tax laws, or that it entered into one or more schemes not permitted by law to limit its tax liability.

The conduct of Google in relation to its tax affairs would appear to be part of its corporate strategy and is actively encouraged by its board of directors. A news report in *BBC News Technology* of 17 June 2013 states:

Scott Rubin, Communications Director, Google has been asked about Google's tax arrangements and said that his company pays what is 'required by law'.<sup>63</sup>

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<sup>61</sup> Simon Santow, Google, Apple and Microsoft deny tax avoidance at Senate inquiry, *ABC News* 9 April 2015 <<http://www.abc.net.au/news/2015-04-08/google-apple-microsoft-deny-tax-avoidance-senate-inquiry/6379024>>.

<sup>62</sup> Matt Wade, Tax avoidance hearing: Google, Microsoft and Apple tell Senate committee they fully comply with Australian laws, *Sydney Morning Herald Business Day*, 9 April 2015.

<sup>63</sup> 'Google: "We pay tax required by law"' *BBC News Technology* (online) 17 June 2013 <<http://www.bbc.co.uk/news/technology-22932794>>.

If Google pays all tax mandated by law, as it contends, the premise for it being named and shamed may be false or at least based on an incorrect view of the law. It is up to the courts to say that the view taken by Google is incorrect. The mere fact that a corporation pays tax at a rate lower than the headline rate or pays no tax at all in a country in which income is generated does not mean the company has not complied with all the tax laws of that country. If a country wishes to tax certain forms of income then it must ensure it passes effective tax laws to capture the income targeted.

In a 6 January 2014 report in *The Times* notes that in 2012 Google had income in the UK of £3.1 billion, profits of £889 million and a potential tax liability if tax was paid on all profits of £213 million. Tax in the sum of £11.6 million was paid. The report notes that after investigations since 2010 by Her Majesty's Revenue and Customs (HMRC), Google was required to pay back tax of £24 million (it is not stated over which income years these back taxes are calculated). These taxes were for the disallowance of specific deductions claimed in previous years.<sup>64</sup>

The report notes that alongside Google, Apple, Amazon and Facebook claimed these deductions. Since a conspiracy by each of these companies to defraud HMRC of tax in an identical manner is highly improbable, this suggests that each of these companies believed they were entitled to these deductions on their interpretation of the UK tax laws. That their view of the law may be mistaken cannot be doubted; however, the genuineness of their belief must presumably also be accepted.

At the time Google was being named and shamed in 2013 and earlier it was not known that an amended assessment would be issued on the above grounds. The naming and shaming of Google in these years did not suggest, even implicitly, that its failure, at least in part, to pay more tax in the UK was based on a mistaken but genuine view of the law, or that such taxes as were payable by law were not paid. For example, in evidence before the UK Parliament's Public Accounts Committee, the chair, Margaret Hodge (a vociferous critic of Google) , in a

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<sup>64</sup> Dipesh Gadher and Simon Duke, 'British hit Google with \$44m backdated tax bill' *The Times* (London) 6 January 2014, as cited by *The Australian* (online) <<http://www.theaustralian.com.au/news/world/british-hit-google-with-44m-backdated-tax-bill/story-fnb64oi6-1226795373948#>>.

question to Matt Brittin, vice-president for Google Incorporated (Google) in northern and central Europe, said '[w]e are not accusing you of being illegal; we are accusing you of being immoral'.<sup>65</sup> What Hodge appears to be saying is that the UK would like Google to pay more tax in the UK than it currently does and presumably in an amount greater than is required by law.

After what was presumably an intensive investigation of more than three years, the disallowed deduction total of £24 million is miniscule in relation to Google's earnings in the UK over the period 2010 to 2013 (assuming 2012 is representative). This gives some credence to Google's statement that, as far as it is concerned, it pays such tax as is required by law. Further, there is no direct assertion in the 2014 *Times* report that HMRC contended that the deductions sought to be set aside were tainted by avoidance or criminal conduct. Significantly the claim by HMRC was for a deduction that was disallowed and not for undeclared income.

Then in 2016, in what was triumphantly announced as a major victory for HMRC Google entered into an agreement with it to pay it £130 million. *The Guardian* reports:<sup>66</sup>

Google has agreed a deal with British tax authorities to pay £130m in back taxes and bear a greater tax burden in future. The deal will cover a decade of underpayment of UK taxes by the company, which has been criticised in the past for its tax avoidance policies...A Google spokesman confirmed reports that the firm was to pay £46.2m in taxes on UK profits of £106m for the 18 months to June 2015, as well as back taxes owed for the previous decade.

One will recall the article in the *Times* of January 2014 that noted that in 2012 Google had income in the UK of £3.1 billion, profits of £889 million and a potential tax liability if tax was paid on all profits of £213 million. If one accepts this as being indicative of the income

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<sup>65</sup> UK Parliament, Evidence to Parliament's Public Accounts Committee (2 November 2012) (Margaret Hodge).

<sup>66</sup> Kevin Rawlinson, Google agrees to pay British authorities £130m in back taxes, *The Guardian*, 23 January 2016.

of Google each year in the preceding decade then the amount paid is miniscule. The total tax over a period of 10 years should presumably have been in the region of £2.1 billion based on an annual tax liability of about £200 million each year.

The 'triumph' was immediately criticised. An example appears from an *ABC News* reports as follows:<sup>67</sup>

Google said the 130 million pounds would settle a probe by the British tax authority, which had challenged the company's low tax returns for the years since 2005.

The report continues:

John McDonnell, finance spokesman for the opposition Labour party, said the tax authorities needed to explain how they had settled on the figure of 130 million pounds, which he described as relatively insignificant.

*"It looks to me ... that this is relatively trivial in comparison with what should have been made, in fact one analysis has put the rate down to about 3 per cent, which I think is derisory," he told BBC Radio.*

*"This looks like another sweetheart deal."*

*Prem Sikka, professor of accounting at Essex University, agreed, saying that for a company that enjoyed UK turnover of around 24 billion pounds over the period and margins of 30 per cent, the settlement represented an effective tax rate in the low single digits for Google.*

*"This is a lousy number and we need to know more," he said. (My emphasis).*

Nassim Khadem reports Rupert Murdoch saying the following about the Google agreement with HMRC:<sup>68</sup>

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<sup>67</sup> Google agrees to pay Britain 130 million pounds in back taxes, Opposition label figure 'derisory' *ABC News online*(updated 24 January 2016)

< <http://www.abc.net.au/news/2016-01-24/google-agrees-to-pay-back-taxes-to-britain/7110044>>.

Rupert Murdoch may be right, well this time any way...

'Google et al broke no tax laws' Murdoch wrote on twitter.

'Now paying token amounts for PR purposes. Won't work. Need strong new laws to pay like the rest of us'.

An issue that illustrates how ineffective this transaction is from the perspective of HMRC appears from a report in *The Guardian* of 4 February 2016 which records:<sup>69</sup>

*George Osborne's claim that the government secured a major corporation tax deal with Google appear to be unravelling after it emerged that a quarter of the £130m recovered by HM Revenue & Customs related to the US company's share options scheme.*

Filings by Google's UK subsidiary show that £33m of the funds paid to the Treasury followed a wrangle over share options handed to staff, which the US business had argued were exempt from UK tax.

*The company's accounts show that the government was only able to claw back less than £100m in corporation tax from Google for the 2005-2014 period, and not the £130m the chancellor claimed. MPs and foreign governments have criticised the deal for allowing Google to generate billions of pounds in profits from its UK business and pay little corporation tax. (My emphasis).*

The agreement with Google, as Murdoch suggested, appears to be a stratagem on its part to obtain respite from the attention of the media. Notwithstanding this it appears the monies paid to HMRC is but a token of all the taxes it is contended it should have paid in the past. The individual parts of how the sum of £130 million is made up is not known.

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<sup>68</sup> Nassim Khadem, Rupert Murdoch is right, the tax deal with Google is 'token', *The Sydney Morning Herald, Business Day*, 29 January 2016.

<sup>69</sup> Google tax deal under fire as it emerges figure included share options scheme, *The Guardian* (on line) 4 February 2016

<<http://www.theguardian.com/technology/2016/feb/04/google-uk-tax-deal-share-options-scheme>>.

The naming and shaming campaign against Google although causing a loss of reputation resulted in minimal gain to HMRC. There have to the author's knowledge been no successful challenges to the tax affairs of Google in Australia despite intensive investigations into its affairs. The only way in which the UK or any other country is able to tax entities such as Google for income derived in their countries are to enact effective tax laws that capture this income. Whether the Diverted profits tax in the UK or the MAAL in Australia accomplishes this task is yet to be demonstrated.

## **5. Conclusion**

The media plays an important role in naming and shaming. Without the media naming and shaming would not be effective. There are significant issues with such campaigns. These include issues such as blameless entities may be targeted. With such campaigns the media appears to be the sole arbiter of what is right and wrong. The targets of these campaigns can do very little to counter it.

The media campaigns against what it refers to as 'tax avoidance'. These campaigns are and continue to be based on what would appear to be a misconception of the scope and ambit of the tax laws and what constitutes avoidance. This misconception may be deliberate. The concept of 'Tax avoidance' as used in the media appears to have a meaning which is indeterminate and open ended which enables the media to label any conduct other than the payment of the headline rate of tax as avoidance.

One of the corporations targeted was Google. As a result of this campaign Google's reputation was damaged. After many years of being the brunt of a naming and shaming campaign it concluded an agreement with HMRC apparently to cover taxes not paid over a period of a decade. This payment is seen to a stratagem to limit the media campaign against it. The amount paid bears no relationship to the income earned over the decade in question or the tax on that income which it was contended was not paid.

Campaigns of naming and shaming which cause corporations to make payments to the revenue authorities of sums of money that are not payable under the tax laws demean the rule of law. Taxes should only be paid in relation to those amounts which the law requires. To determine if there has been noncompliance with the tax laws whether it is avoidance or some other breach requires expert knowledge of the tax laws and a careful consideration of the facts to which it is sought to apply such laws. The media is not capable of making complex legal distinctions between compliance and non-compliance and it is certainly not their role to punish extra-curially without any legal basis for assigning blame/guilt.

The obligation to pay tax should be based on a liability created by legislation and not be an ex gratia payment or attempt to appease unjustified, and often uninformed and vociferous criticism. If there are to naming and shaming campaigns against corporations the media should ensure their allegations of misconduct are based on breach of the tax laws and not a breach of some intangible amount of which they are the sole arbiters.