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Paying a fair share of tax and aggressive tax planning — A tale of two myths

Kalmen Hyman Datt¹

Abstract

This article critically evaluates calls by the Australian Taxation Office (ATO) for directors of corporations to ensure companies pay a 'fair share of tax' or act as a 'good corporate citizen' or not embark on 'aggressive tax planning' schemes. The author concludes the first two terms mean whatever the speaker wishes them to mean and introduce an emotive and subjective element into the determination of a company's tax liability. Although tax regulators have attempted to define what is meant by 'aggressive tax planning' this too suffers from the above criticisms. This latter phrase does not tell the reader/listener how to identify 'aggressive tax planning'. Either a scheme can be successfully challenged by the regulator or it cannot. If the latter, irrespective of the descriptors used, it is legal and unobjectionable. The author suggests the Commissioner should refrain from using these terms.

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1. INTRODUCTION

This article, although directed primarily at the Australian tax system has application to all jurisdictions where the regulator calls on directors to ensure corporations pay a ‘fair share of tax’ or act as a ‘good corporate citizen’ or not embark on ‘aggressive tax planning’ schemes. This article critically evaluates these calls. No meaning can be ascribed to the first two terms. All the phrases convert what should be an objective determination of liability for tax into an emotive subjective concept with political overtones. These statements may also be a call to pay more tax than the law requires. If this latter view is correct the Commissioner has no power to make such calls as their effect would be to impose a tax or increase the rate of taxation beyond that prescribed by Parliament. These phrases may also be calls for directors to breach their corporations’ law obligations.

The scheme of this article is as follows: Section two briefly reviews the obligation of directors imposed by the *Corporations Act 2000 (Cth)* (*Corporations Act*) with reference to tax. Although having relevance to all taxes imposed by Parliament this article only deals with Federal income tax. Section 3 critically evaluates the phrases pay a ‘fair share of tax’ or to act as a ‘good corporate citizen.’ Consideration is also given to a related topic namely corporate social responsibility (CSR). Section 4 critically analyses the call by the ATO not to embark on ‘aggressive tax planning’. Section 5 sets out the author’s conclusions.

The next section considers the obligations of directors in relation to tax. The first part deals with the obligation of directors to act in the best interests of the corporations. The next part considers the duties of care, good faith and diligence. Part three reviews the overarching duty of taxpayers to pay such taxes as the law prescribes.

2. THE OBLIGATION OF DIRECTORS

2.1 The primary obligation

There are numerous cases that state that directors must act for the benefit of the company.² This is reinforced by the *Corporations Act*, which require directors to act in good faith and in the best interests of the company.³

Van Der Linde states “[t]he focus of directors’ duties remains the company as a whole, translating into the maximisation of shareholder value”.⁴ The derivation and maximisation of profits is important because generally, without profits few, if any, of

² Examples include, *Harlowe’s Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483; *Smith Kline & French Laboratories Ltd v Inter-Continental Pharmaceuticals (Australia) Pty Ltd* (1969) 123 CLR 514; *Kalls Enterprises Pty Ltd (In Liq) v Baloglow* [2007] NSWCA 191 (24 October 2007).

³ *Corporations Act* s 181 (1).

⁴ Kathleen Van Der Linde, ‘The Personal Liability of Directors for Corporate Fault—An Exploration’ (2008) 20 *SA Mercantile Law Journal* 439, 439–440.

the goals of the corporation can be achieved. The predominant way of measuring success is the level of post-tax profits derived by a company. Tax must be calculated and accurately reflected in companies' financial statements.⁵ The greater the profit derived by a company, the greater the ability of the company to achieve its goals and act for the benefit of its shareholders and other stakeholders. A loss-making company is generally unable to pay dividends and loses value. In the past corporations could only pay dividends from profits but since the incorporation of section 254T into the *Corporations Act* in 2010 corporations can now pay dividends if: the company's assets exceed its liabilities immediately before the dividend is declared and the excess is sufficient for the payment of the dividend; the payment of the dividend is fair and reasonable to the company's shareholders as a whole; and the payment of the dividend does not materially prejudice the company's ability to pay its creditors.⁶

Tax is an unavoidable expense of the company in its search for profits and directors need to devote time to formulating tax strategies both to ensure a corporation complies with its tax obligations and to limit its liability for tax. Corporations generally strive to achieve a competitive effective tax rate. Owens states:

So what are the aims of the tax directors today? Clearly, an overriding objective continues to be to minimise tax liabilities so as to produce a competitive effective tax rate. But this desire to minimise tax will normally be tempered by the need to achieve a stable and sustainable tax rate. Achieving this should reduce the amount of time that senior management has to spend on resolving tax disputes with the revenue bodies.⁷

Not everyone holds that a lower effective tax rate is advantageous. Thomas and Zhang contend that, although a tax expense is deducted from pre-tax profit when computing net income, it is essentially a proxy for underlying profitability; as such, unexpected increases in tax expense are good news.⁸ If the increase in tax is supported by an increase in profits, this view seems correct. However, if the increase in tax is not accompanied by an increase in profits, and is not owing to a change in the tax laws, this may be cause for concern and may indicate the directors are not acting in accordance with their common law and statutory obligations.

If there is any conflict (other than in insolvency) between the interests of the corporations and the interests of shareholders or other stakeholders, the interests of the company take precedence. The Supreme Court of Canada, in a unanimous judgment in *BCE*, state:

The fiduciary duty of the directors to the corporation originated in the common law. It is a duty to act in the best interests of the corporation. Often the interests of shareholders and stakeholders are co-extensive with the

⁵ For example, the Australian Accounting Standards Board, 'Standard AASB112' (2012) Items 12 and 15 deal with how corporations' financial statements must reflect tax.

⁶ *Corporations Act* s254T (1) (a) to (c).

⁷ Jeffrey Owens, 'Keynote Address' (Speech delivered at the Tax Executives Institute Conference, Washington DC, 19 March 2007).

⁸ Jacob Thomas and Frank Zhang, 'Valuation of Tax Expense' (2010) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1464162>.

interests of the corporation. But if they conflict, the directors' duty is clear—it is to the corporation.⁹

Australian common law has the same principle.¹⁰

It follows that tax minimisation policies that do not breach the anti-avoidance rules should be considered and adopted if they lead to greater profits being available for investment, distribution or the attainment of other goals of the corporation and are in its best interests.

In addition to the common law duty to act in the best interests of the corporation, there are a number of statutory duties imposed under the *Corporations Act*. From a tax perspective, the statutory duties of care, diligence,¹¹ good faith and to act in the interests of the corporation¹² are arguably the most important although the latter duty appears to be the primary obligation dealing with tax. It is on this latter duty that next section concentrates.

2.2 The duties of care, diligence and good faith

The duty of good faith is owed to the corporation.¹³ It is a criminal offence if a director is reckless or intentionally dishonest and fails to exercise his or her powers and duties in good faith in the best interests of the corporation.¹⁴ Risk taking is not a breach of these duties, although risks must be weighed against potential reward for the corporation.¹⁵ It is a breach if directors authorise or permit a company to commit contraventions of provisions of the *Corporations Act*, “or authorise a course which attracts the risk of that exposure (the imposition of penalties), at least if the risk is clear and the countervailing potential benefits insignificant”.¹⁶ A full bench of the Supreme Court of New South Wales Court of Appeal was of the view that “the question whether a director has exercised a reasonable degree of care and diligence can only be answered by balancing the foreseeable risk of harm against the potential benefits that could reasonably have been expected to accrue to the company from the conduct in question”.¹⁷ It is arguable that permitting a corporation to commit a taxation offence or possibly making it subject to administrative penalties constitutes a breach.

In the leading Australian case on the duty of care, *Daniels*, Justices Clarke and Sheller emphasise that a failure to make proper enquiry is not a defence when a breach of the duty of care and diligence is alleged. They state: “Directors may not shut their eyes to corporate misconduct and then claim that because they did not see the misconduct,

⁹ *BCE Inc. and Bell Canada v A Group of 1976 Debentureholders* [2008] 3 SCR 560 [37].

¹⁰ *Bell Group Ltd (In Liq) v Westpac Banking Corporation* (No 9) [2008] WASC 239 (28 October 2008) [4389]–[4392].

¹¹ *Corporations Act* s 180.

¹² *Corporations Act* s 181.

¹³ *ASIC v Maxwell* (2006) 24 ACLC 1,308 [102].

¹⁴ *Corporations Act* s 184 (1).

¹⁵ *Vrisakis v Australian Securities Commission* (1993) 11 ACLC 763; *ASIC v Lindberg* [2012] VSC 332 (9 August 2012).

¹⁶ *ASIC v Maxwell* (2006) 24 ACLC 1,308 [104]. See also *ASIC v Sydney Investment House Equities Pty Ltd* [2008] NSWSC 1224 (21 November 2008).

¹⁷ *Vines v ASIC* [2007] NSWCA 75 (4 April 2007), [598].

they did not have a duty to look”.¹⁸ Directors must be familiar with the fundamentals of the business in which the corporation is engaged (including risk management) and must keep themselves informed about the activities of the corporation.¹⁹ This oversight function includes establishing a system to prevent, detect and correct any wrongdoing with reference to tax. This rule is applied in the US. In *Daniels* the majority were of the opinion that directors must ensure they have available “means to audit the management of the company so that it can satisfy itself that the company is being properly run”.²⁰ A breach of these duties results in liability under the *Corporations Act*.²¹

An objective standard of care is applicable to both executive and non-executive directors.²² If anything is found to be amiss or the directors are put on enquiry, a proper investigation must be undertaken. Failure to do so is a breach of their duty of care and diligence.

The level of risk, including tax risk, a company is prepared to take in achieving its goals are determined by its board of directors. A company must comply with applicable legal and accounting rules although directors have some discretion in the way they design and operate compliance and governance programs.

In *Disney*, the following examples of conduct were identified as establishing a failure to act in good faith:

Where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties. There may be other examples of bad faith yet to be proven or alleged, but these three are the most salient.²³

Although based on a US decision the provisions of the *Corporations Act* and cases cited above suggest the same principles apply in Australia and that even a breach of the anti-avoidance rules may be a failure to act in good faith. It seems that when performing their duties directors do not consciously consider the good faith requirement. Consideration of the company’s best interests would arguably satisfy this test and the analysis in *Disney* above.

This section has shown the statutory duties of care, diligence and good faith require directors to weigh foreseeable risk against potential gain (in part, this is a reiteration of the need to maximise profit). Tax being an unavoidable expense of a company, should be contained. Directors need to devote time and effort to the tax affairs of corporations.

¹⁸ *Daniels v Anderson* (1995) 13 ACLC 614, 664–5.

¹⁹ In *Re Caremark Int'l*, 698 A.2d 959, 970 (Delaware Chancery, 1996), Chancellor Allen states:
I note the elementary fact that relevant and timely *information* is an essential predicate for satisfaction of the board’s supervisory and monitoring role.
See also *ASIC v Adler* (2002) 20 ACLC 576, 652.

²⁰ *Daniels v Anderson* (1995) 13 ACLC 614,662. See also *Vines v ASIC* [2007] NSWCA 75 (4 April 2007).

²¹ Even where the company makes what turns out to be large profits due to wrongful conduct the directors are liable: *Re Barings plc (No 5)*, *Secretary of State for Trade and Industry v Baker (No 5)* [1999] 1 BCLC 433.

²² *ASIC v Healey* [2011] FCA 717 (27 June 2011) [172].

²³ *Re Walt Disney Co. Deriv Litig*, 906 A 2d 27, 67 (Delaware, 2006).

In seeking to maximise profits companies must find and exploit manageable risks. Directors must ensure companies pay such taxes as the law requires.

How then should tax be calculated and paid? This is considered next.

2.3 The obligation to pay tax

Camp said the following about the US self-assessment system “[u]ndergirding the entire self-assessment regime is the idea that for every taxpayer, there exists a ‘true’ tax liability”.²⁴ Doran states, “in the view of the IRS, then, ‘tax compliance’ requires that the taxpayer make a correct assessment of their tax liability with all legal uncertainties resolved correctly”.²⁵ This equates with the Australian position.²⁶ The foregoing statements have their genesis in what has been said by the highest courts in many countries. For example in the United States, Judge Learned Hand in *Gregory*²⁷ said:

Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.

Lord Wilberforce, in the UK, notes, from the perspective of the regulator, that: “A man is not to be taxed by a dilemma: he must be taxed by positive provision under which the Crown can satisfactorily show that he is fairly and squarely taxed”.²⁸ In Australia the late Justice Hill said, the Commissioner is “obliged 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”.²⁹

It is only the various taxing statutes that can determine an entity’s liability for tax. The basic principle behind a self-assessment system such as that which operates in Australia is that any tax is capable of precise determination in an amount fixed by law. According to Freedman, “companies cannot be expected to pay voluntary tax over and above the amounts imposed by law”.³⁰

The Crown is not entitled to retain any tax recovered by virtue of a lack of statutory power.³¹ An entity is not obliged to put aside its own interests to pursue a tax policy that is the most beneficial to the government.³²

²⁴ Camp Bryan T, Tax Administration as inquisitorial process and the partial paradigm shift in the IRS restructuring and Reform Act of 1998, (2004) 56 *Florida Law Review* No. 1
<http://mytechlaw.law.ttu.edu/library/faculty/Faculty%20Scholarship%20Files/Camp%2056%20Florida.pdf>.

²⁵ Michael Doran, ‘Tax Penalties and Tax Compliance’ (2009) 46 *Harvard Journal on Legislation* 111, 140.

²⁶ *Taxation Administration Act 1953* (Cth) s 166A.

²⁷ *Gregory v Helvering, Commissioner of Internal Revenue* 69 F.2d 809 (1934).

²⁸ *IRC v Holmden* [1968] AC 685, 712.

²⁹ *Brown v Commissioner of Taxation* 99 ATC 4516, 4526 [51].

³⁰ Judith Freedman, ‘Tax and Corporate Responsibility: In My Opinion’ (2003) 695 *Tax Journal* 2, 6.

³¹ *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1992] 3 All ER 820.

³² Richard Happe, ‘Multinationals, Enforcement Covenants, and Fair Share’ in J Freedman (ed), *Beyond Boundaries: Developing Approaches to Tax Avoidance and Tax Risk Management* (Oxford University Centre for Business Taxation, 2008) 157.

The inevitable consequence of the foregoing is that corporations are entitled to arrange their affairs to pay only such tax as the law requires. The Commissioner acknowledges “[t]ax planning is a key feature of any tax landscape”.³³

Notwithstanding the foregoing it would appear that the ATO believes that corporate entities should pay what is described as their ‘fair share of tax’ or take the interests of the community into account when determining their tax liability and act as a ‘good corporate citizen’. For example the Commissioner said:

Compliance is a rather strong sounding word. Perhaps it is better to think in terms of fairness, for that is what compliance with our tax laws is all about. It is about people paying their fair share as set by our laws.³⁴

The Commissioner reverts to this theme on numerous occasions.³⁵

The acceptance by the Commissioner that tax planning is legitimate is somewhat contrary to calls for companies to pay a ‘fair share of tax’ or to act as a ‘good corporate citizen’. The tension between these two positions is discussed in the next section which is divided into two parts. The first considers the concepts of a ‘fair share of tax’ and ‘good corporate citizenship’ whilst the latter reviews CSR.

3. PAY A ‘FAIR SHARE OF TAX’ AND ACT AS A ‘GOOD CORPORATE CITIZEN’

Freedman, Loomer and Vella undertook a survey investigating the attitudes and opinions of some large businesses and Her Majesty’s Revenue and Customs (HMRC) and report that:

All of these respondents agreed that it was acceptable for a taxpayer to implement a business-led transaction in the most tax effective manner ... corporation tax is a significant cost against business profits; reducing that cost in order to maintain competitive position or enhance shareholder value was seen as a valid commercial objective in itself.³⁶

A survey conducted by Rawlings indicates that there is a perception that high wealth and corporate taxpayers do not pay their proportionate share of tax.³⁷

³³ Michael Carmody Commissioner of Taxation *Managing Compliance* Address to The Tasmanian Chamber of Commerce and Industry 3 September 2003

³⁴ Michael Carmody, ‘The State of Play Five Years On’ (Address to Taxation Institute of Australia Victorian Division 3 February 1998).

³⁵ See for Commissioner of Taxation, ‘*Consultation, collaboration and co-design: The way forward for the tax office*’ (Address to Australian Public Service Commission SES Breakfast, Boathouse by the Lake, Canberra 21 September 2006).

³⁶ Judith Freedman, Geoffrey Loomer and John Vella, ‘Moving Beyond Avoidance? Tax Risk and the Relationship between Large Business and HMRC’ in Judith Freedman (ed), *Beyond Boundaries: Developing Approaches to Tax Avoidance and Tax Risk Management* (Oxford University for Business Taxation, 2008) 81, 90.

³⁷ Gregory Rawlings, ‘Cultural Narratives of Taxation and Citizenship: Fairness, Groups and Globalisation’ (Working Research No 52, Centre for Tax System Integrity, Australian National University, February 2004) 1.

Similar results were obtained in a survey conducted by Valerie and John Braithwaite.³⁸

Since tax is essentially a private affair, particularly having regard to the secrecy provisions of the *Taxation Administration Act 1953 (Cth) (TAA)*, the results of the surveys conducted by Rawlings and John and Valerie Braithwaite may reflect an incorrect view on the part of the respondents interviewed on how tax is imposed, calculated and paid by corporations. No one knows what is declared and in what amount tax is paid, with the exception of some corporations that must publish their results. Even where returns are published there is no means of determining whether the company has or has not complied with its obligations under the tax laws. Recent legislation (*Tax Laws Amendment (2013 Measures No 2) Act 2013 (Cth)*) overrides the secrecy provisions contained in the *TAA* by requiring the Commissioner to publish information about corporations with a turnover in excess of \$100 million. The reasons advanced for the introduction and effect of these provisions is outside the scope of this article.

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, the Commissioner'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'.³⁹

If the Commissioner is of the view that taxpayers are obliged to pay tax in accordance with the law—something that is not open to any form of challenge—then requests to pay a 'fair share of tax' seems inappropriate. This adds an element of uncertainty and subjectivity and possibly even a political element to what should be an entirely objective concept. The Commissioner is entrusted with the administration of the tax laws, not nebulous concepts such as 'fairness' or 'good citizenship'.

The Commissioner has never (and can never) explain what is meant by a 'fair share' of tax. According to Slemrod "[t]here is an active controversy about what exactly fairness means".⁴⁰

Does the payment of a 'fair share of tax' mean that corporate taxpayers must pay the headline rate, or is this an allusion to some other percentage? If the latter, how is this percentage to be determined and by whom? What if the various taxing acts provide that certain income is not assessable? For example, certain income derived from overseas businesses controlled by Australian companies is not assessable income and is not exempt income of the company.⁴¹ To suggest that, because some corporate

³⁸ Valerie Braithwaite and John Braithwaite, 'Democratic Sentiment and Cyclical Markets in Vice' (November 2006) 46 *British Journal of Criminology* 1110, 1111–4. See also: Valerie Braithwaite, 'Perceptions of Who's Not Paying Their Fair Share' (Working Paper No 54, Centre for Tax System Integrity, Research School of Social Sciences, Australian National University, February 2004).

All authors are referred to by their surnames in the body of this article other than for John and Valerie Braithwaite. The reason is to avoid confusion between these two scholars.

³⁹ Dan M Kahan, 'Logic of Reciprocity: Trust, Collective Action, and Law' (2003–2004) 102 *Michigan Law Review* 71.

⁴⁰ Joel Slemrod, 'Old George Orwell Got it Backward: Some Thoughts on Behavioral Tax Economics' (CESIFO Working Paper No 2777, Category I: Public Finance, September 2009) 5. See also: Donna J Wood and Jeanne M Logsdon, 'Business Citizenship as Metaphor and Reality' (January 2008) 18(1) *Business Ethics Quarterly* 51.

⁴¹ *Income Tax Assessment Act 1936 (Cth)* ss 23AI–23AJ.

taxpayers have an effective tax rate of 20 or 10 per cent as opposed to the headline rate of 30 per cent, they are not paying their fair share is meaningless unless one knows how the tax is calculated and whether this is in accordance with the law. If in accordance with the law the reference to ‘fairness’ is redundant. One need only pose the question of what is a ‘fair share of tax’ to understand the futility of attempting an answer.

Another problem with the concept of a ‘fair share of tax’ is the multitude of techniques that governments adopt to increase the tax burden without directly stating they are doing so. Taxpayers tend to underestimate the total tax they pay when the amount is spread over various taxes or when different techniques are used to cause voters to underestimate the true cost of government.⁴² For example, by switching from manual, per-trip remittance of traffic tolls to automatic electronic charging, Finkelstein argues that toll increases are facilitated because the act of remittance becomes less salient to drivers/voters.⁴³

Gribnau argues that ethics and morality have a role to play in determining how far a corporation should go in determining its risk policy and the extent to which it will take advantage of tax planning opportunities. According to Gribnau, the ethical factors to be considered when interpreting tax legislation may exceed the legal ones. However, he concedes that not all tax planning is unethical. He argues that what is not utilised by corporations is a value judgment as to what constitutes aggressive tax planning and avoidance.⁴⁴

Tulberg cites various philosophers who are critical of altruism and oppose claims of never-ending duties when dealing with tax issues.⁴⁵ Williams refers to the morality system as a punitive structure of obligations, blame and guilt.⁴⁶ Morse suggests that responsive regulation is not a good basis for ‘prosocial strategies’ (persuading taxpayers that compliance is the socially acceptable or moral choice) because the foundation necessary for building a trusting relationship (a prerequisite for responsive regulation) is likely to be absent between the ATO and non-compliant taxpayers. Morse queries why tax regulators follow such a strategy, having regard to the limited empirical evidence that such strategies work.⁴⁷

The author suggests that directors should always act in the interests of the company and if tax mitigation is in such interests directors have an obligation to act. Morality, although an important concept, plays no part in determining a corporation’s liability

⁴² Slemrod, above n 38, 14.

⁴³ Amy Finkelstein, ‘EZ Tax: Tax Salience and Tax Rates’ (NBER Working Paper No 12924, February 2007).

⁴⁴ Hans Gribnau, ‘CSR and Tax Planning Not by Rule Alone’ (Paper delivered at the TRN Conference, Exeter, UK, September 2013). It is notable that the ‘fair share of tax’, ‘morality’ and ‘ethics’ approaches do not consider the case in which taxes have been unfairly overpaid.

⁴⁵ Jan Tulberg, ‘Reflections upon the Responsive Approach to Corporate Social Responsibility’ (2005) 14(3) *Business Ethics: A European Review* 261, 268–270. The following are cited in support: Bernard Williams, *Ethics and the Limits of Philosophy* (Fontana Press, 1985); David P. Gauthier, *Moral Dealing: Contracts, Ethics and Reason* (Cornell University Press, 1996); J. Mackie, *Ethics: Inventing Right and Wrong* (Harmondsworth Penguin, 1977).

⁴⁶ Bernard Williams, *Ethics and the Limits of Philosophy* (Routledge, first published 1985, 2011 ed), ix.

⁴⁷ Susan C Morse, ‘Narrative and Tax Compliance’ (University of California Hastings Research Paper No 14, 24 September 2013).

for tax although it should ensure that a company does not seek to reduce its tax liability to an amount less than that required by law.

That a taxpayer acts within the law but immorally is not a basis for a court to intervene.⁴⁸

This article argues there is no basis for the proposition that a company is obliged to pay tax in an amount other than as prescribed by law. There is no basis for assessing or calculating tax by reference to what constitutes a 'fair share'. This is so whether one states that the concept means to act as a good corporate citizen; or if the meaning is to preclude corporations adopting tax policies that have as their goal the limitation of a company's tax liability to that prescribed by law. Either the law provides for an obligation to pay a tax or it does not.

Hartnett, the former Permanent Secretary for Tax and the Commissioner of HMRC, implicitly acknowledges that paying a 'fair share' of tax means paying more tax than the law requires. Hartnett states:

In broad terms, corporates recognise tax as a cost to business and that paying more tax than is strictly due may breach legal duties and obligations to shareholders. But an increasing number of corporates see real worth in a positive working relationship with tax administrations and they value a good reputation with governments, their customers, employees and the public at large.⁴⁹

Hartnett is also reported as asking "with increasing numbers of investors taking an interest in the ethical and social policies of companies ... are we now at a time when corporate responsibility demands a new attitude to tax avoidance?"⁵⁰ Hartnett is suggesting that tax administrations have been given license by the general community (where there may be a heightened sense of ethics and morality) to enforce the UK tax laws. Provided the law is applied in accordance with its terms rather than some nebulous 'fair share' or 'good citizenship' standard, there should be no problem.

The ATO also tries to influence the way tax is calculated by corporations by suggesting that the manner in which this is done may reflect good corporate citizenship by taking the community into account when determining a company's tax liability. The public benefit in any one taxpayer paying more tax than the law provides is minimal. In Morse's view, to most taxpayers the reference to public benefit is remote, confusing and boring.⁵¹ Corporations cannot give to the community via the tax system; they can only give to the state. The two are not identical.⁵² There is a difference between complying with an obligation imposed by law and paying some amount incapable of precise determination. The concept of 'good corporate citizenship' is subject to the same criticisms as is the concept a 'fair share of tax'.

⁴⁸ *Re Fortex Pty. Limited* 86 ATC 4351, 4358 (Enderby J).

⁴⁹ David Hartnett, 'Tax and Corporate Governance' (Speech delivered at the International Network for Tax Research, 8–9 December 2006).

⁵⁰ Henderson Global Investors, 'Tax Risk and Corporate Governance' (Report on a survey made of 350 companies quoted on the London Stock Exchange, October 2005).

⁵¹ Susan C Morse, 'Tax Compliance and Norm Formation under High-Penalty Regimes' (2012) 44(3) *Connecticut Law Review* 675.

⁵² David F Williams, 'The Concept of Tax Governance' (Paper presented at the KPMG Tax Business School, UK, 2007).

In making the claim for companies to act as ‘good corporate citizens’ the Commissioner seeks to raise some moral obligation or some form of contract in calculating and paying their taxes. The Commissioner contends large business and the ATO have mutual obligations to ensure that the compliance process is working efficiently and effectively, and to demonstrate to the wider community how it works. According to the Commissioner, the challenge for the ATO and the business sector is to facilitate and support good corporate citizenship that will strengthen the Australian economy and promote the well-being of Australian society.⁵³ The call here is not for the payment of taxes as mandated by the law but rather for taxpayers to consider the community in determining how to conduct their tax affairs. The Commissioner never explains the basis or foundation for this sweeping statement. The obligation of taxpayers is limited to compliance with the tax laws and paying all such taxes as required by law.

If taxpayers accede to interpretations of the law made by the Commissioner that may be incorrect, or if they do not claim deductions or other benefits to which they are entitled as a result of statements made by the Commissioner, this may give the Commissioner a de facto power to impose tax, or at least may subvert the role of the courts to resolve disputes and declare the meaning of disputed legislation. Dabner and Burton say:

In practice, a taxpayer’s risk assessment will typically result in the administrator’s interpretation being a proxy for what is ‘correct’. To then say that the parties have a common interest to see that the ‘correct’ amount of tax is paid ignores the reality that the parties have a different view of what is ‘correct’, and thus no shared vision.⁵⁴

If the Commissioner has inadvertently or intentionally assumed the power to impose tax or negates the role of the courts, it is beyond the authority granted to the Commissioner by the tax laws.⁵⁵ It would place too much power in the hands of the regulator if taxpayers were bound by its apparent unfettered discretion to determine the meaning and operation of the law.

Pascal Saint-Amans (Director of the Centre for Tax Policy and Administration, OECD) is reported to have said:

Policy makers cannot blame businesses for using the rules that governments themselves have put in place. It is their responsibility to revise the rules or introduce new rules to address existing concerns.⁵⁶

⁵³ See for example: Chris Jordan, ‘Tax, The Way Ahead’ (Speech delivered at Tax Institute 28th Annual Convention, Perth, 14 March 2013).

⁵⁴ Justin Dabner and Mark Burton, ‘The “Enhanced Relationship” Model Collides with Reality — The Determinants of the Relationship between Tax Administrators and Tax Intermediaries’ (Paper delivered at the Law and Society Association Annual Conference, 5–8 June 2012, Hawaii).

⁵⁵ See, for example, *Matthews v The Chicory Marketing Board (Vic)* (1938) 60 CLR 263; *Air Caledonie International v Commonwealth of Australia* (1988) 82 ALR 385; *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622; *R v Barger* (1908) 6 CLR 41; *DCT v Brown* (1958) 100 CLR 32.

⁵⁶ Greg Wibe, ‘Interview with Pascal Saint-Amans’ cited in KPMG, *Cutting through Complexity — What Should Governments Tax — A Question of Morality or Policy?* <<http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/future-focus-tax-asia-pacific/Pages/oecd-report.aspx>>.

For Saint-Amans, the solution to low effective corporate tax rates is to be found in tax policy and not in rhetorical demands.

The confusion between tax that is imposed by statute and some imprecise moral imperative has important consequences for the manner in which the media and others treat companies in relation to their tax affair.⁵⁷ For example, in evidence before the UK Parliament's Public Accounts Committee, the chair, Margaret Hodge, in a 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".⁵⁸ What Hodge appears to be saying is that the UK would like Google to pay more tax than that required by UK law. If this inference is correct then politicians such as Hodge are assuming an unlegislated entitlement on the part of the UK tax authorities.

There is evidence that some large companies are acceding to the power of pressure groups in relation to tax.⁵⁹ KPMG note:

The emergence of pressure groups ... is further evidence of the higher profile of tax on the wider business stage. Tax management has been the target of some emotional and, arguably, inaccurate comment in an increasingly heated debate about whether corporations are paying their 'fair share' of taxes ... 'naming and shaming' attacks on alleged tax avoiders can damage their reputations in the eyes of important stakeholders, which can lead to sharp short-term share price falls and the unwelcome attention of more than one taxing authority.⁶⁰

Kagan, Gunningham and Thornton note a growing body of literature focusing on the role of social pressures in shaping company behaviour.⁶¹ These pressures derive from shareholders, advocacy groups, individuals and community groups that lodge complaints with regulatory agencies and courts. In doing so, these groups create adverse publicity that damages a company's reputation. These pressure groups wield immense power. Baxt notes how shareholder activism can be used to force companies to consider community issues.⁶² These pressure groups often require companies to make contributions to the community and to do more than operate their businesses successfully to maximise profits.

Irrespective of the demands of these pressure groups, it is the duty of a director to act in the best interests of the corporation and to maximise shareholder wealth. If directors intentionally cause a company to pay more tax than the law provides without any corresponding advantage to the company, they breach their duty to act in the best interests of the corporation as well as their duty of good faith.

⁵⁷ Naming and shaming is beyond the scope of this article.

⁵⁸ UK Parliament, Evidence to Parliament's Public Accounts Committee (2 November 2012) (Margaret Hodge).

⁵⁹ KPMG LLP, *The Tax Function, Facing up to the Changing World* (KPMG LLP, 2006).

⁶⁰ KPMG LLP, *Tax in the Boardroom: A Discussion Document* (2004).

⁶¹ Robert A Kagan, Neil Gunningham and Dorothy Thornton, 'Explaining Corporate Environmental Performance: How Does Regulation Matter?' (March 2003) 37(1) *Law & Society Review* 51, 68.

⁶² Robert Baxt, 'Future Directions for Corporate Law: Where are We Now and Where do We Go from Here? The Dilemmas of the Modern Company Director' (2011) 25 *Australian Journal of Corporate Law* 213.

As Friedman stated:

There is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.⁶³

Heard believes paying a ‘fair share of tax’ and CSR distorts allocative efficiency.⁶⁴

The foregoing authors concur that it is the function of a company to maximise shareholder wealth. Although disagreeing with Friedman’s reasoning, Bainbridge is of the view that the function of a director is to maximise shareholder wealth,⁶⁵ which is usually achieved by increasing after-tax profits. In compliance with their obligations to act in the best interests of the corporation, directors must ensure they maximise the advantages and minimise the risks of the corporation.

It is apposite to conclude this section by referring to what Sir Anthony Mason says on this topic: ‘as a taxpayer can’t be expected to pay tax when it is not legally payable, legislative amendment rather than rhetoric is the answer to the problem’.⁶⁶

The next part considers a related call by tax administrators and the public for companies to accept and follow principles of CSR when dealing with tax issues.

3.1 Corporate social responsibility

Avi-Yonah, discussing CSR, refers to three theories about tax and the corporation and states that corporations should not enter into tax minimisation schemes under any theory because:

Under the artificial entity view, it undermines the constitutive relationship between the corporation and the state. Under the real view, it runs contrary to the normal obligation of citizens to comply with the law even in the absence of effective enforcement. And under the aggregate view, it is different from other forms of shareholder profit maximisation in that it weakens the ability of the state to carry out those functions that the corporation is barred from pursuing.⁶⁷

There are a number of difficulties with Avi-Yonah’s view. Firstly, even if the company is a creation of the legislature (state), this does not mean its tax obligations should be greater than the law provides. If this were the case, an immediate problem would be to determine how much tax should be paid. Secondly, the fact that the

⁶³ Milton Friedman, ‘The social responsibility of business is to increase its profits’ *The New York Times Magazine* (New York) 13 September 1970. Slemrod suggests this view may be impacted by reputational concerns on the part of the corporation: Joel Slemrod, ‘The Economics of Corporate Tax Selfishness’ (NBER Working Paper No 10858, October 2004).

⁶⁴ Victoria Heard, ‘The Philosophy of Tax’ (Research paper delivered at the KPMG Business School, UK, 2005).

⁶⁵ Stephen M Bainbridge, ‘In Defence of the Shareholder Wealth Maximization Norm: A Reply to Professor Green’ (1993) 50 *Washington and Lee Law Review* 1423.

⁶⁶ Sir Anthony Mason, ‘Opening Address’ in K H Datt, B Tran-Nam and K Bain (eds), *International Tax Administration: Building Bridges* (CCH Sydney, 2010) 3, 5.

⁶⁷ Reuven S Avi-Yonah, ‘Corporate Social Responsibility and Strategic Tax Behavior’ in Wolfgang Schon (ed), *Tax and Corporate Governance* (Springer, Berlin Heidelberg, 2008) 183.

corporation cannot perform certain functions that are the exclusive preserve of the state is not a basis for requiring corporate taxpayers to pay an indeterminate amount to the revenue. If this latter argument had any validity, all taxpayers would be required to pay more tax than provided by law in some amount that is incapable of determination. Thirdly, compliance with the law does not mean that a corporation must voluntarily pay more tax than required by law.

Pekka comments on the views of Avi-Yonah as follows:

We must firstly keep in mind that paying taxes has not been recognized as a primary CSR obligation and I am not sure if it is even a secondary one. Secondly it should be noted that tax planning or strategic tax behavior are normally considered problematic by the state only (the one losing cash flows from taxes) and other stakeholders seldom react to it. Thirdly this means that it is extremely difficult to claim that a company is promoting the enlightened value maximization by voluntarily paying taxes as it is quite difficult to see the connection between short-term cost and expected long-term profit. Instead, taxes are treated as standard costs which companies should minimize whenever that is possible by legal means.⁶⁸

Other than possibly preserving a company's reputation, or achieving a trouble-free relationship with the ATO there appears to be no apparent advantage in paying more tax than required by law. Naming and shaming should not occur if corporations have paid all tax required by the law. Not minimising tax, on the other hand, may be a breach of the duty of directors to act in the best interests of the company.

There is no limit to the power of Parliament to enact taxation laws, provided they meet the constraints prescribed by the *Constitution*.⁶⁹ If the state requires additional revenue to meet its social or other agendas, it has the power to legislate for additional tax. The state's need for revenue should not require a company to pay tax in an amount other than as the law requires. If companies wish to do good deeds, they can do so openly and gain the benefits of being good citizens.

When discussing the boundaries and obligations of companies in relation to CSR, Lantos states:

For any organization ethical CSR (avoiding societal harms) is obligatory, for a publicly-held business altruistic CSR (doing good works at possible expense to stockholders) is not legitimate, and ... companies should limit their philanthropy to strategic CSR (good works that are also good for the business).⁷⁰

According to Lantos, corporations should not act purely out of benevolence for three reasons. Firstly, using corporate resources for social works may breach the obligation to maximise profits. Secondly, the corporation's shareholders may not be financially well off and may rely on the payment of dividends or capital appreciation to fund their

⁶⁸ Timonen Pekka, 'Corporate Social Responsibility and Strategic Tax Behavior — Comment on the Paper by Reuven S Avi-Yonah' in Wolfgang Schon (ed), *Tax and Corporate Governance* (Springer, Berlin Heidelberg, 2008) 199.

⁶⁹ *R v Barger* (1908) 6 CLR 41 (Isaccs J).

⁷⁰ Geoffrey P Lantos, 'The Boundaries of Strategic Corporate Social Responsibility' (2001) 18(7) *Journal of Consumer Marketing* 595, 595.

daily expenditures. Thirdly, altruistic CSR forces stockholders to sacrifice part of their income so that managers can be generous with shareholders' funds. Lantos accepts that being socially responsible does not mean that profits will decline. They might rise because of favourable publicity. Moreover, enhanced employee morale might lead to greater productivity and less government intervention. However, if a business prospers, this is because of strategic, not altruistic, CSR.⁷¹ Strategic CSR is appropriate even if the gain is not immediately visible in a company's financial statements.⁷² There is nothing wrong with doing well simultaneous to doing good deeds.⁷³ In these circumstances, directors are acting in the best interests of the corporation. By contrast, it seems that making a gift to the revenue by paying more tax than prescribed by law is not such a good deed.

Having reviewed the concepts of a 'fair share of tax', 'good corporate citizenship' and CSR this article turns to a consideration of aggressive tax planning, and its relationship, if any, to avoidance.

4. AGGRESSIVE TAX PLANNING AND AVOIDANCE

Tax avoidance in Australia occurs when a transaction breaches the (specific and general) anti-avoidance rules. These rules prescribe criteria that must be met before the tax consequences of a transaction can be set aside as invalid as against the Commissioner.⁷⁴ In some jurisdictions, the courts may resort to statutory interpretation or other tools to protect the revenue from tax avoidance schemes. In the UK, the Commissioner can rely either on the General Anti Avoidance Rule (GAAR), enacted in 2013,⁷⁵ or the *Ramsay* principle as a means of challenging what HMRC contend to be an avoidance scheme.⁷⁶ 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.

The Commissioner and regulators in other jurisdictions refer to avoidance as following the letter, but not the spirit, of the law; or not following the policy of the law; or as being a scheme that undermines the integrity of the tax system. 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".⁷⁷ Freedman argues

⁷¹ Ibid 610–611.

⁷² 'Strategic giving' is also referred to by Schwartz and Carroll: Mark S Schwartz and Archie B Carroll, 'Corporate Social Responsibility: A Three-domain Approach' (2003) *Business Ethics* 503, 507.

⁷³ Tulberg, above n 44. For a view critical of CSR, see, Bruce Welling, 'Corporate Social Responsibility — A Well-meaning but Unworkable Concept' (2009) *Corporate Governance eJournal* <epublications.bond.edu.au>.

⁷⁴ The transaction is legal and binding on the parties in all other respects.

⁷⁵ This legislation does not refer to a GAAR but to an 'anti-abuse rule' contained in Part 5 of the *Finance Act 2013*.

⁷⁶ *W T Ramsay Ltd v CIR* [1981] 1 All ER 865.

⁷⁷ John Hasseldine and Gregory Morris, 'Corporate Social Responsibility and Tax Avoidance: A Comment and Reflection' (2013) 37(1) *Accounting Forum* 1, 11.

that proper consideration has to be given to the actual legal position, rather than focusing on vague and unenforceable notions such as the ‘spirit of the law’.⁷⁸

References to concepts such as the ‘spirit’ or ‘policy’ of the law do not add much to the enquiry about the distinction between tax planning and tax avoidance, although the ‘spirit’ or ‘policy’ of the law are relevant to a court when seeking to interpret a statutory provision. For example, when interpreting the GAAR, a court may have regard to the policy behind the law or the ‘spirit of the law’. However, once the meaning and purpose of the legislation have been determined, these concepts play no further role in assessing whether a transaction is affected by the GAAR.

Regulators, including the ATO and OECD, also refer to a concept they call ‘aggressive tax planning’.⁷⁹ It seems common cause that tax planning is permissible; however, all regulators take issue with aggressive tax planning. This article takes the view that either a tax minimisation scheme is effective for tax purposes or it is not. If the regulator is unable to successfully challenge a transaction that reduces tax, how the arrangement or scheme is described is irrelevant; it is legally unobjectionable and amounts to legitimate tax planning. In such a case, a change in the law is the only way to ensure these transactions are subject to tax. The House of Lords notes that it is primarily for the UK government to correct flaws in the (corporations) tax regime. If there is manipulation, the best way to counter this is to tighten the regulatory framework.⁸⁰ “There is no substitute for improving the tax code to reduce tax avoidance”⁸¹

The Commissioner, in what appears to be an attempt to increase the tax take, has made suggestions that those taxpayers that embark on ‘aggressive tax planning’ are non-compliant and that such schemes should not be concluded. For example in 2013, the Commissioner stated “we are seeing some of the 1,300 large and international businesses adopt aggressive tax structures to avoid their obligations”.⁸² It is not clear what the Commissioner means by the use of the word ‘avoid’ in the previous extract. If a scheme is hit by the anti-avoidance rules, it is avoidance and the Commissioner has the remedies granted by the tax laws. It seems the Commissioner may be referring to those schemes not hit by the anti-avoidance rules but which limit the tax of corporations in circumstances in which the ATO believes more tax should be paid. It seems the Commissioner overreaches his administrative power by applying vague characterisations of taxpayer behaviour as if they have a legislative foundation.

⁷⁸ 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.

⁷⁹ Freedman, Loomer and Vella suggest that aggressive tax planning and avoidance are synonymous: Judith Freedman, Geoffrey Loomer and John Vella, ‘Corporate Tax Risk and Tax Avoidance: New Approaches’ (2009) 9(1) *British Tax Review* 74, 75.

⁸⁰ 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?* (2013) [136], [145].

⁸¹ *Ibid* [148].

⁸² ATO, *Compliance in Focus: 2013* (Last modified 7 July 2013).

The ATO incorrectly operates on the implicit assumption that the law is constant and known to all.⁸³ The complexity of the tax laws makes it difficult for the regulator to justify such an approach. As Picciotto states:

Various players may have different and genuinely-held understandings of a rule's meaning, and may each consider theirs the correct and clear meaning. As such, people who regard themselves as compliant based on their understanding of the regulatory requirements may, from the regulator's viewpoint, be avoiders or game-players.⁸⁴

Valerie Braithwaite, Reinhart and McCrae view game playing as an attempt to cheat the system to limit the amount of tax paid.⁸⁵ Arranging a corporation's affairs to reduce its tax liability to no more than is prescribed by law is not cheating. Some taxpayers may attempt to cheat the system, but in such circumstances, there are myriad provisions (civil and criminal) in both the *Corporations Act* and tax laws to address such conduct. The majority of companies seek to comply, but may be faced with the dilemma postulated by Picciotto above.

The ATO appears to try to persuade taxpayers not to venture into areas of uncertainty, or to develop structures that take advantage of these uncertainties, even where there is a reasonable prospect that a court would find the taxpayer's view of the law to be correct. Friese, Link and Mayer argue that regulators:

Make use of a large range of deterring measures such as threatening intensive auditing, procedural pressure, negative publicity, *etc.* Thereby they create a quasi-illegal status that is not in line with the classical distinction. In such an environment ambiguous tax statutes become a method for raising revenues as taxpayers are forced to stick to unchallenged positions.⁸⁶

Duff has a similar view.⁸⁷

An exacerbating factor is that the Commissioner operates on the basis that the ATO's view of the law is the correct one. An example of this can be seen from the following statement by the Commissioner:

⁸³ For an article discussing the issues that may arise due to what is referred to as 'indeterminate law', see, Mark Burton, 'Responsive Regulation and the Uncertainty of Tax Law — Time to Reconsider the Commissioner's Model of Cooperative Compliance?' (2007) 5(1) *eJournal of Tax Research* 71 <http://www.asb.unsw.edu.au/research/publications/ejournaloftaxresearch/Documents/paper4_v5n1.pdf>.

⁸⁴ Sol Picciotto, 'Constructing Compliance: Game Playing, Tax Law, and the Regulatory State' (January 2007) 29(11) *Law & Policy* 11, 12.

⁸⁵ Valerie Braithwaite, Monika Reinhart and Jason McCrae, 'Game Playing with Tax Law' (Research Note No 8, Centre for Tax System Integrity, 2004). The view of these authors is reminiscent of the Speech of Lord Morris in *Lupton v F.A. & A.B. Ltd* 47 TC 618, in which it was said that '[o]thers think of the analogy of a wolf in sheep's clothing with the revenue as the prey', cited by David Goldberg, 'The Approach of the Courts to Tax Planning Schemes', <http://www.taxbar.com/documents/Approach_Courts_David_Goldberg.pdf>.

⁸⁶ Arne Friese, Simon Link and Stefan Mayer 'Taxation and Corporate Governance—The State of the Art' in Wolfgang Schon (ed), *Tax and Corporate Governance* (Springer Berlin Heidelberg, 2008) 400.

⁸⁷ David Duff, 'Relationships, Boundaries, and Corporate Taxation: Compliance and Avoidance in an Era of Globalization' in Judith Freedman (ed), *Beyond Boundaries: Developing Approaches to Tax Avoidance and Tax Risk Management* (Oxford University for Business Taxation, 2008) 197, 200–201.

Case planning starts with a high-level risk hypothesis that either:

1. some taxpayers may not be applying the law in accordance with our view and, therefore, are not paying the correct amount of tax
2. the application of the law may be having unintended consequences.⁸⁸

The Commissioner says “I want business to clearly know, if they choose questionable or very aggressive practices there will be consequences”.⁸⁹ However, the only practical consequence that can flow is the use of the anti-avoidance rules if appropriate. If the ‘consequences’ for corporations utilising such schemes, where these are compliant with the law, is pressure imposed by the ATO to make this behaviour more expensive, this would also appear to be outside the powers granted to the Commissioner. The Commissioner is not entitled to impose a tax that would otherwise not be payable.

The Commissioner appears to refer to “game playing”, where the ATO is beaten (presumably legitimately) through smart moves and reliance on grey areas of the law.⁹⁰ ‘Game playing’ and ‘aggressive tax planning’ seem to be synonymous terms. However, it is not ‘game playing’ or ‘aggressive tax planning’ when tax minimisation schemes cannot be successfully challenged. This appears to be another attempt to utilise subjective and emotive terms that mean whatever the Commissioner wishes them to mean. Hartnett says:

The big issue for tax administrations is that aggressive and artificial tax shelters and schemes across the globe, promoted by advisers once more renowned for caution and the accuracy of their work than for breathtaking creativity in relation to tax, have at times reduced to nothing the tax paid by individuals and corporates who are often the persons best placed to pay the taxes governments expect of them.⁹¹

Implicit in the above statement is an inability on the part of HMRC to challenge some or all of these schemes. If no challenge can be made, no matter how breathtakingly creative they may be, the complaint by Hartnett is misplaced. If there is a problem it is that the law is unable to tax certain transactions or income or disallow certain deductions. The remedy is to change the law.

Further the statement by Hartnett suggests that: ability equates to an obligation to pay; and wealthy individuals and corporations should not take advantage of enacted provisions that enable them to reduce their tax liability. If these are correct, this would appear as an indictment of HMRC and other regulators that have a similar approach to revenue collection. It may even constitute a call for directors to breach their obligations under the *Corporations Act*. Directors have an obligation to act in the best interests of the company. It is reasonable for directors, in carrying out their *Corporations Act* obligations, to structure transactions to legitimately minimise a tax liability if it is in the interests of the corporation to do so. That a corporation has the

⁸⁸ ATO, Large Business Active Compliance Manual—Income Tax (Last modified 9 July 2013).

⁸⁹ Jordan, above n 51.

⁹⁰ Michael Carmody, ‘Taxation, Current Issues and Future Directions’ (Speech delivered at the Australian Institute of Company Directors, Perth, 1 May 2001).

⁹¹ David Hartnett (Speech delivered at the International Network for Tax Research, 8–9 December 2006).

means to pay more tax than the law requires is irrelevant in the determination of that company's tax liability.

That taxpayers may have a different view of the law to the regulator does not mean they have no sense of morality or business ethics or are non-compliant.⁹² Corporations are not obliged to pay more tax than is mandated by law. Taxpayers who seek to comply with the law should not be regarded as enemies, but rather should be seen as colleagues with whom the regulator disagrees. This would change the dynamics of the discussion and debate between the parties. The Commissioner's public statements suggest a different approach.

Aggressive tax planning is said by the ATO to refer to schemes and arrangements that undermine the integrity of the tax system and erode community confidence in the fairness and equity of that system.⁹³ Statements such as this and other references to 'aggressive tax planning' are unhelpful, as they do not explain to taxpayers how to recognise an aggressive tax planning scheme and do not identify the criteria used by the Commissioner to determine which schemes might be challenged successfully. If corporations pay all the tax required by law, the integrity of the system cannot be impaired in any way. The contrary is the case. To suggest that paying all the tax the law requires can undermine community confidence in the fairness and equity of the system suggests some inherent problem with the system itself and would appear to be based on a misconception of a taxpayer's obligations.

The OECD believes that large corporate taxpayers and high net wealth individuals are the most likely to adopt aggressive tax planning strategies.⁹⁴ The OECD describes aggressive tax planning in the following terms:

Planning involving a tax position that is tenable but has unintended and unexpected tax revenue consequences; and

Taking a tax position that is favourable to the taxpayer without openly disclosing that there is uncertainty whether significant matters in the tax return accord with the law.⁹⁵

This definition uses opaque terms, is open-ended and is designed to maximise revenue collection. For example, if a tax position causes unintended consequences, this does not convert something that is unobjectionable into something else. A noteworthy aspect of the OECD definition is the concession that aggressive tax planning involves taking a tax position that is 'tenable'.

Freedman, Loomer and Vella are critical of the OECD definition and say:

[A]ggressive tax planning ... and this definition specifically, are ... highly contentious ... the fact that the tax revenue consequences of a transaction are not those that the revenue authorities expected does not mean that they are not those that the legislature acting as a body expected and, moreover, that

⁹² David F Williams, 'The Concept of Tax Governance' above n 53.

⁹³ K Fitzpatrick, 'The Australian Taxation Office's Approaches to Aggressive Tax Planning' (Speech delivered at the Centre for Tax System Integrity 3rd International Research Conference 'Responsive Regulation: International Perspectives on Taxation', Canberra, 24–25 July 2003).

⁹⁴ OECD, *Study into the Role of Tax Intermediaries* (14 March 2008) 11 ('*Tax Intermediaries*').

⁹⁵ OECD, *A Framework for Voluntary Code of Conduct for Banks and Revenue Bodies*, above n 113, [3.1.3.1].

the test of whether tax planning is ‘acceptable’ should be what the legislation says as interpreted by the courts and not what the tax authorities suppose it was intended to say.⁹⁶

Broad and vague definitions only make an already complex area of law even more difficult.

McBarnet describes avoidance as ‘creative compliance’, whereby taxpayers find “[w]ays to accomplish compliance with the letter of the law while totally undermining the policy behind the words”.⁹⁷ There are objective factors that must be met before a company falls foul of the anti-avoidance rules and particularly the GAAR. Policy does not play a significant role here.

McBarnet says: “A tax planning device may fail in court without being branded a tax fraud. It is an essential element — and attraction — of creative compliance that it can claim to be ‘not illegal’, to be quite distinct from non-compliance”.⁹⁸ Avoidance is neither criminal nor compliance; it falls between the two. The anti-avoidance rules provide that if the criteria they prescribe are met, certain consequences follow.

McBarnet also suggests that economic elites with the resources to buy legal creativity can also buy immunity from the law.⁹⁹ That a corporation can afford to pay for advice on structuring transactions in the most tax effective way is not the problem. The only issue is whether all tax required by law is paid. It is not immoral, unethical or illegal to structure a transaction to ensure no more tax is paid than is prescribed by law. To argue that paying for advice to ensure one complies with the law is in some way reprehensible is unfounded.

Fraser notes that the line between that which is and is not taxable is an intellectual boundary; however, in the absence of a relevant judicial decision, there may be no consensus as to where that line lies.¹⁰⁰ Fraser continues:

[T]he taxpayer’s only legitimate expectation is, prima facie, that he will be taxed according to statute, not ... a wrong view of the law ... Why then should the expectations of the taxing authority be relevant to directors’ behaviour, to the point where the disappointment of such expectations might be regarded as giving rise to some kind of sanction?¹⁰¹

Fraser’s view appears to be a correct reflection of how directors should approach decisions relating to tax. Taxpayers should not have to pay more tax than is provided by law to comply with what may be an improper demand or an incorrect view of the law by the regulator unless it is in the interests of the corporation to do so.

⁹⁶ Freedman, Loomer and Vella, ‘Corporate Tax Risk and Tax Avoidance’, above n 82, 75–6.

⁹⁷ Doreen McBarnet, ‘When Compliance is Not the Solution but the Problem: From Changes in Law to Changes in Attitude’ in Valerie Braithwaite (ed), *Taxing Democracy* (Ashgate Publishing, 2002) 229.

⁹⁸ *Ibid* 232.

⁹⁹ Doreen McBarnet, ‘Legitimate Rackets: Tax Evasion, Tax Avoidance, and the Boundaries of Legality’ *Journal of Human Justice* (Spring 1992) 3(2) 56, 73.

¹⁰⁰ Ross Fraser, ‘Aggressive Tax Behaviour and Corporate Social Responsibility: A Response’ in J Freedman (ed), *Beyond Boundaries: Developing Approaches to Tax Avoidance and Tax Risk Management* (Oxford University Centre for Business Taxation, 2008) 139, 141.

¹⁰¹ *Ibid* 144.

The ATO appears (in principle) to acknowledge the validity of Fraser's view. Hamilton says:

One experienced tax auditor said to me that a number of large clients appear to 'sit just behind the dam wall'. We can usefully think of that dam wall as the bar or line where acceptable tax planning becomes unacceptable tax avoidance, where tax positions transit to become more 'highly contestable'. Clients, advisers and the regulator may have very different views on where that line is.¹⁰²

The above passage acknowledges the distinction between tax planning and avoidance and that there may be different but legitimate views of how the law operates or whether the boundary to avoidance has been crossed. A contestable arrangement may not be capable of successful challenge by the Commissioner, but companies may nevertheless be persuaded from entering into such transactions. This suggests that the Commissioner seeks to maximise the collection of revenue. Hamilton notes that in cases of two different but reasonably arguable positions owing to ambiguity in the legislation, the ATO will choose an interpretation that lowers taxpayer compliance costs.¹⁰³ This intimates that a correct view of the law may not always be the approach followed.

The Privy Council in *O'Neil* notes that referring to something as 'tax mitigation' or 'avoidance' is unhelpful because this "describes a conclusion, rather than providing a signpost to it".¹⁰⁴ An answer may well depend on which fact or facts the court considers to dominate a particular matrix of facts.¹⁰⁵ As the Privy Council in *Peterson* notes, "not every tax advantage comes within the scope of the section; only those which constitute tax avoidance as properly understood do so".¹⁰⁶ This principle is of application to Australia.

The views of Fraser and the Privy Council in *O'Neil* and *Peterson* are accurate expositions of the problem faced when considering the distinction between tax planning (whether it is aggressive or otherwise) and avoidance. Since the decision in *Spotless*, it has been accepted that taxpayers can arrange their affairs to minimise the extent of their tax obligations, provided their actions do not bring them within the ambit of the anti-avoidance rules.¹⁰⁷

Even if a tax mitigation scheme is incapable of successful challenge by the Commissioner, the reduction in tax must be greater than the direct and indirect costs of implementing the scheme. These costs include any potential costs of litigation with the ATO, possible reputational damage, possible civil or criminal penalties and what Sartori describes as 'implicit taxes'.¹⁰⁸ Implicit taxes emerge when, after having minimised the tax rate, the rate of return of investments is lower than would have been the case with the higher tax rate. Tax mitigation should not reduce the net after-tax return of a transaction.

¹⁰² Stuart Hamilton, 'New Dimensions in Regulatory Compliance — Building the Bridge to Better Compliance' (2012) 10(2) *eJournal of Tax Research* 483, 505.

¹⁰³ *Ibid.*

¹⁰⁴ *O'Neil v Commissioner of Inland Revenue* (2001) 20 NZTC 17,051, 17,057 [9] (Lord Hoffmann).

¹⁰⁵ *BP Australia Ltd v FC of T* [1965] 3 ALL ER 209.

¹⁰⁶ *Peterson v Commissioner of Inland Revenue* (2005) 22 NZTC 19098, 19109.

¹⁰⁷ *FCT v Spotless Services Ltd* (1996) 186 CLR 404.

¹⁰⁸ Sartori, above n 111.

Bersten believes that the potential costs of schemes to be considered by directors include the possibility of a reduction in the market value of the company due to adverse publicity, the time value of money and whether the transaction would compel the Commissioner to challenge the view taken by the taxpayer. Bersten notes that media controversy can arise from a surprise disclosure of a major tax risk, but that disclosure prior to the issue of an amended assessment appears generally to pass without criticism.¹⁰⁹

This section has shown that tax planning, regardless of how it is described, is a legitimate activity of corporate taxpayers, provided actions taken do not stray into the realms of avoidance. A company that actively seeks to minimise its tax payable to the amount provided by law does not act either immorally or illegally. The problem is to identify, if possible, the boundary between tax planning and tax avoidance. If there is any doubt, the transaction should not proceed. Conduct may well be found to be compliant despite the ATO initially thinking otherwise.

Both tax planning and tax avoidance aim to reduce an entity's tax liability. Neither is illegal; however, as Lord Denning notes in *Re Weston's Settlements*, "The avoidance of tax may be lawful, but it is not yet a virtue".¹¹⁰

The use of the adjective 'aggressive' is not helpful in constructing a regulatory conversation with taxpayers regarding tax compliance. More specific guidance on this matter should be provided by the legislature.

5. CONCLUSION

As this article has demonstrated, no meaning can be ascribed to the terms 'a fair share of tax' or 'good corporate citizenship'. They are emotive and subjective with possible political overtones designed to induce corporate taxpayers to act in a manner that may be inimical to the corporations' interests.

Ethical CSR is obligatory; any other form of CSR should not be embarked upon, unless it can be expected to bring a positive, albeit not necessarily an immediate, advantage to the corporation.

The Commissioner should refrain from making statements or calls such as those considered above, as they cannot be enforced and only add to the difficulty directors face in complying with the tax laws. The Commissioner's role is to administer the law. The Commissioner should not seek to oversee some ill-defined concepts such as 'fairness' or 'good corporate citizenship'.

Further, even though the article has not made a comprehensive review of directors obligations, calls by the Commissioner for corporate taxpayers to pay what is described as a 'fair share of taxes' or other similar or analogous requests may be a call for corporate taxpayers to pay more tax than that mandated by law. This may also be an unintentional, assumption by the Commissioner to impose taxes or to increase the rate of taxation – something beyond his powers.

¹⁰⁹ M Bersten, 'Managing Risks in a Tax Audit — The Tax Man Cometh' (Paper delivered at the 45th Victorian State Convention of the Taxation Institute of Australia, Victoria, 6 October 2006).

¹¹⁰ *Re Weston's Settlements* [1968] 3 All ER 338, 342.

Aggressive tax planning suffers from the same problems. It is a conclusion which does not indicate how one could ever identify, with certainty, what is 'aggressive tax planning'. It may be a stratagem to persuade taxpayers from embarking on tax mitigation schemes that cannot be challenged. If this is the case, it is beyond the powers of the Commissioner.

There is, in the author's opinion, no basis for calls such as those described in this article. They add an emotive, subjective and political dimension to the administration of the tax laws. A Corporation's tax liability should be capable of objective determination in accordance with the law. Any other basis could make compliance subject to the subjective determination of others.¹¹¹

¹¹¹ The Constitutional consequences of this are beyond the scope of this article.