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# To shame or not to shame: That is the question

Kalmen Datt<sup>1</sup>

## ***Abstract***

This paper evaluates the naming and shaming of large corporations and concludes that such a response is unhelpful and counterproductive. The author argues that the only effective response to tax planning schemes is to enact effective laws that capture the income sought to be taxed.

Without the media, naming and shaming would not be effective. Naming and shaming campaigns appear to be a (deliberate?) misconception of the tax laws. 'Avoidance' is given an indeterminate and open-ended meaning. The media is not sufficiently versed in the tax laws to make an expert judgement of avoidance. It is not their role to punish extra-curially without any legal basis for assigning blame/guilt.

Keywords: Naming and shaming; tax planning; avoidance; effective legislation and Google.

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## 1. INTRODUCTION

This article evaluates the approach that the media, activists and politicians take to the manner in which large Australian and multinational corporations structure either themselves or individual transactions to ensure they limit their tax liability.<sup>2</sup> The response is to name and shame the entities concerned.

This article concludes that naming and shaming 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 author argues that the only effective response to the tax planning techniques of these corporations is for the enactment of effective laws that capture all the income sought to be taxed. Without such laws there can be no liability for tax. As Lord Wilberforce stated:

A subject is only to be taxed on clear words, not on 'intendment' or on the 'equity' of an Act.<sup>3</sup>

Implicit in the naming and shaming response is the suggestion that those corporations named are in some way either acting illegally or breach the anti-avoidance rules of the jurisdiction in which they do business. The reality, however, appears to be that to date legislatures have been unable to draft tax laws that capture the income or at least portions of the income these corporations derive within their jurisdictions.

In naming these entities there is a constant reference to 'tax avoidance'. This phrase is becoming one of indefinite meaning both in Australia and internationally. Tax avoidance now encompasses the obligation of these corporations to pay what is often described as 'a fair share of taxes'<sup>4</sup> or some other open-ended means of calculating an entity's tax.

This extended meaning of avoidance is made even more confusing when regulators in Australia and other jurisdictions refer to avoidance 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>5</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

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<sup>2</sup> In the context of this article the media includes all forms of mass communication.

<sup>3</sup> *W T Ramsay Ltd v Inland Revenue Commissioners, Eilbeck (Inspector of Taxes) v Rawling*, [1982] AC 300, [1981] 1 All ER 865. Griffiths J noted in *Webb v Syme* [1910] HCA 32; (1910) 10 CLR 482 that: 'The scheme of the Acts can only be ascertained from their express provisions, for there is no common law of income tax'. See also *Hans Jurgen Liedig v Commissioner of Taxation* [1994] FCA 1058.

<sup>4</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>5</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.

to make do with the ‘letter of the law’.<sup>6</sup> Freedman argues that proper consideration has to be given to the actual legal position, rather than focusing on vague and unenforceable notions.<sup>7</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 foregoing it is this extended and indeterminate meaning of ‘tax avoidance’ that is used to name and shame these corporations.

Before commencing the evaluation of the naming and shaming option a number of facts must be borne in mind. The first is that the all regulators accept tax planning is a legitimate function of taxpayers.<sup>8</sup> Second, avoidance 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 countries although some 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, why it is used 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.

## 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:

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

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<sup>6</sup> John Hasseldine and Gregory Morris, ‘Corporate Social Responsibility and Tax Avoidance: A Comment and Reflection’ (2013) 37(1) *Accounting Forum* 1, 11.

<sup>7</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.

<sup>8</sup> See, for example, Michael Carmody, ‘Managing Compliance’ (Speech delivered at the Tasmanian Chamber of Commerce and Industry, Tasmania, 3 September 2003).

<sup>9</sup> See, for example, *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).

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

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> Pfaltzer 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>

Braithwaite and Drahos believe 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 that 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>

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. The damage may, in monetary terms be greater than any fine a court could impose.<sup>17</sup> Naming and shaming does not prevent the regulator from challenging the taxpayer under the remedies granted to it by the tax laws. The ability of the regulator to proceed either civilly or criminally post such shaming could result in the imposition of a double penalty. This is undesirable. As Justice Starke noted:

But I protest against the injustice of this double penalty against practically the same party, the company and the respondent, for identically the same acts. The way of the wrongdoer must not be made easy, but he should not be oppressed. If the penalties inflicted on the company be recovered, those inflicted on the respondent should not, as I venture to think, be enforced, or they should be remitted by the proper constitutional authority.<sup>18</sup>

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<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 JW Pfaltzer, ‘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.

<sup>17</sup> See, for example, R Macrory and G Britain, *Regulatory Justice: Making Sanctions Effective (Final Report)*. Cabinet Office, London, November 2006).

<sup>18</sup> *Adams v Cleeve* (1935) 53 CLR 185. Chief Justice Allsop made similar comments in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited* [2015] FCA 330 [85] where he said:

I propose to identify a single penalty in respect of all contraventions in accordance with the totality principle, bearing in mind that what can be seen as four courses of conduct formed part of a single marketing strategy. This is appropriate to ensure that there is not double punishment.

The learned judge in the above extract was commenting on the injustice of a penalty being imposed on different entities for the essentially the same act. With naming and shaming a penalty may be imposed for no wrongful conduct, but if such wrongful conduct were found to exist there would be a double penalty on the same party first in being shamed and second the penalty imposed by the court or regulator.

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>19</sup>

Shame can occur without the publicity of being publicly named. Grasmick and Bursik describe shame as the feeling of guilt one experiences after having committed a wrong; it is a self-imposed punishment.<sup>20</sup> The greater the wrong committed, the greater is the prospect and extent of the feeling of shame.<sup>21</sup> Grasmick and Bursik found, after surveying a number of respondents, that the prospect of feeling shame inhibited tax cheating.<sup>22</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 publicised do not receive the same attention as does naming and shaming.<sup>23</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 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 its response receives the same attention as the original adverse publicity.<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

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<sup>19</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>20</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>21</sup> Grasmick and Bursik above, n 20 at 840.

<sup>22</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 and Kristie R Blevins (eds), *Taking Stock: The Status of Criminological Theory. The Advances in Criminological Theory* (Transaction Publishers, 2008).

<sup>23</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>24</sup> David F Williams, 'The Concept of Tax Governance' (Paper presented at the KPMG Tax Business School, UK, 2007).

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

when criminal charges have been laid and made public because the public ascribes 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 wrongfulness of their conduct with a view to a limitation of possible consequences.<sup>26</sup>

Leighton, writing on the US experience, says:

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.<sup>27</sup>

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 when 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. There is an objective standard that is breached before an entity is named and shamed.

A key issue with naming and shaming is whether the audience believes 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> The secrecy provisions of the tax laws may impede drawing an accurate link between the listener’s values and the story.<sup>31</sup>

Pawson states 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. The author suggests that without the media the necessary publicity required to make known the conduct complained of would not be present. The media’s role is pivotal to a corporation being named and shamed. This is the case irrespective of the identity of the party initiating the complaint against the corporation.

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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.

<sup>32</sup> Pawson Ray, above n 11.



Kohn notes ‘since the latter part of the 20<sup>th</sup> 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 US 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>

As this article demonstrates it seems this objectivity may be lacking when corporations are named and shamed.

Silverman says the publication by the media on some issues at best, creates a permissive climate for intolerance and, at worst, for vigilantism.<sup>35</sup>

The media

[e]njoy 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>36</sup>

Corporations in Australia, with limited exceptions, are unable to sue for defamation.<sup>37</sup> Even if they are able to sue for defamation in other jurisdictions the proceedings are subject to reports of the proceedings by the media which may exacerbate the problem. Further, corporations have significant evidential hurdles to overcome, 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>38</sup>

Activist groups and politicians actively encourage naming and shaming to achieve a political agenda where there may have been no wrongdoing on the part of a corporation. For example, in a joint report produced by United Voice and the Tax Justice Network it was contended by innuendo and a selective use of information that as large number of corporate taxpayers quoted on the Australian Stock Exchange did not pay the headline 30% rate of tax the Government had been done out of not less

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<sup>33</sup> Steven A Kohm, ‘Naming, Shaming and Criminal Justice: Mass-mediated Humiliation as Entertainment and Punishment’, August 2009 (5)2 *Crime Media Culture* 188–205.

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

<sup>35</sup> Jon Silverman, ‘The Shaming in Naming’, (March 2003) 14 *British Journalism Review* 49–53.

<sup>36</sup> El Ghoul, Sadok, Omrane Guedhami, Robert C Nash and Ajay Patel, *New Evidence on the Role of the Media in Corporate Social Responsibility* <<http://ssrn.com/abstract=2712239>> or <<http://dx.doi.org/10.2139/ssrn.2712239>>, accessed 7 January 2016.

<sup>37</sup> See, for example, section 9 of the *Defamation Act 2005* (NSW).

<sup>38</sup> Mark Twain, *License of the Press*, Monday Evening Club at Hartford, March 31, 1873.

than \$8.4 billion of tax.<sup>39</sup> Although not directly alleging wrongful conduct on the part of the corporations named in the report the inference (incorrectly) drawn is that these companies either have been guilty of what is referred to as ‘aggressive corporate tax avoidance’ or ‘aggressive tax avoidance’ or ‘tax aggressive behaviour’ or ‘aggressive tax minimisation practices’. The meaning of these terms is never explained.

The fact that a corporation pays little or no tax in Australia means nothing without reference to the particular circumstances of that corporation and how the tax laws impact on its various transactions. Notwithstanding the foregoing, the report advocates that these corporations be named and shamed. It states:

Disclosure and transparency of corporate tax practices needs to be increased. Greater public awareness of aggressive tax avoidance will provide an incentive to Australian corporations to be less tax aggressive. Tax dodging practices, when exposed, will damage corporate reputations and may increase regulatory and financial risks. Responsible companies should not wait for inevitable changes to the rules before deciding to act.<sup>40</sup>

This report was given headline treatment in the media. Examples include: Aston and Wilkins<sup>41</sup> who describe the main findings of the report and then give some views that do not agree with the conclusions reached; and Shorten and AAP where the results of the report are extensively reported.<sup>42</sup>

It is the media that gives credence to misleading claims about the tax affairs of corporations by politicians and activists rather than objectively and accurately reporting on their tax affairs. Reality and candour appear to be of little consequence.

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>43</sup> According to Tulberg, there is an absolute right or wrong and the media 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.

There would appear to be little or no accountability on the part of the media, politicians or activists as to the accuracy and truth of what they publish or disseminate. Simply to make broad unsubstantiated allegations is not acceptable conduct from elected representatives who have the power to enact effective laws that capture within the tax net that income which is currently not assessable. Similarly the media may be abusing their power in publishing reports without comment when objectively these reports may be incorrect.

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<sup>39</sup> United Voice and the Tax Justice Network, *Who pays for our Common Wealth? Tax practices of the ASX 200*  
[<sup>40</sup> \*Ibid\* at 9.](http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwiA89PFg_zPAhWHJ5QKHWe5BEwQFggiMAE&url=http%3A%2F%2Fwww.unitedvoice.org.au%2Fdocuments%2Fwho-pays-our-common-wealth-full&usq=AFQjCNGoo94O-2LN-LI9WpqSw3Y5VpFIFQ&sig2=dm7GKLTzW-lpoI8HERTLsg></a></p>
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<sup>41</sup> Heath Aston and Georgia Wilkins, ‘ASX 200 Company Tax Avoidance Bleeds Commonwealth Coffers of Billions a Year, Report Finds’, *Business Day, Sydney Morning Herald*, 29 September 2014.

<sup>42</sup> Kristin Shorten and AAP, ‘Tax Justice Network Report Reveals Tax Burden Shifting From companies to ordinary taxpayers’, *News Corporation Australia Network*, 29 September 2014.

<sup>43</sup> Jan Tulberg, ‘Reflections upon the Responsive Approach to Corporate Social Responsibility’ (2005) 14(3) *Business Ethics: A European Review* 261.

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>44</sup>

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>45</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 media disseminates or what politicians or activists may say, the vast majority of persons will not know or understand or accept that, notwithstanding what is said or reported a corporation 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. Vague notions of fairness or morality not based on a proper application of the facts to the tax laws should be discouraged. The media, politicians and to a lesser extent activist groups have significant influence on community attitudes and a concomitant responsibility to report objectively and accurately. A truthful and dispassionate discourse on how these corporations deal with tax issues appears to be absent in the majority of cases.

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>46</sup> This suggestion does not appear to have been accepted by the media.

Mention must be made of the apparent cynical attempt by the Australian Parliament to encourage naming and shaming by enacting legislation<sup>47</sup> directing the Commissioner to publish certain information without comment about the tax affairs of large corporate

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<sup>44</sup> Silverman, above n 35.

<sup>45</sup> Gareth Hutcheons, 'Damage Done in the Rush to Go Public', *Weekend Business, The Sydney Morning Herald*, 18–19 January 2014, 7.

<sup>46</sup> Select Committee on Economic Affairs, *1st Report of Session 2013–14, Tackling Corporate Tax Avoidance in a Global Economy: Is a New Approach Needed?*, House of Lords, (31 July 2013) [50], [69]–[80].

<sup>47</sup> *Tax Laws Amendment (2013 Measures No 2) Act 2013* (Cth).

entities (with income in excess of \$100 million).<sup>48</sup> This information is the company's name, its Australian Business Number, its total income, taxable income and tax payable.<sup>49</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 as reflected in the corporation's tax return is as prescribed by law. 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:

[t]o discourage large corporate tax entities from engaging in aggressive tax avoidance practices.<sup>50</sup>

The distinction, if any, between aggressive and other tax avoidance practices eludes the author.

The purpose alluded to above cannot be achieved by a mere perusal of the return and certainly not from the limited information that must be published by the Commissioner. 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.

The media, activists and politicians are not so constrained and in the vast majority of cases (the author would suggest all) they are not sufficiently versed in the tax laws to be able to do so.

It would seem the reason for this legislation is in large a measure to encourage the media to name and shame some or all of these corporations into paying more tax than they currently do, or to pay what is euphemistically called 'a fair share of taxes.'<sup>51</sup> The fact that these companies may be fully compliant with their tax obligations seems to be irrelevant. If this view is correct (and it seems to be), it is an indictment on politicians that seeks by extra legislative and judicial means to impose taxation on corporations when the law is unable to do so. As Terry McCrann noted (referring to a report published by the Commissioner in terms of this legislation) albeit in somewhat exaggerated terms:

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<sup>48</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>49</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: Section 166A of the *Income Tax Assessment Act 1936* (Cth).

<sup>50</sup> Explanatory Memorandum, *Tax Laws Amendment (2013 Measures No 2) Bill 2013* (Cth) Schedule 5 [5.6].

<sup>51</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>>.

What he (the Commissioner) should have done is headline the first page of both the report and his press release with a sentence in 18 point capitalised red ink saying something like: “Warning these figures are published by legislative direction, but they are not just meaningless but potentially grossly misleading. Absolutely no inferences can be drawn from them about any individually named company’s tax affairs, and in particular its compliance or otherwise with both the letter and the spirit of its tax obligations.”<sup>52</sup>

A majority of the Senate Economics Legislation Committee when considering possible amendments to this disclosure legislation noted some misgivings about the operation of the law. Heath Ashton reports that they were 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 mislead due to poor understanding of the relationship between gross accounting turnover and net taxable income.<sup>53</sup>

The views expressed above are of application to all corporations.

Further a consultation paper on a Tax Transparency Code issued by the Board of Taxation on 15 December 2015 gives implicit support for the views expressed by the author. The report from the Board of Taxation states:

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... 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 effect of reducing the effective tax rate.<sup>54</sup>

In the 2016 Budget, the Government has recommended large and medium-sized corporations adopt the tax transparency code (released by the Board of Taxation in May 2016). The Code suggests that corporations voluntarily disclose details about their tax affairs even where they are under no legal obligation to do so. It is suggested corporations report on inter alia:

A reconciliation of accounting profit to tax expense and to income tax paid or income tax payable;

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<sup>53</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>54</sup> Board of Taxation, *ibid.*

Identification of material temporary and non-temporary differences; and Accounting effective company tax rates for Australian and global operations (pursuant to AASB guidance).<sup>55</sup>

As noted above any such disclosure is meaningless without expert knowledge of the tax laws and a careful consideration of all the facts.

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 so 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 Base Erosion and Profit Shifting (BEPS) documentation issued by the OECD and the response of various countries such as the UK Diverted profits Tax<sup>56</sup> and the Australian Multinational Anti Avoidance Law (MAAL)<sup>57</sup> appear to be attempts to ensure income derived in a country is taxed in that country and not diverted to some zero 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 foregoing 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 both in 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 behaviour being found would appear to be an anathema to the 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.

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

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<sup>55</sup> ATO, *Voluntary Tax Compliance Code* (20 September 2016) <<https://www.ato.gov.au/Business/Large-business/In-detail/Tax-transparency/Voluntary-Tax-Transparency-Code/>>.

<sup>56</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. In the 2016 Australian budget the Treasurer made reference to the intention to introduce a similar law in Australia.

<sup>57</sup> *Tax Laws Amendment (Combating Multinational Tax Avoidance) Act 2015* (Cth).

### 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>58</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 in which 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>59</sup>

Governments should not name and shame unless there is some legal basis (at the very least) for contending there has been misconduct.

Pawson identifies other areas of concern with naming and shaming.<sup>60</sup> These are:

1. the performance or behaviour in question is classified inappropriately (often the case when avoidance is alleged)
2. the disclosure is poorly managed by sparse or excessive publicity
3. 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
4. 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. Those who name and shame are *prima facie* seeking community outrage against what may be blameless conduct. It is not for the media or politicians or activists to be the sole arbiter of blame/guilt based on some subjective, indeterminate and non-legislated basis known only to them. The media, politicians and activists are 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.

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<sup>58</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>59</sup> Joshua D Blank, ‘What’s Wrong With Shaming Corporate Tax Abuse’ (2009) 62 *Tax Law Review* 539.

<sup>60</sup> Pawson Ray, above n 11.

A tax liability can only be created by legislation and liability should not be based on attempts to appease what may be unjustified, uninformed and vociferous criticism. For corporations to act in this way may require directors to 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>61</sup>

Conduct such as that set out above demeans the rule of law. It is the antithesis of corporate conduct required by the media, politicians and activists.

Naming and shaming should be used in situations in which there has been some legally demonstrable deviant behaviour. If there is no breach of the tax laws, then attacks on the reputation of corporations should not occur. The media, politicians and activists appear to be unrestricted in determining whether corporations are blameworthy when discussing their tax affairs. No regard appears to be given to what the law requires when publishing reports about corporations in which it is contended they are 'guilty' of tax avoidance. The deviant behaviour identified by these entities is based on some indeterminate, non-legislated basis on which they are 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 inappropriate, as appears from this article that a regulator should act in this manner.

It is neither the role nor right of the media, politicians or activists 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 effect and possible abuse of naming and shaming and the care that must be taken by those who use it or encourage its use as a tool to compel some corporations to pay more tax than they currently do.<sup>62</sup>

#### 4. GOOGLE

Google earned significant monies in the UK, but paid little tax on these earnings. In response, the media, activists and politicians in that country embarked on a sustained campaign against Google. Examples from this campaign in the media follow.

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

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<sup>61</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 Select Committee on Economic Affairs, *1st Report of Session 2013–14, Tackling Corporate Tax Avoidance in a Global Economy: Is a New Approach Needed?*, House of Lords, (31 July 2013)[68].

<sup>62</sup> There are many other examples, particularly with large multinational corporations. These include Amazon, Starbucks and Apple.



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>63</sup>

*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>64</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>65</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>66</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 as saying:

"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>67</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

<sup>63</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>64</sup> Vanessa Barford and Gerry Holt, 'Google, Amazon, Starbucks: The Rise of Tax Shaming', *BBC News Magazine*, 21 May 2013 <<http://www.bbc.com/news/magazine-20560359>>.

<sup>65</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>66</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>>.

<sup>67</sup> ABC, 'Google, Apple and Microsoft Deny Tax Avoidance at Senate Inquiry', *ABC News*, 9 April 2015 (Simon Santow) <<http://www.abc.net.au/news/2015-04-08/google-apple-microsoft-deny-tax-avoidance-senate-inquiry/6379024>>.

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>68</sup>

When representatives of Google, Apple and Microsoft came before the Australian Senate enquiry McGrath reports that:

Chair of the enquiry, Senator Sam Dastyari, said the issue was “a question of morality”, rather than legality.

“I think there are some very, very legitimate community concerns about how you are structured, how your companies are engaged in what appears ... to be tax minimisation.”

“I’m not casting the activity as being illegal, but the structure of your companies in places like Bermuda, Singapore, and Ireland ... raises concerns”.<sup>69</sup>

The comments cited above in the article by McGrath are almost in identical terms to those of Margaret Hodge the chairperson of a similar enquiry in the UK and mentioned below.

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 the respective tax laws of these countries, 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>70</sup>

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.

On 6 January 2014, a 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

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<sup>68</sup> Matt Wade, ‘Tax Avoidance Hearing: Google, Microsoft and Apple Tell Senate Committee They Fully Comply with Australian Laws’, *Business Day, Sydney Morning Herald*, 9 April 2015.

<sup>69</sup> James McGrath, ‘Tax “A Question of Morality”—Tech Giants Grilled By Senators’, *AdNews*, 9 April 2015 <<http://www.adnews.com.au/news/tax-a-question-of-morality-tech-giants-grilled-by-senators>>.

<sup>70</sup> ‘Google: “We pay tax required by law”, *BBC News Technology* (online), 17 June 2013 <<http://www.bbc.co.uk/news/technology-22932794>>.

which income years these back taxes are calculated). These taxes were for the disallowance of specific deductions claimed in previous years.<sup>71</sup>

After what was presumably an intensive investigation of more than three years, the disallowed deduction 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 *The 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.

This report in *The Times* notes that alongside Google, Apple, Amazon and Facebook claimed deductions on same basis (it concerned employee share schemes). 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 question to Matt Brittin, vice-president for Google in northern and central Europe, said, '[w]e are not accusing you of being illegal; we are accusing you of being immoral'.<sup>72</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.

The parliamentary enquiries both in Australia and the UK were apparently not directed at some unlawful activity on the part of these multinational companies or even avoidance but appear to be an attempt to name and shame these entities to pay more tax than possible is required by law. The various reports of these enquiries reflect no wrongful conduct but if distilled reflect an indictment on the legislature's inability to legislate effective tax laws which would capture the income sought to be recovered from these entities.<sup>73</sup>

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<sup>71</sup> Dipesh Gadhur 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#>>.

<sup>72</sup> Evidence to Public Accounts Committee, UK Parliament, 2 November 2012 (Margaret Hodge).

<sup>73</sup> These reports, issued in two parts, can be found at <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Corporate\\_Tax\\_Avoidance/Report\\_part\\_1](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Corporate_Tax_Avoidance/Report_part_1)>; <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Corporate\\_Tax\\_Avoidance/Report\\_part\\_2](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Corporate_Tax_Avoidance/Report_part_2)>

In 2016, in what was triumphantly announced as a major victory for HMRC Google entered into an agreement to pay HMRC £130 million. *The Guardian* reports:<sup>74</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.

This ‘triumph’ was immediately criticised. An example appears from an *ABC News* reports as follows:<sup>75</sup>

John McDonnell, finance spokesman for the Opposition Labor Party, said that 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 percent, 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. (Emphasis added.)

Nassim Khadem reports Rupert Murdoch saying the following about the Google agreement with HMRC:<sup>76</sup>

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>77</sup>

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<sup>74</sup> Kevin Rawlinson, ‘Google Agrees to Pay British Authorities £130m in Back Taxes’, *The Guardian*, 23 January 2016.

<sup>75</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>>.

<sup>76</sup> Nassim Khadem, ‘Rupert Murdoch is Right, The Tax Deal With Google is “Token”’, *Business Day, The Sydney Morning Herald*, 29 January 2016.

<sup>77</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>>.

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. (Emphasis added.)*

The agreement with Google, as Murdoch suggests, appears to be a stratagem on its part to obtain respite from the attention of the media. The monies paid to HMRC appear to be but a token amount of all the taxes it is contended it should have paid in the past. How the sum of £130 million is made up is not disclosed. Significantly part of the amount Google agreed to pay was the sum of £33 million in relation to staff options. This is the same cause for the amended assessment in 2014 as referred to in *The Times* report of 4 January 2014.

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. Fundamentally 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, politicians and activist groups campaign against what they 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 these campaigns appear 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, politicians and activist groups are 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 be 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 and indeterminate amount of which they are the sole arbiters.