

Tax and human rights – much ado about nothing¹

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Abstract

There are claims that large Australian and other multinational corporations that pay no or little tax because of taking abusive tax positions breach their human rights obligations as they deprive governments of the means to provide services. These services include poverty alleviation, health, education, housing and access to water. This article critically examines the legal validity of this claim and seeks to determine if such a link exists. The article concludes that a breach by such corporations of their tax obligations, no matter how egregious, does not constitute a breach of human rights.

Key words: tax, human rights, tax avoidance, public services

¹ Apologies to William Shakespeare. The author is grateful to anonymous reviewers whose constructive comments were useful in finalising this article.

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1. INTRODUCTION

There are many organisations and individuals, such as Carmona,³ the German Tax Justice Network (GTJN),⁴ the Australian Tax Justice Network,⁵ Pogge,⁶ de Zayas,⁷ Scheffer,⁸ Darcy,⁹ the Centre for Economic and Social Rights,¹⁰ Avi-Yonah and Mazzoni¹¹ and Lipsett,¹² who contend that large Australian and other multinational corporations (collectively referred to as MNCs) pay no or little tax because of taking abusive tax positions. In doing this they deprive governments of the means to alleviate poverty and to provide basic services such as health, education, housing and access to water (the rest of this article will only refer to the alleviation of poverty as a collective phrase for all of the foregoing).¹³ Those who contend for a link between human rights and tax state that an abusive tax position includes criminal conduct, tax evasion, avoidance, and embarking on schemes that appear to be in compliance with the tax laws but do not result in the MNC paying what is referred to as a fair share of taxes.¹⁴ This article examines whether there is any legal basis for such claims.

There are a few limitations to this article. The article does not seek to determine whether human rights can impact on the decision of the regulator or legislature in seeking to enforce or legislate the tax laws. Nor does it consider the issues that arise if a taxpayer's human rights are infringed by the tax law-maker or regulator. It is for this reason that there is little discussion on such human rights as privacy or the right to fair trial. Only limited reference is made to human rights cases both in Australia and overseas to illustrate that to the extent that human rights are raised in tax cases they are limited to allegations by taxpayers of a breach of their rights. The author has been unable to find any cases that suggest a breach of the tax laws constitutes a breach of human rights. The enquiry is focused on whether a link can be found between a breach of the tax laws and

³ Magdalena Sepúlveda Carmona, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Report of the Special Rapporteur on extreme poverty and human rights, Human Rights Council, Twenty-sixth session, Agenda item 3, A/HRC/26/28 (2014) [60].

⁴ Policy brief of the Tax Justice Network Germany, 'Taxes and human rights', Info Steuergerechtigkeit No. 8, February 2013 <http://www.l4bb.org/reports/taxes_human_rights.pdf>.

⁵ Australian Tax Justice Network, <<http://www.taxjustice.org.au/>>.

⁶ Thomas Pogge, 'Are we violating the human rights of the world's poor?' (2011) 14(2) *Yale Human Rights and Development Journal* 1.

⁷ Alfred de Zayas, 'Human rights expert calls for a new UN body to address tax evasion and harmful tax competition around the world', media release (20 October 2016), <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20721&LangID=E>>.

De Zayas was appointed as the first Independent Expert on the promotion of a democratic and equitable international order by the Human Rights Council, effective May 2012.

⁸ David Scheffer, 'The ethical imperative of curbing corporate tax avoidance' (2013) 27(4) *Ethics and International Affairs* 361.

⁹ Shane Darcy, "'The elephant in the room": Corporate tax avoidance and business and human rights' (2017) 2(1) *Business and Human Rights Journal* 1.

¹⁰ Centre for Economic and Social Rights, <<http://cesr.org/article.php?id=1834>>.

¹¹ Reuven S Avi-Yonah and Gianluca Mazzoni, 'Taxation and human rights: A delicate balance' (University of Michigan Public Law Research Paper No. 520, September 2016).

¹² Lloyd Lipsett, 'Tax abuse as a business and human rights issue', Shift, October 2013, <<http://www.shiftproject.org/resources/viewpoints/tax-abuse-business-human-rights/>>.

¹³ See for example International Bar Association, *Tax abuses, poverty and human rights* (2013) 94-96; Mauricio Lazala, Deputy Director, Business & Human Rights Resource Centre, 'Tax avoidance: the missing link in business & human rights?', <<https://business-humanrights.org/en/tax-avoidance-the-missing-link-in-business-human-rights>>.

¹⁴ See for example International Bar Association, above n 13, 7.

a breach of human rights. Finally, the article does not consider the means that can be employed to enforce tax or human rights obligations in the event of a breach.

The scheme of this article is the following. Section 2 considers some preliminary issues and then considers the component parts of the phrase ‘abusive tax position’ mentioned above. Section 3 first briefly evaluates the human rights obligations of states and MNCs. It then determines whether any person in Australia can found a claim based on human rights that an abusive tax position taken by any MNC is a breach of such rights. The author concludes no such claim can succeed but, on the alternative assumption that this conclusion is mistaken, section 4 evaluates the proposition from a tax point of view. The article concludes that irrespective of whether the analysis is from a human rights or tax perspective the contention that there is a legal nexus between tax and human rights is mistaken.

The article now turns to the preliminary issues alluded to above.

2. PRELIMINARY ISSUES AND DEFINITIONS

2.1 Preliminary issues

First all human rights and tax laws should not be breached.

Second, taxes paid by MNCs do contribute towards the resources available to governments. Presumably this is done by the creation of wealth and jobs in the communities in which they operate and by the MNC paying income and other taxes. Wettstein and Waddock accept that governments depend on taxes to fund their programs but say:

[W]ith their narrow focus on profit-maximization, corporations did not only not contribute adequately to the realization of human rights, but often also perpetuated the massive and ongoing violation of them; through their uncompromising striving for profit, they are holding up and accelerating the very economic system that is largely responsible for the undermining of a vast array of human rights.¹⁵

An MNC’s emphasis on profit is not demonstrative of either a breach of human rights or of the tax laws. It is irrelevant if an MNC has the means to pay more tax than the law requires.¹⁶ That MNCs or any other taxpayer may have a different view of the law to the regulator does not mean they have no sense of morality or business ethics or that their views of the law are incorrect.¹⁷

Third many of those that contend that abusive tax positions are breaches of human rights accept that this is not the sole cause of governments’ inability to alleviate poverty. For example, Carmona says:

¹⁵ Florian Wettstein and Sandra Waddock, ‘Voluntary or mandatory: That is (not) the question; Linking corporate citizenship to human rights obligations for business’ (2005) 6(3) *Zeitschrift für Wirtschafts- und Unternehmensethik* 304.

¹⁶ Kalmen Datt, ‘Paying a fair share of tax and aggressive tax planning-A tale of two myths’ (2014) 12(2) *eJournal of Tax Research* 410.

¹⁷ David F Williams, ‘The concept of tax governance’ (Paper presented at the KPMG Tax Business School, UK, 2007).

Evidence shows that, even in developing countries, widening tax bases and improving tax collection efficiency could raise considerable additional revenue... Tax collection efficiency can also be increased by improvements in tax administration. Tax administrations with appropriate financial, personal and technical resources are critical to increase levels of revenue collection and to avoid abuse.¹⁸

At the third International Conference on Financing for Development (July 2015) the participant countries agreed that domestic resource mobilisation was central and required measures that widened the revenue base, improved tax collection and combated both tax evasion and illicit financial flows.¹⁹

Alston (United Nations Special Rapporteur on Extreme Poverty and Human Rights) considered the link between tax and human rights and suggested the problem was primarily based on policy issues rather than the obligation to pay any taxes imposed. He said:

First, there is the most obvious link which is that of resource availability. Refusing to levy taxes, or failing to collect them, both of which are commonplace in many countries, results in the availability of inadequate revenue to fund human rights related expenditures.²⁰

The problem alluded to by Alston is not limited to human rights expenditures. Tax policies that allow MNCs to pay little or no tax should be discouraged.

Next the European Court of Human Rights (ECtHR) in tax cases where breaches of the European Convention on Human Rights (ECHR) are raised, refers only to rights of taxpayers. For example, the inalienable right to property is not a human right that requires the state or anyone else to transfer property to others. This right ensures that you are not deprived of any property that you may hold without due compensation.²¹ The ECtHR in *NKM* held that a tax at the rate of 98 per cent on the top slice of a severance payment (resulting in an average tax rate of 52 per cent) violated the right to enjoyment of possessions.²² Attard, referring to the decision in *Ferrazzini v. Italy*,²³ notes that the ECtHR in a majority decision held that:

¹⁸ Carmona, above n 3 [56]-[57]. The Tax Justice Network Germany, above n 4, have a similar view.

¹⁹ United Nations, 'Secretary-General hails launch of "new era" for global partnership as General Assembly endorses framework for development financing, press release (27 July 2015), <<https://www.un.org/press/en/2015/ga11663.doc.htm>>.

²⁰ Philip Alston, 'Tax policy is human rights policy: The Irish debate' (Keynote Address at Christian Aid conference on The Human Rights Impact of Tax and Fiscal Policy, Dublin, 12 February 2015). The Scottish HR Commission has a similar view to that of Alston: Scottish Human Rights Commission, 'A Scottish Approach to Taxation', Submission to the Finance Committee - Call for evidence, Scottish Parliament, September 2016.

²¹ See for example *Commonwealth of Australia Constitution Act* s 51(xxxi). See also Christophe Golay and Ioana Cismas, 'The right to property from a human rights perspective', Legal Opinion, International Centre for Human Rights and Democratic Development (2010), http://storre.stir.ac.uk/bitstream/1893/21703/1/Golay%20and%20Cismas_Working%20Paper_2010.pdf.

²² *NKM v Hungary*, 14 May 2013, Application No. 66529/11.

²³ Application No. 44759/98, 12 July 2001, cited by Robert Attard, 'The classification of tax disputes, human rights implications' in Georg Kofler, Miguel Poiars Maduro and Pasquale Pistone (eds), *Human Rights and Taxation in Europe and the World* (IBFD Publications, 2011) 397, 397.

The ECHR does not apply to tax disputes because tax disputes are not civil rights and obligations to which Art. 6 applies. The decision of the ECtHR in *Ferrazzini* implies that in a tax dispute a litigant does not have a right to a fair hearing under Art. 6 of the ECHR.²⁴

The effect of this judgment has subsequently been limited by the ECtHR by it holding that a case which involves a tax penalty of 25 per cent or higher is punitive in nature and changes the nature of the dispute from being a tax dispute subject to the restrictive *Ferrazzini* doctrine to a criminal law dispute subject to Article 6.²⁵

The ECtHR has held that a taxpayer who had overpaid tax and was entitled to tax rebates but had not received them over a period of years suffered an interference with his possessions.²⁶ This was a breach of article 1 of Protocol No. 1 to the ECHR.²⁷ Other cases in the ECtHR have held that:

- tax laws may not breach Article 14 of the ECHR that protects individuals placed in similar situations from discrimination in their enjoyment of their rights under the Convention and its Protocols,²⁸
- in the *Building Society* case there were alleged breaches of article 14 and article 6.1 that provides that in the determination of a person's civil rights and obligations 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. The facts briefly were that certain regulations imposing taxation were invalid. A building society challenged the imposition of this tax and was successful and obtained a refund of tax overpaid. In the interim the Government passed new legislation retrospectively validating the previously unenforceable law. The applicants although supporting the actions of the former took no formal steps themselves to challenge the validity of the assessments levied on them. The applicants then unsuccessfully sought to contend that the validating legislation breached their human rights. The court *inter alia* held that article 6 cannot be interpreted as preventing any interference by the authorities with pending legal proceedings to which they are a party by passing retrospective legislation.²⁹

Sixth MNCs argue that they comply with the tax laws of countries in which they do business. For example, a news report in *BBC News Technology* of 17 June 2013 stated:

²⁴ This article *inter alia* requires a fair trial and raises the presumption of innocence in criminal proceedings.

²⁵ Attard, above n 23. See *Paykar Yev Haghthank Ltd v Armenia*, European Court of Human Rights, Application No. 21638/03, 20 December 2007.

²⁶ *Buffalo Srl in liquidation v Italy* (no. 38746/97) (3 July 2003), Factsheet – Taxation and the ECHR (May 2017).

²⁷ This guarantees the 'peaceful enjoyment' of one's possessions.

²⁸ *Darby v Sweden* (Application no. 11581/85, 9 May 1989). *Van Raalte v The Netherlands* (Application no. 20060/92, 21 February 1997) also considered article 14 but the issue here was discrimination based on gender.

²⁹ *The National Provincial Building Society, The Leeds Permanent Building Society and The Yorkshire Building Society v The United Kingdom* (117/1996/736/933-935, 23 October 1997).

Scott Rubin, Communications Director, Google has been asked about Google's tax arrangements and said that his company pays what is 'required by law'.³⁰

This seems to have been accepted by the chair of the UK Parliament's Public Accounts Committee, Margaret Hodge, who, in a question to Matt Brittin, vice-president for Alphabet Incorporated (Google) in northern and central Europe, said that '[w]e are not accusing you of being illegal; we are accusing you of being immoral'.³¹ What Hodge appears to be saying is that the UK would like Google to pay more tax than it did and presumably in an amount greater than mandated by law. If this view of Hodge's statement is correct it is an indictment of the laws then in force in the UK or their administration or both.

Gelski, referring to a similar Senate enquiry in Australia, notes:

Most representatives of MNEs appearing before Senator Dastyari and his colleagues also pointed out that, not only were they legal, but many of their arrangements and structures had been blessed by the ATO in Advance Pricing Arrangements. These exchanges did not reach the eyes or ears of many a 'man and woman in the street'.³²

Next even if MNCs paid all the taxes demanded by those who seek to draw a link between tax and human rights it does not mean such monies will be used to alleviate poverty. It is in the absolute discretion of governments to allocate resources as they deem appropriate unless required by legislation. The tax laws do not allocate revenue to any resource other than the Consolidated Revenue Fund.³³ These monies can be allocated to whatever project the government of the day determines including those which may breach their human rights obligations.

Penultimately, in Australia and other common law countries taxes can only be imposed by legislation. There is no common law of taxation.³⁴ The High Court has developed detailed and comprehensive criteria that must be met before determining whether an exaction is a tax or something else. A tax is defined in the following terms: '[i]t is a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered'.³⁵ A charge for the acquisition or use of property, a fee for a privilege and a fine or penalty imposed for criminal conduct or breach of statutory obligation are not taxes.³⁶ There are two further important factors the courts consider when determining if an exaction is a tax. The first is that the tax must

³⁰ BBC, 'Google: "We pay tax required by law"', *BBC News Technology* online (17 June 2013), <<http://www.bbc.co.uk/news/technology-22932794>>.

³¹ UK Parliament, Evidence to Parliament's Public Accounts Committee (2 November 2012) (Margaret Hodge).

³² Richard Gelski, 'Law, morality and multinationals' (Paper presented to the Taxation Institute of Australia, 32nd National Convention, Adelaide, 15 March 2017). Gelski refers to the Australian Senate inquiry into tax avoidance by multinationals which was chaired by Senator S Dastyari.

³³ *Commonwealth of Australia Constitution Act* s 81.

³⁴ *Liedig v Commissioner of Taxation* [1994] FCA 1058 [34]. Griffiths J noted in *Webb v Syme* (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 *W T Ramsay Ltd v Inland Revenue Commissioners, Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865; Tony Honoré, 'The dependence of morality on law' (1993) 13(1) *Oxford Journal of Legal Studies* 1.

³⁵ *Matthews v The Chicory Marketing Board (Vic)* (1938) 60 CLR 263, 276 per Latham CJ (reference omitted).

³⁶ *Air Caledonie International v Commonwealth* (1988) 165 CLR 462.

not be arbitrary and second it must be contestable.³⁷ For a tax not to be arbitrary the legislation must determine the identity of the entity to be held liable and set out how that liability is to be calculated by reference to objective ascertainable facts. A tax that is arbitrary or not contestable is unconstitutional and unenforceable. These prerequisites are attempts to protect individual and other taxpayer rights and the rule of law.

The Crown is not entitled to retain any tax recovered by a lack of statutory power.³⁸ Just as the ATO and other tax regulators may hold audits or reviews to ensure a taxpayer has not underpaid tax, if the regulator determines too much tax had been paid it must refund the excess.³⁹

Finally, Forstater looks at the claims of the immense share of wealth that is apparently available if governments crack down on what she calls ‘questionable tax practices’. She reviews the sources of these claims and concludes that many are overstated. She explains that estimates of illicit financial flows through trade mis-invoicing issued annually by the NGO Global Financial Integrity are often misunderstood as an estimate of tax loss whereas tax is always at best, a fraction of income. She then gives an example of what appears to be double counting of tax. The NGO Citizen’s for Tax Justice in the US views the low tax rates paid by companies such as Apple, Google, Nike, PepsiCo as taxes lost to the US treasury while those in Europe view them as taxes lost to the source countries. A third example given is that some of the most widely quoted evidence for massive transfer pricing abuses are estimates based on analysis of bilateral trade data which do not isolate trades involving subsidiaries from trades between unrelated companies. This mismatch suggests that the taxes at stake are several times greater than is in fact the case.⁴⁰

Forstater suggests:

Unrealistic expectations cloud the perhaps obvious reality that while businesses should pay tax on the profits they make, the potential for countries to raise more from taxing international business is limited by actual level of activity by foreign companies within each country, and that changes to the effective tax burden may also have impacts on investment.

Forstater concedes the monies that are contended to be lost due to ‘abusive tax positions’ are not insignificant ‘but suggests this is a statistical observation and should not be interpreted as an estimate of the actual amount of money that could be collected in practice’.⁴¹

Significantly the Australian Commissioner of Taxation (CoT) in an address to the National Press Club is reported as stating that the tax gap from large corporations was much less than that arising from claims for deductions by individuals based on workplace expenditure.⁴² It has never been contended that these persons are breaching their human rights.

³⁷ *Deputy Federal Commissioner of Taxation v Brown* (1958) 100 CLR 32, 40-42 [7].

³⁸ *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1992] 3 All ER 820.

³⁹ See for example *Taxation (Interest on Overpayments and Early Payments) Act 1983* (Cth).

⁴⁰ Maya Forstater, ‘Can stopping ‘tax dodging’ by multinational enterprises close the gap in development finance?’ (CGD Policy Paper 069, Center for Global Development, Washington, DC, October 2015).

⁴¹ *Ibid.*

⁴² Joanna Mather, ‘ATO Targets Work Expense Rorts’, *Australian Financial Review* (6 July 2017).

The article now considers the meaning attributed to the component parts of what is an 'abusive tax position' cited in section 1 above. This is necessary as these phrases are used in contexts that are not reflective of their accepted legal meanings by those who contend for a link between tax and human rights.

2.2 What is an abusive tax position?

Non-reporting of income from criminal activity does impact on a government's resources to meet its human rights and other obligations. Although there is no empirical evidence available, it is suggested that few criminals pay tax on their illicit gains. It is partly for this reason that the Serious Financial Crime Taskforce⁴³ in Australia commenced its activities in July 2015 and up to 30 September 2016 raised tax liabilities totalling AUD 146.79 million.⁴⁴ The author suggests that most, if not all, MNCs do not consciously embark on any criminal activity. MNCs would have well-developed risk management systems in place to identify and avoid any illegal conduct.⁴⁵ However, if they did, human rights would play no role in prosecuting these entities. The tax and criminal laws would deal comprehensively with these issues.

Tax planning or tax mitigation is the means used by MNCs (and other corporate taxpayers) to limit their tax liability, having regard to the interests of the corporation,⁴⁶ to what MNCs believe is the lowest amount of tax payable that the law requires. There is nothing illegal or immoral in acting in this manner. The Australian Taxation Office (ATO) has stated: 'You have the right to arrange your financial affairs to keep your tax to a minimum – this is often referred to as tax planning or tax-effective investing'.⁴⁷ The International Bar Association notes that: 'Stakeholders from civil society and government were careful not to suggest that anyone should pay more taxes than strictly required by law'.⁴⁸ The Organisation for Economic Co-operation and Development (OECD) in its Guidelines for Multinational Enterprises accepts this when it records:

⁴³ The Serious Financial Crime Taskforce includes the AFP, ATO, Australian Crime Commission, Attorney-General's Department, AUSTRAC, Australian Securities and Investments Commission, Commonwealth director of public prosecutions and Australian customs and border protection services: ATO, 'Government expands serious financial crime focus' (last modified 3 July 2015), <<https://www.ato.gov.au/general/the-fight-against-tax-crime/in-detail/targeting-tax-crime-magazine/2015/targeting-tax-crime--wickenby,-a-lasting-legacy/?page=2>>.

⁴⁴ ATO, 'Tax crime prosecution results' (last modified 21 December 2016), <<https://www.ato.gov.au/General/the-fight-against-tax-crime/news-and-results/tax-crime-prosecution-results/>>.

⁴⁵ See for example HMRC, 'Exploring large business tax strategy behaviour', HMRC Research Report 363, July 2015; Catriona Lavermicocca, 'Tax risk management practices and their impact on tax compliance behaviour—The views of tax executives from large Australian companies' (2011) 9(1) *eJournal of Tax Research* 89; Emer Mulligan and Lynne Oats, 'Tax risk management: evidence from the United States' [2009] 6 *British Tax Review* 680; ATO, 'Seven principles of effective tax governance' (last modified 31 May 2016),

<<https://www.ato.gov.au/business/private-owned-and-wealthy-groups/tax-governance/corporate-governance-and-tax-governance/seven-principles-of-effective-tax-governance/>>.

⁴⁶ See for example *Corporations Act 2001* (Cth) s 181, which requires a director or other officer of a corporation to exercise their powers and discharge their duties in good faith in the best interests of the corporation.

⁴⁷ ATO, 'Tax Planning' (last modified 13 September 2016), <<https://www.ato.gov.au/general/tax-planning/>>. See also Michael Carmody, 'Managing Compliance' (Speech delivered at the Tasmanian Chamber of Commerce and Industry, 3 September 2003).

⁴⁸ International Bar Association, above n 13. See also OECD, *Addressing Base Erosion and Profit Shifting* (2013).

Enterprises should comply with both the letter and spirit of the tax laws and regulations of the countries in which they operate. Complying with the spirit of the law means discerning and following the intention of the legislature. It does not require an enterprise to make payment in excess of the amount legally required pursuant to such an interpretation.⁴⁹

Avi-Yonah, discussing Corporate Social Responsibility, refers to three theories about tax and the corporation and states that corporations should not embark on 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.⁵⁰

Two of the matters mentioned by Avi-Yonah raise some difficulties. First, even if the company is a creation of the legislature, this does not mean its tax obligations should be other than as the law provides. If this were not the case, how would one determine how much tax must be paid and by whom this determination is to be made? Second, the fact that a 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 of tax to the revenue. If this argument had any validity, all taxpayers would be required to pay more tax than provided by law in some indeterminate amount. The real view as described by Avi-Yonah accords with the tax obligations of all corporations. Taxpayers must pay those taxes required by law. Avi-Yonah does not suggest they must pay more.

Evasion is intentional criminal conduct designed to limit or not pay taxes.

Tax avoidance is neither criminal nor compliance with the tax laws; it is somewhere in between the two. It can often be very difficult to define avoidance.⁵¹ In Australia, there are objective factors to be met before a corporation falls foul of the anti-avoidance rules and particularly the general anti-avoidance rule contained in Part IVA of the *Income Tax Assessment Act 1936* (Cth) (ITAA 1936). For the purposes of this article tax avoidance in Australia means a breach of the specific or general anti-avoidance rules contained in the tax laws. This definition is supported by reference to legislation and case law. The proponents for a link between tax and human rights tend towards a subjective meaning for avoidance that has no relationship as to how the tax laws or the courts or the ATO construe avoidance.

⁴⁹ OECD, 'Guidelines for Multinational Enterprises', <<http://www.oecd.org/daf/inv/mne/48004323.pdf>>.

⁵⁰ Reuven S Avi-Yonah, 'Corporate social responsibility and strategic tax behavior', in Wolfgang Schön (ed), *Tax and Corporate Governance* (Springer, 2008) 183.

⁵¹ Freedman discusses some of the difficulties in defining 'tax avoidance': Judith Freedman, 'The tax avoidance culture: Who is responsible? Governmental influences and corporate social responsibility' (2006) 59(1) *Current Legal Problems* 359.

Even though Australia has anti-avoidance rules not all countries have such rules in their tax legislation. In some jurisdictions, the courts may resort to statutory interpretation or other tools to protect the revenue from tax avoidance schemes. In the UK, for example, the Commissioner can rely either on an anti-avoidance rule enacted in 2013⁵² or the *Ramsay* principle as a means of challenging what HMRC contend to be an avoidance scheme.⁵³ 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.

In keeping with the views of the OECD,⁵⁴ the CoT and regulators in other jurisdictions at times refer to avoidance as following the letter, but not the spirit of the law;⁵⁵ 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’.⁵⁶ Freedman argues 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’.⁵⁷

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 may be relevant when a court seeks to interpret a statutory provision. For example, when interpreting the general anti-avoidance rule, 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 has been determined, these concepts play no further role in assessing whether a transaction is affected by these rules.⁵⁸

Notwithstanding the foregoing, judicial officers have views on morality which may play a role in the ultimate determination of a tax or other dispute. If a scheme infringes that view the officer may insofar as the law permits seek to set aside the transaction. This has the inevitable consequence that if a taxpayer believes or is advised that a scheme is at or close to the boundary of breaching the anti-avoidance rules such schemes should be avoided. Notwithstanding this, as Bloom states:

⁵² This legislation refers to an ‘anti-abuse rule’ contained in Part 5 of the *Finance Act 2013*.

⁵³ *W T Ramsay Ltd v Inland Revenue Commissioners, Eilbeck (Inspector of Taxes) v Rawling* [1982] AC 300, [1981] 1 All ER 865.

⁵⁴ OECD, above n 49.

⁵⁵ In *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16 [93], Justice French describes the ‘spirit of the law’ in these terms:

In a statutory setting a requirement to act in good faith... 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.

⁵⁶ John Hasseldine and Gregory Morris, ‘Corporate social responsibility and tax avoidance: A comment and reflection’ (2013) 37(1) *Accounting Forum* 1, 11.

⁵⁷ Judith Freedman, ‘Responsive regulation, risk, and rules: Applying the theory to tax practice’ (2011) 44(3) *UBC Law Review* 627, 648-651.

⁵⁸ Kalmen Datt, *A Critical Evaluation of How Aspects of the Tax System in Australia Are Administered and Their Impact on Corporations and Directors* (Australian Research Foundation, Research Study 49, 2015).

It is worth noting, while we are on the tricky subject of morality, that not everyone shares the government's fervent zeal for taxation and its collection. Whether the Parliament likes it or not, income tax is, in every sense, an imposition. Thus, by the *Income Tax Act 1986* (Cth) s 5(1) 'income tax is imposed' upon taxable incomes, not anything else...⁵⁹

The words of the late Justice Hill bear repeating here. He said:

First, there is a real danger in judges deciding cases by reference to their own morality or sense of justice. This is so for no other reason than that views of morality differ from person to person. Second, to adapt a metaphor from another area of law and another time, the outcome of each case would depend upon the size of the Chancellor's foot, rather than the application of some predictable principle.⁶⁰

Finally, on the issue of morality Lord Wilberforce is recorded as saying: 'A subject is only to be taxed on clear words, not on "intendment" or on the "equity" of an Act'.⁶¹

Morality has no role to play in determining a taxpayer's liability for tax. Either the law imposes a tax on certain income or it does not. As stated earlier all taxpayers must comply with the tax laws but there is no obligation moral or otherwise to pay more taxes than the law provides. The author suggests that the cases such as the 'naming and shaming' of Starbucks and the subsequent overpayment of tax by this corporation should never have happened. As stated by the author on another occasion:

The obligation to pay tax should be based on a liability created by legislation and not be an ex gratia payment or attempt to appease what may be unjustified, uninformed and vociferous criticism. For corporations to act in the way required by the media may require directors to 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.⁶²

Conduct such as that set out above demeans the rule of law.⁶³

The following can be reasonably inferred from the above extract from Starbucks:

⁵⁹ David Bloom QC, 'Tax avoidance: A view from the dark side' (2016) 39(3) *Melbourne University Law Review* 950, 954.

⁶⁰ Justice Graham Hill, 'The judiciary and its role in the tax reform process' (1999) 2(2) *Journal of Australian Taxation* 66, 77.

⁶¹ *WT Ramsay Ltd v Inland Revenue Commissioners, Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865, 870.

⁶² 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>>.

⁶³ Kalmen Datt, 'To shame or not to shame: That is the question' (2016) 14(2) *eJournal of Tax Research* 486.

- Starbucks would not apply the law of the land and claim a deduction to which it was entitled to appease a demand by customers;
- the law is of secondary importance when a corporation is named and shamed; and
- whether the corporation was blameless or not is irrelevant to the campaign of naming and shaming by the media.

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

Either a scheme is a lawful tax planning exercise, or it is avoidance or evasion. There is no *via media*. If the state wishes to collect more revenue (assuming no breach of the tax laws):

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. There is no substitute for improving the tax code to reduce tax avoidance.⁶⁴

The concept of a 'fair share of taxes' is incapable of definition.⁶⁵ For example, the question has been asked elsewhere by the author whether

[a] 'fair share' of tax means that corporate taxpayers must pay the headline rate, or is this an allusion to some other percentage? If the latter, how and who determines this liability? Must a taxpayer not claim deductions that the law allows? To suggest that, because some corporate taxpayers have a lower effective tax rate than 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. The question of what is a 'fair share' of tax is incapable of a rational answer by reference to the laws imposing tax.⁶⁶

As Vodafone has noted in its Tax Risk Management Strategy document:

Vodafone believes its obligation is to pay the amount of tax legally due in any territory, in accordance with rules set by governments. In so doing it is not able to determine the 'fair' amount of tax to pay.⁶⁷

⁶⁴ Datt, 'Paying a fair share of tax and aggressive tax planning-A tale of two myths, above n 16 (references omitted).

⁶⁵ According to Slemrod, '[t]here is an active controversy about what exactly fairness means': Joel Slemrod, 'Old George Orwell got it backward: Some thoughts on behavioral tax economics' (CESifo Working Paper No. 2777, September 2009) 5.

⁶⁶ Datt, 'Paying a fair share of tax and aggressive tax planning-A tale of two myths, above n 16.

⁶⁷ Vodafone Group plc, 'Tax risk management strategy', <https://www.vodafone.com/content/dam/sustainability/pdfs/vodafone_tax_risk_management_strategy.pdf>.

The CoT's responsibility is the administration of the tax laws, not some nebulous concept of 'fairness'.⁶⁸

This article now turns to a consideration of the human rights obligations of states and MNCs.

3. HUMAN RIGHTS, STATES AND MNCs

3.1 The human rights obligations of states

The starting point is the *Universal Declaration of Human Rights* by the United Nations in 1948 which *inter alia* provides that human rights are universal, inalienable and indivisible.

Donnelly notes:

Human rights are also inalienable rights, because being or not being human is an inalterable fact of nature, not something that either is earned or can be lost. Human rights are thus 'universal' rights in the sense that all human beings hold them 'universally'. Conceptual universality is in effect just another way of saying that human rights are, by definition, equal and inalienable.⁶⁹

Shaw et al. in similar vein suggest human rights have four characteristics. These are that they are universal, equal, not transferable and are not dependent on human institutions.⁷⁰

Any person that introduces a bill before the Australian Parliament must cause a statement of compatibility to be prepared that shows the bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.⁷¹ A failure to comply with this Act does not affect the validity, operation or enforcement of the Act or any other provision of a law of the Commonwealth.⁷² Each of these instruments imposes obligations only on states to ensure that they take adequate steps to ensure these

⁶⁸ Datt, *A Critical Evaluation of How Aspects of the Tax System in Australia Are Administered*, above n 58.

⁶⁹ Jack Donnelly, *Universal human rights in theory and practice* (Cornell University Press, 3rd ed, 2013) 10.

⁷⁰ William H Shaw, Vincent Barry, Theodora Issa, Bevan Cately and Donata Muntean, *Moral issues in business* (Cengage, 3rd Asia Pacific ed, 2015) 89.

⁷¹ The following international instruments are cited in section 3:

(a) the *International Convention on the Elimination of all Forms of Racial Discrimination* done at New York on 21 December 1965 ([1975] ATS 40);

(b) the *International Covenant on Economic, Social and Cultural Rights* done at New York on 16 December 1966 ([1976] ATS 5);

(c) the *International Covenant on Civil and Political Rights* done at New York on 16 December 1966 ([1980] ATS 23);

(d) the *Convention on the Elimination of All Forms of Discrimination Against Women* done at New York on 18 December 1979 ([1983] ATS 9);

(e) the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* done at New York on 10 December 1984 ([1989] ATS 21);

(f) the *Convention on the Rights of the Child* done at New York on 20 November 1989 ([1991] ATS 4);

(g) the *Convention on the Rights of Persons with Disabilities* done at New York on 13 December 2006 ([2008] ATS 12).

⁷² *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 8(5).

rights are achieved. They do not impose obligations on those entities that do business in these states. As noted by O'Neill:

Declarations and Covenants are not the corollaries of the human rights that the documents proclaim. The Covenants do not assign states straight-forward obligations to respect liberty rights (after all, liberty rights have to be respected by all, not only by states), but rather second-order obligations to secure respect for them.⁷³

The article now turns to the human rights obligations of MNCs.

3.2 The obligations of MNCs

This section commences with an extract from an article by Wilkinson, a Circuit Judge, United States Court of Appeals, for the Fourth Circuit in discussing the approach courts in the US take to the enforcement of what at times appear to be absolute human rights. He states:

More fundamentally, rights impose obligations on others, and in many cases, those obligations are more than society can absorb. Competing social needs and goals, not to mention limitations of time and money, necessitate various qualifications on rights that we think of as absolute. The implementation of individual rights should not take its cues from rhetoric alone, without any concern for the dictates of prudence.⁷⁴

This statement reflects that courts, when enforcing human rights, must consider various competing interests when reaching a decision. This would appear to be an implicit limitation on the obligations of MNCs in relation to human rights.

The UN Global Compact's Ten Principles require corporations to operate in ways that meet fundamental responsibilities in the areas of human rights, labour, environment and anti-corruption.⁷⁵ In 2005, Ruggie drafted the United Nations Framework for Business and Human Rights 'Protect, Respect and Remedy'.⁷⁶ The concept of protect encompasses states promoting corporate respect for human rights and to prevent corporate-related abuse. Respect means corporations acting with due diligence to ensure they avoid infringing on the rights of others and addressing harms that do occur. This includes having policies, strategies and processes in place to ensure it does not breach any person's human rights. The requirement for a remedy means states must provide remedies for those whose human rights have been breached. The obligations of corporations extend not only to their activities but to the activities of those with whom they do business or interact but impliedly, there is no inter-jurisdictional obligation.⁷⁷ Leisinger records:

⁷³ Onora O'Neill, 'The dark side of human rights' (2005) 81(2) *International Affairs* 427.

⁷⁴ J Harvie Wilkinson III, 'The dual lives of rights: The rhetoric and practice of rights in America' (2010) 98(2) *California Law Review* 277, 278.

⁷⁵ These can be found at <<http://www.unglobalcompact.org/aboutthegc/thetenprinciples/index.html>>.

⁷⁶ United Nations, 'The UN "Protect, Respect and Remedy" Framework for business and human rights' (September 2010), <<https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf>>.

⁷⁷ *Ibid.*

For most of the companies that have signed on to the UN Global Compact, the sphere of influence extends beyond the factory site and includes immediate business partners and suppliers—it usually does not cover ‘government and the wider society’. John Ruggie’s Interim Report sees an emerging consensus view among leading companies that there is a gradually declining direct corporate responsibility outward from employees to suppliers, contractors, distributors, and others in their value chain but also including communities.⁷⁸

Kinley and Tadaki say:

However, it can be argued that TNCs [MNCs] do have duties to prevent human rights abuses in certain circumstances where they maintain close connections with potential victims or potential perpetrators, and where TNCs are in a position to influence the level of enjoyment of human rights.⁷⁹

It seems that an MNC’s human rights obligations are merely a reflection of the obligations of the state and are enforceable by the laws of the state in which the MNC does business. Cohen appears to accept this when he states that:

Although there is no explicit language restricting the obligations to a state’s own territory, one has the sense in reading the Covenant that extraterritorial obligations were not considered or intended.⁸⁰

Cohen does note that:

[A]t least one committee of legal experts, convened by Maastricht University and the International Commission of Jurists, interprets the Covenant to impose extraterritorial obligations.⁸¹

The preamble to the United Nations *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* appears to go further contending for an extra-territorial operation of human rights. It states:

Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.⁸²

⁷⁸ Klaus M Leisinger, Special Advisor to the Secretary General on the Global Compact, ‘On corporate responsibility for human rights’, Basel, April 2006, <http://www.commddev.org/userfiles/files/958_file_corpresforhr_kl.pdf>.

⁷⁹ David Kinley and Junko Tadaki, ‘From talk to walk: The emergence of human rights responsibilities for corporations at international law’ (2004) 44(4) *Virginia Journal of International Law* 931, 964.

⁸⁰ Stephen B Cohen, ‘Does Swiss bank secrecy violate international human rights?’ (2013) 140 *Tax Notes* 355, 356, referring to the *International Covenant on Civil and Political Rights*.

⁸¹ Cohen, above n 80. See also United Nations, *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* art 1, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/160/08/PDF/G0316008.pdf?OpenElement>>.

⁸² United Nations, *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, above n 81.

Even with this extended meaning the obligation is that of the state to enforce these rights.

Brenkert⁸³ suggests there are divergent views as to whether businesses need only comply with some or all human rights, other than those enshrined in law. He refers to a variety of approaches on how businesses should go about determining their specific human rights responsibilities. The first is what he refers to as a good reasons approach. Here the MNC must take a decision where the strongest weight of reason lies. This involves evaluating the extent to which it can make a difference, on what others can be expected to do, and the appropriateness of how the required supportive actions may be shared. On this basis and depending on the facts there may be no obligation to take any action. This approach is dependent on the view one takes of the corporation. Is it a private body or one with political power? If the latter the obligations may be greater and may be synonymous with those of the state. Next is the fair-share theory that determines which responsibilities a business has based upon three factors: relationship, effectiveness and capacity.⁸⁴ The reference to 'relationship' means the nature, duration and physical proximity of the business to the rights holder. On this basis, the cost of acting is a factor that may legitimately be considered. Effectiveness refers to the ability of different entities to carry out their human rights obligations whilst capacity refers to their ability to bear the costs involved in the enforcement and promotion of human rights. The use of risk management techniques in determining specific responsibilities are also issues to be considered.⁸⁵ This tool is more than just a cost benefit analysis of cause and effect.⁸⁶ Brenkert continues:

A third approach to determining specific responsibilities is exemplified by Ruggie's defence of risk management as a tool for businesses determining '... the human rights risks that the proposed business activity presents and [to] make practical recommendations to address those risks'. This involves determining which risks of adverse human rights impacts are the most significant where this involves determining not only the probability of such impacts occurring but also their severity and the vulnerability of those who might be impacted.⁸⁷

The OECD Guidelines for Multinational Enterprises⁸⁸ also prescribe certain human rights obligations for MNCs although they appear not to have an extraterritorial operation. These Guidelines draw on the Ruggie Framework. The commentary to these Guidelines *inter alia* provides that:

⁸³ George G Brenkert, 'Business ethics and human rights: An overview' (2016) 1(2) *Business and Human Rights Journal* 277.

⁸⁴ Brenkert cites Michael A Santoro, 'Engagement with integrity: What we should expect multinational firms to do about human rights in China' (1998) 10(1) *Business & the Contemporary World* 25, 34; Michael A Santoro, *Profits and principles: Global capitalism and human rights in China* (Cornell University Press, 2000) in support of this theory.

⁸⁵ See for example Bridget M Hutter and Clive J Jones, 'From government to governance: external influences on business risk management' (2007) 1(1) *Regulation and Governance* 27.

⁸⁶ Brenkert cites John Ruggie, *The corporate responsibility to respect human rights: An interpretative guide*, HR/PUB (2012) /12/02 42.

⁸⁷ Brenkert, above n 83, 297 (references omitted).

⁸⁸ OECD, *OECD Guidelines for Multinational Enterprises* (OECD, 2011), <<http://www.oecd.org/daf/inv/mne/48004323.pdf>>.

- MNCs should strive to honour human rights provided it does not cause them to breach the laws of the land in which they do business;
- where an enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact or if possible, use whatever influence it may have to effect change in the practices of an entity that cause adverse human rights impacts.

The Corporations Act itself imposes a limitation on the human rights obligations of corporations when it requires directors to take decisions that are in the interests of the corporation.⁸⁹ The ‘interests of the corporation’ is not some abstract concept. For example, Redmond discussing human rights and the interests of the corporation said:

Directors may have regard for non-shareholder stakeholder interests within some uncertain limits, but not independently of consequential corporate benefit... This formulary comprises three distinct but related duties: a subjective duty of good faith, that is, to act honestly in the company's interests as the directors perceive them; a duty to exercise powers for a proper purpose; and a duty to consult and act by reference to interests that the law recognises as the ‘interests of the company’.⁹⁰

Kennedy discusses various problems that, in his opinion, arise when non-government organisations and other activist entities make claims about breaches of human rights issues by MNCs in taking abusive tax positions. He accepts that some have greater validity than others but, he says, one should not close one's eyes to them as the answers to each requires a pragmatic reassessment of humanitarian commitments, tactics and tools. Based on the views of Kennedy, various potential issues arise from the claim that abusive tax positions are a breach of human rights. These include:

- generalisations that MNCs are violating their human rights obligations by taking ‘abusive tax positions’ ignore the clear majority of MNCs that pay all taxes the law requires;
- those who contend for a link between tax and human rights are unable to enact laws that prescribe how taxes are to be calculated and paid or how to enforce such laws. The claim about abusive tax positions and human rights is rhetorical even though they may bring abuses of some MNCs into the public domain. As Gelski notes:

It was this change in taxpayer stakeholder expectations that has caught the government, and I suspect, the ATO off guard. I am not alone in pointing out that arrangements that the ATO not only knew about but in many cases officially approved, are now being revisited and challenged;⁹¹

⁸⁹ *Corporations Act 2001* (Cth) s 181(1).

⁹⁰ Paul Redmond, ‘Directors’ Duties and Corporate Social Responsiveness’ (2012) 35(1) *University of New South Wales Law Journal* 317, 324-325.

⁹¹ Gelski, above n 32.

- there may be a mistaken impression that there is a larger pool of monies available than may be the case. This is reminiscent of the views of Forstater considered in section 2.1 above.

The foregoing suggests the link between tax and human rights is at best tenuous and appears to be based on some (possibly intentional) misconceptions. These include:

- whatever additional tax is recovered by governments will be utilised in the alleviation of poverty;
- not paying more tax than the law requires is in some way a breach of an MNC's human rights or tax obligations (this suggests that complying with the law is something to be despised); and
- the obligation to pay tax is based on some subjective indeterminate criteria which are incapable of creating any enforceable legal liability. Examples of this are the use of phrases such as 'tax practices that may be legal, strictly speaking, but are currently under scrutiny because they avoid a "fair share" of the tax burden'.

Before concluding on the issue of the human rights obligations of MNCs, it is appropriate to cite the words of former High Court Chief Justice Robert French when delivering a speech on the Courts and Parliament. He said:

The common law principle of legality has a significant role to play in the protection of rights and freedoms in contemporary society while operating consistently with the principle of parliamentary supremacy. It does not, however, authorise the courts to rewrite statutes in order to accord with fundamental human rights and freedoms.⁹²

Finally, if the legislature does not impose a human rights obligation on MNCs then there is nothing to be enforced. An essential element of the Ruggie framework would be missing. The comments of O'Neill are apposite here. She said:

If we take rights seriously and see them as normative rather than aspirational, we must take obligations seriously. If on the other hand we opt for a merely aspirational view, the costs are high. For then we would also have to accept that where human rights are unmet there is no breach of obligation, nobody at fault, nobody who can be held to account, nobody to blame and nobody who owes redress. We would in effect have to accept that human rights claims are not real claims.⁹³

The foregoing suggests an MNC's human rights obligations are limited to those with whom the corporation has a direct connection or those for whom it voluntarily assumes liability. As the connection becomes more distant so the obligation becomes smaller until eventually it may become non-existent. If the state does not legislate enforcement mechanisms, claims for breaches of human rights are mere rhetoric.

⁹² Chief Justice Robert French AC, 'The courts and the Parliament' (2013) 87(12) *Australian Law Journal* 820, 827.

⁹³ O'Neill, above n 73, 430.

There is no legislation that draws a link between tax and human rights.⁹⁴ This does not mean claims cannot be made under international instruments such as the *International Covenant on Civil and Political Rights* where there has been a breach of human rights. An example where such a claim was made to a Committee created under the above instrument was that of one Charif Kazal who lodged a complaint to the UN about the operations of and findings of misconduct against him by a statutory body created in New South Wales known as the Independent Commission Against Corruption. No legal avenues were available to Kazal to challenge the findings of the Commission resulting in a claim of a breach of human rights under the above instrument.⁹⁵ No decision has to date been handed down on this complaint. This action by Kazal does not detract from the fact that it is a long row to hoe to find any actionable link between tax and human rights.

The foregoing indicates the obligations of MNCs are limited and not in the absolute terms suggested by those who contend for a link between tax and human rights. There is no direct link between the two. The article now considers whether in Australia MNCs owe some duty of care to persons other than the state (regulator) not to take an abusive tax position. This would appear to be the only basis for founding a claim based on a breach of human rights. In so far as the author can determine no country has legislatively sought to draw a link between a breach of the tax laws and a breach of human rights. Even the OECD in its action points designed *inter alia* to ensure that MNCs pay such taxes as they may be obliged to do on income generated in specific jurisdictions does not draw such a link.⁹⁶

3.3 Do MNCs owe a duty of care?

As the Australian law currently stands, it seems an MNC does not owe a duty of care to any specific individual or group of individuals to ensure it does not take an abusive tax position. The courts can, however, extend the grounds under which a duty of care may be owed. As Brennan J noted:

When the existence of a duty in a new category of case is under consideration, the question for the court is whether there is some factor in addition to reasonable foreseeability of loss which is essential to the existence of the duty...where a novel category of duty is proposed...the court may have regard to a variety of considerations: the nature of the activity which causes the loss, the nature of the loss, the relationship between the parties and contemporary community standards (especially where liability for breach of the proposed duty would be disproportionate to the risk which a person might reasonably be expected to bear as an incident of engaging in the particular activity if no limiting factor were identified).⁹⁷

Deane J in the same case noted that:

⁹⁴ See for example Cohen, above n 82, 356.

⁹⁵ See for example Chris Merritt, 'Kazal sues state for "malicious ICAC inquiry"', *The Australian* (26 January 2018) 23; Chris Merritt, 'ICAC case ignites UN Human Rights Row', *The Australian* (26 January 2018) 4.

⁹⁶ See for example OECD, 'BEPS Actions', <<http://www.oecd.org/ctp/beps-actions.htm>>.

⁹⁷ *Hawkins v Clayton* [1988] HCA 15, 164 CLR 539, 556 [15].

The content of the duty of care... may, in some special categories of case, extend to require the taking of positive steps to avoid physical damage or economic loss being sustained by the person or persons to whom the duty is owed. Apart from cases... where the person under the duty has created the risk, the categories of case in which a relationship of proximity gives rise to a duty of care which may, according to circumstances, so extend are, like those in which there is a duty of care to avoid pure economic loss, commonly those involving the related elements of an assumption of responsibility and reliance.⁹⁸

Based on the above dicta it seems unlikely that a new duty would be found to link human rights and tax. Even if this view is incorrect the courts will not extend the duty to cases where the duty is owed to the world at large. A relationship between a claimant and the MNC must be established to justify the allegation of a duty owed. An allegation of negligence *simpliciter* will not suffice. Thus, in *Chester*, a young child fell into a hole dug by the Council and drowned. The child's mother sued for mental anguish submitting the council owed her a duty of care not to injure her child so as to cause her a nervous shock when she saw, not the happening of the injury, but the dead body of the child. A majority in the High Court dismissed her appeal. Rich J handing down a concurring majority judgment said:

The train of events which flow from the injury to A almost always includes consequential suffering on the part of others... But the law must fix a point where its remedies stop short of complete reparation for the world at large, which might appear just to a logician who neglected all the social consequences which ought to be weighed on the other side.⁹⁹

Starke J in the same case said:

Some relationship of duty on the part of the municipality towards the appellant must be established. Negligence in the abstract or in the air, as has often been said, is not enough.¹⁰⁰

In *Heyman* the issue was whether a local authority which gave approval to the erection of a dwelling owed a duty to persons who subsequently became the owners and occupiers of the house, to take reasonable care to ensure that the building was constructed in conformity with the plans and specifications which it approved. Each member of the Court handed down separate concurring judgments dismissing the appeal. Deane J said (in a lengthy extract):

The common law imposes no prima facie general duty to rescue, safeguard or warn another from or of reasonably foreseeable loss or injury or to take reasonable care to ensure that another does not sustain such loss or injury... reasonable foreseeability of a likelihood that such loss or injury will be sustained in the absence of any positive action to avoid it does not of itself suffice to establish such proximity of relationship as will give rise to a prima facie duty on one party to take reasonable care to secure avoidance of a reasonably foreseeable but independently created risk of injury to the other... Apart from those cases where the circumstances disclose an assumption of a

⁹⁸ Ibid 579 [27].

⁹⁹ *Chester v Waverley Municipal Council* (1939) 62 CLR 1, 11.

¹⁰⁰ Ibid 12.

particular obligation to take such action or of a particular relationship in which such an obligation is implicit, [special categories] are largely confined to cases involving reliance by one party upon care being taken by the other in the discharge or performance of statutory powers, duties or functions....¹⁰¹

Chester and *Heyman* reflect the case that MNCs do not owe a duty of care to all the inhabitants of a state or even an unknown and potentially unlimited number of claimants. The necessary relationship with the MNC or an assumption of liability by it is missing. This too would appear to be destructive of any contention for a link between human rights and tax.

It seems no individual would be able to contend that any one or more MNCs owed that individual a duty of care not to take an abusive tax position so as to found a claim in human rights. There is no special relationship between any MNC and the community at large or any individual where it can be contended the MNC assumed an obligation to eradicate poverty. On this basis 'there is no breach of obligation, nobody at fault, nobody who can be held to account, nobody to blame and nobody who owes redress'.¹⁰²

A further hurdle for those who contend that 'abusive tax practices' are a breach of human rights is that for such a claim to succeed the claimant would have to show some breach by the MNC of both its tax and human rights obligations. The ability of such an entity doing so is remote especially in view of the secrecy provisions contained in Division 355 of the *Taxation Administration Act 1953* (Cth). The claimant/s would presumably be incapable of proving a breach of the tax laws. It seems all they can do is argue in generalities which may reflect an intentional but mistaken view of the operation of the tax and human rights law by those who contend for a link between the two.

There is no theory of the corporation that suggests it must pay more taxes than those required by the law. In the event of a breach by an MNC of its tax obligations there would presumably be an amended assessment issued by the tax regulator to ensure the correct amount of tax was paid. There is no need to suggest that human rights has any role to play in the enforcement of the tax laws. To do so would be pointless. Further to suggest that there is a moral obligation not to take an abusive tax position (which includes tax mitigation which is lawful) as this gives rise to a breach of human rights has the inevitable consequence that every act on the part of every person or corporation, whether lawful or otherwise, which results in a reduction of the revenue available to a government to alleviate poverty is a breach of human rights. Such a proposition would strain the credulity of even the most gullible of minds.

All of the foregoing suggests there is little, if any, merit in the claim that taking 'abusive tax positions' constitutes a breach of human rights. On the assumption, however, that the author is mistaken, the article now considers the same issues from a tax perspective.

¹⁰¹ *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, 502 (emphasis added and references omitted).

¹⁰² See O'Neill, above n 73.

4. TAXES

4.1 The obligations of MNCs in relation to tax

Australia follows a self-assessment regime when dealing with the tax affairs of MNCs. Interestingly some MNCs are under permanent audit or review by the ATO depending on the ATO's views of their perceived risk to the revenue. The basic principle behind a self-assessment system is that any tax is capable of precise determination in an amount fixed by law.¹⁰³ According to Freedman, 'companies cannot be expected to pay voluntary tax over and above the amounts imposed by law'.¹⁰⁴ Such voluntary payments would not be the payment of taxes. An MNC is not obliged to put aside its own interests to pursue a tax policy that is the most beneficial to the state.¹⁰⁵ 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'.¹⁰⁶

When considering the tax obligations of MNCs and human rights there are cases in Australia where taxpayers sought to raise a defence to the payment of taxes that some taxes or conduct on the part of the ATO may be an abuse of human rights. The basis on which the courts found against these taxpayers is suggestive of an approach that might be followed if a claim were made that a breach of the tax laws was a breach of human rights.

4.2 Tax cases and human rights

In *Re Burrowes* the taxpayer *inter alia* argued he was not bound by the tax laws of Australia as it involved a violation of his right to conscientiously object to paying tax which was used by the Australian Government to finance military activities and the nuclear arms race. He relied on Article 18 of the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*. The Court held that neither document provides a legal basis which allows Australian taxpayers at their individual option to withhold any part of the tax which is otherwise payable.¹⁰⁷

In *Ellenbogen* the taxpayer, a recent immigrant to Australia, claimed certain deductions which were disallowed by the Commissioner. The taxpayer then made a complaint of racial discrimination against the Commissioner contending Australian tax laws were discriminatory against newly arrived immigrants as they did not accord with the *Universal Declaration of Human Rights* because they discriminated on the basis of national origin. The taxpayer then lodged a claim before the Human Rights and Equal Opportunity Commission, but the claim was dismissed. The Court found the decision

¹⁰³ For an article discussing the US tax system, see Bryan T Camp, 'Tax administration as inquisitorial process and the partial paradigm shift in the IRS Restructuring and Reform Act of 1998' (2004) 56(1) *Florida Law Review* 1. See also *IRC v Holmden* [1968] AC 685 where Lord Wilberforce said: '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. An entity is not obliged to put aside its own interests to pursue a tax policy that is the most beneficial to the government'.

¹⁰⁴ Judith Freedman, 'Tax and corporate responsibility: In my opinion' (2003) 695 *Tax Journal* 2, 6.

¹⁰⁵ Richard Happe, 'Multinationals, enforcement covenants, and fair share' in Judith Freedman (ed), *Beyond Boundaries: Developing Approaches to Tax Avoidance and Tax Risk Management* (Oxford University Centre for Business Taxation, 2008) 157.

¹⁰⁶ *Brown v Commissioner of Taxation* [1999] FCA 563 [51].

¹⁰⁷ *Re Burrowes; Ex parte DFCT* (1991) 22 ATR 885.

by the Commissioner did not deprive a person of any particular race, colour or national or ethnic origin of a right, or limit their enjoyment of a right.¹⁰⁸

*Taylor*¹⁰⁹ involved bankruptcy proceedings which went on appeal. The taxpayer appellant sought to raise the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) as a basis for prosecuting the appeal. The Court dismissed this submission on the basis the legislation did not afford the taxpayer any right.

Possibly of more relevance is a case examined by Aharony and Geva where an individual was charged with tax evasion in Israel.¹¹⁰ The case was initially determined in favour of the revenue by the District Court but subsequently overturned by the Israeli Court of Appeal. As a basis for its determination the District Court found it necessary to consider the social and national purposes of taxation. Aharony and Geva report the learned judge in the District Court as stating:

Tax is a social instrument. With it, society fights phenomena perceived as negative. It encourages activities that are viewed favorably and deters undesirable activities. It develops natural and human resources. It encourages industry, research and science. It leads to redistribution of the means of production. Income tax constitutes a major part of the national income and it has fiscal, economic and social repercussions. Given that the main purposes of the income tax are to enrich the treasury and to realize various social goals, it is only too clear that the tax policy will aim to impose tax on any activity producing an income generated in Israel.¹¹¹

The District Court in Israel appeared to take a broad view of the uses to which taxes may be put as a tool in determining the meaning and purpose of the statute being considered by it. The Court was of the view that the corporation has not only economic and legal obligations, but also certain responsibilities to society, which extend beyond these obligations.¹¹² This judgment did not seek to suggest that a breach of the tax laws in Israel was a breach of human rights.

The approach adopted by the District Court in Israel is analogous to the arguments put by those who contend that MNCs must not adopt 'abusive tax positions' to ensure states have sufficient resources to alleviate poverty. In setting aside this finding the Israeli Court of Appeal adopted an approach to the interpretation of the tax laws that precluded the use of external factors (unrelated to the mischief the statute was seeking to counter) to facilitate an interpretation of the law. The function of the court is to give effect to the will of Parliament as expressed in the law.¹¹³

¹⁰⁸ *Ellenbogen v Federal Commissioner of Taxation* (1988) 19 ATR 736.

¹⁰⁹ *Taylor & Anor v DFC of T* [1999] FCA 195.

¹¹⁰ Joseph Aharony and Aviva Geva, 'Moral implications of law in business: a case of tax loopholes' (2003) 12(4) *Business Ethics: A European Review* 378.

¹¹¹ *Ibid* 383-384 (references omitted).

¹¹² *Ibid* 383.

¹¹³ *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23, 241 CLR 252, 265 [32] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ, citing Mason CJ, Wilson and Dawson JJ in *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 518. Heydon J was to the same effect: 241 CLR 252, 277-278 [74].

The Australian High Court in *Alcan*¹¹⁴ is to the same effect when it referred to a judgment of Gleeson CJ¹¹⁵ who stated:

[I]t may be said that the underlying purpose of an Income Tax Assessment Act is to raise revenue for government. No one would seriously suggest that s 15AA of the *Acts Interpretation Act* has the result that all federal income tax legislation is to be construed so as to advance that purpose.

The Honourable Murray Gleeson describes the approach of Australian courts in interpreting tax statutes as follows:

Liability to tax is not determined by judicial discretion. The rule of law applies both to revenue authorities and to taxpayers, regardless of whether in a particular case it comes down on one side or the other.¹¹⁶

A purposive approach is adopted to determine what the law is trying to achieve from a tax perspective.¹¹⁷ That it may raise revenue for the state is not such a purpose. All statutes imposing tax raise revenue for the state. As early as 1907 Isaacs J noted:

Where Parliament has in the public interest thought fit... to exact from individuals certain contributions to the general revenue, a Court should be specially careful, in the view of the consequences on both sides, to ascertain and enforce the actual commands of the legislature, not weakening them in favour of private persons to the detriment of the public welfare, nor enlarging them as against the individuals towards whom they are directed.¹¹⁸

It seems Australian courts will adopt a similar approach to that used by the Israeli Court of Appeal in overturning the District Court judgment. It is the author's view that the question of the uses to which taxes may be utilised, unless specifically stated to be the case in the legislation, is not something of which a court will take account in interpreting tax legislation. Even if this were the case a court would still be faced with the issue of determining whether the contended liability was provided for in the legislation and if there were objective factors present capable of determining a precise liability. The fact that monies may be directed to human rights purposes does not mean that a transaction or income is targeted by the legislation. The purpose for which monies are used is not a basis for determining liability.

The tax laws in Australia permit the government of the day in its sole discretion to determine the uses to which all or part of any revenue received may be put. Courts do not interpret tax laws by way of conjecture as to possible uses to which revenue derived from a tax may be put.

¹¹⁴ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41, 239 CLR 27, 47 [51] per Hayne, Heydon, Crennan and Kiefel JJ. French CJ delivered a separate concurring judgment.

¹¹⁵ *Carr v The State of Western Australia* [2007] HCA 47, 232 CLR 138, 143 [6].

¹¹⁶ The Honourable Murray Gleeson, 'Justice Hill Memorial Lecture – statutory interpretation' (2009) 44(1) *Taxation in Australia* 25, 27.

¹¹⁷ *Acts Interpretation Act 1901* (Cth), ss 15A-15AD.

¹¹⁸ *Scott v Cawsey* (1907) 5 CLR 132, 154-155.

If the law does not impose tax on an entity no liability exists. If an MNC pays the lowest amount of tax required by law, no claim can legally be made for payment of additional amounts no matter what adjectives are used to describe this conduct.

Often it is the inability (unwillingness?) of Parliament to enact legislation that targets the income sought to be taxed that enable MNCs to pay less tax than anticipated. 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.¹¹⁹

Demands by third parties or even governments for MNCs to pay taxes calculated on some unlegislated and subjective basis in an indeterminate amount are not taxes and no government can enforce such claims.

The Australian legislature, aware of these problems, has recently enacted legislation to capture a greater percentage of the revenue derived by MNCs and generated in Australia by amending the general anti avoidance rule in Part IVA of the ITAA 1936. These amendments are affected by the introduction of what is known as the multinational anti-avoidance law (MAAL)¹²⁰ and the diverted profits tax (DPT).¹²¹

The MAAL is designed to counter the erosion of the Australian tax base by multinational entities using artificial and contrived arrangements to avoid the attribution of profits to a permanent establishment in Australia.¹²² Portas and Slater describe the primary purpose of the DPT as:

- ensuring significant global entities' (SGEs, ie, MNCs with turnover in excess of AUD 1 billion) Australian tax payable reflects the economic substance of Australian activities; and
- preventing SGEs from reducing Australian tax by diverting profits offshore.¹²³

The CoT has already commenced recovery proceedings against some MNCs contending for liability based on an alleged breach of the MAAL. In this regard Andrew White reports that:

Seven companies are preparing to face claims from the office totalling \$2 billion by June in a crackdown on multinational tax avoidance.¹²⁴

That an allegation of liability is made does not mean that the courts will necessarily agree with the views of the CoT. However, it does indicate that the new law has the

¹¹⁹ Greg Wiebe, 'Interview with Pascal Saint-Amans' cited in KPMG, *What should governments tax—A question of morality or policy?*, <<http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/future-focus-tax-asia-pacific/Pages/oced-report.aspx>>.

¹²⁰ *Tax Laws Amendment (Combating Multinational Tax Avoidance) Act 2015*.

¹²¹ *Treasury Laws Amendment (Combating Multinational Tax Avoidance) Act 2017*.

¹²² How the MAAL and DPT operate is beyond the scope of this article.

¹²³ Anthony Portas and Daniel Slater, 'DPT and MAAL – How and when they apply and managing disputes' (Paper presented to the Tax Institute, 2017 Queensland Tax Forum, Brisbane 24-25 August 2017).

¹²⁴ Andrew White, 'ATO circles firms in \$2bn avoidance hit', *The Australian* (10 June 2016) 23.

prospect of raising significant revenue. Whatever additional revenue is raised may, subject to the priorities of the government of the day, be deployed in the alleviation of poverty.

5. CONCLUSION

There are claims by a range of stakeholders, academics, multinational organisations and non-government organisations that large Australian and other multinational corporations that pay no or little tax because of taking abusive tax positions breach their human rights obligations as they deprive governments of the means to *inter alia* alleviate poverty. This article has examined the legal basis for these claims and concluded there is no basis for this contention.

Any tax obligation is dependent on legislation specifying objective criteria as to how the tax is to be computed and who is liable. Provided the tax paid by the MNC complies with the law it is irrelevant how much tax an MNC pays. If no successful challenge can be made it is legally valid. Just as the ATO may adjust a taxpayer's liability upwards if it finds too much tax has been paid it must refund any overpayment of tax.

MNCs cannot be held responsible for a breach of human rights based on their tax affairs. MNCs do not owe a duty of care to the entire world nor to all the inhabitants of the state or any unspecified part thereof to ensure that poverty in that state is alleviated. There is no relationship between the MNC and these persons. There is also no assumption of liability by the MNC that would found a claim in human rights based on a contention that it has an obligation to alleviate poverty.

If a claim for a breach of human rights were lodged it seems no individual claimant would be able to discharge the onus on that individual needed to be successful. If the state were the claimant, it would not need to make any allegations of human rights abuses in its claim against the MNC. It would presumably rely exclusively on the tax and possibly criminal laws to justify its claim.

The essential problem in the past appears to be in part the ineptness (and/or possibly an unwillingness) of governments to legislate tax laws that capture the income sought to be taxed and in part the inability of the regulator to properly enforce those laws that have been enacted. The Australian government has recently enacted legislation that is intended to resolve this difficulty in the form of the MAAL and DPT. Time will tell if these will have their desired effect.

Seeking to draw a link between human rights and tax would appear to be much ado about nothing.