

# Chapter 6

## Parliament's intention since 1982

6.1 In the context of noting that 'the best evidence of Parliament's intent is what Parliament says when it passes legislation',<sup>1</sup> Treasury set out five legislative provisions and accompanying explanatory material that it argued 'show an unmistakably consistent approach by the Parliament' that treaty based transfer pricing rules provide an alternative basis for making transfer pricing adjustments:

- The 1982 amendments which introduced Division 13 and related penalty provisions;
- The 1984 amendments to the penalty provisions;
- The 1995 explanation of franking credit changes;
- The 2001 explanation of new thin capitalisation rules; and
- The 2003 changes to the definition of 'relevant provision'.<sup>2</sup>

6.2 These points will be discussed below, with the exception of the 2003 amending Act which will be discussed in the following chapter.

6.3 In the context of highlighting these amending Acts, Treasury outlined that 'it is not the signing of the treaty that expands the taxing power; it is the way in which it is incorporated into the domestic law that does that':

I understand that the Joint Standing Committee on Treaties, JSCOT, has detailed scrutiny of all of the treaties that we enter into, so the mere signing of a treaty is not enough to incorporate it into law; it needs to be ratified by the parliament in order to take effect. Otherwise, the executive would have its own law-making power. Lawyers at the table will know better than I do the broader consequences of that, but it is the way in which those treaties are then incorporated into the Australian law and then become binding on the Australian government. That process is done through the 1953 act and interacts with the 1936 act.<sup>3</sup>

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1 Mr Tony McDonald, General Manager, International Tax and Treaties Division, Revenue Group, *Committee Hansard*, 26 July 2012, p. 55.

2 Treasury, *Submission 21*, p. 15.

3 Mr Tony McDonald, General Manager, International Tax and Treaties Division, Revenue Group, Treasury, *Committee Hansard*, 26 July 2012, p. 57.

## 1982 introduction of Division 13

6.4 The *Income Tax Assessment Act 1982* (Act No. 29 of 1982) (1982 amending Act) introduced the transfer pricing rules set out in Division 13.<sup>4</sup> The provisions for the 1982 amending Act replaced section 136 of the *Income Tax Assessment Act 1936* (ITAA1936).

6.5 Treasury asserted that the Explanatory Memorandum (EM) to the 1982 Act made repeated reference to provisions in Division 13 'and the fact that in addition to these, the treaties "contain their own provisions" or carry out the same functions'. Treasury highlighted an explanation of section 170 as further evidence of this.<sup>5</sup>

### *Section 170 – amendment of assessments*

6.6 Treasury outlined that as part of the introductory pages describing 'the main features' of the 1982 amending Act, the EM stated:

Reflecting the position that exists in relation to existing section 136 [replaced by Division 13], an assessment may be amended to give effect to the revised Division 13 at any time, so long as the Division has not previously been applied in relation to the same subject matter. **Where a double taxation agreement provision operates to reallocate profits, amendment of assessments will be authorised on the same basis** (emphasis added by Treasury).<sup>6</sup>

6.7 The EM to the 1982 amending Act specifically addressed subsection 170(9B) (as discussed by submitters in the previous chapter) further on:

**In their practical effect, proposed sub-sections 170(9B) and (9C) will clarify the powers of the Commissioner to amend an assessment where a provision of a double taxation agreement that deals with profit shifting may be applicable.** Sub-section 4(2) of the *Income Tax (International Agreements) Act 1953* provides that the provisions of that Act are to have effect notwithstanding anything inconsistent with those provisions contained in the *Principal Act* [ITAA 1936]. Technically, therefore, the provisions of a double taxation agreement that deal with profit shifting, either under a "business profits" article ... or an "associated enterprises" article ..., may have to be applied instead of Division 13. Where the profit shifting provisions of a double taxation agreement are to apply in these circumstances, sub-sections 170(9B) and (9C) confer the

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4 *Income Tax Assessment Amendment Act 1982*, [www.comlaw.gov.au/Details/C2004A02588](http://www.comlaw.gov.au/Details/C2004A02588) (accessed 24 July 2012).

5 Treasury, *Submission 21*, p. 15.

6 Explanatory Memorandum, *Income Tax Assessment Amendment Bill 1982*, p. 6, [www.austlii.edu.au/au/legis/cth/bill\\_em/itaab1982330/memo\\_0.pdf](http://www.austlii.edu.au/au/legis/cth/bill_em/itaab1982330/memo_0.pdf) (accessed 24 July 2012), see Treasury, *Submission 21*, p. 16.

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same specific powers of amendment of an assessment as are to be provided in relation to revised Division 13 (emphasis added by Treasury).<sup>7</sup>

6.8 Treasury asserted that '[u]nderpinning subsection 170(9B) is the clear assumption that the treaty based transfer pricing rules operate as a separate and independent basis for making transfer pricing adjustments'.<sup>8</sup>

### ***Explanation of section 136AB – operation of Division 13***

6.9 Treasury also highlighted section 136AB which pertains to the operation of Division 13. It states:

- (1) Nothing in the provisions of this Act other than this Division shall be taken to limit the operation of this Division.
- (2) In the application of this Division, the operation of section 31C shall be disregarded.<sup>9</sup>

6.10 The EM to the 1982 amending Act makes the following comments on section 136AB of the Act:

The basic purpose of the proposed section 136AB is to give to Division 13 an overriding operation in relation to the general provisions of the Principal Act, similar to that of Part IVA.

It is **not proposed that Division 13 will override the Income Tax (International Agreements) Act 1953**. The double taxation agreements which appear as Schedules to that Act **contain their own provisions to deal with profit shifting arrangements** which occur in an agreement context, and these provisions are based on application of the arm's length principle (emphasis added by Treasury).<sup>10</sup>

### ***Section 226 – penalty provisions***

6.11 Treasury also highlighted comments in the EM of the 1982 amending Act relating to the powers of the administrative tribunal relating to its assessments of profit shifting cases. Section 22 of the 1982 amending Act amends section 193 of the ITAA 1936 to give the Taxation Board of Review powers to review decisions of the Commissioner on adjustments for profit shifting cases.

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7 Explanatory Memorandum, Income Tax Assessment Amendment Bill 1982, p. 79, [www.austlii.edu.au/au/legis/cth/bill\\_em/itaab1982330/memo\\_0.pdf](http://www.austlii.edu.au/au/legis/cth/bill_em/itaab1982330/memo_0.pdf) (accessed 24 July 2012); see Treasury, *Submission 21*, p. 17.

8 Treasury, *Submission 21*, p. 16.

9 *Income Tax Assessment Amendment Act 1982*, [www.comlaw.gov.au/Details/C2004A02588](http://www.comlaw.gov.au/Details/C2004A02588) (accessed 24 July 2012).

10 Explanatory Memorandum, Income Tax Assessment Amendment Bill 1982, pp 63–64. [www.austlii.edu.au/au/legis/cth/bill\\_em/itaab1982330/memo\\_0.pdf](http://www.austlii.edu.au/au/legis/cth/bill_em/itaab1982330/memo_0.pdf) (accessed 24 July 2012); see Treasury, *Submission 21*, p. 15.

6.12 The extract from the EM also refers to section 23 of the 1982 amending Act which amends section 226 of the ITAA 1936 to insert new sub-sections (2B), (2C) and (2D). The explanations of section 23 of the 1982 amending Act (which is said to complement the changes set out in section 22) stated that it:

...proposes the amendment of section 226 of the Principal Act [ITAA 1936] to insert new sub-sections (2B), (2C) and (2D) by which statutory additional tax at the rate of 10 per cent per annum will be imposed where, in calculating the tax assessable to a taxpayer, the revised Division 13 or a corresponding provision of a double taxation agreement has been taken into account and the application of the Division or agreement provision has resulted in an increase in the amount of tax assessable to the taxpayer.<sup>11</sup>

6.13 Treasury highlighted the following explanation in the 1982 amending Act which outlined that it will insert:

...new sub-sections (2B) and (2D) to statutorily impose additional tax by way of penalty on a taxpayer in relation to whom the revised Division 13 or **a corresponding provision of a double taxation agreement has been applied to increase the tax assessable to the taxpayer** (emphasis added by Treasury).<sup>12</sup>

6.14 Treasury argued that this 'clearly indicates that a transfer pricing adjustment to increase a tax liability can be made under either the domestic law or the provisions of a tax treaty'.<sup>13</sup>

6.15 Subsection 226(2C) (since repealed)<sup>14</sup> which made provision for penalties described as 'additional tax' (as outlined above). Treasury explained that subsection 226(2C) was a determination that imposed a penalty amount on the taxpayer as a result of treaty provisions applying, and the penalty amount if Division 13 was applied instead:

(a) for the purpose of making an assessment, the Commissioner has calculated the tax that, but for this sub-section, is assessable to a taxpayer in relation to a year of income; and

(b) in calculating the tax assessable to the taxpayer, **a prescribed provision** was not applied in a particular case **by reason of the Income Tax**

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11 Explanatory Memorandum, Income Tax Assessment Amendment Bill 1982, p. 81, [www.austlii.edu.au/au/legis/cth/bill\\_em/itaab1982330/memo\\_0.pdf](http://www.austlii.edu.au/au/legis/cth/bill_em/itaab1982330/memo_0.pdf) (accessed 24 July 2012).

12 Explanatory Memorandum, Income Tax Assessment Amendment Bill 1982, p. 80, [www.austlii.edu.au/au/legis/cth/bill\\_em/itaab1982330/memo\\_0.pdf](http://www.austlii.edu.au/au/legis/cth/bill_em/itaab1982330/memo_0.pdf) (accessed 24 July 2012); see Treasury, *Submission 21*, p. 15.

13 Treasury, *Submission 21*, p. 16.

14 For discussion on its repeal refer to '1984 amendments to the penalty provisions' below.

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**(International Agreements) Act 1953**, the Commissioner shall determine the following amounts: ... (emphasis added by Treasury).<sup>15</sup>

6.16 Treasury explained that subsection 226(2D) then provided that a taxpayer was liable for a penalty equal to the lesser of the two amounts determined under Division 13 or the treaty.<sup>16</sup> The EM to the 1982 amending Act outlined:

By sub-section 226(2D), additional tax is to be imposed where a prescribed provision has not applied because of the *Income Tax (International Agreements) Act 1953*, that is, **where by virtue of sub-section 4(2) of that Act** (under which the provisions of that Act have effect notwithstanding anything inconsistent therewith in the Principal Act) **the provisions of a double taxation agreement dealing with profit shifting have applied instead of a prescribed provision**. Paragraph (3) of Article 5 and paragraph (1) of Article 7 of the Australia/U.K. agreement and corresponding articles in other agreements are such agreement provisions.)

Sub-section 226(2C) applies for purposes of subsection (2D) and provides for the calculation of additional tax on two bases. In effect, additional tax of 10 per cent per annum is to be calculated, on the basis set out in subsection (2B), by reference to the tax that would have been assessed if Division 13 had been applied (paragraph (c)) and by reference to the tax that has been assessed upon the application of the provision of the double taxation agreement that has displaced the application of Division 13 (paragraph (d)).

Where the amount calculated under each of the two paragraphs is the same, the taxpayer will be liable, by subsection 226(2D), to pay that amount as additional tax. In a case where different amounts are calculated under paragraphs 226(2C) (c) and (d), the taxpayer will be liable to pay the lesser of the two amounts (emphasis added by Treasury).<sup>17</sup>

6.17 Treasury also highlighted an extract in introductory comments from the EM to the 1982 amending Act which clearly outlined the intention that treaties could be used to 'increase' a taxpayer's tax liability:

Where a taxpayer's tax liability is increased under corresponding provisions of a double taxation agreement in circumstances where, but for the agreement, the Division would have applied to the same effect, the additional tax will also be payable.<sup>18</sup>

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15 *Income Tax Assessment Amendment Act 1982*, [www.comlaw.gov.au/Details/C2004A02588](http://www.comlaw.gov.au/Details/C2004A02588) (accessed 24 July 2012); see Treasury, *Submission 21*, p. 17.

16 Treasury, *Submission 21*, p. 17.

17 Explanatory Memorandum, *Income Tax Assessment Amendment Bill 1982*, p. 81, [www.austlii.edu.au/au/legis/cth/bill\\_em/itaab1982330/memo\\_0.pdf](http://www.austlii.edu.au/au/legis/cth/bill_em/itaab1982330/memo_0.pdf) (accessed 24 July 2012); see Treasury, *Submission 21*, p. 18.

18 Explanatory Memorandum, *Income Tax Assessment Amendment Bill 1982*, p.6, [www.austlii.edu.au/au/legis/cth/bill\\_em/itaab1982330/memo\\_0.pdf](http://www.austlii.edu.au/au/legis/cth/bill_em/itaab1982330/memo_0.pdf) (accessed 24 July 2012); see Treasury, *Submission 21*, p. 18.

6.18 Treasury argued that the explanation of these provisions provided in the EM 'clearly assumed that both the treaty transfer pricing rules and Division 13 could independently impose a tax liability and that these amounts may differ with either being greater than the other':

...the legislative provisions and the accompanying Explanatory Memorandum for the penalty provisions clearly assume that a tax liability may be imposed as a result of either Division 13 or the transfer pricing articles contained in a double tax agreement. Moreover, these penalty provisions explicitly envisaged that an adjustment made as a result of a double tax agreement could take precedence over Division 13.<sup>19</sup>

### 1984 amendments to the penalty provisions

6.19 The *Taxation Laws Amendment Act 1984* (1984 amending Act) amended penalty provisions of taxation laws including those associated with transfer pricing.<sup>20</sup> The EM to the 1984 amending Act addressed transfer pricing as part of its introductory comments. It noted that the primary change was an increase in the penalty rate set out in subsections 226(2B) and (2D) of the ITAA1936. The 1984 amending Act replaced these subsections with new section 225:

In regard to international profit shifting arrangements, the existing income tax law provides that additional tax of 10% per annum is payable where the Commissioner has adjusted a taxpayer's declared income or claimed deductions to counter the avoidance of tax through transfer pricing or profit shifting arrangements. Under proposed amendments the additional tax payable will be (subject to a general power of remission by the Commissioner) either 200% flat or 25% per annum.

Additional tax of 200% will be payable where the arrangements are blatant schemes to avoid Australian tax — that is, schemes entered into with the sole or dominant purpose of avoiding tax. Additional tax at the rate of 25% per annum will be payable in other cases - that is, where tax avoidance is not the key purpose of the arrangements.

**Where a taxpayer's tax liability is increased under corresponding provisions of a double tax agreement where, but for the agreement, the profit shifting tax avoidance provisions would have applied to the same effect, the appropriate additional tax will also be payable** (emphasis added by Treasury).<sup>21</sup>

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19 Treasury, *Submission 21*, p. 18.

20 *Taxation Laws Amendment Act 1984*, Comlaw website, [www.comlaw.gov.au/Details/C2004A02987](http://www.comlaw.gov.au/Details/C2004A02987) (accessed 24 July 2012).

21 Explanatory Memorandum – Part A, *Taxation Laws Amendment Bill 1984*, p. 12, [www.austlii.edu.au/au/legis/cth/bill\\_em/tlab1984258/memo\\_1.pdf](http://www.austlii.edu.au/au/legis/cth/bill_em/tlab1984258/memo_1.pdf) (accessed 24 July 2012), see also p. 32.

6.20 Treasury highlighted this reference which, as consistent with the previous penalty provisions above, noted that a taxpayers tax liability could be 'increased' as a result of the operation of treaty provisions.<sup>22</sup>

6.21 Following on from this, the EM to the 1984 amending Act further outlined the approach taken for the calculation of penalties for profit shifting which included consideration of treaty provisions:

In determining **the increase in tax attributable to the application of Division 13 or of a corresponding double taxation agreement provision**, and on which the 25% per annum or 200% additional tax is based, it is necessary first to calculate a base amount of tax: The base amount of tax for this purpose will, broadly, be the tax that would be payable if the taxpayer were to be assessed as having the taxable income revealed by the taxpayer's return. **The tax payable as the result of the application of Division 13 or of the relevant agreement provision** having been calculated, the additional tax - in cases where the profit shifting arrangements are not connected with blatant tax avoidance arrangements - will be 25% per annum of the difference between that amount and the base amount, calculated from the last day allowed for furnishing the return to the date of assessment. Where tax would not have been assessable to the taxpayer but for the application of Division 13, or of a relevant agreement provision, the additional tax will be 25% per annum for the abovementioned period or 200% flat, as the case may be, of the tax payable (emphasis added by Treasury).<sup>23</sup>

#### ***Interaction with subsection 4(2) of the International Tax Agreement Act 1953***

6.22 The 1984 amending Act made reference to subsection 4(2) of the *International Tax Agreement Act 1953* (ITAA 1953) which states:

The provisions of this Act have effect notwithstanding anything inconsistent with those provisions contained in the Assessment Act (other than Part IVA of the Income Tax Assessment Act 1936) or in an Act imposing Australian tax.<sup>24</sup>

6.23 In its submission to this inquiry, Treasury highlighted commentary in the EM on how the 1984 amending Act interacts with subsection 4(2) of the ITAA 1953 and argued that it 'may result in the provisions of a double tax agreement being applied

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22 Treasury, *Submission 21*, p. 18.

23 Explanatory Memorandum – Part B, Taxation Laws Amendment Bill 1984, p. 33, [http://www.austlii.edu.au/au/legis/cth/bill\\_em/tlab1984258/memo\\_0.pdf](http://www.austlii.edu.au/au/legis/cth/bill_em/tlab1984258/memo_0.pdf) (accessed 25 July 2012).

24 International Tax Agreement Act 1953, Comlaw website, <http://www.comlaw.gov.au/Details/C2011C00513> (accessed 25 July 2012).

instead of Division 13'. Treasury highlighted that this understanding was consistent with the amendments to subsection 170(9B).<sup>25</sup>

6.24 In the case of the 1984 amending Act, the EM outlined that when the provisions of a treaty were to be applied instead of Division 13 (according to subsection 4(2) of the ITAA1953) penalties were to be calculated under the previous subsection 226(2C):

By new sub-section 225(2) (replacing existing sub-section 226(2C)), additional tax is to be imposed where a prescribed provision has not applied because of the *Income Tax (International Agreements) Act 1953* – that is, where by virtue of sub-section 4(2) of that Act (under which the provisions of that Act have effect notwithstanding anything inconsistent therewith in the Principal Act) **the provisions of a double taxation agreement dealing with profit shifting have applied instead of a prescribed provision.** (Paragraph 2 of Article 7 and paragraph 1 of Article 9 of the Australia/USA Convention, and corresponding articles in other agreements, are such agreement provisions).

In effect, additional tax of 25% per annum or 200% flat is to be calculated on the basis set out in subsection 225(1), by reference to the tax that would have been assessed if Division 13 had been applied (paragraph (c)) **and by reference to the tax that has been assessed upon the application of the provision of the double taxation agreement that has displaced the application of Division 13 (paragraph (d)).**

Where the amount calculated under each of the two paragraphs is the same, the taxpayer will be liable, by sub-section 225(3), which replaces sub-section 226(2D), to pay that amount as additional tax. In a case where different amounts are calculated under paragraphs 225(2)(c) and (d), the taxpayer will be liable to pay the lesser of the two amounts (emphasis added by Treasury).<sup>26</sup>

## 1995 explanation of franking credits

6.25 The *Income Tax (Franking Deficit) Amendments Act 1995* (Act No. 172 of 1995) (1995 amending Act) amended Part IIIAA of the ITAA1936.<sup>27</sup> The EM to the 1995 amending Act outlined that a component of the Act:

Amends the income tax law to deny franking credits under the imputation system for tax paid by companies as a result of a transfer pricing or non-

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25 Treasury, *Submission 21*, p. 19. See submitters' comments on ss. 4(2) of the ITAA 1953 in Chapter 5.

26 Explanatory Memorandum – Part B, Taxation Laws Amendment Bill 1984, p. 33, [http://www.austlii.edu.au/au/legis/cth/bill\\_em/tlab1984258/memo\\_0.pdf](http://www.austlii.edu.au/au/legis/cth/bill_em/tlab1984258/memo_0.pdf) (accessed 25 July 2012); see Treasury, *Submission 21*, pp 19–20.

27 *Income Tax (Franking Deficit) Amendments Act 1995*, [www.comlaw.gov.au/Details/C2004A05019](http://www.comlaw.gov.au/Details/C2004A05019) (accessed 24 July 2012).

arm's length dealing adjustment made under the Income Tax Assessment Act 1936 or a double taxation agreement.<sup>28</sup>

6.26 Treasury highlighted an extract from Chapter 4 of the EM to the 1995 amending Act and argued that the explanation demonstrates that 'the amendment to the franking credit rules assumes that the treaty has a taxing power' to 'increase' revenue in accordance with arm's length principles:

4.2 ...In certain circumstances, franking credits could, instead of relieving the second tier of tax on company profits, be used to frank profit distributions that would not otherwise be franked dividends. This could occur where the 'profits' **which have been taxed under the transfer pricing or non-arm's length dealing adjustment provisions of Division 13 of the Act or a double taxation agreement** have been misallocated to an offshore affiliate. Where 'profits' have been shifted or misallocated offshore, unlike other additional tax situations, they are not available for distribution by an Australian resident company.

[...]

4.4 **Both Division 13 and the double tax agreements entered into by Australia with other countries contain provisions aimed at ensuring that the Australian revenue is not disadvantaged by transfer pricing practices** and non-arm's length dealings which shift or misallocate profits offshore. For taxation purposes, **these provisions provide for profits to be notionally increased in accordance with arm's length principles** i.e. a misallocation of profit adjustment (emphasis added by Treasury).<sup>29</sup>

### *2001 explanation of thin capitalisation rules*

6.27 Treasury have also highlighted that there are a number of statements on transfer pricing treaty articles contained in the EM to the *New Business Tax System (Thin Capitalisation) Act 2001* (Act No. 162 of 2001) (2001 amending Act).<sup>30</sup> Treasury noted that comments in the EM to the 2001 amending Act explained that Division 13 and the treaties go beyond thin capitalisation provisions. The EM also mentioned that the arm's length principle in the transfer pricing rules apply to a wider breadth of transactions, and is not limited to thin capitalisation:

1.78 ... Further, there may be instances where the purpose of the application of the arm's length principle under Division 13 and comparable provisions of DTAs to a particular case is not the same as for applying the arm's length test under the thin capitalisation rules. In these cases, the arm's length principle articulated in Division 13 and comparable provisions of

28 Explanatory Memorandum, Income Tax (Franking Deficit) Amendments Bill 1995, p. 5, [www.austlii.edu.au/au/legis/cth/bill\\_em/itdab1995327/memo\\_0.pdf](http://www.austlii.edu.au/au/legis/cth/bill_em/itdab1995327/memo_0.pdf) (accessed 24 July 2012).

29 Treasury, *Submission 21*, p. 20

30 Treasury, *Submission 21*, pp 20–21; see also *New Business Tax System (Thin Capitalisation) Act 2001*, [www.comlaw.gov.au/Details/C2004A00897](http://www.comlaw.gov.au/Details/C2004A00897) (accessed 24 July 2012).

DTAs should apply. For example, **the application of the arm's length principle to determine whether a rate of interest is greater than an arm's length amount can only be done under Division 13 and comparable provisions of DTAs.**

1.79 The thin capitalisation rules also interact with Division 13 and comparable provisions of DTAs... in relation to the amount of a debt deduction which would otherwise be allowable. In normal circumstances, the amount otherwise allowable is that determined under section 8-1 of the ITAA 1997. However, Division 13 and comparable provisions of DTAs may also impact on the amount otherwise allowable. The thin capitalisation rules apply, therefore, to the amount of a debt deduction which is otherwise allowable having regard to any other provision in the income tax law or in the DTAs (emphasis added by Treasury).<sup>31</sup>

6.28 Treasury argued that this is 'clearly based on the assumption that the thin capitalisation rules interact with the transfer pricing provisions of both the domestic legislation and Australia's tax treaties and that each might impact on the amount of a debt deduction'.<sup>32</sup>

### **Committee view**

6.29 The committee accepts that there are differing views on whether the treaties provide an independent taxing power and that this has created uncertainty on transfer pricing assessments. Further, the committee acknowledges that the issue is yet to be tested by the courts.

6.30 Following a careful examination of both arguments, it is clear that the introduction of this bill and its retrospective nature 'is not done lightly' as evidenced by Treasury's thorough reporting of relevant amending Acts dating back to 1982.

6.31 The committee agrees with Treasury's assertions that the bill does indeed clarify the intent of Parliament on the taxation power of treaties. The bill does not introduce a fundamentally different regime, it re-states a pre-existing position that has on numerous occasions been announced publicly through taxation rulings by the Commissioner, and never challenged by relevant ministers.

6.32 Further, the committee appreciates the rights of a taxpayer to test the assessments of the Commissioner in court. It notes, based on the evidence submitted, the apparent long-standing view of many taxpayers which are in opposition to the stated position of the Commissioner.

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31 Explanatory Memorandum, New Business Tax System (Thin Capitalisation) Bill 2001, [www.austlii.edu.au/au/legis/cth/bill\\_em/nbtscb2001489/memo1.html](http://www.austlii.edu.au/au/legis/cth/bill_em/nbtscb2001489/memo1.html) (accessed 24 July 2012); see Treasury, *Submission 21*, p. 21.

32 Treasury, *Submission 21*, p. 21.

6.33 Where there is a perceived lack of clarity between the stated law and the Commissioner's interpretation, the committee encourages taxpayers to draw it to Parliament's attention and not limit such debate to the finality of court proceedings. The committee confirms the separation between the two bodies but highlights to taxpayers Parliament's ability to bring further clarity to taxation legislation in consultation with industry.

6.34 However, as discussed in the previous chapter, it is of some concern to the committee that explanatory material to Australia's treaties do not expressly clarify parliament's intention on taxing powers in relation to transfer pricing. The committee encourages Treasury officials to further examine this matter in due course.

