Australian Government

The Treasury

Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Senator Bishop

SUBJECT - Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No. 1) 2012

Please find attached Treasury's submission regarding the Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No. 1) 2012. Australia's transfer pricing rules seek to ensure an appropriate return for the contribution made by Australian operations is taxable in Australia.

The Government's rationale for this Bill is set out in detail in the accompanying Explanatory Memorandum. In particular, paragraph 1.5 of the Explanatory Memorandum states that 'the introduction of retrospective legislation is not done lightly. It is generally only done where there is a significant risk to revenue that is inconsistent with the Parliament's intention'.

The Explanatory Memorandum explains that:

- Amendments to the income tax law since 1982 demonstrate the Parliament's long held understanding that Australia's tax treaties may be used to make transfer pricing adjustments;
- This position is reinforced by Parliamentary statements made in accompanying explanatory material;
- The ATO has consistently administered the law on the basis that the treaty rules apply and published a significant body of guidance material in support of this position; and
- This Bill protects significant revenue that would otherwise be at risk if the amendments were not introduced.

The purpose of this submission is to clarify and expand on aspects of the Explanatory Memorandum that have been contested or misunderstood, including the following:

- Claims that consultation on this Bill was limited;

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- Concerns that the Bill will have inappropriate implications for taxpayers, particularly in respect of settled cases, penalties, the risk of double taxation, and the use of profit methods.
- Claims that the Bill breaches Australia's bilateral agreements, including the Australia-US Convention.
- Assertions that the Bill seeks to overturn Court decisions.

We would welcome the opportunity to further explain any of these issues to the Committee.

Yours sincerely

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Rationale for the legislation

Issue: It has been claimed that the policy justification for the Bill has not been adequately made out.

Key Points:

- Amendments to the income tax law since 1982 demonstrate the Parliament's long held understanding that Australia's tax treaties may be used to make transfer pricing adjustments.
- This position is reinforced by Parliamentary statements made in accompanying explanatory material.
- The ATO has consistently administered the law on the basis that the treaty rules apply and published a significant body of guidance material in support of this position.
- This Bill protects significant revenue that would otherwise be at risk if the amendments were not introduced.

The Parliament has intended that the treaty rules apply

A number of legislative provisions in the income tax law make it clear that the Parliament has considered that the transfer pricing rules contained in Australia's tax treaties provide an alternative basis to the rules in Division 13 for making transfer pricing adjustments. The explanatory material accompanying these provisions demonstrates the Parliament's assumption that treaty based transfer pricing rules may be applied to increase a taxpayer's liability, as well as the Parliament's intention that this outcome be both facilitated and clarified by the relevant amendments (see **Attachment A**).

The Parliament's understanding of the way the law in this area has always operated is consistent with the findings of the judiciary prior to the introduction of Division 13. In *Case N69*,[1] for example, the Taxation Board of Review found that the relevant treaty transfer pricing rules would prevail in the event of an inconsistent outcome under section 136 (which Division 13 replaced). To the extent that the law currently operates in the manner the Parliament has always understood, these amendments constitute a mere clarification of the rules already in place allowing the treaty transfer pricing rules to apply alternatively to Division 13. In the event that some deficiency exists in the current law, however, these amendments ensure the law can operate as the Parliament intended.

The law has been administered on the basis that the treaty rules apply

Over several decades, the Commissioner of Taxation has publicly maintained that Division 13 and the treaty based transfer pricing rules could be independently applied to make transfer pricing adjustments. Importantly, because Australia's transfer pricing rules operate on the basis of the Commissioner making a determination (rather than on a self-assessment basis), the Commissioner's view of the way in which the law operates is fundamental to the application and administration of the transfer pricing rules.

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[1] (1963) 13 TBRD (NS) 270

Although in practice taxpayers may reasonably self-assess their own tax position in such a way so as to minimise the likelihood of the Commissioner exercising a discretion, any such process necessarily requires consideration to be had to the Commissioner's view of how the law operates.

The Commissioner's reasoning for the ATO's publicly stated view has been consistently explained in tax rulings (see **Attachment B** in respect of the ATO's tax rulings and **Attachment C** which provides a summary of recent publications by major accounting firms). In 2009 the ATO also published a supporting legal opinion from former Federal Court Judge, Mr Ron Merkel QC and Ms Diana Harding.

The revenue protected by this Bill is substantial

It has been claimed that the revenue protected by this measure is insubstantial; however, there is a significant risk to revenue if this law is not enacted. The ATO has advised that there is $1.9 billion of tax in dispute related to transfer pricing issues in current audits.[2]

It is important to note that the risk to revenue is not the same as the financial impact of not proceeding with the amendments. This Bill is a revenue protection measure and does not raise additional revenue in the Budget. It ensures the law operates in accordance with the way Parliament intended and the way it has always been administered. That is, it is about maintaining the base and protecting against base erosion rather than expanding the base.

[2] The $1.9 billion relates to primary tax. Revenue at risk would also contain additional components, such as interest on audit adjustments which have not been quantified.

Consultation on this Bill was extensive

Issue: It has been suggested that consultation on this Bill was limited and therefore the amendments do not take into consideration the concerns of industry.

Key Points:

- In developing the rules, extensive consultation was conducted both on a public basis, and with tax practitioners, peak body representatives and industry representatives.
- The legislative design of the Bill has greatly benefited from this consultation.

The consultation arrangements in relation to this Bill have been multifaceted and involved a combination of public consultation processes, large stakeholder meetings, focus groups and meetings with individual firms, companies and peak bodies. A number of changes to the rules have been made as a result of these consultation processes including, for example, the interaction of these rules with the thin capitalisation rules.

- Treasury released a discussion paper for public consultation on 1 November 2011 - a four week consultation period followed and 28 submissions were received.
- The Government released exposure draft legislation with accompanying draft explanatory memorandum on 1 February 2012 - a four week consultation period followed and 22 submissions were received.

In addition to the public consultation processes, three large consultation meetings were held on 18 November 2011, 7 February and 4 April 2012. Tax practitioners, peak body representatives and industry representatives were invited to attend these meetings. Among the stakeholders represented were the following participants:

- The Tax Institute
- Corporate Tax Association
- Institute of Chartered Accountants Australia
- CPA Australia
- Law Council of Australia
- Minerals Council of Australia
- PwC
- KPMG
- Ernst & Young
- Deloitte
- Australian Bankers' Association
- Federal Chamber of Automotive Industries
- Uniting Church in Australia
- A number of other interested corporates.

In addition to these large group meetings, a focus group was also established to look specifically at the interaction between the transfer pricing and thin capitalisation rules. Any members of the above group who had a specific interest in this issue were invited to participate in this focus group.

Multilateral discussions were also supported by bilateral meetings. Treasury had at least 10 additional bilateral meetings with specific firms and individual corporates.

In addition to consultation with the community Treasury also consults, as a matter of course, with other areas across Government. The Office of Parliamentary Counsel undertakes similar consultation to ensure that various legal areas within Government have an opportunity to assess the Bill against their area of expertise prior to finalisation. For example, a Bill such as the *Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No. 1) 2012* would typically be referred to the Office of International Law in the Attorney-General's department to ensure that the provisions of the Bill are consistent with Australia's international obligations. These processes perform an important quality assurance function in respect of both the policy and legislative design functions.

Implications for taxpayers

Issues: The following issues have been raised in respect of the potential impact of these rules on taxpayers:

- The ATO may seek to apply the rules to cases that have already been settled;
- Taxpayers will be inappropriately subject to penalties on laws enacted retrospectively;
- The rules will result in increased risks of double taxation; and
- The rules place an improper emphasis on the use of profits methods.

Key Points:

- Settled cases will not be reopened as a result of these amendments. Settled cases include completed audits, mutual agreement procedures and advance pricing arrangements.
- To the extent that these rules have application to prior income years, taxpayers will only be subject to penalties that could have been imposed prior to the enactment of the rules.
- Mutual agreement procedures will continue to provide relief from double taxation.
- The rules do not prioritise profit based methods. An interpretive provision is included that ensures consistency with the OECD approach, which requires the 'most appropriate' method be used.

Settled cases will not be reopened

Where a taxpayer has properly entered into a settlement with the Commissioner in relation to their transfer pricing related international dealings, the ATO has advised that it will not be opening settled cases as a result of the legislative amendments proposed by this bill. Settled cases include audits, mutual agreement procedures and advance pricing arrangements that have been concluded.

Transitional rules for penalties will apply

A transitional rule is included in the Bill that relates to the imposition of penalties. It ensures that to the extent a taxpayer would have been subject to a penalty amount prior to the application of these amendments they will not be subject to a different or further amount as a result of these amendments in so far as they relate to prior years.

Protection from double taxation

Subdivision 815-A is modelled on the transfer pricing rules in Australia's tax treaties. Multinational groups that are subject to Australian tax as a result of Subdivision 815-A will be able seek to offset that liability in the treaty partner jurisdiction through mutual agreement procedures (MAP) in cases where automatic relief is not granted. All of Australia's tax treaties contain a MAP article that is intended to resolve cases of double taxation should they arise. The ATO has been successful in reaching agreements with other jurisdictions through MAP and these amendments will not change the capacity of the competent authorities to reach a satisfactory solution should double taxation occur. This ensures that in treaty cases the internationally accepted approach to resolving transfer pricing issues is adopted, which will decrease rather than increase the likelihood of double taxation.

Protection from double taxation does not however provide relief to taxpayers who would otherwise not be taxed in any jurisdiction on their income. Some multinationals may have structured their

arrangements in such a way that allows them to exploit asymmetries arising from differing tax treatment between jurisdictions. For example, members of the same group may be able to reduce their income by claiming a deduction in relation to the same amount in both jurisdictions. While transfer pricing rules of themselves do not prevent such arrangements, they will limit their effectiveness as a profit shifting strategy.

The rules do not prioritise profit methods

Some submissions have suggested that Subdivision 815-A could lead to an inappropriate emphasis being placed on the use of profit based methods at the expense of transactional based methods. The amendments in no way lessen the access to transaction based pricing methodologies.

Importantly, Subdivision 815-A includes an interpretive provision to ensure consistency between the proposed rules and the OECD approach. The OECD approach requires the 'most appropriate' method to be adopted and provides that where a range of methods are equally appropriate, that transaction based methods prevail. The interpretive provision applies to the evaluation of whether an entity gets a transfer pricing benefit, as well as the interpretation of the provisions of an international agreement insofar as it relates to Subdivision 815-A (to the extent such guidance material is relevant). The selection and application of different methodologies in a given case falls squarely within the scope of this interpretive provision.

The rules do not breach Australia's bilateral agreements

Issues: The following issues have been raised in respect of the interaction between the Bill and Australia's bilateral agreements:

- Tax treaties cannot be used to extend domestic taxation;
- The rules breach Article 1(2) of the Australia-US Convention; and
- The rules breach the non-discrimination articles contained in some tax treaties.

Key Points:

- The proposition that tax treaties cannot be used to extend domestic taxation is not a principle of international law and has no legal basis under Australian law.
- These rules do not breach Article 1(2) of the Australia-US Convention because that article does not apply to these amendments.
- Even if Article 1(2) of the Australia-US Convention were to apply, Article 1(3) would permit the application of the rules insofar as they relate to Australian residents.
- The rules do not breach any of the non-discrimination articles contained in Australia's tax treaties.

Tax treaties can be used to extend taxation

During consultation on these rules, it has been argued that the purpose of a tax treaty 'is for the relief of double taxation' and that this purpose cannot be reconciled with the proposition that tax treaties can be used to extend taxation. However, clearly Australia's tax treaties generally have a dual purpose: one, as noted above, is to relieve double taxation; the other being 'for the avoidance of fiscal evasion'. The Joint Standing Committee on Treaties has frequently referred to the articles that address profit shifting as relevant to the second limb of treaties' objectives.[3]

Importantly, there is no principle under international law that tax treaties are to be applied in an exclusively relieving manner. The issue is a matter for the constitutional arrangements and domestic laws of a given country.[4] Having regard to Australia's constitutional framework, a Commonwealth law may adopt its terms or text from another source, which can be an international agreement. In the Australian context there is no legal basis to support the proposition that a power to make or amend an assessment on the basis of the provisions of a tax treaty can only operate in an exclusively relieving manner.[5]

The Bill does not breach Article 1(2) of the Australia-US Convention

A number of submissions argued that the proposed amendments could potentially breach Article 1(2) of the Australia-US Convention.

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[3] See, for example, the Joint Standing Committee's report on treaties, Report No. 48, page 16, paragraph 3.

[4] Baker, P. *Double Tax Conventions and International Tax Law*, London, Sweet and Maxwell, 1994, page 9.

[5] Paragraphs 1.32 and 1.33 of the Explanatory Memorandum to the *Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No. 1) 2012* set out other examples of tax treaties being used to extend taxation both by Australia and by other jurisdictions.

Article 1(2) does not apply to these rules; it is concerned with a different subject matter. In order for Article 1(2) to operate it requires identification of a relevant and specific exclusion, exemption deduction rebate or allowance. None of Australia's transfer pricing rules (current or proposed in this Bill) contain any such provisions.

Even if it were possible to construe Division 13 as providing the type of specific benefit set out under Article 1(2), Article 1(2) would still have no application as it would not be the convention of itself operating to restrict the benefit but rather the operation of another domestic law. There is no suggestion that Article 1(2) prevents the implementation of the Convention, in whole or part, in the domestic law.

Further, even in the event that all of the issues above could be overcome Article 1(2) would still not apply in transfer pricing cases as Article 1(3) must also be considered.

Broadly, Article 1(3) of the Convention authorises either Australia or the United States to tax its own residents in any manner irrespective of any other provision of the Convention, including Article 1(2). Article 1(3) very deliberately takes precedence over Article 1(2), and would apply to all cases involving the application by Australia of Article 9 of the Australia-US Convention (involving associated enterprises).

The Bill does not breach any non-discrimination articles

It has also been suggested that the proposed rules could breach the non-discrimination articles contained in some of Australia's tax treaties.

Broadly, a non-discrimination article may apply where a Contracting State subjects residents who are foreign nationals to more negative tax treatment than residents who are nationals. In the case of enterprises, Article 24(5) may apply where a Contracting State subjects a resident enterprise that is owned or controlled by foreign residents to a more onerous tax burden than that imposed upon another resident enterprise owned or controlled by residents. Article 24(5) may also apply where an adjustment is made for both enterprises, but is more onerous for the enterprise that is owned or controlled by foreign residents as a result of its ownership or control status.

A transfer pricing adjustment that is made as a result of a tax treaty applying would not offend a non-discrimination article contained in that treaty. This is because the relevant power upon which such an adjustment would be based would not distinguish enterprises on the basis of nationality, or the residence or nationality of its owners or controllers. That is, the treaty transfer pricing rules apply to enterprises without discrimination as to nationality or ownership.

Moreover, even if such an adjustment did result in differential treatment, the non-discrimination articles contain specific carve-outs in relation to transfer pricing adjustments that would preclude the article from applying. These carve-outs apply to the relevant treaty powers given that they are conferred under the domestic law.

This Bill does not overturn a decision of the Courts

Issue: It has been suggested that these rules have been introduced to overcome adverse findings in the Courts, and in particular the decision in *SNF*.

Key Points:

- The Courts have not been required to determine the question of whether the treaty based transfer pricing articles provide a separate basis for making transfer pricing adjustments.
- These rules are not designed to 'overcome' the *SNF* decision - the *SNF* decision related to the application of Division 13 and as such is of limited relevance to the question of whether the treaty based transfer pricing rules apply.

In evaluating the effect of the incorporation of a tax treaty into Australia's domestic laws, the terms of the treaty are relevant. Where the treaty simply *allocates* to Australia the right to assess income tax on a particular basis, it is acknowledged that its incorporation by the *International Tax Agreements Act 1953* (the Agreements Act) may not be sufficient of itself to establish a rule of liability and enable the Commissioner to assess tax on the basis of that rule. That is, the provisions that allocate taxing rights should be distinguished from those that provide for a taxing power and impose a liability on taxpayers.

While courts have commented broadly on the allocative function of treaties, no case has specifically tested the question of whether the transfer pricing articles as currently incorporated into Australia's domestic law give rise to a power to make or amend assessments, although judges have made *obiter* comments in respect of this issue in two cases, namely *Roche Products Pty Limited v Commissioner of Taxation*[6] and *SNF Australia Pty Ltd v Commissioner of Taxation.*[7] During consultation on this Bill, a number of submissions cited a number of *obiter* comments, however in none of those cases was the status of the treaty based transfer pricing rules in issue.[8]

Contrary to some claims,[9] in *Roche* the Commissioner's view in respect of the application of the treaty based transfer pricing rules and subsection 170(9B) of the *Income Tax Assessment Act 1936* was <u>not</u> comprehensively argued or considered by the Tribunal. In respect of that issue, Justice Downes made the following observation: *"I note that the submissions were limited (particularly those of the Commissioner) and both parties accepted that the result in this case would not be affected if the treaties conferred no power to assess..."*[10] Moreover, although some written submissions were provided on the point, the arguments were not put to the Court in the course of the hearing or subject to cross-examination. Although his Honour did observe that "*...there is a lot to be said for the proposition that the treaties, even as enacted as part of the law of Australia, do not*

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[6] [2008] AATA 639 (22 July 2008) at [191].

[7] [2010] FCA 635 at [23-24]

[8] For example, Goldberg J in *Chong v Commissioner of Taxation* (2000) 101 FCR 134 at [27], [44]; Middleton J in *GE Capital Finance Pty Ltd v Federal Commissioner of Taxation* (2007) 159 FCR 473 at [27], [29], [36], [45]-[46]; and Lindgren J in *Undershaft (No 1) Ltd v FCT* (2009) 175 FCR 150 at [17] and [27].

[9] See for example, Collins, P. James, L. & Klank, P. (2012) *The smoke and mirrors around the "stage one" transfer pricing reforms*, The Tax Specialist, June 2012, page 214.

[10] Downes J in *Roche Products Pty Limited v Commissioner of Taxation* [2008] AATA 639 (22 July 2008) at [190].

go past authorising legislation and do not confer power on the Commissioner to assess", he clearly prefaces this statement with the qualification that he was not required to decide the issue.[11]

In contrast to the observations made in *Roche*, Justice Middleton in *SNF* commented specifically that, having regard to subsections 170(9B) and 170(14) of the ITAA 1936, there was a clear legislative intention that the Commissioner could rely on either Division 13 or the relevant treaty based transfer pricing article in amending an assessment. In this regard, his Honour noted the following:[12]

> 23. As the stand alone taxing power issue was raised in written submissions, I make the following very brief comment. I do see some force in the argument that by operation of s 170(9B) of the ITAA and the terms "prescribed provision" and "relevant provision" as defined in s 170(14) of the ITAA, there is a clear legislative intention (at least from the time of the introduction of s 170(9B)) that the Commissioner may in amending an assessment, rely on either s 136AD or the relevant associated enterprises article, as conferring upon the Commissioner, as a separate power, a power to amend an assessment. I say this although there is no provision expressly stating that "the relevant provision" (namely, the associated enterprises article) has been incorporated into the ITAA. However, it seems to me that the express words in the ITAA necessarily and naturally imply the required incorporation of the relevant associated enterprises article into the ITAA.

In the *SNF* decision, Justice Middleton distinguished his above comments from those he had made previously in *GE Capital Finance Pty Ltd v Federal Commissioner of Taxation*.[13] In *GE*, his Honour had determined that subsection 3(11) of the Agreements Act, when read in conjunction with the business profits articles, did not apply to deem a foreign resident beneficiary to have derived interest income in carrying on a business at or through a permanent establishment in Australia. The issue the *GE* case was fundamentally different from the question of whether a treaty based transfer pricing power exists that allows the Commissioner to amend assessments. In essence, the case turned upon the question of whether subsection 3(11) applied in instances where a trustee was a resident of Australia. Consistent with the wording of that subsection, his Honour found that subsection 3(11) only applied where the relevant trust was not a resident of Australia.

In *Commissioner of Taxation v Lamesa Holdings BV*,[14] the respondent was a foreign resident company that did not have a permanent establishment in Australia. The Federal Court determined that the respondent did not have an Australian tax liability due to the application of the Australia-Netherlands Agreement. Similarly, in *Undershaft (No 1) Limited v Commissioner of Taxation*,[15] the Federal Court was required to determine whether capital gains taxation constituted a tax of the kind covered by the Australia-UK and Australia-Netherlands agreements. Justice Lindgren concluded that because capital gains tax was covered by the agreements, any capital gains made after those agreements were entered into were not assessable income under the ITAA 1997 (subject to the requirements of the relevant articles). In both *Lamesa* and *Undershaft*, the Court's statements must be read in the context of the questions put before the Court which related to the relevant agreements having the effect of allocating taxing rights or limiting exclusively domestic taxation. As such the decisions did not consider, and have no bearing upon, the question of whether certain

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[11] Downes J in *Roche Products Pty Limited v Commissioner of Taxation* [2008] AATA 639 (22 July 2008) at [191].
[12] Middleton J in *SNF Australia Pty Ltd v Commissioner of Taxation* [2010] FCA 635 at [23-24].
[13] (2007) 159 FCR 473
[14] [1997] FCA 785 (20 August 1997)
[15] [2009] FCA 41

provisions of an agreement can be relied upon to increase a tax liability relative to that which might be imposed in the absence of the treaty.

The SNF decision is of limited relevance

It has been suggested that this Bill is being introduced to specifically overcome the decision in *SNF*. This is not the case. Rather, the amendments ensure that an internationally consistent legislative framework can be applied to treaty related transfer pricing issues. The *SNF* case was handed down in June 2011 and represented the first substantive transfer pricing case to be heard by the Full Federal Court. However, *SNF* was determined solely on the application of Division 13 and the purpose of these amendments is to confirm the application of the treaty transfer pricing rules. As a result the *SNF* decision is of limited relevance to this Bill.

Despite the fact that the Court was not required to determine whether the treaty power was effective, the decision did have relevance to transfer pricing generally and as a result a number of *obiter* comments were made.

As discussed above, Justice Middleton (at first instance), made comments broadly supportive of the Commissioner's view that Australia's domestic law that references the treaty rules provide a separate assessing power and explicitly noted the 'clear legislative intention' that the law should apply this way.

An additional comment made by the Full Federal Court, on appeal, that this Bill does squarely address is the use of the OECD guidelines as an aid to the interpretation of the treaty transfer pricing articles. The Court held that in the absence of evidence of state practice the guidelines could not be used to interpret the provisions of a treaty (or Division 13).

Attachment A: Parliament's intention

This attachment sets out a number of amendments to the income tax law which demonstrate Parliament's long held understanding that the treaty based transfer pricing rules provide an alternate basis for making transfer pricing adjustments.

The following legislative provisions and accompanying explanatory material show an unmistakably consistent approach by the Parliament over an extended period of time:

- 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'.

1982 Introduction of Division 13

The commentary contained in material that accompanied the introduction of Division 13 represented the treaty transfer pricing articles as an effective (and potentially more effective) alternative to the domestic transfer pricing rules in section 136.

The Explanatory Memorandum to the *Income Tax Assessment Amendment Act 1982*, which introduced the current transfer pricing rules in Division 13, clearly indicated that Australia's tax treaties may operate to make transfer pricing adjustments. The Explanatory Memorandum makes repeated references to the provisions and functions of Division 13, and the fact that in addition to these, the treaties "contain their own provisions" or carry out the same functions.

In this regard, the explanation in respect of section 136AB states:

> 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*).[16]

In discussing the powers of an administrative tribunal, the Explanatory Memorandum explains that section 226 complements another amendment to the income tax law which empowers the Taxation Board of Review to review an ATO determination of additional tax imposed in profit shifting cases under both the domestic law and Australia's tax treaties. It explained that the amendments to section 226:

> ... will insert in that section 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*).[17]

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[16] Explanatory Memorandum - Act No. 29 of 1982, pages 63 & 64.

[17] Explanatory Memorandum - Act No. 29 of 1982, page 80.

This statement 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. This statement reflects the design of the penalty rules in section 226, which provided that Division 13 and treaty transfer pricing rules could each impose tax.

Reflecting the representations of the treaty power in the Explanatory Memorandum, the parliamentary debate also indicated an assumption that the transfer pricing articles contained in Australia's tax treaties could be used as a separate basis for making transfer pricing adjustments. For example, during the 1982 Parliamentary Debate on the introduction of Division 13, Mr Willis made the following point:

> Possibly the most significant aspect of our treaties, especially given the problems I have outlined, is the section modelled after article 9 of the model OECD agreement which allows the reconstruction of profits of associated entities which have obviously been engaging in transfer pricing activities. **This provision has generally been regarded as a more effective weapon against transfer pricing than the current section 136 of the Income Tax Assessment Act** because the provisions of the Income Tax (International Agreements) Act prevail over the ordinary provisions of the Income Tax Assessment Act (*emphasis added*).[18]

This comment explicitly acknowledges the treaty article as providing a robust and independent mechanism to deal with transfer pricing issues.

Section 170 – amendment of assessments

Subsection 170(9B) – which was introduced with Division 13 – provides the Commissioner with an unlimited period for amending assessments to give effect to a transfer pricing adjustment under Division 13 or the treaty transfer pricing articles. On the face of this provision, it is clear that the treaty based transfer pricing rules are considered to operate as an *alternative* to Division 13 in providing a basis for amending assessments.

Section 170 provides for the amendment of assessments. Subsection 170(9B) provides:

> Subject to subsection (9C), nothing in this section prevents the amendment, at any time, of an assessment for the purpose of giving effect to a **prescribed provision** or a **relevant provision** (*emphasis added*).

Subsection 170(14) defines 'prescribed provision' as the domestic transfer pricing rules in Division 13 and 'relevant provision' as the associated enterprises and business profits articles contained in Australia's tax treaties.

Underpinning 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. Moreover, the Explanatory Memorandum indicates that the treaty based transfer pricing rules could take precedence over Division 13 as a result of subsection 4(2) of the Agreements Act. These assumptions are repeatedly reinforced by statements made in the Explanatory Memorandum which accompanied the legislation amending section 170:

> Reflecting the position that exists in relation to existing section 136, 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.**[19]

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[18] See Commonwealth, *Parliamentary Debates*, House of Representatives, 28 April 1982, 1951-57 (Ralph Willis).

[19] Explanatory Memorandum - Act No. 29 of 1982, page 5.

[...]

New sub-section 170(9B) ... authorising the amendment of an assessment at any time to apply the anti-profit shifting provisions of revised Division 13. **The sub-section also contains a corresponding power of amendment where a matching provision of a double taxation agreement is applied instead of Division 13.** These provisions are respectively designated as a "prescribed provision" or as a "relevant provision" and are defined in proposed new sub-section 170(14).

Proposed sub-section 170(9C) will limit the authority to amend an assessment contained in sub-section 170(9B). It is to the effect that, **once the revised Division - or the corresponding provisions in a double taxation agreement - have been applied in relation to a particular subject matter - whether in an original or an amended assessment - no further amendment to apply those same provisions to the same subject matter can be made under the authority of sub-section 170(9B).** In other words, once a prescribed provision or a relevant provision has been applied in relation to a particular subject matter, any further amendment of an assessment to apply that provision in relation to that subject matter can only be made in accordance with the general amendment powers of section 170 that are outlined above.

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 same specific powers of amendment of an assessment as are to be provided in relation to revised Division 13 (*emphasis added*).[20]

Section 226 - Penalty provisions

The 1982 amendments also introduced a new subsection 226(2C) (since repealed), which made provision for penalties (described as 'additional tax') to be applied in the event of an amendment being made under the transfer pricing rules contained in Australia's tax treaties. The legislation clearly assumed that the treaty transfer pricing rules in the Agreements Act could take precedence over Division 13.

Subsection 226(2C) provided that:

Where:

(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 (International Agreements) Act 1953,**

the Commissioner shall determine the following amounts: ... *(emphasis added).*

The determination referred to above was for the penalty amount that could be imposed on the taxpayer as a result of the treaty provisions applying, and the penalty amount that would have applied if Division 13 had instead applied. Subsection 226(2D) then provided that the taxpayer was liable for a penalty equal to the lesser of these two amounts.

Section 226(2F) provided similar treatment for a transitional year when the former section 136 could still apply. In such cases, the taxpayer was liable for a penalty equal to the lesser of the amount payable under former Division 136 and the amount under the treaty transfer pricing rules.

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[20] Explanatory Memorandum - Act No. 29 of 1982, page 79.

The explanation of the penalty provisions in the Explanatory Memorandum 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. After discussing the additional tax that is payable after an adjustment under Division 13, the Explanatory Memorandum states that:

> 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.[21]

The Explanatory Memorandum goes on to discuss the specific penalty clauses, stating that:

> 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 sub-section (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 sub-section (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)) (*emphasis added*).[22]

Consistent with the amendments to section 170, 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.

1984 Amendments to the penalty provisions

The *Taxation Laws Amendment Act 1984* amended the penalty provisions associated with transfer pricing. The Explanatory Memorandum to those amendments reaffirmed the understanding that the transfer pricing articles contained in a double tax agreement could take precedence over Division 13 as a result of the Agreements Act.

Part A of the Explanatory Memorandum to those amendments stated that:

> 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.[23]

The reference to the tax liability being 'increased' as a result of the operation of a double tax agreement reiterates the understanding that a tax liability could be increased as the result of the provisions of a double tax agreement.

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[21] Explanatory Memorandum - Act No. 29 of 1982, page 6.
[22] Explanatory Memorandum - Act No. 29 of 1982, pages 81 & 82.
[23] Explanatory Memorandum - Act No. 123 of 1984, page 12.

The Explanatory Memorandum explains that the primary change in respect of the transfer pricing penalties was a change in the penalty rate:

> Proposed new section 225 will replace these existing sub-sections and provide for the imposition of additional tax (at an increased level) **where Division 13 or a corresponding provision of a double taxation agreement has been applied** either on assessment or in considering an objection against an assessment...
>
> Additional tax at the rate of 25% per annum is to be imposed unless the transfer pricing or profit shifting arrangements were entered into for the sole or dominant purpose of avoiding liability to Australian tax, in which case additional tax of 200% is to be payable (*emphasis added*).[24]

When discussing the calculation of the penalty, the Explanatory Memorandum repeatedly refers to an adjustment being made under either Division 13 or the treaty based 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*).[25]

Consistent with the commentary which accompanied the introduction of subsection 170(9B), the Explanatory Memorandum also provides that the operation of subsection 4(2) of the Agreements Act may result in the provisions of a double tax agreement being applied instead of Division 13. In such cases, penalties were to be calculated consistent with previous subsection 226(2C) (discussed above):

> 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

[24] Explanatory Memorandum – Act No. 123 of 1984, Part B, pages 32 to 34.
[25] Explanatory Memorandum – Act No. 123 of 1984, Part B, page 33.

> 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*).[26]

Observations of this nature demonstrate the understanding of Parliament that the treaty based transfer pricing rules could be relied upon to make transfer pricing adjustments. Moreover, the implication of amendments to the law of this kind over a period of many years is clearly that the Parliament sought to facilitate the ongoing operation of the law in this manner.

1995 Amendments to Franking Credits rules

The Explanatory Memorandum to the *Income Tax (Franking Deficit) Amendment Act 1995* (No 172 of 1995) also indicates that a taxing power exists under the treaty. The reforms amended Part IIIAA of the ITAA 1936 to provide that no franking credits arise under the imputation system for tax paid by companies where profits which have been misallocated offshore through transfer pricing or non-arm's length dealings.

The Explanatory Memorandum defines the purpose of the amendments as ensuring that franking credits, in certain circumstances, are not used to negate the 'additional' company tax payable as a result of a transfer pricing adjustment. Chapter 4 of the Explanatory Material explains that:

> 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)*.

The obvious implication is that a taxpayer's 'profits' can be taxed under either Division 13 *or* the provisions of a tax treaty. That is, the amendment to the franking credit rules assumes that the treaty has a taxing power.

2001 Introduction of new Thin Capitalisation rules

The Explanatory Memorandum to the *New Business Tax System (Thin Capitalisation) Act 2001* (No. 162 of 2001) makes a number of statements in respect of the transfer pricing articles contained in Australia's tax treaties. After making a point about how the transfer pricing rules set out in Division 13 and comparable treaty provisions apply to a wider range of transactions than the thin capitalisation rules, the Explanatory Memorandum makes a similar point about the wider breadth of the arm's length principle in the transfer pricing rules under both the domestic legislation and Australia's tax treaties.

The Explanatory Memorandum states that:

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[26] Explanatory Memorandum – Act No. 123 of 1984, Part B, page 33.

> 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 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).*

The references in the Explanatory Memorandum to both the domestic legislation and the treaties imposing the arm's length principle only makes sense in the context of the treaties being understood to give rise to an alternate taxing power. These statements are 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.

2003 changes: to the rules for amending transfer pricing assessments — Section 170 definition of 'relevant provision'

Parliament last indicated that the transfer pricing rules in tax treaties provide a separate taxing power in 2003, with changes to the definition of a "relevant provision" in subsection 170(14) which provides a generic description of the transfer pricing articles. The 2003 amendments were enacted as part of the *International Tax Agreements Amendment Act 2003*, with the Explanatory Memorandum to that Act describing the change as follows:

> Subsections 170(9B) and (9C) of the ITAA 1936 deal with time limits for amending income tax assessments for the purpose of giving effect to a relevant provision . Paragraph (a) of the definition for relevant provision in subsection 170(14) defines relevant provision as paragraph (3) of Article 5 or paragraph (1) of Article 7 of the existing tax treaty with the United Kingdom (currently defined as United Kingdom agreement within subsection 170(14)), or a provision of any other tax treaty that corresponds with either of those paragraphs. **These paragraphs in Australia's tax treaties allow for adjustments to the profits of permanent establishments or associated enterprises on an arm's length basis** (*emphasis added*).

These changes commenced on 5 December 2003. This date is important because it provides the rationale for the proposed retrospective treaty transfer pricing rules to apply from the 2004 income year. The 2004 income year is the next income year following the commencement of the amendments on 5 December 2003.

Attachment B: The ATO's Tax Rulings

The ATO has publicly maintained its position in respect of the treaty based transfer pricing rules for some time. This attachment sets out a number of rulings that have been issued which articulate this position.

1986 - IT 2311

- The Tax Ruling was on remission of penalties where Division 13 or comparable treaty provisions are applied (issued 18 June 1986), consistently refers to adjustments being made under Division 13 or the Treaty provisions.

1992 - IT 2670

- IT 2670 on the meaning of trading stock (issued 5 March 1992) states that the Treaties can operate to make transfer pricing adjustments to Australian taxpayers (paragraph 18).

1992 - TR 92/11

- TR 92/11 on transfer pricing and loan arrangements and credit balances (first issued 1 October 1992), refers to adjustments being made under the Treaty provisions (paragraphs 63-79).

1994 - TR 94/14

- Taxation Ruling TR 94/14 'Income tax: application of Division 13 of Part III (international profit shifting)' specifically addresses the interaction between Division 13 and Australia's Double Taxation Agreements. It explicitly states that 'The Commissioner may apply the provisions of Division 13 and/or the treaty provisions' (paragraph 18) and that 'Australia's double taxation agreements, which appear as schedules to the *Income Tax (International Agreements) Act 1953 ("the IT(IA)A")*, contain their own provisions to deal with profit shifting arrangements in certain circumstances' (paragraph 184); and that '...the Commissioner may apply the provisions of Division 13 and/or the treaty provisions' (paragraph 186).

1995 - TR 95/23

- TR 95/23 on advance pricing arrangements (issued 22 June 1995) refers to the Commissioner making transfer pricing adjustments under Division 13 and/or the Treaty (paragraph 35).

1997 - TR 97/20

- TR 97/20 on transfer pricing methodologies (issued 5 November 1997) notes that the Treaties may apply in cases to which Division 13 also applies (paragraphs 1.10-11).

1999 - TR1999/1

- TR1999/1 on intra-group services (issued 20 January 1999) refers to the Commissioner making transfer pricing adjustments under Division 13 and/or the Treaty (paragraphs 1, 14-15, 29).

2001 - TR 2001/11

- TR 2001/11 on the operation of Australia's permanent establishment attribution rules (issued 31 November 2011), states that both Division 13 and the Treaty provisions may apply and that furthermore, the Business Profits articles of the Treaties are self-operating (paragraphs 2.1 to 2.9).

2001 - TR 2001/13

- TR 2001/13 on interpreting Australia's double tax agreements (issued 19 December 2001), reiterates the position of earlier rulings that the transfer pricing rules in Australia's Treaties are "empowering" rather than merely "permissive" (paragraphs 29-33).

2002 - TD2002/20

- TD2002/20 on film production companies (issued 22 August 2002) refers to transfer pricing adjustments being allowable under Division 13 and the Treaty.

2007 – TR2007/1

- TR2007/1 on the effects of transfer pricing determinations (issued 7 March 2007) refers to subsections 170 (9B) providing an unlimited time to make transfer pricing amendments under a prescribed provision or a relevant provision (paragraph 26).

2010 - TR 2010/7

- TR 2010/7 on the interaction of Division 820 and the transfer pricing provisions (issued 27 October 2010), notes that 'an adjustment applying the arm's length principle to the pricing or profit allocation in respect of a taxpayer's international dealings is authorised on the basis of Australia's transfer pricing provisions in Division 13 and those related treaty provisions.' It goes on to refer to the amendments made in 1982 to section 170 as well as the favourable comment, in *obiter*, from the Federal Court (Middleton J) in *SNF (Australia) Pty Ltd v Commissioner of Taxation* (paragraphs 39-42).

2011 - TR 2011/1

- TR 2011/1 on the application of the transfer pricing provisions to business restructurings (issued 9 February 2011), notes that the Treaty permits transfer pricing adjustments (paragraphs 9 and 44).

Attachment C: Accounting firms have acknowledged the ATO's position

The 'big four' accounting firms have publicly acknowledged the ATO's position on the role of tax treaties in Australia's transfer pricing rules. This is particularly evident in their global transfer pricing guidance materials.

These extracts don't seek to infer implicit support for the views of the Commissioner in all cases but rather to demonstrate the extensive dissemination, both domestically and globally, of the ATO's view that the domestic law referencing the relevant treaty articles operates as a separate assessing power.

PwC

- PwC in *International Transfer Pricing 2008* make the following statement about Double Tax Agreements in the context of Australia's transfer pricing rules:

  The domestic legislation is supplemented by the provisions in Australia's double tax agreements (DTAs) with a wide range of countries. Applicable Articles in the DTAs include mutual agreement procedures, associated enterprises and business profits. The DTA Articles will generally prevail over Division 13.[27]

- PwC in *International Transfer Pricing 2012 states*:

  The ATO holds the view that the Associated Enterprises and Business Profits Articles of Australia's DTAs provide the Commissioner a separate power to make transfer pricing assessments independently of Division 13. While obiter dicta comments in the recent SNF case provide some support for this position, it remains untested as to whether the relevant Articles of Australia's DTAs provide a separate power to assess.[28]

- PwC's *International Transfer Pricing 2008* manual cites several Tax Rulings which, it says, *'both interpret the application of the statutory rules and provide guidance on other issues not specifically covered by statute.'*[29] The Tax Rulings that PwC cites include those which affirm the Commissioner's view of a taxing power under the treaty. These are, particularly:

  - TR92/11 (on loan arrangements and credit balances);
  - TR94/14 (on basic concepts underlying the operation of Division 13);
  - TR95/23 (on APAs);
  - TR97/20 (on Methodologies);
  - TR 1999/1 (on Services); and
  - TR2001/11 (on Permanent Establishments).

- In a paper prepared by three PwC partners and published by the Institute of Chartered Accountants Australia in 2011, the authors acknowledge that:

  [I]n obiter dicta, Middleton J reasoned that 'the express words in the ITAA necessarily and naturally imply the required incorporation of the relevant associated enterprises article into the ITAA', which suggest that the associated enterprises article may provide a standalone taxing power. Furthermore, Middleton J commented that the 'result may be different should the Court be called upon to interpret and apply Div 13 or the relevant DTA' as the 'tests under

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[27] PwC, *International Transfer Pricing 2008*, 2008, page 218.
[28] PwC, *International Transfer Pricing 2012*, 2012, page 215.
[29] PwC, *International Transfer Pricing 2008*, 2008, page 218.

each DTA are different than that under Div 13'. These obiter dicta comments echo the Queens Counsel opinion which the ATO obtained previously. In that advice, which the ATO publicly released, Merkel and Harding noted that the associated enterprises articles of Australia's DTAs appear to operate more broadly than Division 13 and therefore may provide greater latitude for the Commissioner in addressing the income tax consequences of non-arm's length.[30]

Ernst & Young

- The chapter on Australia in Ernst & Young's *Transfer Pricing Global Reference Guide* (November 2010 edition), under the heading 'Taxing authority and tax law' cites as the relevant transfer pricing tax law *'Division 13 of Part III of Income Tax Assessment Act and relevant provisions of double tax treaties'.*[31]

- Furthermore, under the heading 'Relevant regulations and rulings', Ernst & Young's *Transfer Pricing Global Reference Guide* cites several Tax Rulings which set out the Commissioner's view of a taxing power under the treaty. In addition to the Tax Rulings listed above, the manual cites:

  - TR2010/7 (Interaction of Transfer Pricing and Thin Capitalization Provisions) and
  - TR2010/D2 (Transfer Pricing Implications of Business Restructures; this draft ruling was subsequently finalised as TR2011/1).[32]

Deloitte

- Deloitte's *2011 Global Transfer Pricing – Desktop Reference* cites the Tax Rulings (as listed above) as being relevant to the administration of transfer pricing laws in Australia.[33] As explained above, these rulings state that Australia's tax treaties provides for a separate assessment authority for the Commissioner to make transfer pricing adjustments.

KPMG

- KPMG's *Global Transfer Pricing Review* 2012 cites the *International Tax Agreements Act 1953* as being relevant to the transfer pricing rules.[34] It should be noted that through this Act Australia incorporates its tax treaties into domestic law.

- KPMG's *Global Transfer Pricing Review* 2012 also cites several tax rulings (as listed above) which make clear the Commissioner's position as to a taxing power under the treaty.[35]

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[30] Calleja, P. Houseman, N. & McNab, P. 'TH10 - Tax disputes/litigation in the transfer pricing context,' Institute of Chartered Accountants in Australia, 2011, page 5.
[31] Ernst & Young, *Transfer Pricing Global Reference Guide*, 2010, page 11.
[32] Ernst & Young, *Transfer Pricing Global Reference Guide*, 2010, page 11.
[33] Deloitte, *2011 Global Transfer Pricing – Desktop Reference*, 2011, page 6.
[34] KPMG, *Global Transfer Pricing Review*,2012, page 15.
[35] KPMG, *Global Transfer Pricing Review*,2012, page 15.