CHAPTER 2

OVERVIEW AND BACKGROUND TO THE COMMONWEALTH BILLS

Overview of the Bills

2.1 The second reading speeches for the Corporations Bill 2001 and the Australian Securities and Investments Commission 2001 Bill set out the background and intention of the Bills. The speeches advise that the Bills form an historic package of legislation, which will finally deliver with certainty a single national regulatory regime for corporations. The Bills do this by addressing legal uncertainties resulting from recent decisions of the High Court, as part of a number of legislative and administrative measures under which the States will refer certain powers in relation to corporations to the Commonwealth.

2.2 The speeches emphasise that the High Court decisions are a serious threat to the national corporate regulation framework, which could prejudice the actual existence of companies established under the Corporations Law. These problems are particularly significant because they adversely affect attempts by Australia to position itself as a global financial centre and to project a message of regulatory leadership. However, the package of arrangements, of which the Bills form a key part, whereby the States will refer appropriate powers to the Commonwealth, should remedy uncertainties and enable the establishment of a scheme which is constitutionally sound.

Background to the Bills

2.3 The second reading speeches and the Explanatory Memoranda for the two Bills, together with material submitted to the Committee jointly by the Attorney-General's Department and the Treasury, explain the need for the legislation.

2.4 In 1982 the 'cooperative scheme' of corporate regulation replaced the haphazard uniform companies laws of the 1960s. This scheme represented a considerable advance but was deficient in that it had no proper structure of responsibility and accountability and lacked a national approach. The scheme failed to meet challenges resulting from corporate change and especially from the corporate misdeeds of the 1980s.

2.5 The *Corporations Act 1989* and the *Australian Securities Commission Act 1989* were intended to remedy these deficiencies, but several States successfully challenged the validity of some parts of the legislation in the High Court. These difficulties were addressed by a new scheme under which the Corporations Law was enacted as a law for the Australian Capital Territory, with each State and the Northern Territory applying the Corporations Law as a law of that jurisdiction. Consequently,

any changes to the Corporations Law applied automatically throughout Australia. The practical effect was a single national scheme.

2.6 The Australian Securities and Investments Commission (ASIC), a Commonwealth agency, administers the Corporations Law, with laws of each State and the Northern Territory applying relevant provisions of the Commonwealth Act. State laws also confer administrative functions under the Corporations Law on other Commonwealth bodies, such as the Director of Public Prosecutions and the Australian Federal Police. In addition, the Commonwealth, the States and the Northern Territory agreed on consultation and approval procedures as a recognition of the separation of legislative responsibility for company law. Litigation was facilitated by 'cross-vesting' provisions in the legislation, under which Federal courts could exercise relevant State jurisdiction and vice-versa.

High Court decisions

2.7 The second reading speeches advise that it is widely acknowledged that the current Corporations Law scheme has provided the benefits of stability and uniformity to Australian business. However, two recent decisions by the High Court have raised concerns about the validity of the constitutional framework of that scheme.

2.8 The first case was *Re Wakim: ex parte McNally* (1999) 198 CLR 511, decided in June 1999, which invalidated cross-vesting legislation conferring State jurisdiction on Federal courts. This decision largely removed the capacity of the Federal Court to determine matters arising under the Corporations Laws of the States, which the second reading speech advises was a part of the scheme which had been working very well.

2.9 The second case was *The Queen v Hughes* (2000) 74 ALJR 802, which cast doubt on the ability of Commonwealth agencies to perform some functions under the Corporations Law. This is likely to affect adversely the administration and enforcement of the scheme, particularly the powers exercised by ASIC and the Commonwealth DPP. For instance, the registration and incorporation provisions of the Corporations Law may not be within Commonwealth legislative power. The *Hughes* decision, therefore, is a serious threat to the effective operation of the entire Corporations Law scheme which will, without remedial action, result in continuing legal challenges to regulatory and enforcement actions taken by Commonwealth officials and agencies.

New agreement with the States

2.10 In order to overcome the problems raised by these two cases, a joint meeting of the Standing Committee of Attorneys-General and the Ministerial Council for Corporations agreed in principle in August 2000 that the States would refer to the Commonwealth sufficient legislative powers to enact the provisions of the Corporations Law and the *Australian Securities and Investments Commission Act 1989*. The States would also refer power to amend these provisions in relation to company formation and regulation and the regulation of financial services. However,

the parties could not agree on the details of the referral and it was not until 21 December 2000 that the Commonwealth, New South Wales and Victoria agreed on measures to rectify the constitutional flaws and resulting harmful uncertainty affecting the Corporations Law. On 23 March 2001 Queensland and Western Australia agreed in principle to refer the necessary powers. Negotiations are continuing to meet the concerns of South Australia and Tasmania but all States have agreed to work towards a commencement of the new Corporations Act on 1 July 2001.

2.11 The new agreement provides for enhanced State consultation and voting rights in relation to proposed amendments of corporate law. Where the approval of the Ministerial Council is required for an amendment to the Corporations Law, the required number of jurisdictions favourable to a proposed amendment will increase from 2 approvals to 3 approvals. The second reading speech advises that the new agreement should result in an effective, responsive and flexible regulatory framework, which will enhance Australia's position in the global marketplace. In particular, the new agreement will continue to ensure that different versions of the law will not operate in different jurisdictions and that divergent regimes will not develop.

2.12 The new agreement provides for other safeguards to meet State concerns about referral of powers to the Commonwealth. For instance, an objects clause in the State reference legislation will provide that referred powers are not intended to be used by the Commonwealth to regulate industrial relations.