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Dimensions Of Legal Diversity In  
Corporate Structure: Linking The Global  
And The Local

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## Dimensions Of Legal Diversity In Corporate Structure: Linking The Global And The Local

### Introduction

The pressures of globalisation, in particular economic globalisation, create great structural and regulatory challenges for government and business. On the one hand, the reality of the impact of globalisation on corporations and businesses striving to attain global competitiveness in the 21<sup>st</sup> century economy drives a move toward multinational corporate bodies capable of operating across national boundaries. On the other hand, there is a competing pressure to maintain the local culture of regions and nations, including legal and regulatory culture. These competing pressures have been particularly felt in the European Union (EU), which has been struggling for over thirty years to attain a viable structure for a European Company – *Societas Europaea* or SE – capable of operating across national borders of the Member States of the EU. Significant recent developments in achieving this corporate form have been made, but the substance of the provisions of Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company<sup>1</sup> will create significant destabilising factors, ultimately affecting the long term viability of this corporate form. At the heart of these factors are the significant differences in the legal and regulatory cultures of the Member States of the EU.

While the EU has been facing<sup>2</sup> the significant issues left unresolved following the adoption of the Regulation, Australia has been confronting its' own crisis in corporate law. These problems stem from the decisions in the cases of *Re Wakim; Ex Parte McNally*<sup>3</sup> and *R v Hughes*<sup>4</sup>, and the short to medium term resolution in the referral of powers over corporations from the States to the Commonwealth. This referral has provided a measure of stability in the corporate legal structure at the present time. However, as we in Australia consider the next step following the current referral of powers, it is important to think not only of Australian corporate law's medium to long-term future, but also to consider the future role Australian corporate law may play in the Australasian region.

The challenges of diverse legal cultures in federal and quasi-federal systems have been charted elsewhere<sup>5</sup>, as has the likely impact of the *Societas Europaea* on corporate law in the EU<sup>6</sup>. This paper will focus on one key aspect of the implementation of the SE, that of regulation. Diversity in legal culture affects corporate structure and regulation, which in turn impacts on industry and on government regulators. It is in this context, in particular, that Australian experience in the structure of regulation of corporations and corporate law is instructive. In order to set the scene for this analysis, it is appropriate to consider the competing pressures of globalisation: to enhance global competitiveness while maintaining diversity in legal and regulatory culture at a local level or member state level; and the legal and cultural parameters within which the regulation of the *Societas Europaea* will occur under the Regulation in its present form.

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<sup>1</sup> Available at [http://europa.eu.int/eur/lex/en/lif/dat/2001/en\\_301R2157.html](http://europa.eu.int/eur/lex/en/lif/dat/2001/en_301R2157.html); accessed 11 December 2001.

<sup>2</sup> Or rather pushing aside, to the extent of ignoring. The Member States at present have shown little initiative in developing the bodies and rules necessary to implement the *Societas Europaea* by the end of 2004.

<sup>3</sup> (1999) 198 CLR 511

<sup>4</sup> (2000) 34 ACSR 92

<sup>5</sup> See Judith Marychurch "Globalisation, Federalism and Legal Plurilism: The Challenges of Diverse Legal Cultures in Federal Systems" published in the proceedings of the Diversity Conference 2003 at <http://DiversityConference.Publisher-Site.com>.

<sup>6</sup> See Judith Marychurch, 'Societas Europaea – Harmonisation or Proliferation of Corporate Law in the EU' (2002) Australian International Law Journal (in press). See also Françoise Blanquet, 'European Company Statute (SE)' (2002) Australian Journal of Corporate Law 56.

## **Globalisation: balancing global competitiveness with maintaining diversity in local legal culture**

The term “globalisation” is used commonly today in academic and political circles, as well as among the general populous. However, providing a widely accepted definition is a complicated matter. Depending on the perspective adopted, globalisation may be explained in economic, cultural or environmental terms. It has also been suggested that an adequate understanding of globalisation requires an integrated approach, taking account of economic, social, cultural, environmental and political relationships<sup>7</sup>.

At first glance, an analysis of the impact of globalisation on the structure and regulation of corporate law would concentrate on what might be termed ‘economic globalisation’, focussing on the economic issues and consequences of globalisation. It is on the economic issues raised by globalisation that much of the globalisation literature focuses<sup>8</sup>, including on the development of global corporate capital and transnational or multinational corporations. It is not a new, nor necessarily recent, phenomenon, with multinational corporations engaging in transborder trade and investments from the end of the nineteenth century<sup>9</sup>. Carrigan has traced the impact of multinational corporations, and the export of capital by them, in the globalisation of the economy. Of particular note is Carrigan’s submission that ‘the obstacle to the harmonisation and unification of business laws is the competitive struggle between multinational corporations with their headquarters in the Triad of Europe, Japan and the United States.’<sup>10</sup>

While the United States is the most obvious comparator for assessing progress in the European Union in relation to harmonisation of corporate law and regulation, Australian experience can also offer insight, particularly in light of nearly a century of struggle with this very issue in a context of shared history and culture which is not present in the European Union. If we have faced difficulty in Australia, and still face long-term issues that will need to be addressed within the next three years<sup>11</sup>, the fact that the European Union has made any progress at all is significant in itself.

Beyond economic globalisation is globalisation of culture. Of particular interest in this context is the impact of globalisation on corporate culture and legal culture. To what extent has globalisation changed perceptions of the need for a harmonised/ harmonious approach to the framework in which corporate business is conducted, and to corporate law? A truly global approach at this stage seems an impossible dream, perhaps a more realistic one in coming centuries, and so we must concentrate now on the immediate issues arising from harmonisation of corporate law in a century-old federal system, and a more recent union of nation states in Europe. Particularly in the case of Australia, harmonisation of law and regulation would at first glance, at least to one unfamiliar with the history of federation in Australia, to be a very simple matter, and hardly an issue that would plague the corporate law community for decades. Nonetheless, this is exactly what has been the case in Australia. The

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<sup>7</sup> Wiseman, John, *Global Nation? Australia and the Politics of Globalisation*, Cambridge University Press, 1998, 15.

<sup>8</sup> *Ibid*

<sup>9</sup> Frank Carrigan, ‘Globalisation and Legal Transnationalisation’, (1999) *Australian Journal of Corporate Law* 122, 123.

<sup>10</sup> *ibid*, abstract, 122

<sup>11</sup> The *Corporations (Commonwealth Powers) Act 2001* (Name of State), s.5 imposes a sunset clause of five years on the referral of State power over corporations to the Commonwealth. This will expire on 15 July 2006, unless extended. In theory, the Australian states could extend this referral indefinitely, but this would leave Australian business and Commonwealth regulators subject to the same uncertainty and instability as in the period following *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511 and prior to the enactment of the above Act containing the referral of powers.

EU has also attempted to address the development of harmonised approach to a European corporate form capable of operating on a pan-European basis for over three decades. The recent Regulation on the European Company, referred to above, is by no means the resolution of this issue. The EU is in fact likely to encounter regulatory problems similar to those we have in Australia. It is in this respect that government regulators, and businesses, as those subject to the regulation, can learn from the Australian experience.

### **Regulating the Societas Europaea: the effect of cultural diversity at a local level**

The SE becomes available as a corporate form on 8 October 2004. A key aspect of its' potential success will be its implementation, and the application of the Regulation, through administrative bodies or regulators. One of the key problems of the Regulation for the SE in its current form is the lack of a central regulator, which has proven in Australia to be a crucial element of success in a federal system of corporate law. The Regulation itself<sup>12</sup> is silent on a central regulator for the SE. Article 68, however, provides that “[t]he member states shall make such provision as is appropriate to ensure the effective application of the Regulation”, including the designation of “competent authorities” as required by the Regulation<sup>13</sup>. The difficulty here is that the reservation of implementation and regulation of the SE to the Member States' administrative bodies will lead to more inconsistencies when applying both the Regulation and relevant national laws of the Member States. This is even more likely given the future integration of new Member States into the European Union, particularly of former Eastern Bloc nations. Regulatory inexperience and the unique regulatory cultures of these Member States in relation to this type of corporation, operating across national boundaries, will affect the ultimate form and success of the SE.

The Regulation as adopted defers many decisions down to Member State level. This appears to have been due to the problems of achieving consensus in relation to the form of the SE over the thirty year period, and finally the economic and competitiveness pressures to give effect to the SE in name, if not in substance<sup>14</sup>. While the lack of a central regulator rates highly on the list of such deferrals in its potential impact on the SE, the Regulation in fact reserves the majority of details governing the formation and ultimate operation of SEs to the member states. It is in this respect that the Regulation contributes more to the proliferation of corporate law in the EU rather than to its harmonisation. For example, the Regulation permits the Member States to require SEs registered in their territory the additional obligation to locate their head office and registered office in the same location<sup>15</sup> if the Member State so chooses. The SEs annual and consolidated accounts will be governed by the laws of the Member State where the SE has its registered office<sup>16</sup> subject to Article 62. If the SE faces winding-up, liquidation, insolvency or cessation of payments, the legal provisions on public limited-liability companies will in the relevant Member State (typically the State of registration of the SE) will apply. As a result, the impact of national law, and in the case of Member States like Germany which have an internal federal structure, the local laws of that Member State, on the SE will be significant. Add to this the crucial lack of central or at least

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<sup>12</sup> Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company, above note 1.

<sup>13</sup> Also, Article 68(2) provides that “Each member state shall designate the competent authorities within the meaning of Articles 8, 25, 26, 54, 55 and 64. It shall inform the Commission and the other member states accordingly.”

<sup>14</sup> See Judith Marychurch, ‘Societas Europaea – Harmonisation or Proliferation of Corporate Law in the EU’ (2002) *Australian International Law Journal* (in press).

<sup>15</sup> Article 7.

<sup>16</sup> Article 61, subject to Article 62 which applies to a SE that is a credit institution, financial institution or insurance undertaking.

co-ordinating regulator<sup>17</sup>, and what we are left with is a corporate form that is European in name rather than in substance.

While the Regulation has arguably been able to retain local and member state legal and regulatory cultures in the formation of the SE, it is unlikely to meet the competing challenge of globalisation, being to enhance global competitiveness by creating multinational bodies capable of operating on at least a pan-European scale. An SE will be able to change the location of its registered office and head office subject to some restrictions, which is an improvement on the current situation where a company must wind up its operations in one Member State in order to set up an office in another Member State. However, several problems remain. The priority given to national or Member State law in the Regulation means that the Regulation is unlikely to support a long-term and coherent approach to the problem of the corporate structure for pan-European activities in an era of globalisation. Many issues will confront the business community, practitioners and government regulators during the Regulation's implementation, particularly in identifying and applying relevant national laws, and balancing these against the original intentions of the Regulation: to meet the competitiveness challenges of economic globalisation by embracing a truly European company free of the limitations of the borders of the Member States.

### **Australian Experience of Corporate Regulation**

Australia has travelled the path of State regulation of corporations operating across state boundaries in the past, and faced significant difficulties. This has been done in various forms. The key schemes were the Uniform Companies Acts scheme of the 1960s; the Co-operative scheme of the 1980s and the National scheme of 'federalised' corporate law in the 1990s. It was the latter that was the subject of debate following the decisions in *Re Wakim; Ex parte McNally*<sup>18</sup> and *R v Hughes*<sup>19</sup>, resulting in the referral of State power to the Commonwealth in 2001.

The *Uniform Companies Acts* were the result of the work of a committee of State and Commonwealth Attorneys-General established in 1959, in response to the growing realisation that the substantial differences in corporate law between the States was causing problems for companies operating in more than one State. This was becoming increasingly common in the post-war recovery period with the emergence of a national economy<sup>20</sup>. The first of the *Uniform Companies Acts* was enacted in 1961, and was adopted, with modifications, in all States, the Northern Territory, the ACT, and the Territory of Papua New Guinea as it was then<sup>21</sup>. As a result of these variations between the Acts adopted by each of the States, the scheme was never truly uniform, and these differences became more pronounced as amendments were made by the States. With the mining boom of the late 1960s, glaring deficiencies in the regulation of the securities markets became apparent<sup>22</sup>. This resulted in the establishment of a Select Committee to inquire into the 'desirability and feasibility of establishing a securities and exchange commission by the Commonwealth either alone or in co-operation with the States'<sup>23</sup>. In addition, the High Court handed down a decision in *Strickland v Rocla Concrete Pipes Ltd*<sup>24</sup> which suggested that the High Court was willing to expand the previous restricted interpretation of s.51 (xx) of the Constitution adopted in

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<sup>17</sup> The latter has been tried in Australia with significant problems. This will be discussed subsequently.

<sup>18</sup> (1999) 198 CLR 511

<sup>19</sup> (2000) 34 ACSR 92

<sup>20</sup> Paul Redmond, *Company and Securities Law Commentary and Materials*, LBC, 2000, 49.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid* at 55

<sup>23</sup> Australia, *Parliamentary Debates*, Senate 1969-70, Vol S. 43, p.489, as quoted in Redmond, *ibid*, 55-6.

<sup>24</sup> (1971) 124 CLR 468

*Huddart Parker*. National legislation was drafted by the Labor Government of the time, but the *Corporations and Securities Industry Bill* lapsed with the dismissal of the Whitlam government in 1975 and the successive election of the Fraser Liberal government.

Not content to allow the Commonwealth to take control over the securities markets, four States enacted their own Securities Industry Acts and entered into a co-operative arrangement for administration of companies and securities legislation which centred around the Interstate Corporate Affairs Commission (ICAC)<sup>25</sup>. This arrangement was the precursor to the Co-operative scheme of the 1980s. While the ICAC scheme itself was short-lived, its impact is apparent in the central idea and structural elements of the Co-operative scheme.

In 1978, the Commonwealth consulted with the States with a view to achieving a ‘national’ scheme via co-operation. This resulted in the Formal Agreement, executed by the Commonwealth and the States in December 1978<sup>26</sup>. Pursuant to this agreement, a three-tiered regulatory structure was established, which placed the various State corporate affairs commissions at the bottom of a new regulatory hierarchy as agents or delegates of a body called the National Companies and Securities Commission (NCSC), the latter body reporting to the Ministerial Council for Companies and Securities, comprising Ministers responsible for company law of each of the participant governments to the Formal Agreement<sup>27</sup>. The Formal Agreement also made provision for a method of achieving uniformity of company and securities legislation, via States adopting legislation enacted by the Commonwealth from the ACT with the State legislation being framed so as to cause any amendments made to the Commonwealth legislation approved by the Ministerial Council to become effective in the States without the latter having to pass any additional State legislation to achieve this<sup>28</sup>. A collection of Commonwealth statutes was passed in 1980 and 1981 to give effect to the legislative scheme approved by the Ministerial Council. The subsequent years were to be among the most challenging for corporate regulators, and it is in the regulation of this scheme that the deficiencies of the arrangement became apparent.

The position of the State corporate affairs commissions under the NCSC showed the basic flaw in the administrative structure established under the Formal Agreement. While the NCSC was ostensibly a national body, the State corporate affairs commissions did not, by virtue only of the administrative structure of the Formal Agreement, cease to be State bodies, with their staff continuing in the service of the relevant State’s civil service.

In 1988, the Federal government decided to make another attempt at a truly national scheme, introducing the Corporations Bill 1988 (Cth), subsequently enacted as the *Corporations Act 1989* (Cth). This set in motion a chain of events, the effects of which we are still grappling with. This Bill essentially purported to take over corporations law in Australia, a circumstance the States were disinclined to accept. In June 1989, within one month after the passing of the Act through the Commonwealth Parliament, four States had launched a challenge against the Act<sup>29</sup>.

*NSW v The Commonwealth*<sup>30</sup>, set the scene for the ‘federalised’ structure, based on inter-State and Commonwealth co-operation adopted via the Alice Springs Agreement for the *Corporations Law* in the 1990s. It was this scheme on which constitutional doubt was cast in

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<sup>25</sup> Redmond, *ibid*, 57-8

<sup>26</sup> The Northern Territory joined the scheme in 1986. See Redmond, *ibid* at 59.

<sup>27</sup> Redmond, *ibid* 59.

<sup>28</sup> Redmond, *ibid* 60.

<sup>29</sup> The States were New South Wales, Queensland, South Australia and Western Australia.

<sup>30</sup> (1990) 169 CLR 482

*Re Wakim* and then in *R v Hughes*. The decision in *NSW v The Commonwealth* essentially held, by a majority of 6:1<sup>31</sup> that the Commonwealth did not have the constitutional power to make laws with respect to the incorporation of companies. While rendering parts of the *Corporations Act 1989* (Cth) constitutionally invalid, primarily those provisions dealing with the incorporation process, much of the Act was still within the law-making power of the Commonwealth. Nonetheless, in the climate at the time, the decision caused a major upheaval. It is in the reaction to this decision, echoed in 1999 following the *Re Wakim* decision, that the issues of legal culture can be seen. These issues will be discussed shortly, in order to continue the outline of the legal and political process leading up to the referral of powers by the States in 2001.

Following the decision in *NSW v Commonwealth*, the States, the Commonwealth and the Northern Territory entered into another co-operative agreement, in many ways similar to the co-operative scheme of the 1980s. The agreement was reached in Alice Springs in June 1990, hence the title normally used to refer to the agreement, the 'Alice Springs Agreement'. The legislative scheme thereby established was a 'federalised' scheme, in the sense that it was established without a referral or relinquishing of power to the Commonwealth from the States, and hence was reliant on the States to ensure its stability. Theoretically at least, any or all States could repeal the State Act adopting the Commonwealth legislation applying to the Australian Capital Territory to the State in question. The key redeeming feature in comparison to the previous co-operative scheme was the establishment of a central, national regulatory body, the Australian Securities Commission (ASC). The scheme worked reasonably successfully for a decade, thanks in part to the utilisation of the cross-vesting scheme established via co-operative legislation, which vested the jurisdiction of one court to another court. This scheme allowed the Federal Court to exercise the power of the State Supreme courts, and vice versa.

In *Re Wakim*, the High Court held that the Federal Court cannot exercise state jurisdiction under the Constitution, with the consequence that cannot hear nor determine matters arising under the Corporations Law of any State, though it can hear and determine matters arising under the Corporations Law of the ACT due to s.52(i) of the Constitution. *Re Wakim* dealt with the exercise of civil jurisdiction, so this decision did not affect the exercise of criminal jurisdiction. This was addressed in *R v Hughes*, where an argument was advanced in favour of Mr Hughes, that the Commonwealth Director of Public Prosecutions did not have the capacity to prosecute State *Corporations Law* offences. Mr Hughes was unsuccessful in this argument, the High Court finding that the Commonwealth DPP did have the power to bring the prosecution in this case, but the issue of whether the DPP had the power to prosecute all State Corporations Law offences was left unanswered. This resulted in further uncertainty as to the operation of the national scheme in the criminal sphere.

In August 2000, State Attorneys general reached an in principle agreement to refer their powers over corporations to the Commonwealth Parliament pursuant to s.51(xxxvii). Working out the details involved in implementing this agreement proved to be more difficult. In December 2000, NSW agreed to the referral and introduced the *Corporations (Commonwealth Powers) Bill 2000*, which was passed in 2001. Subsequently, the Federal Parliament passed the *Corporations Act 2001* (Cth) and the other States implemented the agreement through their own parliaments. The *Corporations Act 2001* (Cth) then came into effect on 15 July 2001, as did the *Australian Securities and Investments Commission Act 2001* (Cth), which confirmed ASIC's position and powers as Australia's central, or national, regulator. The terms of reference of the power to the Commonwealth ensure that the States

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<sup>31</sup> Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ in the majority, with Deane J in dissent.

are consulted about any amendments to be made to the Corporations Act; and the referral will terminate five years after the commencement of the Commonwealth Corporations Act or at an earlier time, or may be extended. Another proviso is that the Commonwealth will not use the referred powers to legislate in the area of industrial relations.

It is clear from the above discussion that the Australian structure of corporate law and regulation has been significantly affected by cultural issues, with the result that national or central regulation has only been a reality, at least in a constitutional sense, since 2001. Previous regulatory schemes consisting of state regulation only or a combination of state regulators and a central co-ordinating regulator proved to have serious flaws. It is from this lesson that government regulators and businesses, as lobbyists, should learn.

### **Concluding Remarks**

The impact of legal culture of the EU's Member States will inevitably affect the process and form of co-operation in federal systems in relation to any issue requiring federal attention to achieve the objectives of the union as a whole. Even in a relatively homogeneous culture such as that of Australia, differences in matters such as regulation have demonstrated the impact of variation in legal and political culture. The impact of such factors can only increase when considering a union such as the EU, and the vast differences in attitudes and approaches to important issues like the role of employees in company management<sup>32</sup>. Therefore, effective co-operation in achieving a workable structure for harmonisation of law – corporate law or otherwise – is crucial. The co-operation however must extend to arriving at a suitable structure of the legislation and regulation of the relevant area. It is this structure that has been of great challenge to Australia, and will still prove a challenge in the future as the extension of the referral comes due. The challenges that Australia has faced will be magnified in the case of the European Union, and the harmonisation process will take much more concerted effort if it is to succeed, including a willingness to learn from the experiences of other jurisdictions, including Australia.

A framework of law and regulation that takes into account the potential addition of other nations into a harmonised framework would better serve not just Australia but also the world as it faces increasing pressures of globalisation. To assume that all laws will be the same and will be enforced in the same way across the globe is nonsensical. However, the potential for harmonisation of laws is important across the globe, and in dealing with relations, in this context specifically business relations, between people or entities in different nation states, should not be ignored. Corporate law is one such area. Asian nations already look to Australia for guidance and examples of appropriate developments in corporate law. To put it simply, and in the words of a global network of companies, we need to '[t]hink global, act local'<sup>33</sup>. The EU represents a system that is already at this next stage of a union of nation states, and so by examining the current pressures faced by the EU and the response to them to date, we can identify the likely problems Australia will face, and consider how both Australia and the European Union can address these challenges in the coming decades.

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<sup>32</sup> This was the key legal and cultural stumbling block in the earlier unsuccessful attempts at achieving a Regulation for a European Company. The 2001 Regulation was only successfully adopted after a compromise was reached on worker involvement in company management in the form of Council Directive 2001/86/EC of 8 October 2001 on Worker Involvement. The Directive essentially allows an SE to select the form of worker involvement in that company, from no involvement, as in the British model for example, to involvement in two tier management structure involving employees in management of the company, as in Germany.

<sup>33</sup> The Body Shop. Wiseman uses similar terminology in his monograph *Global Nation*, Cambridge University Press, 1998, in particular Chapter 10 "Alternative Directions? Thinking and Acting Locally and Nationally", 131-148.

Is true harmonisation possible? In short, no – not without radical departures from the paths hitherto followed in Australia and the EU, and this is not possible in the current climate – with the cultural aspects attending thereto. It would take a major cultural shift to allow such a diversion. In a perfect world, this could be achieved through education and concerted effort. In the imperfect world in which we live, we will probably not see substantial progress in the next twenty years.