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Publication Details

This article was originally published as Marychurch, JM, Co-operation or Sovereignty? Achieving federalisation of Corporate Regulation, Macquarie Journal of Business Law, 1, 2004, 59-71. Original journal available here.

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Abstract
This paper will analyse the tensions between the harmonisation of law and the maintenance of sovereignty of member states in federal systems. The paper will focus on Australia and the European Union and the pressures faced, in light of the impact of globalisation, to resolve the issues that have plagued both jurisdictions for decades in achieving a satisfactory and sustainable model for corporate regulation on a federal level.

Keywords
sovereignty, corporate regulation, harmonisation, globalisation

Disciplines
Law

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This journal article is available at Research Online: http://ro.uow.edu.au/lawpapers/23

CO-OPERATION OR SOVEREIGNTY? ACHIEVING FEDERALISATION OF CORPORATE REGULATION

JUDITH MARYCHURCH*

This paper will analyse the tensions between the harmonisation of law and the maintenance of sovereignty of member states in federal systems. The paper will focus on Australia and the European Union and the pressures faced, in light of the impact of globalisation, to resolve the issues that have plagued both jurisdictions for decades in achieving a satisfactory and sustainable model for corporate regulation on a federal level.

I INTRODUCTION

In contrast to other recognised federal systems, notably the United States and Canada, Australia still faces challenges to its national scheme of corporate law and regulation. Recent years have seen a resurgence in constitutional challenges posed to national regulation, and the adoption of another method of overcoming the limitations inherent in s 51(xx) of *The Australian Constitution*. The long history of difficulty in achieving a national scheme, and the continued importance of the Australian Securities and Investments Commission (ASIC) as the national corporate regulator, provide valuable lessons for the European Union.[1] The EU has also been struggling with the issues of harmonisation of corporate law in recent decades, particularly during the last three years, with the adoption of the Regulation on the Statute for the European Company in 2001.[2]

The tensions between the interests of member states in both Australia and the EU have been instrumental in determining the paths towards harmonisation that have been adopted. This paper will seek to analyse the source of these tensions, including the impact of globalisation on the progress so far made. These tensions centre around the inherent conflict between the sovereignty of individual member states and the co-operation of those same states in achieving desired outcomes for the federation. This is reflective of the centralisation versus decentralisation debate common in federal systems. Evaluation of such debate is limited to a given point of time, as federations, and the balance between centralism and decentralism within them, changes over time.

This article will first address the validity of the comparison between Australia and the EU. In particular, it will address the classification of the EU, in its current form, as a federal system. This will be followed by an analysis of the links between sovereignty and federalism, and subsequently the links between sovereignty and harmonisation. This latter section will analyse recent developments in Australia and the EU to provide a basis for the concluding remarks.

II THE EUROPEAN UNION – A FEDERAL SYSTEM?

The initial hurdle that must be overcome in making a comparison between the paths adopted by Australia and the EU concerns the current framework of the two systems. It is conceded that the comparison is both non-traditional[3] and concerns jurisdictions which are very different in size, composition and culture. Nevertheless, it is maintained that the comparison is both valid and useful, as will be outlined below.

While there is no doubt that Australia is a federation, the nature of the grouping of nation states in the European Union is unprecedented in world history. Furthermore, it is unclear whether this grouping

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1 Hereafter, the European Union will be referred to as the EU.

2 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company Available at <http://europa.eu.int/eur/lex/en/lif/dat/2001/en_301R2157.html> at 11 December 2001 (hereinafter 'the Regulation').

3 The more conventional comparison adopted being between the United States and the EU.

can be classified as a 'federation' as the term has hitherto been understood.[4] For this reason, it is necessary to establish whether or not the European Union in its current form can be described as a federation or federal system, and to consider the implications of the moves taken in 2003 toward a formalised federal system with a written constitution.

According to Osborn's Concise Legal Dictionary a federal state is:

> A State with a written constitution which apportions the sovereign power between a central or 'federal' legislature on the one hand, and a system of local legislatures on the other, in such a way that each is sovereign within its prescribed sphere, eg, the United States of America. The purpose is to hold minor communities together, or to reconcile national unity and power with the maintenance of State rights; there is union without unity.[5]

The EU does not have a written constitution in the same sense as the United States, or Australia. However, written evidence that cannot be discounted is the series of treaties establishing the European Coal and Steel Community (ECSC) and ultimately the EU itself. This is also acknowledged by other theoretical writings on the classification of federations. King has described a federation as 'a constitutional system which instances a division between central and regional governments and where special or entrenched representation is accorded to the regions in the decision-making procedures of the central government'.[6] While again King refers to a constitutional system, it is acknowledged that a constitution need not be 'written on paper or firmly imprinted on men's minds'.[7] A 'basic controlling document or customary understanding' providing for a continued and stable structure of government and peaceful mechanisms for change in the government may be seen as representing a constitutional arrangement. In this respect, the treaties establishing the EU may be seen as 'constitutional' documents. The two key integration treaties are the Treaty of Paris 1951 and the Treaty of Rome 1957.[8]

In an expanded definition of federation, King considers that a federation:

> is a state which is constitutionally divided into one central and two or more territorial (regional) governments. The responsibility of the centre is nation-wide, while that of the territories (regions) is mostly local. The central government is not sovereign in a manner which excludes the involvement of the regional units. This is because these units are constitutionally incorporated into the centre for certain purposes, as to do with the way in which the centre's legislature is constituted or its executive appointed or constitutional amendments enacted.[9]

The key institutions involved in law-making at the central level of the European Union are the Council and the Commission. The Council is comprised of ministers from each of the member states responsible for the policy area at issue at any particular meeting of the Council. Its chief role is to make decisions as to the adoption of legislation, which is typically proposed by the Commission, the executive agency of the EU. The Commission is responsible for the implementation of the treaties, and prepares all legislative proposals. It also intervenes at all stages of the legislative process to facilitate agreement within the Council or between the Council and the European Parliament.[10] Adoption of legislation is determined alone by the Council in some policy areas or by joint decision of the Council and the European Parliament in areas specified by the treaties. The Parliament is elected by direct universal suffrage every five years, attempts to ensure democratic accountability of EU policy-making, and plays a role in some legislation, but most of its work occurs in committees. This is clearly a more limited role than many central parliaments in other federations, but the chief central law-making roles are fulfilled by the Council and the Commission, and are appropriately seen as central institutions with responsibility in restricted areas while the general law-making power resides with the member states.

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4 There has been considerable academic writing on this. See, eg, Professor Dusan Sidjanski (English Translation by Mme Chamouni Stone), *The Federal Approach to the European Union or The Quest For an Unprecedented European Federalism* (Research Policy Paper No 14, Gropement D'Etudes et de Recherches, Notre Europe, July 2001).

5 Roger Bird, *Osborn's Concise Law Dictionary* (7th ed, 1983) 145.

6 Preston King, *Federalism and Federation* (1982) 140-1.

7 Ibid 145.

8 Guyomarch, Machin and Ritchie, *France in the European Union* (1998) 6; Treaty Establishing the European Coal & Steel Community, Paris, 18 April 1951; Treaty Establishing the European Community, Rome, 25 March 1957.

9 King, above n 6, 139-140.

10 Guyomarch, Machin and Ritchie, above n 8, 12.

The European Community, the predecessor to the EU, has been described as an important development in the history of federalism, representing the re-emergence of confederation as a viable form of government.[11] A confederation refers to a situation whereby several existing states combine to form a government for particular defined purposes.[12] The unusual factor in the establishment of the European Community was the purpose behind it. Instead of the usual foreign affairs or defence purposes, the reason was economic. The Treaty Establishing the European Community[13] identifies the purpose of the union in Article 2:

> The Community shall have as its task, by establishing a common market and an economic and monetary union … to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

The economic imperative behind formation of the EC remains paramount in the EU today, and being the primary reason behind the sudden compromise which allowed the Regulation for the European Company, or the Societas Europaea – 'SE' – to be approved by the European Council. However, the strategy appears to be failing, with Western Europe forecast to be the slowest growing economic region in the world economy.[14] However, the economies of the nations in transition to becoming member states of the EU are forecasted to be the fastest-growing.[15] The difficulty is that the structure of the Regulation as currently adopted refers significant power and responsibility to the member states of the EU, without regard to the ability of those states to adequately exercise those powers and regulate the SEs formed under the Regulation. To date, no progress has been made in establishing the administrative structure necessary to regulate the SE in key member states of the EU, including Britain, Germany, France and Spain, nor in nominating the 'competent authorities' to be responsible for regulation of the SE.[16] The Regulation is due to come into effect on 8 October 2004. To this point, the economic benefits originally sought to be attained by the SE do not appear likely to be achieved.[17]

The federal characteristics already present in the institutional structure of the EU, combined with the moves taken in 2003 towards a true federation of States in the EU, justify the classification of the EU as a federal system for the purposes of this article.

III SOVEREIGNTY AND FEDERALISM

When examining the significant developments in the structure of corporate law in Australia and the EU in 2001, one is struck by the history of difficulties each jurisdiction has faced in casting, and implementing, the legislative framework for corporate law, particularly from the perspective of state sovereignty. Indeed, the issue of state sovereignty has been at the heart of the problems faced in Australia in legislating for corporations since the decision in *Huddart Parker & Co Pty Ltd v Moorehead*.[18] Similarly, difficulties founded in matters of state sovereignty have been behind the thirty year delay in adoption of the Regulation for the SE. These difficulties also shed light on the reasons behind the substantive provisions of the Regulation which refer extensive powers over SEs to individual member states.

Where does sovereignty lie in a federal system? In order to answer this question, one must have a conception of what sovereignty is. It is inappropriate when examining a federal system to see sovereignty in absolute terms, where one agent acts to the exclusion of all others. This definition is too

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11 Elazar, *Exploring Federalism* (1987) 52-53.

12 Ibid 53.

13 Treaty Establishing the European Community, Rome, 25 March 1957.

14 EU Business Week, Issue 203, 19 December 2003, available at <http://www.eubusiness.com>.

15 Ibid 14.

16 Article 68 provides are to make appropriate provision for the application of the Regulation, including the designation of competent authorities to regulate SEs.

17 The anticipated cost savings have been put at $30 billion per year – Schulz & Anor, 'The European Company Statute – the German View' (2001) 29(10) *Intertax* 332. The author has not been able to substantiate the method of calculation of this figure.

18 *Huddart Park & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.

absolutist for most States, not just federations.[19] The very nature of a federal system centres around a division of power between regional governments and the central government, and this division of power may be centralised, decentralised or balanced between these levels – or anywhere in between.

In respect of corporate law, the balance of legislative power in Australia has shifted over time. Under *The Australian Constitution*, the federal parliament's power is limited to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'.[20] It is clear from decisions such as *NSW v The Commonwealth*[21] that the federal parliament may not make legislation for the formation of companies, but may pass legislation with respect to foreign corporations, by definition incorporated outside Australia, and trading or financial corporations already created under State law. This restriction on Commonwealth power set the scene for a succession of schemes aimed at achieving consistency in the regulation of companies incorporated under State law, including 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, which was essentially 'undone' by the decisions in *Re Wakim; Exparte McNally*[22] and *R v Hughes.*[23] It was these decisions that ultimately resulted in the referral of State power over corporations to the Commonwealth under s 51(xxxvii) of the Australian Constitution, and the shift of legislative power from the states to the Commonwealth, at least until 2006. However, the difficulties involved in finally achieving this referral are demonstrative of the importance of the states in the balance of power, and the potential for their future influence on the structure of corporate law in Australia.

The adoption of the Regulation for the SE in 2001 may be seen as the culmination of a difficult and lengthy journey over a period more than thirty years. However, the form and effect of the Regulation has left many questions unanswered and has in fact created a very different company than was originally envisaged.[24]

Ebke has considered the nature of company law and lawmaking in the EU, and its position along the centralised/decentralised spectrum.[25] The purpose of his article at the time was 'to develop answers to the still unsettled question of how much uniformity in corporate law is needed and how much state regulation of corporate affairs is desirable to accomplish the objectives of the EU'.[26] As has been charted elsewhere, there has been a shift in terminology in relation to the co-ordination of corporate law in the EU from 'harmonisation' to 'approximation',[27] with a decreased emphasis on uniformity of law. The EU, in its quest to give effect to a corporate form that has been commonly identified as one of the key components of a successful move to an integrated single economy, appears to have abandoned uniformity and central regulation of a transnational corporation in favour of a corporate form which is European in name rather than in substance.

Early proposals for a European Company envisaged a truly European corporation operating at a level independent of the laws of the members states, that is, at a central or federal level. In particular, the proposal envisaged a corporate form that would operate free of the constraints of national/member state laws, particularly the impossibility of cross-border mergers. The Regulation as adopted is highly dependent on the laws of member states for the substance of the governing law of the SE, and the application of that law via member state regulatory agencies. As such, substantive aspects of what would otherwise appear to be a central, European law are to be determined at a decentralised, or member state level.

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19 King, above n 6, 141.

20 *The Australian Constitution*, s 51(xx).

21 *NSW v The Commonwealth* (1990) 169 CLR 482. Also *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.

22 *Re Wakim; Exparte McNally* (1999) 198 CLR 511.

23 *R v Hughes* (2000) 34 ACSR 92.

24 For analysis of the SE see J Marychurch, 'Societas Europaea – Harmonisation or Proliferation of Corporations Law in the EU' (2002) *Australian International Law Journal* 80; See also F Blanquet 'European Company Statute (SE)' (2002) 15 *Australian Journal of Corporate Law* 56.

25 Ebke, 'Company Law and the European Union: Centralised versus Decentralised Lawmaking' (1997) 31(4) *International Lawyer* 961.

26 Ibid, 964.

27 See for analysis of the SE see Marychurch, above n 24, 83-6.

The ultimate effect of this position is to place the EU and Australia in opposite positions in respect of the form or framework of federal corporate law on the one hand, and the substance of that law on the other hand. In Australia, the states essentially have the power to determine the framework of corporate law in Australia. This power arguably persists to this day despite the referral of powers at the heart of the current national scheme, due to the five-year sunset clause which expires in 2006. At the same time, the substance of corporate law has been primarily determined at the federal level, with state influence via the Ministerial Council for Corporations,[28] for several decades. The European Union has now adopted a federal corporate form, primarily in response to the economic pressures of globalisation, via central legislation, but the significant referral of substantive issues to the laws of the member states mean that key aspects of the operation of the SE are determined at a decentralised level, and will result in significant variations between SEs according to the member state of their formation.

IV SOVEREIGNTY AND HARMONISATION

The preceding discussion suggests that the maintenance of sovereignty of member states in federal systems is key in the area of corporate law. This is reflected in the United States, Australia and the EU. The desire to maintain this dominance takes precedence over economic imperatives, including those imposed by the pressures of globalisation. Issues of sovereignty have significantly influenced the path of harmonisation of corporate law in both Australia and the EU, and their respective positions along the federal spectrum between centralisation and decentralisation. This is particularly clear in the example of the European company, the SE, which will be especially difficult to implement compared to the national system currently operating in the Australian context. In Australia, corporate law is currently based on the referral of powers. This model is both adequate and sustainable while the states agree to the current sovereignty balance, but is potentially at risk of the states essentially holding the Commonwealth to ransom. In contrast, despite a three year transition period leading up to the implementation of the Regulation in October this year, member states, in whose favour the powers over the SE clearly fall, have made no progress towards implementation of the administrative structures necessary to implement the SE.

What are the pressures faced in light of globalisation to harmonise corporate law? The factors are both economic and cultural. Evidence of this can be found in the experiences of both Australia and the EU. As will be demonstrated in the subsequent analysis, the economic and cultural factors are often inherently linked, both to one another and to factors best described as being political in nature. As such, unravelling them is difficult, but also instructive in understanding the path of harmonisation hitherto taken in these jurisdictions and the directions this process is taking. The factors affecting the position in Australia will first be analysed, followed by the EU.

The decision in *NSW v The Commonwealth*[29] gave rise to, at the very least, perceptions that the decision 'may have therefore done irreparable damage to Australian business interests and the Australian economy'.[30] *Re Wakim* had the same effect, precipitating a great deal of political and academic discussion on the impact of the case and the way forward. However, when faced with this structural crisis in Australian corporate law in 1999 and 2000, a return to State regulation was never seriously contemplated. The alternatives that were considered were:

- A referendum to amend the Constitution to expand the Commonwealth's power to regulate corporations
- A referral of powers by the States to the Commonwealth pursuant to s 51(37) of the Constitution

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28 This body was the continuation of the Ministerial Council established in 1978, and comprised of the Commonwealth Minister responsible for the administration of the Commonwealth Corporations legislation (the permanent chairman) and states ministerial representatives, with legislative proposal and voting procedures overall favouring the influence of the Commonwealth: Ford, Austin & Ramsay, *Ford's Principles of Corporations Law* (10th ed, 2001) 48.

29 *NSW v The Commonwealth* (1990) 169 CLR 482.

30 R McQueen, 'Why High Court Judges Make Poor Historians: The Corporations Act Case and Early Attempts to Establish A National System of Company Regulation in Australia' (1990) 19 *Federal Law Review* 245, 264.

- A split system of regulation between the States and the Commonwealth, with States legislating for the incorporation of companies (and potentially other matters) with fundraising and other matters regulated by the Commonwealth

A referendum in the timeframe necessary to resolve the uncertainty created by the decisions in *Re Wakim* and *R v Hughes* would have been unlikely to succeed. The decision to reject the split system had effectively been made in 1990, with the states agreement to the co-operative nationalised scheme, including the central regulation of ASIC. 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). While there were last minute hiccoughs delaying the implementation of the referral until 15 July 2001, overall it would be fair to say that the States did agree, with relative co-operation, to the referral. Michael Whincop, has posed the question as to why the States so readily agreed to essentially write themselves out of the regulatory scheme.[31] Whincop saw the choice between state and federal regulation as having already been made with the States' assent to the Alice Springs Agreement a decade earlier, although neither an economic analysis of the decision in *Re Wakim* nor *R v Hughes* compelled a referral of powers as the best or most appropriate solution.[32]

It must also be recalled that the referral of powers was not achieved without some difficulty. The attorney general of Western Australia and South Australia initially indicated opposition to a referral,[33] resulting in a delay of the implementation of the *Corporations Act 2001* (Cth) from 1 January 2001 to 1 July 2001, and ultimately to 15 July 2001. This refusal to participate, although ultimately reversed, does demonstrate the impact of legal culture of the states of Australia, in particular a culture of fear of loss of power or sovereignty, particularly in relation to key economic and social issues including industrial relations. Ultimately, when the referral was agreed to, it was on the basis of a strict restriction on the extent of the referral, in particular the exclusion of the possibility of the Commonwealth using the power to legislate in relation to industrial issues. The sunset clause of five years[34] for the referral is also demonstrative of not just skepticism in relation to the operation of the scheme, but also an unwillingness to hand over legislative power to the Commonwealth on any more permanent a basis because of fear of loss of sovereignty. As such, there are clearly limits to the co-operation the states are willing to give, and these limits are at the least influenced by, if not determined by, notions of sovereignty.

Significant parallels can be drawn between the factors influencing the paths taken towards harmonisation in the EU and those in Australia. In the EU, the factors behind the pressure of globalisation to harmonise law are again both cultural and economic, the two being very much entwined in the history of the EU's path to a single European market. The vast majority of company law in the European Union is individual to the member states, as would be expected given the very different legal histories, cultures and regulatory systems of the member states. The implementation of the European single market was never intended to involve removal of corporate law from the member states. For the majority of small to medium companies and a substantial number of larger enterprises, the corporate laws of the member states are largely adequate. Rather than a whole-scale replacement of these individual systems, the EU has long pursued a path of harmonisation of the national corporate laws of the member states via a series of Directives. Six of these Directives are aimed at company law

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31 Whincop, 'The National Scheme for Corporations and the Referral of Powers: A Skeptical View' (2001) 12 *Public Law Review* 263, 263.

32 Ibid, 264. The Alice Springs Heads of Agreement was concluded in Alice Springs on 29 June 1990, by representatives of the Commonwealth, the States and the Northern Territory. Pursuant to this agreement, uniform legislation based on the *Corporations Act 1989* (Cth) and the *Australian Securities Commission Act 1989* (Cth) was prepared, with necessary changes to enable the Acts to apply in the States and the Northern territory. The Commonwealth passed these two Acts to apply to the Australian Capital Territory pursuant to s 52(i) of the Commonwealth Constitution, and the States and the Northern territory passed acts applying the Commonwealth Law in their jurisdictions, via State legislation entitled *Corporations ([name of particular State]) Act 1990* and *the Corporations (Northern Territory) Act 1990*, respectively. The Commonwealth undertook to compensate the States for loss of income from State regulatory bodies with the ASC taking over sole administrative and regulatory responsibilities for corporate law. See Ford, Austin & Ramsay, above n 27, 48-49.

33 I Ramsay, *Challenges to Australia's Federal Corporate La'*, 5 <http://cclsr.law.unimelb.edu.au/research-papers/hoffman.pdf> at 2 December 2002.

34 *Corporations (Commonwealth Powers) Act 2001* (NSW) s 5.

harmonisation.[35] Four other directives address corporate accounting principles,[36] which are intended to achieve consistent corporate accounting principles across the member states. Additional draft Directives also exist.[37] Most were implemented in the period 1970-1989, with the most notable exception being the *Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees*,[38] which was considered a pre-requisite to the Regulation for the SE.

This Directive and the Regulation for the SE were adopted together, illustrating that resolution of the worker participation issue had facilitated the final adoption of the Regulation. The language used in the Directive compared with the Regulation is interesting. The Directive retains reference to the Regulation being aimed:

> at creating a uniform legal framework within which companies from different Member States should be able to plan and carry out the reorganisation of their business on a Community scale.[39]

In contrast, the Directive subsequently recognises that:

> [t]he great diversity of rules and practices existing in the Member States as regards the manner in which employees' representatives are involved in decision-making within companies makes it inadvisable to set up a single European model of employee involvement applicable to the SE.[40]

This reflects the decision to maintain the sovereignty of Member States over worker participation and the subjugation of the status of the harmonisation process as a result. The negotiation over the termsof the Directive has a long history, dating back at least twenty years.[41] The diversity in culture in relation to the issue of worker participation, and its consequent political sensitivity has been the key obstacle in reaching consensus among the Member States in the EU. Kolvenbach notes the genesis of the company law harmonisation program as having:

> as its principal components the coordination, safeguarding, protection and equivalence necessary to protect shareholders, creditors, customers, potential investors and last, but not least, the employees of the companies in the Member States.[42]

At the time of Kolvenbach's detailed analysis of the company law harmonisation program and the influence of the worker participation issue, the approach adopted was a federal one, where the harmonisation results in little influence by the Member States.[43] Kolvenbach expressly noted that the harmonisation process 'is as much political in character as it is technical'.[44] The truth of this statement is evident in the form and substance of the Directive, which only applies to worker participation in an

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35 Disclosure and the validity of obligations entered into by, and the nullity of companies with limited liability: first Directive (1968); The formation of public limited liability companies and the maintenance and alteration of their capital: second Directive (1976); Domestic mergers of public limited liability companies: third Directive (1978); Division of public limited liability companies: sixth Directive (1982); Single-member private limited liability companies: twelfth Directive (1989).

36 Annual accounts of companies with limited liability: fourth Directive (1978); Consolidated accounts of companies with limited liability: seventh Directive (1983); Qualifications of persons responsible for carrying out the statutory audits of accounting documents: eighth Directive (1984); Disclosure requirements in respect of branches: eleventh Directive (1989).

37 Structure of public limited companies: proposal for a fifth Directive; Cross-border mergers of public limited companies: proposal for a tenth Directive; Takeover bids: proposal for a thirteenth Directive.

38 Council Directive 2001/86/EC of October 2001 supplementing the Statute for the European company with regard to the involvement of employees, <http://europa.eu.int/eur-lex/en/lif/dat/2001/en_301L0086.html> at 7 January 2002. (hereinafter 'the Directive').

39 Council Directive, above n 38 Preface, para (2).

40 Ibid para (5).

41 Kolvenbach, 'EEC Company Law Harmonization And Worker Participation' 11(4) *University of Pennsylvania Journal of International Business Law* 709, 748.

42 Kolvenbach, above n 40, 709.

43 Ibid, 712.

44 Ibid.

SE,[45] and the Regulation for the SE, ultimately adopted in 2001. The Directive forms 'an indissociable complement to this Regulation and must be applied concomitantly'.[46]

The Directive 'is designed to ensure that employees have a right of involvement in issues and decisions affecting the life of their SE'.[47] The Regulation and the Directive have the combined effect of putting into place a flexible framework for a choice of structure for the SE, which is expressed in Article 38 of the Regulation as follows:

> Under the conditions laid down by this Regulation an SE shall comprise
> (a) a general meeting of shareholders and
> (b) either a supervisory organ and a management organ (two-tier system) or an administrative organ (one-tier system) depending on the form adopted in the statutes.[48]

Under the two-tier system, the management organ, the members of which are appointed and removed by the supervisory organ[49] is responsible for management of the SE.[50] The supervisory organ, appointed by the general meeting[51] is to supervise the management of the SE, but may not itself exercise management powers.[52] The decision as to the structure of the SE is made prior to the formation of a proposed SE, and the Directive expressly 'governs the involvement of employees in the affairs of European public limited-liability companies',[53] that is, SEs. In order to achieve this goal, the Directive requires the involvement of employees in every SE in accordance with a negotiating procedure laid out in the Directive.[54] Under these provisions, negotiation is to take place between employee and employer representatives 'as soon as possible after publishing the draft terms of merger or creating a holding company or after agreeing a plan to form a subsidiary or to transform into an SE'.[55] The negotiations are to be conducted between representatives of the companies participating in the formation of the SE and representatives of those companies' employees with a view to forming a written agreement for the involvement of employees in the SE.[56] If the rights negotiated for employees under this process result in a reduction of participation rights, the majority required for approval of the agreement increases from an absolute majority of the members of the special negotiating body, provided that such a body also represents an absolute majority of employees[57] increases to a two thirds majority, including the votes of members representing employees employed in at least two Member States.[58] Additional provisions deal with the situation of a special negotiating body being unable to reach an agreement.[59]

The adoption of a flexible system that is likely to result in 'a considerable variety of participation rules throughout the Member States'[60] is demonstrative of both the economic and cultural imperatives in an era of globalisation of business and corporate activity. Issues of industrial and legal culture in the EU combined to contribute, in significant part, to the delay of more than thirty years in the adoption of the Regulation for the SE. Ultimately, it was the economic pressures of globalisation that forced the issue: for the EU to be able to compete with the other global economic powers like the United States, it needed the stability and economic advantages of the single European market. The availability of a European company was key in this process. However, the Regulation could never have been adopted

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45 The original proposal for a Directive addressing the worker participation issue envisaged a harmonisation of the rules for worker participation across the Member States rather than harmonisation within a European company alone.
46 Regulation, above n 2, Preface para (19).
47 Ibid para (21).
48 Reference in the Regulation to 'statutes' is a reference to the SE's internal management rules.
49 Regulation, above n 2, Article 39(2).
50 Ibid Article 39(1).
51 Ibid Article 40(2).
52 Ibid Article 40(1).
53 Directive, above n 37, Article 1(1).
54 Ibid Article 1(2).
55 Ibid Article 3(1).
56 Ibid Article 3(3).
57 Ibid Article 3(4).
58 Ibid. A minimum proportion of employees of the participating companies must be planned to come under those participation rules. The actual proportions depend on the nature of formation of the SE – 25 percent for formation by merger; 50 percent for a holding or subsidiary SE.
59 Directive, above n 37, Article 3(6).
60 Schulz & Anor, above n 17, 337.

without Member State agreement on the issue of worker participation. As a result, fast-tracking of the Regulation required equal speed in resolution of an issue that was social, industrial, corporate and long-standing in character. The significant differences between the cultures of the Member States in relation to worker participation[61] meant that agreement was going to be difficult to achieve. While some Member States were willing to compromise, those at opposing ends of the spectrum, notably the United Kingdom and Germany[62] were not willing to do so. In this sense, the Regulation and Directive again reveal the importance of the maintenance of state sovereignty above the economic objectives of a federal system, taking into account that cultural issues in this respect meant that it was politically unacceptable for a Member State to accept the loss of sovereignty over worker participation.

V CONCLUDING REMARKS

The primary reason for the fast-tracking of the Regulation for the SE over 2000 and 2001 was economic. The intention was to enhance the competitiveness of European companies by enabling them to operate via more efficient corporate structures free of the impediments posed by existing national/member state company law. The current framework provided for the SE in the Regulation does not give effect to this intention. The structure and substance of the Regulation does not provide a satisfactory nor sustainable model for regulation of a European company. In particular, insufficient attention has been paid to administration and regulation of the SE via appropriate regulatory bodies. Australia has been down this path before, and the most viable structure for corporate regulation of companies operating across state boundaries has proven to require central regulation of a single law. It would be foolish and inappropriate to advocate the harmonisation of company law at all levels in the EU. The primary focus of this paper is on the proposed European company in light of the pressure for a harmonised law for reasons of global economic competitiveness. This corporate form was always intended to supplement existing national company law and operate on a different level, suitable primarily for enterprises operating on a pan-European basis. The difficulty now is that the model adopted, with its significant reference to the laws of the member states, means that the Regulation for the European company, like previous models of corporate law and regulation in Australia, is decentralised to the extent that the original objectives of the SE are unlikely to be met. The continuing difficulty that may yet rear its head again in Australia, and will continue to do so in the EU, is state sovereignty. The maintenance of sovereignty does come at a cost – and in the EU the cost is likely to be an unsuccessful model for the European company, which will essentially require a return to the drawing board rather than a resolution of the issues behind the already thirty year long delay in adoption of the Regulation for the European company.

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61 Ranging from no worker participation in the United Kingdom, to significant involvement in company management in Germany.

62 Kolvenbach, above n 40, 722-724.