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Abstract

Australia has recently had to address the structure of corporate law and regulation as a result of decisions in two High Court cases, namely *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511 and *R v Hughes* (2000) 171 ALR 155. The constitutional problems posed by these two cases have currently been resolved using a referral of powers by the states to the Commonwealth. However, this agreement was not reached without difficulty, and uncertainty persists due to a five year sunset clause. The intense debate surrounding these events shed light on the continuing diversity in political and legal culture in the Australian states, and on the perception of business, government and academia concerning globalisation and its' impact of the structure of law. On the other side of the world, the European Union is facing similar challenges, albeit on a different scale. The recent adoption of the Regulation on the European Company follows a history of thirty years of little progress. The impetus for the sudden adoption of this Regulation appears to have been due to the impact of economic globalisation, and the desire to increase competitiveness of the EU in a global economy. However, in order to achieve agreement of the Member States to the Regulation, the key issue of worker participation had to be addressed, an issue going to the heart of the issues of cultural diversity in the corporate law of Member States. This paper will consider the structure of law and its relationship to diversity of legal culture in federal or quasi-federal systems of government. The issues posed by the structure of corporate law are relevant to other areas of law, and the challenges faced by Australia and the European Union now will arise again in the future in the context of other 'unions', perhaps in the Australasian region.

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Globalisation, Federalism and Legal Pluralism: The Challenges of Diverse Legal Cultures in Federal Systems

By Judith Marychurch

“The world needs cultural diversity just as the planet needs biodiversity. What federalism offers is the means to maintain and foster that vital human diversity without endless political fragmentation.”

(*Ralph Lysyshyn, President, Forum of Federations, at the Conference on Co-operative Federalism, Brasilia, May 9, 2000*)

Introduction

As globalisation of the world's economies continues, nations face the challenge of balancing the requirements for global competitiveness against the internal pressure to maintain the cultural identity of the region. These competing pressures create interesting challenges for law and legal structure. The manifestation of these issues in Australia and the European Union (EU) can be seen in the respective developments in the framework of corporate law in these jurisdictions. In both cases, diversity in legal culture, issues of sovereignty and the pressures of globalisation have combined to demonstrate both the challenges and the opportunities provided by a federal or quasi-federal system of government.

The developments in Australia, a federation, were prompted by two High Court decisions, *Re Wakim; Ex Parte McNally*¹ and *R v Hughes*². These decisions necessitated a revision of the existing system. Ultimately, this took the form of a limited referral of powers by the States³ to the Commonwealth in respect of corporations, and the enactment of the *Corporations Act 2001* (Cth) and associated legislation. However, this compromise was not reached without difficulty, and the future is by no means certain.

The EU has seen significant recent progress in the adoption of a Regulation establishing a European Company, known as the *Societas Europaea* or 'SE'⁴. The details and potential impact of this proposal⁵ have been discussed elsewhere⁶. However, the Regulation itself, and the history thereof, are demonstrative of the issues of cultural diversity in the Member States of the EU and both the potential for, and difficulties of, accommodating this diversity in a quasi-federal structure.

Linking Globalisation, Federalism, and Legal Pluralism

The two competing pressures of globalisation, satisfying the requirements of global competitiveness, including facilitating growth in multinational corporations with standardised brand names and operating structures; and the need to maintain the unique cultures of individual nations, can also be seen in developments in legal culture. Globalisation impacts on the development of law in nations including Australia, and in the supra-national body that

¹ *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511.

² *R v Hughes* (2000) 171 ALR 155.

³ See, for example, the *Corporations (Commonwealth Powers) Act 2001* (NSW).

⁴ Council Regulation (EC) No2157/2001 of 8 October 2001 on the Statute for a European Company (SE). Available at http://europa.eu.int/eur-lex/en/lif/dat/2001/en_301R2157.html; accessed 11 December 2001.

⁵ The Regulation came into effect on 8 October 2004.

⁶ Judith Marychurch, 'Societas Europaea – Harmonisation or Proliferation of Corporate Law in the EU' (2002) *Australian International Law Journal* (in press); Françoise Blanquet, 'European Company Statute (SE) (2002) 15 *Australian Journal of Corporate Law* 56.

is the EU. This is evidenced in the literature and agendas of government. Translating policy into law is a complicated process, and the external pressures of globalisation must be balanced with the internal pressure to ensure that legal developments are in accordance with the legal culture of the nation state.

The intersections between globalisation and federalism were discussed at an international Conference on Federalism in 1999⁷. A common theme was the accommodation of diversity within federal systems⁸. It is clear from the presentations that there is the relationship between globalisation and the alienation of citizens, who perceive a loss of identity and of influence over the world⁹. It is here that federalism comes into its own, as a method of safeguarding cultural diversity and the benefits of legal pluralism.

Pluralism recognises the existence of groups within a society that differ ethnically and culturally. While 'legal culture' is a broad term and encompasses its own definitional and conceptual problems¹⁰, it does provide a mechanism for classifying a range of phenomena affecting the operation of law in society that may not otherwise be empirically examined. These include the thoughts, wishes, and ideas of members of society, both generally (the 'ordinary people') and specifically (particular categories of people who influence legal development)¹¹. 'Legal pluralism' conveys the existence of a variety of legal cultures within a society.

A federal system requires a structure of government that accommodates the legal pluralism of regions combining for specific purposes. The typical reasons behind federation include foreign policy and defence. These reasons were crucial to the decision of the Australian colonies to federate in the 1890s. This has not been the experience of the EU. Today, there is fragmentation in foreign relations and security policy in the EU. This may be transitory, 'leading either to the formation of a coherent foreign policy ... or to the maintaining of differentiated policies ... that could lead to the splintering of an evolving federal community'¹². The reasons for the development of the EU are primarily economic¹³. The recent momentum towards a single EU economy is due to economic reasons, forced to the fore by globalisation¹⁴.

Federal systems of government allow movement along the spectrum from centralist federations, where most powers are exercised at the central level, to decentralist federations, where the majority of powers reside with member states. The resolution of the issues

⁷ International Conference on Federalism, 5 – 8 October, 1999. Papers available at <http://www.ciff.on.ca/Reference/documents/docb.html> ; accessed 22 July 2002.

⁸ See B. P. Jeevan Reddy, Chariman, Law Commission of India, 'Challenges of Diversity and federalism in an Era of Globalisation' 6 October 1999, available at <http://www.ciff.on.ca/Reference/documents/docb26.html>; accessed 22 July 2002.

⁹ Jean-Luc. Dehaene, Minister of State and former Prime Minister of Belgium, 'Federalism in the Age of Globalisation', Keynote Speech for the Banquet, International Conference on Federalism, 6 October 1999, available at <http://www.ciff.on.ca/Reference/documents/docb09.html>; accessed 22 July 2002.

¹⁰ Roger Cotterrell, 'The Concept of Legal Culture' in David Nelken (ed.) Comparing Legal Cultures, Dartmouth, England, 1997, Chapter 1.

¹¹ Lawrence M. Friedman 'The Concept of Legal Culture: A Reply' in David Nelken (ed.) Comparing Legal Cultures, Dartmouth, England, 1997, p.38.

¹² Professor Dusan Sidjanski, The Federal Approach to the European Union or The Quest for an Unprecedented European Federalism, Notre Europe, Research and Policy Paper no.14, July 2001, p.47.

¹³ Economic issues were central to the Treaty Establishing the European Coal and Steel Community as Amended by Subsequent Treaties, Paris 18 April 1951 (now expired).

¹⁴ The Competitiveness Advisory Group (CAG), Sustainable Competitiveness: Report to the President of the Commission and the Heads of State and Government, September 1999, available at http://europa.eu.int/comm/cdp/cag/publications/rapport4/index_en.htm; accessed 3 October 2001.

confronting Australia and the EU in structuring corporate law reflect this struggle for the appropriate balance between centralism and decentralism. A federation may at different times be centralist, decentralist, balanced, or somewhere in between. This is determined by a complex interaction of cultural, political, internal and external factors. Globalisation impacts upon these factors, and consequently affects the balance of power between the federal and regional governments. Globalisation at once creates pressures for centralisation to achieve economic goals, and also decentralisation to preserve local exercise of powers in a manner consistent with maintenance of local legal culture.

Cotterrell has summarised Friedman's analysis of the causal significance of legal culture as follows¹⁵:

Legal culture controls the pace of production of demands brought before the legal system for specifically legal solutions to problems or protection of interests. And, by more obscure and complex means, legal culture seems also to determine the legal systems' responses, partly ... through the operation of internal legal culture shaping legal structures and partly through 'external' pressures, reflecting social distributions of power and influence, which equally affect the system's responses.

While Cotterrell and Friedman differ on fundamental issues in relation to the concept of legal culture, the concept does give expression to the forces affecting legal change in society. The subsequent sections will analyse the forces of change at work in the structure of corporate law in Australia, and then the EU.

Legal culture and the Dynamics of Change in Australian Corporate Law

The history of corporate law in Australia goes back to the early days of federation. The High Court decision in *Huddart Parker & Co Pty Ltd v Moorehead*¹⁶, for present purposes, held that s.51(xx) of the Commonwealth constitution did not grant the Commonwealth Parliament the power to legislate for the creation of companies, thus reserving the right to incorporate companies to the states. This interpretation has persisted¹⁷ and prevented the establishment of national corporate law in Australia until 2001, one hundred years after federation. While a 'federalised' system¹⁸ was devised in 1990, and implemented relatively successfully for nearly a decade, *Re Wakim; Ex Parte McNally*¹⁹ and *R v Hughes*²⁰ rendered key parts of the federalised scheme unconstitutional.

Re Wakim invalidated the grant of State Supreme Court jurisdiction to the Federal Court. The reliance on cross-vesting legislation to grant the Federal Court the power to determine matters arising under state law led to the downfall of the federalised scheme. *Re Wakim* applied only to the exercise of civil jurisdiction. The final blow was dealt to the federalised scheme by *R v Hughes*, which questioned the exercise of State criminal jurisdiction by a federal body, in particular the ability of the Commonwealth Director of Public Prosecutions (DPP) to

¹⁵ Roger Cotterrell, 'The Concept of Legal Culture' in David Nelken (ed.) *Comparing Legal Cultures*, Dartmouth, England, 1997, p.19

¹⁶ (1909) 8 CLR 330

¹⁷ *NSW v The Commonwealth* (1990) 169 CLR 482.

¹⁸ The federalised scheme operated as follows: the States parliaments passed legislation essentially stating that the Corporations Law in that State was as found in s.82 of the Corporations Act 1989 (Cth). This section encompassed all of the Corporations Law, as enacted for the Australian Capital Territory by the Commonwealth Parliament pursuant to its constitutional power to legislate for the ACT.

¹⁹ (1999) 198 CLR 511

²⁰ (2000) 171 ALR 155.

prosecute State Corporations law offences. While the court did not clearly answer this question and the prosecution of Mr Hughes was found to be constitutionally valid, the resulting uncertainty sounded the death knell for the federalised scheme.

These decisions re-ignited the debate surrounding the structure of corporate law in Australia. Ultimately, the response was an agreement in August 2000 by State Attorneys General to refer their powers over corporations to the Commonwealth Parliament pursuant to s.51(xxxvii) of the Constitution. This referral did not become effective until 15 July 2001, when the *Corporations Act 2001* (Cth) began operation. The terms of reference of the power ensure that states are consulted about any amendments made to the *Corporations Act*, and provide for the referral to terminate after five years, unless extended, or suspended earlier²¹.

The conditional referral of powers by the states to the Commonwealth sheds light on the legal cultures of the states, and the impact of globalisation on the structure of Australian corporate law. In 1997, the Corporate Law economic Reform Program (CLERP) was announced. The policy framework for CLERP identified globalisation as a key factor driving changes to corporate regulation. In particular²²

The worldwide liberalisation of trade and capital markets has resulted in Australian firms being increasingly exposed to international competition. It is vital that we have a regulatory framework, which permits business to respond to challenges posed by changes in the international marketplace.

Prior to this, the impact of globalisation had been felt in the debate following *NSW v The Commonwealth*,²³ which gave rise to perceptions that irreparable damage had been done to Australia's business interests and economy²⁴. The continuing instability following *Re Wakim* and *R v Hughes* further exacerbated these problems²⁵. The referral was not achieved without difficulty, and the implementation of the *Corporations Act 2001* (Cth) was delayed.

The states' position centres around a fear of loss of power. This may also demonstrate a lack of perspective on the competitiveness imperative of economic globalisation. The balance between the external pressure to be globally competitive and the internal, regional pressure to maintain legislative sovereignty is precarious, and a long term solution is required.

Legal Culture, Globalisation and the Development of EU Corporate Law

In deference to commentators that would not describe the EU as a federation, the EU is classified as a quasi-federation for the purposes of this paper. The EU would fall closer to the decentralised federal model than would Australia. The Member States of the EU each have established systems of corporate law. Harmonisation of these systems has proven difficult, particularly in the context of a European Company, or SE. The key issue has been diversity in legal cultures surrounding worker participation in company management, varying from entrenched rules requiring worker participation via a two-tiered management structure

²¹ The referral terminates on 15 July 2006: Corporations (Commonwealth Powers Act 2001 (NSW), s.5(1).

²² The Commonwealth Treasury, Policy Framework, Corporate law Economic Reform Program, available at <http://www.treasury.gov.au/docuemnts/267/HTML/docshell.asp?URL=index.asp>; accessed 5 March 2003.

²³ (1990) 169 CLR 482

²⁴ See 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.

²⁵ As demonstrated by the forum on 'The Future of Corporate Regulation: Hughes & Wakim and the Referral of Powers', 3 November 2000, University of Sydney, NSW, Australia.

(Germany) and no participation (United Kingdom). A federal system is more capable of accommodating such diversity than any other system.

Globalisation is the key reason for the competitiveness emphasis in EU economic policy, including the push toward a single economy of which the SE was a major part²⁶. The recent Brussels Report on corporate governance in the EU identifies a ‘distinct shift in the approach the EU could take to company law’²⁷. The previous approach involved coordinating the safeguards offered to members and third parties through company law directives, “with a view to preventing a race to the bottom. Whether this effect actually has occurred or would have occurred in the absence of harmonisation is unclear, and some would argue that in some areas we have actually seen a race to the top”²⁸. A federal system permits both of these scenarios. An awareness of this, and study of methods to maximise the race to the top, or otherwise a common standard (depending on centralised or decentralised approach), is key.

“Meeting companies’ needs” had not been previously on the EU agenda²⁹. A key theme in the Brussels Report is the focus of corporate law “to provide a legal framework for those who wish to undertake business activities efficiently, in a way they consider best suited to attain success.”³⁰ Successful European businesses are critical in enhancing the efficiency and competitiveness of the EU. The reality of the single market and the need for businesses to become globally competitive requires corporate structures capable of adapting to changing needs. If the EU is to expand, and provide a model for future supra-national bodies, the structure of law and regulation within the model becomes crucial.

The harmonisation of corporate law in the EU has been achieved via Directives of the European Council, which are implemented in Member State law. However, Directives are hard to change once implemented, and this leads to a “certain ‘petrification’”. Once Member States have agreed to a certain approach in an area of company law and have implemented a Directive accordingly, it becomes very difficult to change the Directive and the underlying approach”³¹. This presents a challenge to develop a framework for harmonisation that is flexible enough to allow the legal change³².

²⁶ See Competitiveness Advisory Group, Sustainable Competitiveness: Report to the president of the Commission and the Heads of State and Government, September 1999, available at http://europa.eu.int/comm/cdp/cag/publications/rapport4/index_en.htm, accessed 3 October 2001.

²⁷ Report of the High Level Group of Company Law Experts on A Modern Regulatory Framework for Company law in Europe, Brussels 4 November 2003, available at http://europa.eu.int/comm/internal_market/en/company/company/modern/index.htm ; accessed 6 March 2003, p.29

²⁸ Report of the High Level Group of Company Law Experts on A Modern Regulatory Framework for Company law in Europe, Brussels 4 November 2003, available at http://europa.eu.int/comm/internal_market/en/company/company/modern/index.htm ; accessed 6 March 2003, p.29

²⁹ Report of the High Level Group of Company Law Experts on A Modern Regulatory Framework for Company law in Europe, Brussels 4 November 2003, available at http://europa.eu.int/comm/internal_market/en/company/company/modern/index.htm ; accessed 6 March 2003, p.29

³⁰ Report of the High Level Group of Company Law Experts on A Modern Regulatory Framework for Company law in Europe, Brussels 4 November 2003, available at http://europa.eu.int/comm/internal_market/en/company/company/modern/index.htm ; accessed 6 March 2003, p.29

³¹ Report of the High Level Group of Company Law Experts on A Modern Regulatory Framework for Company law in Europe, Brussels 4 November 2003, available at http://europa.eu.int/comm/internal_market/en/company/company/modern/index.htm ; accessed 6 March 2003, p.31

³² The Brussels Report recognises that Member States are trying to achieve a measure of flexibility using alternatives, such as secondary regulation, standard setting by market

The Brussels Report identifies the long-term role of European company law as follows³³:

The EU agenda for company law reform will be full [in *sic*] the coming years, and it will require efforts of many involved to achieve results. But a lot of work needs to be done so that company law in Europe can make a proper contribution to the conditions for productive enterprise and the creation and maintenance of competitive and efficient economic and financial markets in Europe. The Group is confident that the results of these efforts will make them worthwhile.

The EU is being forced to examine European forms of enterprise, beyond the SE, to keep pace in a globalising world. All the forms being considered will be affected by legal culture. Culture will determine what forms of business organisation are adopted, and in turn what form of enterprise is chosen for particular ventures.

Conclusion

Australia and the EU are very different federal models, each facing significant challenges in achieving economic goals demanded by globalisation, while maintaining cultural diversity and the benefits of legal pluralism. This struggle makes federalism more relevant than ever. Economic reasons prompted the formation of the EU, and the economic challenges posed by globalisation require development of the harmonisation program. However, legal pluralism, in the form of disparate legal cultures, is preventing the achievement of the benefits of a truly federalised system. This position is similar to Australia. The legal culture of the Australian states, combined with difficulties of constitutional interpretation, has resulted in regular re-emergence of debate over achieving a sustainable federal model of corporate law. Globalisation makes a sustainable model imperative for Australian economic development, and the current system is not sustainable without continued agreement of the states. This cannot be guaranteed, as demonstrated by the difficulties and delays in achieving a referral of power in 2000 and 2001.

The intersections between globalisation, federalism and legal pluralism are vital in understanding recent developments in corporate law in the federal systems of Australia and the EU. The impact of these intersections will be felt in continuing progress in these jurisdictions. The competing pressures of globalisation and legal pluralism can be accommodated within a federal structure. The difficulty is in achieving the appropriate balance between centralism and decentralism. The inherent flexibility of a federal system allows shifts in this balance. Continuing examination of how these two jurisdictions address these challenges is relevant not only to these jurisdictions, but also to other existing and potential federations

participants and model laws: Report of the High Level Group of Company Law Experts on A Modern Regulatory Framework for Company law in Europe, Brussels 4 November 2003, available at

http://europa.eu.int/comm/internal_market/en/company/company/modern/index.htm ;

accessed 6 March 2003, p.31.

³³ Report of the High Level Group of Company Law Experts on A Modern Regulatory Framework for Company law in Europe, Brussels 4 November 2003, available at

http://europa.eu.int/comm/internal_market/en/company/company/modern/index.htm ; accessed 6 March 2003, p.127