Bond University

Bond Law Review

Volume 31 Issue 1

2019

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Abstract

National uniform legislation links the federal distribution of powers achieved more than 117 years ago to the challenges and opportunities faced by Australia in an interconnected world. Over this span of time, varying and at times contradicting classifications of structures of this complex legislation have been offered. This article, firstly, examines a variety of existing classifications and, secondly, provides an analysis of national uniform legislation from the list prepared by the Parliamentary Counsel's Committee comprising 84 sets of uniform Acts. The purpose of this examination is to provide a synthesis of an accurate classification for today. The findings indicate the predominance of three primary structures: referred, applied and mirror. The article proposes to use classification of national uniform legislation constrained to these three primary structures; this approach contributes by diminishing ambiguity and complexity surrounding the development and drafting national uniform legislation. The article offers a classification figure that accommodates variations between previous classifications and streamlines the current understanding. This figure can serve as a practical evaluation tool for policymakers, legislative drafters and legal practitioners when working through inherent ambiguity and complexity surrounding national uniform legislation.

I Introduction

What makes a study of structures of national uniform legislation important and relevant today is the tension between the need for a national response to a growing number of challenges and the need to respect the constitutional separation of legislative powers between the Commonwealth, State and Territory jurisdictions. National uniform legislation relates to many aspects of society, such as the search for cancer cures, counter-terrorism cooperation and surrogacy regulation. These are just some of the challenges the founders of the Australian federation knew nothing about.

* Asia Pacific College of Business and Law, Charles Darwin University. This article is based on the key findings of the PhD thesis entitled 'Achieving Sustainable Uniformity of National Uniform Legislation'. I would like to express my sincere gratitude to supervisors without whom this work would not be possible: Professor Les McCrimmon, Professor David Price, Professor Ned Aughterson and Dr John Garrick. In addition, I would like to acknowledge suggestions from the examiners, reviewers and the editor that added clarity to this article.

Yet policymakers, legislative drafters and law reformers must still work within the confines of the *Australian Constitution* and its distribution of law-making powers between the Commonwealth and the States. As a result, contemporary challenges are addressed by regulations adopted through national uniform legislation. Thanks to legislation that is 'neither state nor federal but simply Australian',[1] the seemingly impossible has been achieved through collaborative efforts among the Commonwealth, State and Territory governments. For example, corporate legislation has been trend-setting not only for Australia but also for Singapore and Malaysia.[2] National uniform legislation has resolved problems of international prison transfers within a federation in which federal prisons do not exist.[3] The Australia-wide business names register has ensured a single, simple register that is easily accessible to all Australians, who do not have to manage numerous registers with inferior transparency and infrastructure. National uniform legislation has been called upon to redress issues created by federalism, including the distribution of legislative powers and achieving 'objects that could be achieved by neither [jurisdiction] acting alone'.[4] Without national uniform legislation, the advancement of the Australian federation would have been impeded.

Although national uniform legislation has existed in Australia almost from the origins of the federation, a new impetus has emerged due to the rapid technological change, increased population mobility, globalisation of law, economic integration, knowledge transfer and even climate change. Within the globalised market, reforms and national responses to local and global issues have been sought.[5] In this context, national uniform legislation in Australia has become an imperative, representing a growing trend. In 1957, Chief Justice Dixon observed: 'In all or nearly all matters of private law there is no geographical reason why the law should be different in any part of Australia'.[6] Dixon CJ would likely be even more convinced today, knowing that Australia now has a 'highly geographically mobile population'[7] estimated as the highest 'residentially mobile' nation

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1 Sir Owen Dixon, 'Sources of Legal Authority' in S Woinarski (ed), *Jesting Pilate: and Other Papers and Addresses by Sir Owen Dixon* (Law Book Company, 1965) 201.

2 Holger Spamann, 'Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law' (2009) (6) *Brigham Young University Law Review* 1813, 1834.

3 *International Transfer of Prisoners Act 1997* (Cth); *Crimes (Sentence Administration) Act 2005* (ACT) (part 11.2); *International Transfer of Prisoners (New South Wales) Act 1997* (NSW); *International Transfer of Prisoners (Northern Territory) Act 2000* (NT); *Prisoners International Transfer (Queensland) Act 1997* (Qld); *International Transfer of Prisoners (South Australia) Act 1998* (SA); *International Transfer of Prisoners (Tasmania) Act 1997* (Tas); *International Transfer of Prisoners (Victoria) Act 1998* (Vic); *Prisoners (International Transfer) Act 2000* (WA).

4 *The Queen v Duncan, Ex parte Australian Iron & Steel Pty Limited* (1983) 158 CLR 535, 557-558.

5 Giovanni Valotti and Alex Turrini, 'Reforming the Public Sector: How to Make the Difference' (2013) *Organização E Gestão Do Sector Público* 41, 42.

6 Sir Owen Dixon commenting on the paper of K O Shatwell, 'Some Reflections on the Problems of Law Reform' (1957) 31 *Australian Law Journal* 325, 340.

7 Graeme Hugo, Janet Wall and Margaret Young, 'Migration in Australia and New Zealand' in Dudley L Poston Jr (ed), *International Handbook of Migration and Population Distribution* (Springer, 2016) 333.

in the world.[8] Technological progress has expanded information sharing across the States and Territories, contributing to a rise in the 'national conscience'.[9] Australia has also faced a myriad of emerging policy challenges requiring a national approach. These have ranged from day-to-day personal security issues of domestic violence[10] to issues of national security relating to counter-terrorism legislation.[11]

The arguments in favour of national uniform legislation are overwhelming, but some impediments make it difficult to achieve. The drafting of national uniform legislation has been referred to as 'the art of the impossible'.[12] Policymakers, law reformers and legislative drafters have to navigate a labyrinth of issues and uncertain conditions involving a wide range of stakeholders while maintaining a tight focus to build momentum for uniformity. In so doing, they have to respond to the demands of a multi-faceted debate among actors from divergent ideological backgrounds with diverse and sometimes irreconcilable differences over values and perspectives. Issues are often strongly contested, exemplified by the debates over euthanasia or marriage equality. In these complex conditions, the law reformers and legislative drafters have to give guidance and advice to policymakers on strategic direction for national reforms.

Explaining why a knowledge gap exists may relate to the sheer complexity of what it means to serve as a deterrent. In addition, divergent views have been expressed on the role that national uniform legislation should play in a federation. In the mainstream literature, commentators have largely been in three camps: (1) those who have contend that a uniform approach should be contained to specific areas; (2) those who have asserted that uniform or referred legislation should be standard, with deviations allowed only when a clear 'states right' issue has been identified; and (3) others who have been passionate advocates of the independence of States. These camps have arrived at a stalemate and they might have missed opportunities to constructively explore solutions.

The main objective of this article is to critically examine the classification of structures of national uniform legislation with a view of diminishing ambiguity in this complex area of law. National uniform legislation has been seen as an umbrella term encompassing a wide range

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8 Graeme Hugo, Helen Feist and George Tan, *Policy Brief Internal Migration and Regional Australia 2006-11* (Australian Population and Migration Research Centre, June 2013).

9 Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979) ix.

10 Commonwealth, *Domestic Violence in Australia,* Interim Report (2015); Commonwealth, Department of Human Services *Family and Domestic Violence Strategy 2016–2019* < https://www.humanservices.gov.au/sites/default/files/12899-1511-family-domestic-violence-strategy.pdf>.

11 Commonwealth, *Australia's National Counter-Terrorism Plan* (October 2017) <https://www.nationalsecurity.gov.au/Media-and-publications/Publications/Documents/ANZCTC-National-Counter-Terrorism-Plan.PDF>.

12 Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Harmonisation of Legal Systems within Australia and between Australia and New Zealand* (2006) Foreword.

of structures, ranging from those with uniformity of an 'underlying principle' to structures allowing 'absolute uniformity'. The various structures have further allowed different levels of harmonisation and consistency.[13] This ambiguity, however, has not been helpful in terms of understanding how national uniform legislation is developed and drafted by those who have to interpret and apply such legislation. 'Age of statutes'[14] is upon Australia and as Carter observed, the statutory law is gaining increasing interest from the legal profession.[15] Firstly, this article provides a historical analysis of why some of these ambiguities have existed. Secondly, a synthesis of the classifications by structure is offered by reference to the analysis of the most comprehensive database of national uniform legislation. Mirror legislation is identified as both the most abundant form of legislation and the foundational structure of national uniform legislation, given that in some cases legislation originates as a mirror structure and then evolves into a referred or applied structure. Thirdly, three primary factors are critically examined in detail in terms of their uniformity and future amendments. Overall, the offered approach to classification contributes by resolving some complexities and ambiguities surrounding the growing area of national uniform legislation.

II Underlying Theory: Cooperative Federalism

Despite the benefits national uniform legislation brings, it should not be treated as a universal remedy. In some cases, preserving the diversity of legislation between jurisdictions is preferable.[16] Uniformity is not a panacea, and uniformity alone cannot cure deficiencies in the law, including uniform law. As the Productivity Commission pointed out, 'national uniformity can deliver economies of scale for governments and firms, reduce transaction costs and enhance competition within the regulated industry. However, achieving uniformity requires significant jurisdictional cooperation.'[17]

In negotiations over national uniform legislation, the Commonwealth, States and Territories have brought various perspectives to the bargaining table. In the modern era, any decision to proceed with a commitment to national uniform legislation, as a 'national concern', could be interpreted as a way of exercising States' rights. This complex theoretical backdrop partially explains why uniformity has often been built on shaky

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13 Cheryl Saunders, 'Collaborative Federalism' (2002) 61(2) *Australian Journal of Public Administration* 69, 72.

14 Anthony J Connolly and Daniel Stewart (eds), *Public Law in the Age of Statutes* (Federation Press, 2015).

15 Ross I Carter, *Burrows and Carter Statute Law in New Zealand* (LexisNexis, 2015) 41.

16 Thomas K Cheng, 'Convergence and Its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law' (2011) 12 *Chicago Journal of International Law* 433, 435.

17 Australian Government, Productivity Commission, *Chemicals and Plastics Regulation Supplement to Research Report, Lessons for National Approaches to Regulation* (January 2009) 5 <http://www.pc.gov.au/inquiries/completed/chemicals-plastics/supplement/chemicals-plastics-supplement.pdf>.

foundations and divided opinions. There has never been an absolute guarantee that implemented legislation or even amendments would be in line with the bargained-for consensus. The definition of federalism most relevant to this article is 'an aspiration and purpose simultaneously to generate and maintain both unity and diversity'.[18] Federalism theory draws on the classic definition by Wheare, which asserts that it is 'the method of dividing powers so that the general and regional governments are each within a sphere, co-ordinate and independent'.[19]

When discussing federalist theory in Australia, the traditional starting point has been the debates of the 1890s, in which its advocates argued that: 'The Commonwealth … owes its birth to the desire for national unity which pervades the whole of Australia, combined with the determination on the part of the several colonies to retain as States'.[20] Today, federalism has a different connotation, and we cannot rely on the noble intentions of the founders. Both beliefs and circumstances are different from the past. Diverse realities surround the current participants debating Fysh's historical arguments. Fysh asserted that 'every member of the electorate must know that, in connection with the various developments of his [or her] own province, there can be no interference by an executive which will sit 1,000 miles away'.[21] His concerns about 'proximity' have been alleviated by the Internet, mobile technology, social media and distance being shortened by satellite technology (with the future developments forthcoming in drones and high-speed driverless transportation). Change has been relentless with globalisation. Advances in science, artificial intelligence and terrorism are just some of the challenges the founders of the Australian federation could not have foreseen. Nevertheless, the policy-makers and legislative drafters today must work within the constitutional powers established over a century ago. This underscores the need for cooperation between jurisdictions to enable the federation to deal with the new realities.[22] It is crucial to recognise that the early decisions on the distribution of Federal and State powers were grounded in the circumstances and beliefs of those times. In the absence of constitutional change, it is important that the parties work together within the given framework.

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18 Daniel J Elazar, *Exploring Federalism* (University of Alabama Press, 1987) 64.

19 K C Wheare, *Federal Government* (Oxford University Press, 4th ed, 1963) 10.

20 A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8th ed, 1926) 529-530.

21 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 4 March 1891, 1:42 (Philip Oakley Fysh). Sir Philip Oakley Fysh was Premier of Tasmania in 1877-1878, returning in 1887-1892. In 1898 he was appointed Agent-General for Tasmania at London. As an activist of the federal movement, he represented Tasmania in the 1891 and 1897 conventions. In 1901, Fysh was elected to the Australian House of Representatives as a member for the Division of Tasmania.

22 See, eg, Augusto Zimmermann and Lorraine Finlay, 'Reforming Federalism: A Proposal for Strengthening the Australian Federation' (2011) 37(2) *Monash University Law Review* 190; Bligh Grant, Roberta Ryan and Andrew Kelly, 'The Australian Government's "White Paper on Reform of the Federation" and the Future of Australian Local Government' (2016) 39(10) *International Journal of Public Administration* 707.

The main proposition at the time was that if the States were to unite, their sovereign rights were not going to be infringed. This belief has changed over the last 100 years, with Wheare observing in the 1960s that there was a greater degree of 'intergovernmental entanglement than such [earlier] strictness would tolerate'.[23] Wheare's view was that integration and the union of jurisdictions would deliver security and economic advantages to the States.[24] He predicted that developments in mobility could lead to an increase in the influence of 'the centre' in social spending.[25] This has proved to be so, but it is a view that might have infringed on the prevailing ideas that have dominated the debates of the Australasian Federal Convention. Indeed, some modern scholars have emphasised the need for centralisation and even the abolition of the States.[26]

Drummond, for instance, urged that such an abolition might result in cost savings of between '$40 billion to $80 billion per annum across both public and private sectors' (in June 2002 dollar terms).[27] According to Brown, '25% of the wider community agree' to the proposition of abolishing the States and Territories.[28] Some argue for a different system of regionalism, based on cities, for instance.[29] Others argue in favour of recognising the Federal Parliament as the only law-making institution, eliminating 'the 10 sets of often conflicting laws we now have'.[30]

Recently, Fenna opined that 'Australia … is a federation in the privileged position of not needing federalism'.[31] When contemplating the separation of authority (including law-making authority), several theories have stemmed from balancing the relationships between jurisdictions. They include the following:

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23 Alan Fenna, 'Federalism' in R Rhodes (ed), *The Australian Study of Politics* (Springer, 2009) 147.

24 Wheare (n 19) 35-50.

25 Ibid 113.

26 Jim Soorley, 'Do We Need a Federal System? The Case for Abolishing State Governments' in Wayne Hudson, and Alexander Jonathan Brown (ed), *Restructuring Australia: Regionalism, Republicanism and Reform of the Nation-State* (Federation Press, 2004) 38.

27 Mark Lea Drummond, *Costing Constitutional Change: Estimates of the Financial Benefits of New States, Regional Governments, Unification and Related Reforms* (PhD Thesis, University of Canberra, 2007) ii; M L Drummond, 'Costing Constitutional Change: Estimating the Costs of Five Variations on Australia's Federal System' (2002) 61(4) *Australian Journal of Public Administration* 4.

28 A J Brown, 'Ideas for Australia: To Really Reform the Federation, You Must Build Strong Bipartisan Support' *The Conversation* (26 April 2016) <https://theconversation.com/ideas-for-australia-to-really-reform-the-federation-you-must-build-strong-bipartisan-support-56081>.

29 See Richard Tomlinson, 'An Argument for Metropolitan Government in Australia' (2017) 63 *Cities* 149.

30 Charles S Mollison and Ross E Garrad, *Drafting a New Constitution for Australia* (Cobbs Crossing Publications/Foundation for National Renewal, 2009) 97.

31 Alan Fenna, 'Federalism' in R Rhodes (ed), *The Australian Study of Politics* (Springer, 2009) 155.

- 'competitive federalism' (where the States and Territories compete for better outcomes to attract more citizens);[32]
- 'dual federalism' (where there is 'the need to safeguard and foster the distinctiveness to preserve the separate systems of democratic accountability embodied in dual government');[33]
- 'collaborative' or 'cooperative federalism' (where jurisdictions cooperate with each other to reach common goals);[34] and
- 'organic' or 'integrated' federalism[35] (where centralisation is strong and regions are losing their bargaining capacity; 'the centre has such extensive powers and gives such a strong lead to regions in the most important areas of their individual as well as their co-operative activities, organic stage begins to develop as the regions lose any substantial bargaining capacity in relation to the centre').[36]

These theories exist along with more critical theories of Australian federalism. For instance:

- 'opportunistic federalism' (where mostly the central government uses opportunities to usurp more power) ;[37]
- 'pragmatic federalism' (where federalism is shaped by the problem at hand rather than an underlying theory);[38]
- 'coercive federalism' (where the Commonwealth is 'unduly authoritarian' towards the States and Territories);[39]

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32 'Policy diversity among the states means that people are presented with meaningful choices if they decide to relocate and indicates that federalism is generating governments that respond to the particular needs of local communities': Scott Stephenson, 'Federalism and Rights Deliberation' (2014) 38(2) *Melbourne University Law Review* 709, 714. See also Wolfgang Kasper, 'High on the Reform Agenda: Competitive Federalism' (1994) 10(3) *Policy: A Journal of Public Policy and Ideas*; David Leyonhjelm, 'The Case for Competitive Federalism' (Paper presented at the Twenty-Sixth Conference of the Samuel Griffith Society, Melbourne, August 2014).

33 Martin Painter, 'Public Sector Reform, Intergovernmental Relations and the Future of Australian Federalism' (1998) 57(3) *Australian Journal of Public Administration* 53, 53.

34 Martin Painter, 'The Council of Australian Governments and Intergovernmental Relations: A Case of Cooperative Federalism' (1996) 26(2) *Publius: The Journal of Federalism* 101; Cheryl Saunders, 'Cooperative Arrangements in Comparative Perspective' in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012); John Wanna et al, *Common Cause: Strengthening Australia's Cooperative Federalism* (Final Report to the Council for the Australian Federation, May 2009).

35 Geoffrey Sawer, *Modern Federalism* (Pitman, 1976) 64.

36 Ibid 104.

37 Tim Conlan, 'From Cooperative to Opportunistic Federalism: Reflections on the Half-Century Anniversary of the Commission on Intergovernmental Relations' (2006) 66(5) *Public Administration Review* 663; Anne Twomey, 'Aspirational Nationalism or Opportunistic Federalism?' (2007) 51(10) *Quadrant* 38.

38 Robyn Hollander and Haig Patapan, 'Pragmatic Federalism: Australian Federalism from Hawke to Howard' (2007) 66(3) *Australian Journal of Public Administration* 280.

39 See Tom Wise, 'Coercive Federalism, COAG and Uniform Legislation: a Lethal Mix for the States?' (Paper submitted for Parliamentary Law, Practice and Procedures Course, School of Law, University of Tasmania, 2011); Ross Cranston, 'From Co-operative to Coercive Federalism and Back' (1979) 10 *Federal Law Review* 121; Gareth Griffith, *Managerial Federalism: COAG and the States* (NSW Parliamentary Library Research Service, 2009).

- 'administrative federalism' (with the 'tendency toward increased Commonwealth power … combined with bursts of [intergovernmental] activity …, assisted by financial sweeteners'[40])'; or
- 'managerial federalism' (where the executive branch of power dictates to the legislative branch).[41]

This article draws on cooperative federalism theory.[42] However, it also acknowledges the need to find a new balance within the federal/state system that enables essential national uniform legislation to be developed and drafted. This means being open to the insights offered by more critical perspectives. In recent decades, the trend towards policy uniformity has intensified as Federal, State and Territory governments have sought to achieve greater standardisation and consistent administration in line with 'collaborative or cooperative federalism'.[43] Nevertheless, cooperation across jurisdictions has not been antithetical to the provisions of the *Australian Constitution*. As Deane J stated, such cooperation has been a 'positive objective of the *Constitution*'[44] allowing for 'structural integration'[45] between the levels of government.

'Cooperation' is not a sterile and rational exercise in a laboratory setting. Rather, it is best understood as a policy-development 'dance' consisting of 'seemingly random movements rather than choreographed order'.[46] Cooperation in discussing water rights, for example, does not mean that South Australia must make substantial compromises to achieve a reasonable result. Yet cooperation in policy development is not always equal. Rather, it is an iterative development invariably characterised by complexity, contested choices, unexpected events and competing roles played by the actors of the day.[47] The centralisation tendencies of

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40 John Phillimore and Alan Fenna, 'Intergovernmental Councils and Centralization in Australian Federalism' (2017) 27(5) *Regional and Federal Studies* 597, 600.

41 Griffith (n 39).

42 Martin Painter, *Collaborative Federalism: Economic Reform in Australia in the 1990s* (Cambridge University Press, 2009); Saunders (n 34); Wanna (n 34); Anne Twomey, 'Federalism and the Use of Cooperative Mechanisms to Improve Infrastructure Provision in Australia' (2007) 2(3) *Public Policy* 211; Brian R Opeskin, 'Mechanisms for Intergovernmental Relations in Federations' (2001) 53(167) *International Social Science Journal* 129; Hagen Henrÿ, 'Basics and New Features of Cooperative Law-The Case of Public International Cooperative Law and the Harmonisation of Cooperative Laws' (2012) 17 *Uniform Law Review* 197.

43 Stephenson (n 32) 718, citing Painter (n 42); Paul Kildea and Andrew Lynch, 'Entrenching "Cooperative Federalism": Is It Time to Formalise COAG's Place in the Australian Federation?' (2011) 39 *Federal Law Review* 103, 108. *Contra* Tony Abbott, 'White Paper on Reform of the Federation' (Media Release, 28 June 2014) <http://www.pm.gov.au/media/2014-06-28/white-paper-reform-federation>.

44 *The Queen v Duncan, Ex parte Australian Iron & Steel Pty Limited* (1983) 158 CLR 535, 589.

45 Ibid 557-558.

46 Catherine Althaus, Peter Bridgman and Glyn Davis, *The Australian Policy Handbook* (Allen and Unwin, 2012) 41.

47 See Meredith Edwards, 'The Policy Making Process ' in John Warhurst (ed), *Government, Politics, Power and Policy in Australia* (Pearson Longman, 2002) 424-425.

Australian federalism are evident[48] and recognised as such by this article. As Phillimore stated: 'State governments are part of a federation in which the Commonwealth government is fiscally dominant and has greatly expanded its policy ambition and reach over the past century.' [49] Cooperation must consider the rights and relative power and resources of the participants (i.e. of the Commonwealth, States and Territories). Cooperation must also consider the widening scope of issues of national concern and accept that the bright line delineation between the powers of the States and the Commonwealth have become problematic.

An adequate response to the current challenges faced by the Australian nation (eg, environmental challenges, artificial intelligence, cybersecurity) 'is to recognise that de facto shared jurisdiction is both current reality and to some extent inevitable and that there is, therefore, a need for closer and more effective co-operation between governments'. [50] In other words, this approach recognises the reality in which 'neither tier of government has the capacity to take full responsibility in any area of social policy, without a (politically unlikely) radical and fundamental redesign of the federation'. [51] What must be acknowledged is that policy areas will continue to be shared. Bright line delineation, in which each level of government 'assumes that power means the ability to preside over one's own empire, free from interference' is not how the world or Australia looks anymore. [52] To the contrary, both levels of government must regulate a space that 'is constantly negotiated and contested'. [53] Cooperation in this contested space is not clearly delineated or neatly coordinated. The shared space requires 'plasticity, innovation, and adaptation as key aspects'. [54] Cooperative federalism and joint regulation dominate the regulative landscape. This is not a situation in which there are winners and losers; the relationships are much more complex. The approach is opaque rather than black and white. A different perspective is required, taking into consideration the multidimensional forms of pragmatic 'reciprocal learning and adjustment' emerging incrementally across Australia.[55]

Gerken, when considering similar problems in the United States of America, arrived at the same conclusion, emphasising the shared responsibility of jurisdictions in federations:

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48 John Phillimore and Alan Fenna, 'Intergovernmental Councils and Centralization in Australian Federalism' (2017) 27(5) *Regional and Federal Studies* 597.

49 John Phillimore and Tracey Arklay, 'Policy and Policy Analysis in Australian States' in Brian Head and Kate Crowley (ed), *Policy Analysis in Australia* (Policy Press, 2015) 87.

50 Phillimore and Fenna (n 48), 600.

51 Scott Brenton, 'Policy Capacity Within a Federation: The Case of Australia' in *Policy Capacity and Governance: Assessing Governmental Competences and Capabilities in Theory and Practice* (Springer, 2018) 337, 353.

52 Heather K Gerken, 'Federalism 3.0' (2017) 105 *California Law Review* 1695, 1698.

53 Ibid 1700.

54 Adrian Kay, 'Separating Sovereignty and Sharing Problems: Australian Federalism and the European Union' (2015) 74(4) *Australian Journal of Public Administration* 406, 408.

55 Amanda Smullen, 'Conceptualising Australia's Tradition of Pragmatic Federalism' (2014) 49(4) *Australian Journal of Political Science* 677, 680.

> Our regulatory structures and politics are deeply intertwined. Neither the federal government nor the States preside over their own empire; instead, they regulate shoulder-to-shoulder in a tight regulatory space, sometimes leaning on one another and sometimes deliberately jostling each other. So, too, States are no longer enclaves that facilitate retreats from national norms. Instead, they are the sites where those norms are forged. [56]

Given the changing reality, and reframing of the debate in terms of subsidiarity, national uniform legislation cannot be treated as a mechanism that is harmful to federalism. In essence, national uniform legislation is a product of federation. Without national uniform legislation, the Commonwealth would have to absorb the powers in cases where national policy is required, and that would be an encroachment. However, national uniform legislation is the mechanism that prevents encroachment. Although the idea of national uniform legislation used to be 'dismissed as unnecessary, impractical, and undesirable',[57] this position would not be supported today. As Manison explained in the context of policing arrangements between the Commonwealth, States and Territories, the influence of the Commonwealth in areas traditionally policed by the States and Territories has expanded considerably since the 1970s. This expansion has not resulted from encroachment but from the expansion of the areas of control for all jurisdictions.[58] The growth of national uniform legislation that can be attributed to both the growth of legislation in general and external factors. Neither show a devious intent of the Commonwealth or the Executive to usurp the powers of the State or Territory parliaments. The instruments and processes for achieving sustainable uniformity can, however, be improved through better understanding of them.

III Classifications of National Uniform Legislation by Structure

An early example of mirror legislation was the Standard Time legislation,[59] dating back to the 1890s. However, attempts to classify national uniform legislation have been slow to develop. The first classification did not take place until the 1990s. There are two possible explanations for this. The first is that the body of national uniform legislation grew substantially during the 1980s, and early classification attempts arose out of the need to organise and classify to reform the law at a national level. Prior to the 1980s, the body of national uniform legislation had probably not achieved the critical mass needed to support classification, and no theoretical map had been required. The second explanation belongs to Saunders, who observed

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56 Gerken (n 52) 1722-1723.

57 Richard H Leach, 'The Uniform Law Movement in Australia' (1963) 12(2) *American Journal of Comparative Law* 206, 208.

58 See Gary F Manison, *Policing in the Australian Federation 1970–2010: A Changed Paradigm* (PhD Thesis, Curtin University, 2015) 6.

59 *Standard Time and Summer Time Act 1972* (ACT); *Standard Time Act 1987* (NSW); *Standard Time Act 2005* (NT), *Standard Time Act 1894* (Qld), *Standard Time Act 2009* (SA), *Standard Time Act 1895* (Tas); *Supreme Court Act 1986* (Vic) s 43; *Standard Time Act 2005* (WA).

that although cooperation between the Australian jurisdictions 'predates Federation, cooperation increased in range and variety only in the later part of the 20th century'. [60] Thus a new approach has been required to categorise future harmonisation attempts. To cope with the increased demand for national uniform legislation, State parliaments and other bodies have turned to classification.

In August 1995, the Uniform Legislation and Intergovernmental Agreements Committee of Western Australia Legislative Assembly tabled a report: 'Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles'. The report identified six main structures:

- referred legislation;
- mirror legislation;
- 'co-operative legislation' (where the Commonwealth enacts legislation reaching the limits of its powers, and the States and Territories legislate on the remaining issues);
- template legislation (where one jurisdiction enacts an act, and other jurisdictions adopt the legislation);
- 'alternative consistent' legislation (where jurisdictions participate in a scheme by enacting legislation consistent with the host jurisdiction); and
- 'mutual recognition' legislation (where jurisdictions agree to recognise each other's legislation). [61]

In October 1996, another classification was prepared by the Senate's Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia and presented in a position paper entitled 'Scrutiny of National Schemes of Legislation'. Eight structures were identified by the position paper:

- 'Complementary Commonwealth-State' or 'co-operative' legislation;
- 'Complementary' or 'mirror' legislation;
- 'Template', 'co-operative', 'applied' or 'adopted complementary' legislation;
- 'Referral of powers' legislation;
- 'Alternative consistent' legislation;
- 'Mutual recognition' legislation;
- 'Unilateralism' – the absence of any structure;
- 'Non-binding national standards model'. [62]

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60 Saunders (n 13) 71.

61 Standing Committee on Uniform Legislation and Intergovernmental Agreements, Parliament of Western Australia, *Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles*, Report No 10 (1995).

62 Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny of National Schemes of Legislation* (October 1996) 45-50.

In 2004, the Uniform Legislation and General Purposes Committee of the Western Australian Parliament identified nine structures, including all of the structures enumerated above and one more: 'adoptive recognition'[63] legislation. Under adoptive recognition, a jurisdiction adopts the decision-making process of another jurisdiction by complying with its requirements, regardless of whether the other jurisdiction mutually recognises the position.[64]

In 2006, the Parliament of the Commonwealth of Australia prepared a report entitled 'Harmonisation of Legal Systems within Australia and New Zealand'. The report moved away from eight or nine structures to a leaner classification system.[65] In addition to mirror and referred legislation, the third group of legislation, 'cooperative legislative schemes', included applied legislation and complementary legislation.[66] 'Applied legislation' pertained to Acts enacted in one jurisdiction and applied by others. 'Complementary legislation' referred to the Commonwealth establishing a national regulator, with jurisdictions legislating the operational activities of the regulator (for instance, the report provides the example of the *Gene Technology Act 2000* (Cth)).[67]

Similarly, in 2008, Wanna et al offered four main structures in their final report commissioned by the Council for the Australian Federation:[68]

- Referral of powers: referral of a matter by States or Territories to the Commonwealth under s 51(xxxvii) of the *Australian Constitution*;[69]
- Complementary applied laws: legislation enacted in one jurisdiction and applied or adopted in other jurisdictions;[70]
- Mirror legislation: legislation enacted by using a common model bill;[71] and

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63 Parliament of Western Australia, Legislative Council Standing Committee on Uniform Legislation and General Purposes, *Uniform Legislation and Supporting Documentation* Report No 19 (2004) 42.

64 Ibid.

65 House Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Harmonisation of Legal Systems within Australian and between Australia and New Zealand* (4 December 2006) 19.

66 Ibid.

67 Ibid.

68 Wanna (n 34).

69 See, eg, *Terrorism (Commonwealth Powers) Act 2002* (NSW); *Terrorism (Northern Territory) Request Act 2003* (NT); *Terrorism (Commonwealth Powers) Act 2002* (Qld); *Terrorism (Commonwealth Powers) Act 2002* (SA); *Terrorism (Commonwealth Powers) Act 2002* (Tas); *Terrorism (Commonwealth Powers) Act 2003* (Vic); *Terrorism (Commonwealth Powers) Act* 2002 (WA).

70 See, eg, *National Gas (ACT) Act 2008* (ACT); *National Gas (New South Wales) Act 2008* (NSW); *National Gas (Northern Territory) Act 2008* (NT); *National Gas (Queensland) Act 2008* (Qld); *National Gas (South Australia) Act 2008* (SA); *National Gas (Tasmania) Act 2008* (Tas); *National Gas (Victoria) Act 2008* (Vic); *National Gas Access (WA) Act 2009* (WA).

71 See, eg, *Civil Law (Wrongs) Act 2002* (ACT) Chapter 9; *Defamation Act 2005* (NSW); *Defamation Act 2006* (NT); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA).

- Framework laws: legislation enacted by the Commonwealth with finer details to be regulated by the States or Territories.[72]

Similarly, the Parliamentary Counsel's Committee ('PCC') has identified and recognised four main structures: referred; applied; mirror; and followed legislation ('legislation enacted in one jurisdiction and followed by another').[73] No examples of 'followed legislation' were found in the list of national uniform legislation prepared by the Committee.[74] What may constitute followed legislation is the effect of spontaneous harmonisation. Spontaneous harmonisation is a process through which Australian jurisdictions have harmonised the legal rules in a voluntary, unprompted and uncoordinated way. Spontaneous harmonisation is contrasted with intended harmonisation, which is a deliberate process through which Australian jurisdictions have achieved uniformity through intergovernmental agreements or the decisions of ministerial councils.

The 2006, 2008 and the PCC classifications have three structures in common: referred, applied and mirror. The difference is in the fact that each classification introduces and additional structures: framework laws, complementary and followed legislation.[75] Otherwise, they appear to be the same. Framework laws and complementary legislation involve some action on behalf of the Commonwealth (whether it is drafting legislation to establish a regulator, or providing the main principles of regulation), leaving the details to the States and Territories. However, these structures can also be viewed as applied and mirror legislation correspondingly. In complementary legislation, the structure is applied with Commonwealth being the leading jurisdiction. In framework legislation the structure is mirror because jurisdictions have to produce similar legislation with Commonwealth having a different role. This article proposes to view this legislation as applied and mirror in principle with variation on the roles of participating jurisdictions. Followed legislation, in contrast, is legislation that is voluntarily drafted by jurisdictions to mirror legislation of other jurisdictions. This practice is relevant for spontaneous harmonisation but can be difficult to trace.

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72 See, eg, *Native Title Act 1993* (Cth); *Native Title Act 1994* (ACT); *Native Title (New South Wales) Act 1994* (NSW); *Native Title Act 1993* (Qld); *Native Title (South Australia) Act 1994* (SA); *Native Title (Tasmania) Act 1994* (Tas); *Native Title (State Provisions) Act 1999* (WA).

73 Parliamentary Counsel's Committee, *Protocol on Drafting National Uniform Legislation* (4th ed, February 2018) ('PCC Protocol') 1.

74 Ibid Appendix 5.

75 Followed legislation seems to be the product of spontaneous harmonisation as discussed in the previous paragraph.

IV Data: List of National Uniform Legislation from the PCC Protocol and Focus on the Level of Uniformity

The PCC Protocol on Drafting National Uniform Legislation[76] contains a comprehensive and up to date list of 'some of the more significant areas of uniform legislation',[77] which are presented in the table annexed to it. Various sets of uniform Acts have been compiled by others in several publications.[78] However, none of these compilations has matched the comprehensiveness and level of accuracy of the PCC's list of national uniform legislation.

For background purposes, the PCC agreed to prepare a document laying down the foundations for drafting national uniform legislation. This resulted from the Standing Committee of Attorneys General meeting on 9-10 November 2006, and the paper prepared by the Commonwealth's First Parliamentary Counsel, entitled *Consistency in Model Legislation*. In April 2007, the PCC developed and published the Protocol on Drafting National Uniform Legislation.[79] The Protocol is now in its fourth edition and includes a classification of national uniform legislation. It sets forth the principles relevant to national uniform legislation and provides insights into the important procedures related to legislative drafting. The PCC Protocol also documents the procedure for handling national uniform legislation projects.[80] First, the project is initiated by the Council of Australian Governments, or any other ministerial council, or by one of the PCC members. Then, the lead jurisdiction for drafting is selected from among the jurisdictions volunteering to draft the uniform bill. The drafting approach is discussed or presented by the lead legislative drafter, and drafts are circulated among the PCC members for input and comments. Once the draft is finalised, a formal report is submitted to the body requesting the legislation.

However, the PCC has a specific procedure for compiling the Acts into the Protocol, which means that some early manifestations of national uniform legislation were not included. For example, the *Sale of Goods*

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76 Parliamentary Counsel's Committee, *Protocol on Drafting National Uniform Legislation* (1st ed, April 2007).

77 PCC Protocol (n 73).

78 Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Harmonisation of Legal Systems within Australia and between Australia and New Zealand* (2006); TimeBase, *What is National Uniform Legislation and What are Some Examples?* (2015) <http://www.timebase.com.au/support/legalresources/What_is_National_ Uniform_ Legislation_and_what_are_some_examp.html>; Commonwealth, *Reform of the Federation White Paper – A Federation for Our Future*, Issues Paper No 1 (2014) Appendix C.

79 PCC Protocol (n 73).

80 Ibid 13-14.

Acts,[81] *Partnership Acts*,[82] *Business Tenancies* legislation,[83] *Interpretation Acts*,[84] and *Torrens Title* legislation[85] were omitted.

The PCC table contains 93 sets of uniform Acts and it is regularly updated. The most recent edition is dated March 2015 and includes national uniform legislation enacted prior to July 2014.[86] Some of these sets represented the subsequent harmonisation of the same legislation. For example, the States' Fair Trade legislation and the Commonwealth Australian Consumer Law were both included in the table. If a set of laws was mentioned more than once in the PCC table, it was counted once for this research. Therefore, 84 sets of the most important national uniform legislation initiatives collated by the PCC were evaluated.

After close analysis of the classification systems discussed above, three main structures emerged: referred, applied and mirror legislation. These are the primary colours of national uniform legislation, which can be mixed to form various hybrids. Viewing national uniform legislation in this light reduces ambiguity and complexity but allows for flexibility of various approaches within three primary structures. Applying classification to current legislation, there have been 84 sets of Acts drafted as national uniform legislation: 44 (52%) are mirror, 19 (23%) applied, 15 (18%) referred, and 6 (7%) hybrid. From the quantitative point of view, mirror legislation has been the predominant structure of national uniform legislation and has been the foundational structure upon which legislation has consequently been harmonised to applied and referred structures. Some examples of the sets of uniform Acts that have gone through consecutive harmonisation with a change of structure include: *AGVET – National Agricultural and Veterinary Chemicals Scheme*[87] (mirror to applied);

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81 *Sale of Goods Act 1954* (ACT); *Sale of Goods Act 1923* (NSW); *Sale of Goods Act 1972* (NT); *Sale of Goods Act 1896* (Qld); *Sale of Goods Act 1895* (SA); *Sale of Goods Act 1896* (Tas); *Sale of Goods Act 1895* (WA).

82 *Partnership Act 1963* (ACT); *Partnership Act 1892* (NSW); *Partnership Act 1997* (NT); *Partnership Act 1891* (Qld); *Partnership Act 1891*(SA); *Partnership Act 1891* (Tas); *Partnership Act 1958* (Vic); *Partnership Act 1895* (WA).

83 *Leases (Commercial and Retail) Act 2001* (ACT); *Retail Leases Act 1994* (NSW); *Business Tenancies (Fair Dealings) Act 2003* (NT); *Retail Leases Act 2003* (Vic); *Retail Shop Leases Act 1994* (Qld); *Retail and Commercial Leases Act 1995* (SA); *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas); *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA).

84 *Act Interpretation Act 1901* (Cth); *Legislation Act 2001* (ACT); *Interpretation Act 1987* (NSW); *Interpretation Act 1978* (NT); Act *Interpretation Act 1954* (Qld); *Acts Interpretation Act 1915* (SA); *Act Interpretation Act 1931 (*Tas); *Interpretation of Legislation Act 1984* (Vic); *Interpretation Act 1984* (WA).

85 *Land Titles Act 1925* (ACT); *Real Property Act 1900* (NSW); *Land Tittle Act 1994* (Qld); *Land Tittle Act 2000* (NT); *Real Property Act 1886* (SA); *Real Property Act 1980* (Tas); *Transfer of Land Act 1958* (Vic); *Transfer of Land Act 1893* (WA).

86 PCC Protocol (n 73) 2.

87 *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) (Code set out in Schedule) and Regulations; *Agricultural and Veterinary Chemicals (New South Wales) Act 1994* (NSW); *Agricultural and Veterinary Chemicals (Northern Territory) Act 1994* (NT); *Agricultural and Veterinary Chemicals (Queensland) Act 1994* (Qld); *Agricultural and Veterinary Chemicals (South Australia) Act 1994* (SA); *Agricultural and Veterinary Chemicals (Tasmania) Act 1994* (Tas); *Agricultural and Veterinary Chemicals (Victoria) Act 1994* (Vic); *Agricultural and Veterinary Chemicals (Western Australia) Act 1995* (WA).

Business Names[88] (mirror to referred); *Consumer Protection*[89] (mirror to applied); *Corporations*[90] (mirror to referred) and *Water Acts*[91] (mirror to referred).

The Figure on the following page depicts the primary and hybrid structures in detail. The next several sections provide a comprehensive description of the structures depicted in the Figure.

The main focus of analysis in this article is the level of uniformity various structures can provide. Although the uniformity of national uniform legislation is not a panacea for all the legal challenges the Australian federation faces today, this article takes a step towards a more effective and efficient national response when one is required. This task is achieved by examining structures of national uniform legislation from the positions of their uniformity.

It is a dangerous assumption to consider national uniform legislation as identical legislation across several jurisdictions. Among the sets uniform Acts in this research, none achieved 100% textual uniformity or were identical. There is evidence to support the illusory nature of ultimate uniformity. Even in the case of corporate legislation, despite strong grounding from spontaneous harmonisation, full uniformity has not been achieved almost 60 years after the initial *intended* harmonisation attempt. Bathurst noted that the enactment of the *Corporations Act 2001* (Cth) did not result in 'a fully unified system'.[92] Barrett agreed, acknowledging that although Australia has come a long way, 'we have not reached and will

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88 *Business Names Registration (Transition to Commonwealth) Act 2012* (ACT); *Business Names (Commonwealth Powers) Act 2011* (NSW); *Business Names (National Uniform Legislation) Request Act 2011* (NT); *Business Names (Commonwealth Powers) Act 2011* (Qld); *Business Names (Commonwealth Powers) Act 2012* (SA); *Business Names (Commonwealth Powers) Act 2011* (Tas); *Business Names (Commonwealth Powers) Act 2011* (Vic); *Business Names (Commonwealth Powers) Act 2012* (WA).

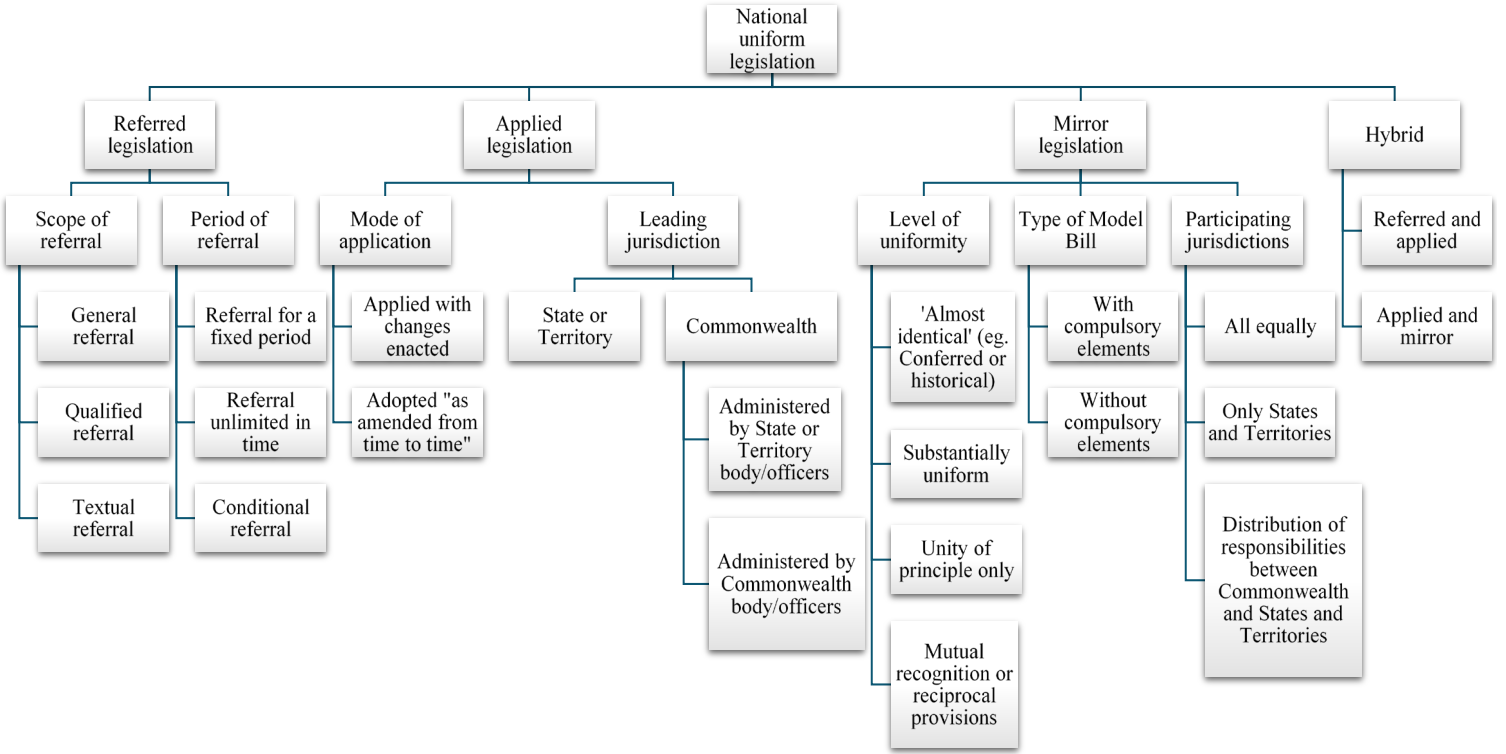
89 Australian Consumer Law set out in *Competition and Consumer Act 2010* (Cth); *Fair Trading (Australian Consumer Law) Act 1992* (ACT) (as amended by Fair Trading (Australian Consumer Law) Amendment Act 2010 (ACT)); *Fair Trading Act 1987* (NSW) (as am by *Fair Trading Amendment (Australian Consumer Law) Act 2010*); *Consumer Affairs and Fair Trading Act 1990* (NT); *Fair Trading Act 1989* (as am by *Fair Trading (Australian Consumer Law Amendment) Act 2010*) (Qld); *Fair Trading Act 1987* (as am by *Statutes Amendment and Repeal (Australian Consumer Law) Act 2010*) (SA); *Australian Consumer Law (Tasmania) Act 2010* (Tas); *Fair Trading Act 1999* (as am by F*air Trading Amendment (Australian Consumer Law) Act 2010* (Vic)); *Fair Trading Act 2010* (WA).

90 *Corporations (Commonwealth Powers) Act 2001* (NSW); *Corporations (Northern Territory Request) Act 2001* (NT); *Corporations (Commonwealth Powers) Act 2001* (Qld); *Corporations (Commonwealth Powers) Act 2001* (SA); *Corporations (Commonwealth Powers) Act 2001* (Tas); *Corporations (Commonwealth Powers) Act 2001* (Vic); *Corporations (Commonwealth Powers) Act 2001* (WA).

91 *Water Act 2007* (Cth); *Water (Commonwealth Powers) Act 2008* (NSW); *Water (Commonwealth Powers) Act 2008* (Qld); *Water (Commonwealth Powers) Act 2008* (SA); *Water (Commonwealth Powers) Act 2008* (Vic).

92 T F Bathurst, 'The Historical Development of Corporations Law' (Speech delivered at the Society for Introduction to Australian Legal History Tutorials, Australian Legal History, 3 September 2013) <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Bathurst/bathurst_20130903.pdf>.

Figure: Structures of national uniform legislation



Source: constructed by the author

probably never reach a point of perfectly harmonised uniformity'.[93] Examples of divergence include Tasmanian legislation where additional preclusions were added for the appointment of an auditor. Specifically, an auditor could be anyone other than a particular office-holder.[94] Another example is the New South Wales legislation allowing court proceedings to be brought against a company in liquidation when leave to proceed has not been granted under the *Corporations Act 2001* (Cth).[95] In addition, due to the insertion of Part 1.1A in the Commonwealth Act entitled 'Interaction between corporations legislation and State and Territory laws', sections of the Act can be excluded from operation in a State or Territory. Inclusion of these roll-over provisions has affected uniformity.

There are also non-obvious differences between jurisdictions resulting from disparate drafting style manuals, naming protocols of the uniform Acts and references to other legislation in the enacting legislation. Even in cases where legislation is identical, interpretation of a set of uniform Acts can be subject to local Interpretation Acts,[96] the absence or existence of human rights legislation,[97] and differences in the criminal law (although these differences relate more to applied, rather than textual, uniformity and are beyond the scope of this article).

In some cases, the impossibility of achieving full uniformity has been due to variations in drafting styles between jurisdictions. Specifically, the legislation of each jurisdiction must correspond to its own legislative drafting manual and statute book. This is so even in cases of drafting national uniform legislation, or in cases of referred structure with the greatest uniformity. The preliminary and concluding parts of the Acts can be different in each jurisdiction. Thus, style is one way that full uniformity has been prevented. For example, the concluding part of one Act from New South Wales is usually entitled and presented as 'Historical Notes'. In Western Australia and Queensland, it is referred to as 'Notes'. In the Australian Capital Territory, Northern Territory, Queensland and Victoria it is drafted as 'Endnotes'. In South Australia it is labelled 'Legislative History' and in Tasmania it is called 'Table of Amendments'. In the Commonwealth Act it is described as 'Notes to the Specific Act'.

Some States and Territories have included a 'Table of Provisions' at the beginning of an Act (eg, Northern Territory), whereas in other cases no table of contents has been included. Some States, like Western Australia and Victoria, have published reprints, but others have not. The same has applied to definitions. In some jurisdictions, Acts have included a dictionary, incorporated at the end of the text. In other jurisdictions it has

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93 R I Barret, 'Towards Harmonised Company Legislation-Are We There Yet?' (2012) 40 *Federal Law Review* 141, 159.

94 *Irrigation Company Act 2011* (Tas).

95 *Dust Diseases Tribunal Act 1989* (NSW).

96 *Acts Interpretation Act 1901* (Cth); *Legislation Act 2001* (ACT); *Interpretation Act 1987* (NSW); *Interpretation Act 1978* (NT); Act *Interpretation Act 1954* (Qld); *Acts Interpretation Act 1915* (SA); *Act Interpretation Act 1931* (Tas); *Interpretation of Legislation Act 1984* (Vic); *Interpretation Act 1984* (WA).

97 *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities 2006* (Vic).

been placed at the beginning. Western Australia provides an index of defined terms; in other jurisdictions, there is no index.

Differences in drafting style do not affect the uniformity of substantive provisions but relate to the style of a particular jurisdiction. These differences add to textual divergence. Therefore, stylistic differences either need to be disregarded, or sets of uniform Acts must be brought into stylistic harmony. This can be achieved by providing a template for future legislation. A precedent already exists, but only for applied structure (found in Appendix 5 of the PCC Protocol). Further, it only pertains to the 'front end' of legislation, the provisions related to the implementation of an applied Act within a jurisdiction. No particular template is used for mirror or referred legislation. In some cases, a template may be suggested by a body proposing a model or it may be one centrally developed by the PCC. That does not mean, however, that it will be adopted, because the drafting style set by each enacting jurisdiction is in accord with the local drafting manual, with no specific allowances for national uniform legislation.

The following sections consider four main structures of national uniform legislation.

V Referred Legislation

Referred legislation is legislation drafted by the Commonwealth, in which the States refer their legislative powers over a certain subject matter pursuant to Section 51(xxxvii) of the *Australian Constitution*. In contrast to the States, the Territories have an option to refer in the same terms as the States or to rely on Section 122 of the *Australian Constitution*. From the perspective of uniformity, this is a highly uniform and rigid structure. Although an assumption that legislation is identical across jurisdictions is not supported by the evidence. This type of legislation is usually evaluated by the Commonwealth. Thus, uniform amendments are achieved by giving the Commonwealth maximum flexibility over them. This structure may require extensive 'political lobbying and negotiation'.[98] So far, the States have referred to the Commonwealth the power to legislate the following matters: consumer credit; [99] corporations; [100] mutual recognition; [101]

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[98] Gerard Carney, 'Uniform Personal Property Security Legislation for Australia-A Comment on Constitutional Issues' (2002) 14 *Bond Law Review* 1, 1-2.

[99] *Credit (Commonwealth Powers) Act 2010* (NSW); *Consumer Credit (National Uniform Legislation) Implementation Act 2010*(NT); *Credit (Commonwealth Powers) Act 2010* (Qld); *Credit (Commonwealth Powers) Act 2010* (SA); *Credit (Commonwealth Powers) Act 2009* (Tas); *Credit (Commonwealth Powers) Act 2010* (Vic); *Credit (Commonwealth Powers) Act 2010* (WA).

[100] *Corporations (Commonwealth Powers) Act 2001* (NSW); *Corporations (Northern Territory Request) Act 2001* (NT); *Corporations (Commonwealth Powers) Act 2001* (Qld); *Corporations (Commonwealth Powers) Act 2001* (SA); *Corporations (Commonwealth Powers) Act 2001* (Tas); *Corporations (Commonwealth Powers) Act 2001* (Vic); *Corporations (Commonwealth Powers) Act 2001* (WA).

[101] *Mutual Recognition (Australian Capital Territory) Act 1992* (ACT); *Mutual Recognition (New South Wales) Act 1992* (NSW); *Mutual Recognition (Northern Territory) Act 1992* (NT); *Mutual Recognition (Queensland) Act 1992* (Qld); *Mutual Recognition (South Australia) Act 1993* (SA); *Mutual Recognition (Tasmania) Act 1993* (Tas); *Mutual*

resolution of financial disputes in de facto relationships;[102] and counter-terrorism legislation.[103]

Section 122 of the *Australian Constitution* empowers the Commonwealth Parliament to make laws related to the territories. Only two territories are currently self-governed:[104] the Northern Territory[105] and the Australian Capital Territory.[106] In practice, Section 122 allows the Commonwealth Parliament to override a Territory law at any time. However, cases of this have been quite rare. One example is the Commonwealth Parliament's 1997 overturn of the Northern Territory's *Rights of the Terminally Ill Act 1995* (NT), an Act that allowed euthanasia. On 25 March 1997, the Federal Parliament passed the *Euthanasia Laws Act 1997* (Cth), which did not technically repeal the Northern Territory legislation but overrode the Northern Territory Act's legal effect. To prevent similar laws in other territories, the Self-Government Acts of the Territories were amended to prevent territorial parliaments from legislating euthanasia. However, Section 122 of the *Australian Constitution* does not preclude the Territories from legislating Acts with consistent terms. For instance, the Northern Territory enacted the *Succession to the Crown (Request) (National Uniform Legislation) Act 2013* (NT), even though it was not strictly necessary.

To illustrate how the referred structure works in practice, an example from a highly contentious area is provided in the form of a case study. The *Water Act*[107] as national uniform legislation has resolved disputes between the States and the Australian Capital Territory that have lasted for decades. For more than a century the Murray-Darling Basin has been managed by several States and the Australian Capital Territory, with all of the parties having competing interests and engaging in heated debates.[108] The River Murray Waters Agreement was signed in 1914, establishing the River Murray Commission (later reformed to become the Murray-Darling Basin Commission). The Commission was bound by the agreement between the

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Recognition (Victoria) Act 1998 (Vic); *Mutual Recognition (Western Australia) Act 2010* (WA).

102 *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW); *De Facto Relationships Act 1991* (NT); *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld); *Commonwealth Powers (De Facto Relationships) Act 2009* (SA); *Commonwealth Powers (De Facto Relationships) Act 2006* (Tas); *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic); *Commonwealth Powers (De Facto Relationships) Act 2006* (WA).

103 *Terrorism (Commonwealth Powers) Act 2002* (NSW); *Terrorism (Northern Territory) Request Act 2003* (NT); *Terrorism (Commonwealth Powers) Act 2002* (Qld); *Terrorism (Commonwealth Powers) Act 2002* (SA); *Terrorism (Commonwealth Powers) Act 2002* (Tas); *Terrorism (Commonwealth Powers) Act 2003* (Vic); *Terrorism (Commonwealth Powers) Act* 2002 (WA).

104 The *Norfolk Island Legislation Amendment Bill 2015* passed by the Australian Parliament on 14 May 2015 (assented on 26 May 2015) abolished self-government on Norfolk Island and transformed Norfolk Island into a council as part of the New South Wales regime.

105 *Northern Territory (Self-Government) Act 1978* (Cth).

106 *Australian Capital Territory (Self-Government) Act 1988* (Cth).

107 *Water Act 2007* (Cth); *Water (Commonwealth Powers) Act 2008* (NSW); *Water (Commonwealth Powers) Act 2008* (Qld); *Water (Commonwealth Powers) Act 2008* (SA); *Water (Commonwealth Powers) Act 2008* (Vic).

108 Daniel Connell, *Water Politics in the Murray-Darling Basin* (Federation Press, 2007) 62.

jurisdictions and could not take any action 'hindering reform and encouraging decision making that was not in the interest of the Basin as a whole'.[109] However, environmental changes involving drought were not factored into the initial agreement. To resolve this unsatisfactory situation, in July 2008, the Intergovernmental Agreement on Murray-Darling Basin Reform was signed, committing the States and the Australian Capital Territory 'to a new culture and practice of basin-wide management and planning, through new governance structures and partnerships'.[110]

The bill to implement the intergovernmental agreement was drafted and implemented in referred structure. The goal of the bill was not only to address past conflicts within the federation but also to build a sustainable future for all of Australia:

> This Water Bill is the first water reform program introduced into this parliament in 106 years. It is truly a nation-building bill, not only for this generation but also for the generations to come. It will ensure the sustainable uniformity of one of Australia's great natural assets. It will underpin our nation's water resources and it will secure the future of the industries, the communities and the environments that rely on them.[111]

From the point of view of a national regulator, this Act not only established one national regulator but represented an intricately coordinated effort between four bodies. First, the Act set up, among other things, the independent Murray-Darling Basin Authority. The Authority is mainly responsible for preparing a strategic plan for the integrated and sustainable management of water resources. Secondly, the Act established the Commonwealth Environmental Water Holder. The Holder manages the Commonwealth's water to protect and restore the environmental assets of the Murray-Darling Basin. Thirdly, the Act affords the ACCC a pivotal role in developing and enforcing water charges and water market rules. Finally, the Act entrusts the Bureau of Meteorology with water information functions (additional to the existing functions under the *Meteorology Act 1955* (Cth)). Although the uniformity of this legislation is already ensured by its presence within a referred structure, strong institutional support is also ensured through national regulators in this intricate arrangement.

The Act, as an 'ambitious reform agenda',[112] has been called on to achieve the following goals:[113]

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109 Australian Government, Department of the Environment, *Water Legislation* (17 May 2016) <http://www.environment.gov.au/water/australian-government-water-leadership/water-legislation>.

110 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 2008, 39 (Peter Garrett).

111 Commonwealth, *Parliamentary Debates*, House of Representatives, 8 August 2007 (Malcolm Turnbull).

112 Dominic Skinner and John Langford, 'Legislating for Sustainable Basin Management: The Story of Australia's *Water Act* (2007)' (2013) 15(6) *Water Policy* 871, 891.

113 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 2008, 39 (Peter Garrett).

- allow effective operation of markets 'in allocating water between competing uses, improving water use efficiency, and delivering water to its highest value uses';
- address the challenges posed by climate change and environmental degradation in the Murray-Darling Basin; and
- 'protect and enhance the basin's social, environmental and economic values.'

On 12 May 2014, the Parliamentary Secretary to the Minister for the Environment announced the results of an independent review of the *Water Act 2007* (Cth): [114]

- The Act's framework did provide for the achievement of economic, social and environmental outcomes: and
- Although significant progress has been made since the commencement of the Basin Plan, the Panel has concluded that much more remains to be done to successfully deliver the Basin Plan in full by 1 July 2019 and to ensure that its objectives and outcomes will be realised.

The Report recommended improving coordination, partnership and transparency. Overall, however, its findings presented the Act in a favourable light. Years of conflict between the States (including the Australian Capital Territory) had been partially resolved by this arrangement. This resolution is, however, subject to limitations. In July 2017, a conflict arose between New South Wales and Victoria. Victorian Minister for Water, Pakula, stressed the fairness of the arrangement but emphasised the importance of complying with its requirements: 'The Murray Basin plan is about getting the best outcome for the environment, economy, farmers and communities. That can only happen if all jurisdictions work within the rules of the agreement'.[115] National uniform legislation, therefore, has limitations, because the rules must still be complied with and enforced.

Another illustration of a referred structure is the legislation implementing the national Personal Property Securities Register. It 'replaced a number of complex and fragmented sets of rules with a single set of rules that apply to security interests in personal property'. [116] The Register was implemented through the *Personal Property Securities Act 2009* (Cth) and State and Territory referral legislation.[117]

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[114] Australian Government, *Report of the Independent Review of the Water Act 2007* (2014), x <http://www.environment.gov.au/system/files/independent-review-water-act-2007.pdf>.

[115] Natalie Kotsios, 'Murray Darling Basin Plan: Victoria, NSW and SA in Border Skirmish', *The Weekly Times* (25 July 2017) <http://www.weeklytimesnow.com.au/news/national/murray-darling-basin-plan-victoria-nsw-and-sa-in-border-skirmish/news-story/78121d588d687a72aa9ff61fc57f9733>.

[116] Commonwealth, *Review of the Personal Property Securities Act 2009 – Final Report* (2015), 11 <https://www.ag.gov.au/Consultations/Documents/PPSReview/ReviewofthePersonalPropertySecuritiesAct2009FinalReport.pdf>.

[117] *Personal Property Securities (Commonwealth Powers) Act 2009* (NSW); *Personal Property Securities (National Uniform Legislation) Implementation Act 2010* (NT); *Personal Property*

Rather than harmonising the existing laws and bringing Australian legislation to a common denominator, the Act adopted a US transplant, namely, Article 9 of the Uniform Commercial Code of the United States ('UCC'). [118] In practice, this has meant that the legal effect has been based on the 'underlying commercial substance of the transaction' rather than on the form the parties choose. [119] The same position has been recognised as a successful legal transplant in approximately 50 countries, [120] including New Zealand, [121] Papua New Guinea [122] and Canada. [123]

The first set of recommendations for a national approach (following Article 9 of the UCC) were made as early as the 1970s. [124] The recommendations contained in the Law Council of Australia's 1972 report on a national approach to consumer credit law were implemented. However, secured transaction laws were left to be regulated by the separate jurisdictions. [125] In the 1990s, the Australian Law Reform Commission, Law Reform Commission of Victoria, Law Reform Commission of New South Wales and Law Reform Commission of Queensland were given a reference to undertake a review of personal property securities laws with the expectation of completing a joint report. Unable to achieve a consensus, the commissions prepared separate reports. [126]

Thereafter, the topic was elevated to the level of the Standing Committee of Attorneys General and momentum for national reform was revived, following the continued efforts of the late Professor Allen [127] and several reports. [128] After going through several reiterations of the consultation draft, exposure draft and revised exposure draft, the bill was

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Securities (Commonwealth Powers) Act 2009 (Qld); *Personal Property Securities (Commonwealth Powers) Act 2009* (SA); *Personal Property Securities (Commonwealth Powers) Act 2010* (Tas); *Personal Property Securities (Commonwealth Powers) Act 2009* (Vic); *Personal Property Securities (Commonwealth Laws) Act 2011* (WA).

118 Commonwealth (n 120) 11.

119 Ibid.

120 Peter Mills, 'The '"Sam Hawk" Supply Chain Creditors, Stakeholders and the PPSA' (2017) 37(9) *Proctor* 12, 14.

121 *Personal Property Securities Act 1999* (NZ).

122 *Personal Property Security Act 2011* (PNG).

123 'Each province and territory in Canada has enacted a PPSA, with the exception of Quebec': Roderick J Wood, 'The Concept of a Security Interest: The Canadian Experience' in Ronald C C Cuming, Catherine Walsh and Roderick J Wood eds, *Personal Property Security Law* (Irwin Law, 2nd ed, 2011).

124 Law Council of Australia, *Report on Fair Consumer Credit Laws*, Committee Report (1972).

125 For example, *Chattel Securities Act 1987* (Vic).

126 Australian Law Reform Commission and New South Wales Law Reform Commission, *Personal Property Securities* (ALRC Discussion Paper Number 52, NSWLRC Discussion Paper 28, August 1992); Queensland Law Reform Commission and Victoria Law Reform Commission, *Personal Property Securities Law: A Blueprint for Reform* (QLRC Discussion Paper Number 39 and VLRC Discussion Paper Number 28, August 1992).

127 Commonwealth (n 120) 13.

128 Standing Council of Attorneys-General, *Review of the Law on Personal Property Securities*, Options Paper (2006); Standing Council of Attorneys-General, *Review of the Law on Personal Property Securities – Registration and Search Issues*, Discussion Paper 1 (2006); Standing Council of Attorneys-General, *Review of the Law on Personal Property Securities – Extinguishment, Priorities, Conflict of Laws, Enforcement, Insolvency*, Discussion Paper 2 (2007); Standing Council of Attorneys-General, *Review of the Law on Personal Property Securities – Possessory Security Interests*, Discussion Paper 3 (2007).

passed by the Commonwealth Parliament in November 2009.[129] According to the Personal Property Securities Law Agreement (entered into on 2 October 2008), the States enacted legislation, referring the power under Section 51(xxxvii) of the *Australian Constitution* to the Commonwealth.[130]

The operation of the Act has now passed the first stages of scrutiny and is considered to be a successful transplant. [131] In reviewing the Act, Whittaker noted, 'there is no one single step that by itself will produce a major improvement to the Act. Rather, improvement needs to come of many small changes'. [132] Therefore, although the set of uniform Acts has operated satisfactorily, some refinement of its operations will need to be pursued through amendments. Amendments in this case will be nationally uniform due to the referred structure.

VI Applied Legislation

Applied legislation is a structure allowing for the adoption or application of laws enacted in other jurisdictions. [133] Applied structures can be 'extremely complicated' [134] due to the variety of ways in which jurisdictions can 'apply' the law. Acts are usually composed of two parts. The first is jurisdiction-specific and the second (usually in the appendix or schedule) is the applied law. The uniformity of applied legislation can be high, and uniform amendments are achieved through application or adoption mechanisms. Ascertaining the level of uniformity in applied structure is an onerous task due to the manner in which this legislation is drafted. From the policy development and drafting perspective, there is an option to 'adopt as amended from time to time' or apply on an 'as is' basis, in which case future amendments must be enacted separately. Reviews of applied sets of uniform Acts are usually carried out by the lead jurisdiction (the jurisdiction initially responsible for drafting) or through the mechanisms of a ministerial council or national regulator.

It is possible that after the lead jurisdiction drafts a Bill, some jurisdictions will 'apply' and others will 'adopt' it. That is what occurred in case of the *Health Practitioner Regulation National Law Act 2009* (Qld).

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129 Personal Property Securities Bill 2008 (Cth); Consultation Draft Personal Property Securities Bill 2008 (Cth), November 2008 Exposure Draft; Personal Property Securities Bill 2008 (Cth), March 2009 Exposure Draft.

130 *Personal Property Securities (Commonwealth Powers) Act 2009* (NSW); *Personal Property Securities (National Uniform Legislation) Implementation Act 2010* (NT); *Personal Property Securities (Commonwealth Powers) Act 2009* (Qld); *Personal Property Securities (Commonwealth Powers) Act 2009* (SA); *Personal Property Securities (Commonwealth Powers) Act 2010* (Tas); *Personal Property Securities (Commonwealth Powers) Act 2009* (Vic); *Personal Property Securities (Commonwealth Laws) Act 2011* (WA).

131 See Commonwealth, *Review of the Personal Property Securities Act 2009,* Final Report (2015) <https://www.ag.gov.au/Consultations/Documents/PPSReview/ReviewofthePersonalPropertySecuritiesAct2009FinalReport.pdf>.

132 Ibid 3.

133 PCC Protocol (n 73) 1.

134 Joe Edwards, 'Applied Law Schemes and Responsible Government: Some Issues' in Glenn Patmore and Kim Rubenstein (eds), *Law and Democracy: Contemporary Questions* (ANU Press, 2014) 96.

The Act was drafted by Queensland as the leading jurisdiction. The Northern Territory adopted the Act by passing an adoption Act (*Health Practitioner Regulation (National Uniform Legislation) Act 2010* (NT)). Section 4 of the *Health Practitioner Regulation (National Uniform Legislation) Act 2010* (NT) provides for the Queensland Act to be adopted as amended in the future. Although this type of Act is rare, it allows for amendments to be automatically implemented across jurisdictions. That means any amendments to the Queensland Act would be adopted in the Northern Territory. In contrast, Western Australia applied the Queensland Act by passing the *Health Practitioner Regulation National Law Act 2010* (WA). That means a separate Act would have to be passed by both Houses of the Western Australian Parliament before any amendments could be implemented. This also means that there is room for delay or even omission when implementing amendments introduced by Queensland.

Unlike the foregoing illustration, sometimes Acts are enacted by the Commonwealth as the leading jurisdiction, as opposed to the States. This arrangement has similarly resulted in sustainable uniformity, an example of which is the national uniform legislation regulating agricultural and veterinary ('AgVet') chemicals.[135] Its complex scheme balanced the conflicting interests of the agricultural and veterinary industries, human health and the environment, under circumstances of increased mobility of human beings and chemicals through globalisation of the food supply. Further, it concurrently harmonised legislation on the subject in all Australian jurisdictions. After World War II, when the use of chemicals began to grow, Australian jurisdictions sought to legislate this area.[136] Prior to 1995, the Commonwealth was responsible for 'evaluation and assessment of selected AgVet' chemicals, and the States and Territories were responsible for 'registration and control of the use of all AgVet' chemicals.[137] In 1991, the Commonwealth, States and the Northern Territory agreed to establish the National Registration Scheme, with the Commonwealth responsible for registration and the States and Territories responsible for controlling the use of agricultural and veterinary chemicals. The Commonwealth passed legislation containing substantive regulatory provisions and the Agricultural and Veterinary Chemicals Code. Each of the jurisdictions enacted legislation to apply the Commonwealth legislation to their jurisdictions[138] and confer powers on the National Registration

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[135] *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) (Code set out in Schedule) and Regulations; *Agricultural and Veterinary Chemicals (New South Wales) Act 1994* (NSW); *Agricultural and Veterinary Chemicals (Northern Territory) Act 1994* (NT); *Agricultural and Veterinary Chemicals (Queensland) Act 1994* (Qld); *Agricultural and Veterinary Chemicals (South Australia) Act 1994* (SA); *Agricultural and Veterinary Chemicals (Tasmania) Act 1994* (Tas); *Agricultural and Veterinary Chemicals (Victoria) Act 1994* (Vic); *Agricultural and Veterinary Chemicals (Western Australia) Act 1995* (WA).

[136] See, eg, *Health (Pesticides) Regulations 1956* (WA) made under the *Health Act 1911* (WA); *Agricultural and Veterinary Chemicals Distribution Control Act 1966* (Qld); *Agricultural and Veterinary Chemicals (Control of Use) Act 1992* (Vic).

[137] Australian Pesticides and Veterinary Medicines Authority, *Legislative Framework* <http://apvma.gov.au/node/4131>.

[138] See, eg, *Agricultural and Veterinary Chemicals (New South Wales) Act 1994* (NSW) s 5.

Authority for Agricultural and Veterinary Chemicals [139] (which subsequently became the Australian Pesticides and Veterinary Medicines Authority).[140]

In 2013, the scheme underwent further development, resulting in an intergovernmental agreement being signed by all jurisdictions. This step was important to modernising the scheme. The objective was to 'encourage the development of newer and safer chemicals by providing more flexible and streamlined regulatory processes with higher levels of transparency and predictability for business seeking approval for AgVet chemicals to enter the market'.[141] The reforms were expected to 'result in a more straightforward assessment process that is easier to understand and more cost effective to administer'.[142] In this case, it appears an applied structure not only ensured a harmonised regime but also set the foundation for future harmonisation and reform.

The key issue has been that when legislation is 'adopted as amended from time to time'. Parliaments have become weary of these arrangements, as noted by Criddle, a member of the Legislative Assembly of Western Australia, expressing his position: 'I am not in favour of falling into line with other States in matters that are ticked off by the ministerial council without the opportunity of this Parliament having an input'.[143] When amendments have been implemented in other jurisdictions, another issue has arisen: the notification and implementation of these amendments. A uniform amendment to keep legislation in line with the other jurisdictions requires additional effort. Such effort adds to the workload of policy making bodies who must inform themselves of the amendments enacted in other jurisdictions. This is not always possible from the resource allocation and public service capacity perspective due to the pressure to downsize and outsource.[144] Thus, the problem with applied legislation has been that when amendments have been made there has not always been a mechanism through which to notify other parliaments.

One option for overcoming this problem has been the solution implemented in Western Australia. Its Consumer Credit (Western Australia) Amendment Bill 2002 included the implementation of hybrid legislation[145] and the requirement that the Minister provide the clerks of each House of

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139 *Agricultural and Veterinary Chemicals (New South Wales) Act 1994* (NSW) s 21(1).

140 *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) (Code set out in Schedule) and Regulations; *Agricultural and Veterinary Chemicals (New South Wales) Act 1994* (NSW); *Agricultural and Veterinary Chemicals (Northern Territory) Act 1994* (NT); *Agricultural and Veterinary Chemicals (Queensland) Act 1994* (Qld); *Agricultural and Veterinary Chemicals (South Australia) Act 1994* (SA); *Agricultural and Veterinary Chemicals (Tasmania) Act 1994* (Tas); *Agricultural and Veterinary Chemicals (Victoria) Act 1994* (Vic); *Agricultural and Veterinary Chemicals (Western Australia) Act 1995* (WA).

141 Revised Explanatory Memorandum, Agricultural and Veterinary Chemicals Legislation Amendment Bill 2013 (Cth) 1.

142 Revised Explanatory Memorandum, Agricultural and Veterinary Chemicals Legislation Amendment Bill 2013 (Cth) 1.

143 Western Australia, *Parliamentary Debates*, Legislative Council, 24 June 2003, 9042 (Murray Criddle).

144 See, eg, Head and Crowley (n 49) 55.

145 With Western Australia enacting legislation in mirror structure.

the Western Australia Parliament with the amended legislation, including a copy of the bill or regulation that amended the Consumer Credit Code or regulation.[146] This measure was 'deemed to have the effect of tabling the bill or regulations in both Houses of Parliament'.[147]

A notification mechanism was also affixed to the Early Childhood Intergovernmental Agreement. Sections 69 to 79 of Schedule A of the intergovernmental agreement prescribed how the national quality framework or legislation implementing it should be amended. The mechanism for amendment, in summary form, was as follows: (1) any member of the Ministerial Council could propose an amendment; (2) the Ministerial Council would decide whether the proposal should be referred to the national authority; (3) the national authority was in charge of preparing a regulatory impact statement, consulting with other members of the Ministerial Council and advising the Ministerial Council; (4) if agreed, the host jurisdiction (Victoria) would seek the agreement of all jurisdictions on the text of the amendments through the board of the national authority and the Ministerial Council; (5) the Bill would be submitted to Parliament; (6) once the amendments were passed, the legislation of all other jurisdictions would automatically be amended, and Western Australia would commit to enacting corresponding legislation in consistent terms; (7) in cases where a single jurisdiction intended to introduce amendments specific to this jurisdiction, it would inform the Ministerial Council and if needed the Ministerial Council could decide that the specific amendment proposed was general in nature and applicable to all jurisdictions, or the amendment was specific to one jurisdiction alone.

The Northern Territory has enacted legislation regulating education and care services[148] by applying the Victorian act. According to Section 5 of the *Education and Care Services (National Uniform Legislation) Act 2011* (NT), nationally approved amendments can be enacted by the Administrator through regulations. This means that policy officers and legislative drafters in the Northern Territory must be informed of the developments in Victorian legislation.

The Australian Capital Territory has taken a different approach to applying laws as amended, instructing that amendments 'passed by the Victorian Parliament after this Act's notification day must be presented to the Legislative Assembly not later than six sitting days after the day it is passed'.[149] This approach has ensured that the Parliament of the Australian Capital Territory is notified of amendments. The amendments are synchronised and there is no delay in keeping pace with legislative developments.

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146 *Consumer Credit (Western Australia) Act 1996* (WA) ss 6 and 6B.

147 Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Health Practitioner Regulation National Law Bill (WA) 2010*, Report No 52 (2010) 31.

148 *Education and Care Services (National Uniform Legislation) Act 2011* (NT).

149 *Education and Care Services National Law (ACT) Act 2011* (ACT) s 6.

To summarise this section, the applied structure was discussed as a structure that may be less uniform than the referred structure, but still has the mechanisms for uniform amendment, thereby allowing for sustainable uniformity. Having said that, the complexity of this structure has sometimes served as a deterrent. In such cases, mirror or hybrid structures have been used. Although uniform amendments in the applied structure have been less of a challenge compared to the mirror structure, implementation and notification of these amendments may still be challenging. Therefore, the way uniform amendments are considered, notified and implemented must be stipulated when the applied structure is proposed.

VII Mirror Legislation

Mirror legislation is the most versatile structure, allowing maximum freedom to the States and Territories. It is also the structure with the least controllable uniformity. Mirror legislation is drafted by one jurisdiction as a model for other jurisdictions to follow.[150] In the academic literature and government reports, mirror legislation and model legislation have been used interchangeably.[151] 'Model', however, is also the term that has sometimes been used to describe a model draft bill that is centrally drafted by the PCC, or developed by one of the jurisdictions. Therefore, to avoid any confusion, this article uses the term 'mirror' throughout, when referring to this structure of national uniform legislation. Mirror legislation can be flexible and can be adapted in each jurisdiction to allow for local differences. Accordingly, the policy is evaluated both at the time of implementation and thereafter. In addition, any jurisdiction can repeal its legislation without any consequences for the other participants or, theoretically, it can make further amendments to the legislation to the extent of extinguishing similarities with other jurisdictions. The degree of uniformity required is expressed by the relevant ministerial council and may be incorporated into an intergovernmental agreement.

With occupational health and safety reforms, a slightly different approach has been followed. The intergovernmental agreement for the 2011 work health and safety legislation proposed a model Bill that allowed for the incorporation of core and non-core provisions. The ability to choose gave jurisdictions a strong framework, enabling them to manoeuvre and accommodate the views of their local groups to retain the universal structure and principles of the Act throughout all jurisdictions.

As for uniformity, the literature on mirror legislation is ambiguous. Some sources have found mirror legislation enacted 'in identical terms'.[152]

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150 PCC Protocol (n 72) 1.

151 See Karl Nerenberg, *Dialogues on Intergovernmental Relations in Federal Systems* (McGill-Queen's Press-MQUP, 2011) 13.

152 Western Australia Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles*, Report No 10 (1995) 4 <http://www.parliament.

Others have asserted that 'where an agreed model bill is enacted in each jurisdiction, sometimes [there are] minor regional variations'.[153] The empirical study herein reveals the reasons why there has been no common understanding in the literature: mirror legislation is versatile. The large distribution of data within this one category was thus unexpected because in a category assumed to be less uniform, the sets of Acts were found to be both highly uniform and very low in uniformity. The level of uniformity in any mirror legislation can reach 'almost identical' levels (the same as referred legislation).

A *Conferral of Jurisdiction*

Cases of high uniformity in mirror legislation can be explained by the conferral of jurisdiction through mirror legislation. The conferral of power in the context of national uniform legislation can be classified into two large groups: conferral of power on a State or Territory official through Commonwealth legislation; or conferral of power by a State or Territory on a Commonwealth official through national uniform legislation. The conferral of power through Commonwealth legislation received judicial interpretation in the consolidated case of *O'Donoghue v Ireland; Zentai v Republic of Hungary; Williams v United States of America* (2008) 234 CLR 599. It was held that the conferral of power under Section 19 of the *Extradition Act 1988* (Cth) was valid because it did not impose a duty but conferred the power of the Commonwealth on State and Territory magistrates. The following sets of uniform Acts are examples of conferral Acts or Acts that have some elements of conferral: Prisoners International Transfer;[154] National Environment Protection;[155] and the Cross Vesting[156]

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wa.gov.au/parliament/commit.nsf/%28Report+Lookup+by+Com+ID%29/3A95DE1EFE7BB319482566D600260D4C/$file/No_10.pdf>.

153 Barry House, 'When a Nod and a Wink Amounts to an Intergovernmental Agreement: Issues Faced by the Legislative Council of Western Australia in the Identification and Scrutiny of Uniform Legislation (Paper presented at the 5th Australasian Drafting Conference, Darwin, July 2010) 4.

154 *International Transfer of Prisoners Act 1997* (Cth); *Crimes (Sentence Administration) Act 2005* (ACT) Part 11.2; *International Transfer of Prisoners (New South Wales) Act 1997* (NSW); *International Transfer of Prisoners (Northern Territory) Act 2000* (NT); *Prisoners International Transfer (Queensland) Act 1997* (Qld); *International Transfer of Prisoners (South Australia) Act 1998* (SA); *International Transfer of Prisoners (Tasmania) Act 1997* (Tas); *International Transfer of Prisoners (Victoria) Act 1998* (Vic); *Prisoners (International Transfer) Act 2000* (WA).

155 *National Environment Protection Council 1994* (ACT); *National Environment Protection Council (New South Wales) Act 1995* (NSW); *National Environment Protection Council (Northern Territory) Act 1994* (NT); *National Environment Protection Council (Queensland) Act 1994* (Qld); *National Environment Protection Council (South Australia) Act 1995* (SA); *National Environment Protection Council (Tasmania) Act 1995* (Tas); *National Environment Protection Council (Victoria) Act 1995* (Vic); *National Environment Protection Council (Western Australia) Act 1996* (WA).

156 *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth); *Jurisdiction of Courts (Cross-vesting) Act 1993* (ACT); *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW); *Jurisdiction of Courts (Cross-vesting) Act 1987* (NT); *Jurisdiction of Courts (Cross-vesting) Act 1987* (Qld); *Jurisdiction of Courts (Cross-vesting) Act 1987* (SA); *Jurisdiction of Courts (Cross-vesting) Act 1987* (Tas); *Jurisdiction of Courts (Cross-vesting) Act 1987* (Vic); *Jurisdiction of Courts (Cross-vesting) Act 1987* (WA).

set of uniform Acts. By way of illustration, the Prisoners International Transfer sets of Acts conferred Commonwealth jurisdiction on State authorised persons under Section 8(1) of the *Prisoners (International Transfer) Act 2000* (WA):

> A prison officer, police officer and any other person who is authorised for the purposes of the Commonwealth Act may perform any function conferred or expressed to be conferred on him or her —
>
> (a) by or under the Commonwealth Act or a corresponding law; or
> (b) in accordance with an arrangement referred to in section 9.

Historically, the *Cross Vesting* set of uniform Acts purported to confer jurisdiction on the Federal Court, Family Courts and Supreme Court of other States and Territories. In a landmark decision of *Re Wakim, Ex parte McNally* (1999) 198 CLR 511, the High Court held that conferral of jurisdiction by the States on the Commonwealth was invalid. The conferral of federal jurisdiction on State courts, however, was left intact. Therefore, the set of uniform Acts was highly uniform because it contained the conferral. For instance, Section 4 of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW) confers jurisdiction in 'State matters' on the Supreme Court of another State or Territory or the State Family Court of another State.

B *Skeletal Legislation*

Two sets of uniform Acts with high uniformity have been described as 'skeletal'. Legislation is 'skeletal' when the primary legislation only provides some policy framework ('bare bones') and significant detail is left to be administratively determined through delegated legislation, usually regulations.

Bills of lading uniform Acts are highly uniform and represent another example of skeletal legislation. Legislation has included the framework; however, the volume has been quite small. In New South Wales, the Act includes 14 sections, and in Queensland there are only 10. This legislation has replaced the 'Imperial model' and 'improved the legal environment for Australia's international trade and introduced a degree of flexibility to ensure that developments in data transmission are accommodated into the future'. [157] In 2005, New South Wales conducted a review of the Act, concluding that it met its policy objectives and was not in need of change.[158] Because the Act is mirror, it has been recommended that the report be tabled at the Standing Committee of Attorneys General meeting.[159]

Skeletal legislation can be objectionable from the perspective of parliamentary sovereignty. In preparing regulations, it has given

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[157] Legislation and Policy Division of the NSW Attorney-General's Department, *Report on the Statutory of the Sea-Carriage Documents Act 1997* (2005) <www.justice.nsw.gov.au/justicepolicy/Documents/sea_carriage_docs_act_review.doc 11>.

[158] Ibid.

[159] Ibid.

considerable discretion to the Executive branch rather than the Parliament in scrutinising primary legislation. Some commentators have expressed their unfavourable view of the overuse of skeletal legislation.[160] However, no recent examples of skeletal legislation were found in the database. This observation points to the conclusion that this legislation is more a product of the past than a preferred current practice.

C *Constitutional Settlement*

Four sets of uniform Acts with high levels of uniformity resulted from the Offshore Constitutional Settlement of 1979. The Settlement included an intricate distribution of powers between the jurisdictions and was considered to be a 'milestone in cooperative federalism'.[161] The resulting legislation was highly uniform, with *Coastal Waters* and *Crimes at Sea* falling under the 'almost identical' level of uniformity and *Offshore Minerals* and *Petroleum (Offshore/ Submerged Lands)* falling under the 'substantially uniform' level of uniformity.[162]

This legislation represents the consensus Australian jurisdictions reached on regulating offshore areas after a decade of disputes between the Commonwealth and States over sovereignty, culminating in the landmark High Court decision in *New South Wales v Commonwealth*.[163] The Offshore Constitutional Settlement 'reinforced shared jurisdiction in offshore areas',[164] aiming to be a cooperative yet practical solution.[165] 'The Commonwealth agreed that the States should be put, so far as possible, in the position they believed they were in before the High Court case. At the October 1977 Premiers Conference, it was agreed that the territorial seas should be the responsibility of the States.'[166] The arrangements involved were substantial and included cooperation among the following bodies: the Australian Minerals and Energy Council, the Australian Fisheries Council, the Australian Environment Council, the Council of Nature Conservation Ministers and the Standing Committee of Commonwealth, with the State Attorneys-General overseeing 'the legal aspects of the exercise'.[167] As Haward recounted, 'The OCS has been the most ambitious and significant

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160 Adele Farina, 'Bones Without Flesh – The Issues with Skeletal Legislation' (Paper presented at the Scrutiny of Legislation Conference, Brisbane, 26-28 July 2011); Joe Francis, 'Some Accountability Issues in Scrutinising Subsidiary Legislation made under Skeletal Acts' (Paper presented at the Scrutiny of Legislation Conference, Canberra, 8 July 2009); Stephen Argument, 'Leaving it to the Regs – The Pros and Cons of Dealing with Issues in Subordinate Legislation' (Paper presented at the Australia-New Zealand Scrutiny of Legislation Conference, Brisbane, 26-28 July 2011) 8-9.

161 Marcus Haward, 'The Australian Offshore Constitutional Settlement' (1989) 13(4) *Marine Policy* 334, 334.

162 The Constitutional Settlement included other areas like the regulation of fisheries, shipwrecks and the Great Barrier Marine Park. However, these are beyond the scope of this article. Only national uniform legislation in the database is considered.

163 (1976) 135 CLR 337.

164 Haward (n 166) 334.

165 Commonwealth of Australia, Attorney-Generals Department, *The Offshore Constitutional Settlement: A Milestone in Cooperative Federalism* (1980) 5.

166 Ibid Appendix.

167 Ibid 4.

intergovernmental framework for Australian marine resources policy … in both scope and complexity'.[168] Although the approach to implementing the agreement's components has evolved from being integrated (where some parts of the agreement could not be implemented until others were) to sectoral (where components of the agreement were implemented within sectors),[169] the institutional support provided has allowed high levels of uniformity to be achieved.

D *Legislation Directed at Resolving an Isolated Problem*

In cases where the sets of uniform Acts are directed at the resolution of an isolated problem, both high uniformity and sustainable uniformity are achievable. Two examples of this are the *Australia Acts* and *Federal Courts (State jurisdictions) Acts*, which are both in the 'almost identical' category.

This section considers the *Australia Acts*[170] first. The Federal Parliament has no specific power to legislate matters related to the monarchy. Thus, a decision was made to enact national uniform legislation to resolve this issue of nation-wide importance. The first step in the arrangement included a State request for legislation, specifically provided for in Section 3 of the *Australia Acts (Request) Act 1985* (NSW), which stated, 'The Parliament of the State requests the enactment by the Parliament of the Commonwealth of an Act in, or substantially in, the terms set out in the First Schedule'. Sections 4 and 5 of the *Australia Acts (Request) Act 1985* (NSW), in similar terms, requested and consented to the enactment of UK and Commonwealth legislation. The second step in the arrangement included the simultaneous enactment of the *Australia Act 1986* (Cth) and the *Australia Act 1986* (UK).

Questions were raised about the constitutionality of this enactment.[171] However, the full court in *Shaw v Minister for Immigration and Multicultural Affairs*[172] confirmed the validity of the *Australia Act* in its two versions, together with the State request and consent legislation. Pursuant to this decision, Australian independence was established on the date the *Australia Act 1986* (Cth) came into operation, 3 March 1986.

Another example of legislation aimed at resolving an isolated problem is the *Federal Courts (State Jurisdiction) Acts*.[173] The aim of this set of uniform Acts was to resolve issues resulting from a High Court decision. As discussed above, in *Re Wakim, Ex parte McNally*,[174] the High Court

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168 Haward (n 166) 347.

169 Ibid.

170 *Australia Act 1986* (Cth); *Australia Acts (Request) Act 1985* (NSW); *Australia Acts (Request) Act 1985* (Qld); *Australia Acts (Request) Act 1985* (SA); *Australia Acts (Request) Act 1985* (Tas); *Australia Acts (Request) Act 1985* (Vic); *Australia Acts (Request) Act 1985* (WA).

171 *Sue v Hill* (1999) 199 CLR 462 and *Attorney-General (WA) v Marquet* (2003) 217 CLR 545.

172 (2003) 218 CLR 28.

173 *Federal Courts (State Jurisdiction) Act 1999* (NSW); *Federal Courts (State Jurisdiction) Act 1999* (Qld); *Federal Courts (State Jurisdiction) Act 1999* (SA); *Federal Courts (State Jurisdiction) Act 1999* (Tas); *Federal Courts (State Jurisdiction) Act 1999* (Vic); *Federal Courts (State Jurisdiction) Act 1999* (WA).

174 (1999) 198 CLR 511.

held that conferral of jurisdiction on the Commonwealth by the States was invalid. This rendered parts of the cross-vesting legislation[175] invalid. To address the situation that arose from the High Court's decision, the Federal Courts (State Jurisdiction) legislation[176] was enacted, which can be classified as 'almost identical'. These sets of uniform Acts provide that the 'ineffective judgements of federal courts made in the purported exercise of State jurisdiction are taken to be judgements of the Supreme Court or the Family Court'.[177] The Bill was prepared by the Standing Committee of Attorneys General in collaboration with the Special Committee of Solicitors-General and the Parliamentary Counsel's Committee.

In cases in which a mirror set of uniform Acts contains a conferral of jurisdiction or skeletal legislation, legislation almost reaches the level of uniformity of referred legislation. This legislation is mirror in structure, but highly uniform because it involves the conferral of functions on the Commonwealth (which is why the Acts are very uniform). The conferral of powers in mirror legislation allows for a high level of sustainable uniformity across jurisdictions. Yet this type of legislation has been rare.

By contrast to highly uniform legislation, some sets of uniform Acts within the mirror structure fall into the category of 'some similarities'. These sets of uniform Acts include the following examples: child protection (offender prohibition orders and offender registration),[178] parentage presumptions[179] and surrogacy.[180] The example of surrogacy legislation demonstrates how little similarity can exist in mirror legislation. Although all jurisdictions except the Northern Territory allow altruistic surrogacy and prohibit commercial surrogacy, there have been great

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175 *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth); *Jurisdiction of Courts (Cross-vesting) Act 1993* (ACT); *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW); *Jurisdiction of Courts (Cross-vesting) Act 1987* (NT); *Jurisdiction of Courts (Cross-vesting) Act 1987* (Qld); *Jurisdiction of Courts (Cross-vesting) Act 1987* (SA); *Jurisdiction of Courts (Cross-vesting) Act 1987* (Tas); *Jurisdiction of Courts (Cross-vesting) Act 1987* (Vic); *Jurisdiction of Courts (Cross-vesting) Act 1987* (WA).

176 *Federal Courts (State Jurisdiction) Act 1999* (NSW); *Federal Courts (State Jurisdiction) Act 1999* (Qld); *Federal Courts (State Jurisdiction) Act 1999* (SA); *Federal Courts (State Jurisdiction) Act 1999* (Tas); *Federal Courts (State Jurisdiction) Act 1999* (Vic); *Federal Courts (State Jurisdiction) Act 1999* (WA).

177 Parliament of Western Australia, Federal Courts (State Jurisdiction) Bill 1999 (WA) <http://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=80FE0AF3FF460F4F4825679F0030A95C>.

178 *Crimes (Child Sex Offenders) Act 2005* (ACT); *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW); *Child Protection (Offenders Registration) Act 2000* (NSW); *Child Protection (Offenders Reporting and Registration) Act 2004* (NT); *Child Protection (Offender Prohibition Order) Act 2008* (Qld); *Child Protection (Offender Reporting) Act 2004* (Qld); *Child Sex Offenders Registration Act 2006* (SA); *Community Protection (Offender Reporting) Act 2005* (Tas); *Sex Offenders Registration Act 2004* (Vic); *Community Protection (Offender Reporting) Act 2004* (WA).

179 *Parentage Act 2004* (ACT); *Status of Children Act 1996* (NSW); *Status of Children Act 1978* (NT); *Status of Children Act 1978* (Qld) (Part 3); *Family Court Act 1997* (WA) Part 5 Div 11 Subdiv 3; *Status of Children Act 1974* (Tas); *Status of Children Act 1974* (Vic); *Family Court Act 1997* (WA) Part 5 Div 11 Subdiv 3.

180 *Parentage Act 2004* (ACT); *Surrogacy Act 2010* (NSW); *Surrogacy Act 2010* (Qld); *Family Relationships Act 1975 (SA) (Part 2B); Surrogacy Act 2012* (Tas); *Status of Children Act 1974* (Vic) Part IV; *Surrogacy Act 2008* (WA).

variations between the sets of uniform Acts. The uniformity found here is only based on a general principle. However, this legislation still falls under the definition of national uniform legislation. Looking at the structure, most sets of uniform Acts have been standalone legislation, although the South Australian provisions are contained in the *Family Relationships Act 1975* (SA).[181] Variations in substantive provisions have been quite significant. The Australian Capital Territory allows same sex couples to become parents of a surrogate child but does not allow single persons to become parents. New South Wales prohibits advertising of surrogacy arrangements. In Victoria, surrogacy arrangements must be approved by a Patient Review Panel. In South Australia, only married or de facto heterosexual infertile couples can enter recognised surrogacy arrangements. In Western Australia, approval must be granted by the Western Australian Reproductive Technology Council. This disparity among regulations has been found to cause inequities because sets of Acts contain discriminatory provisions related to gender, marital status and sexual orientation.[182] Thus, only the general principles of this set of uniform Acts are consistent, and the set itself has 'some similarities'.

In conclusion, the findings show a weak correlation between the level of uniformity and structure in the case of mirror legislation. They also confirm that referred legislation, and in some cases, applied legislation, are structures that produce the highest uniformity. The empirical analysis revealed that designating legislation as mirror legislation does not necessarily mean it is less uniform than applied or referred legislation. The reason for this is that legislation in mirror structure offers versatility.

VIII Hybrid Structure

None of these structures exists in a vacuum and, if necessary, any structure can be modified to achieve the optimal result in a particular case. However, these three structures have been predominant in legislation today.[183] Although some of the Acts have continued to exist in their pure form, a certain percentage have become hybrids, which have often been a combination of applied and mirror legislation.

Table 2 identifies six sets of uniform Acts that belong in the hybrid category. As can be seen, most sets of uniform Acts (five out of six) belong to the hybrid category, combining applied and mirror legislation. Only consumer credit legislation falls into the category of the referred and applied hybrid. Therefore, from the analysis of the Table, it can be concluded that hybrid legislation has been used when for some reason,

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181 *Surrogacy Act 2010* (NSW); *Surrogacy Act 2010* (Qld); *Family Relationships Act 1975* (SA); *Surrogacy Act 2012* (Tas); *Assisted Reproductive Treatment Act 2008* (Vic); *Surrogacy Act 2008* (WA).

182 Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Surrogacy Matters Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (2016) 5.

183 See Australasian Parliamentary Counsel's Committee, *National Uniform Legislation—Acts of Jurisdictions Implementing Uniform Legislation* (June 2012) <http://www.pcc.gov.au/uniform/National%20Uniform%20Legislation%20table.pdf>.

jurisdictions have not been willing to implement referred or applied structures and have relied on legislation with a less rigid structure. In the case of the referred structure, New South Wales has followed the approach of implementing applied legislation through adoption. Similarly, in cases in which applied legislation has been intended, highly uniform mirror legislation has been used by the jurisdictions instead.

Table 2: Hybrid structures of national uniform legislation

Subject	Hybrid	Name of the Act	
Australian Crime Commission	Mirror/ applied	*Australian Crime Commission Act 20* (Cth)	Commonwealth is the leading jurisdiction for the applied act
		Australian Crime Commission (ACT) Act 2003 (ACT)	Mirror
		Australian Crime Commission (New South Wales) Act 2003 (NSW)	Applied
		Australian Crime Commission (Northern Territory) Act 2005 (NT)	Mirror
		Australian Crime Commission (Queensland) Act 2003 (Qld)	Mirror
		Australian Crime Commission (South Australia) Act 2004 (SA)	Mirror
		Australian Crime Commission (Tasmania) Act 2004 (Tas)	Mirror
		Australian Crime Commission (State Provisions) Act 2003 (Vic)	Mirror
		*Australian Crime Commission (Western Australia) Act 200*4 (WA)	
Consumer Credit	Referred /applied	*National Consumer Credit Protection Act 2009* (Cth)	Applied through adoption
		Credit (Commonwealth Powers) Act 2010 (NSW)	Referred through implementation.
		Consumer Credit (National Uniform Legislation) Implementation Act 2010 (NT)	Referred
		Credit (Commonwealth Powers) Act 2010 (Qld)	Referred
		Credit (Commonwealth Powers) Act 2010 (SA)	Referred
		Credit (Commonwealth Powers) Act 2009 (Tas)	Referred
		Credit (Commonwealth Powers) Act 2010 (Vic)	Referred
		Credit (Commonwealth Powers) Act 2010 (WA)	
Gene Technology	Mirror/ applied	*Gene Technology Act 2003* (ACT)	Mirror
		Gene Technology (New South Wales) Act 2003 (NSW)	Applied
		Gene Technology Act (Northern Territory) Act 2004 (NT)	Applied
		Gene Technology Act 2001 (Qld)	Mirror
		Gene Technology Act 2001 (SA)	Mirror
		Gene Technology Act 2001 (Tas)	Mirror
		Gene Technology Act 2001 (Vic	Mirror
		Gene Technology Act 2006 (WA)	Mirror

Road Transport legislation (road rules)	Mirror/ applied	*Road Transport (Safety and Traffic Management) Regulation 2000* (ACT) (cl 6) *Road Rules 2008* (NSW) *Traffic Regulations1999* (NT) (Schedule 3 - Australian Road Rules) *Transport Operations (Road Use Management - Road Rules) Regulation 2009* (Qld) *Road Traffic Act 1961* (SA) *Road Rules 2009* (Tas) *Road Safety Road Rules 2009* (Vic) *Road Traffic Act 1974* (WA)	Australian Road Rules were enacted differently by jurisdictions. In particular, the ACT has incorporated[184] Road Rules 2014 (NSW) and Road Traffic Rules (SA), referenced the Rules document published by the National Road Transport Commission, and the rest of jurisdictions have enacted mirror provisions.[185]
Water Efficiency Labelling	Mirror/ applied	*Water Efficiency Labelling and Standards Act 2005* (Cth) *Water Efficiency Labelling and Standards Act 2005* (ACT) *Water Efficiency Labelling and Standards (New South Wales) Act 2005* (NSW) *Water Efficiency Labelling and Standards Act 2005* (NT) *Water Efficiency Labelling and Standards Act 2005* (Qld) *Water Efficiency Labelling and Standards Act 2006* (SA) *Water-Efficiency Labelling and Standards Act 2005* (Tas) *Water Efficiency Labelling and Standards Act 2005* (Vic) *Water Efficiency Labelling and Standards Act 2006* (WA)	Applied Applied Mirror Applied Mirror Mirror Mirror Mirror

Source: adapted by the author from the PCC list[186]

The way the hybrid of mirror and applied legislation works can be illustrated by the water efficiency labelling legislation arrangement. The main objective of the scheme has been to introduce an Australia-wide efficiency labelling and standards scheme for water appliances. In 2004, the scheme was endorsed through the National Water Initiative and, in accordance with the COAG agreement, the jurisdictions committed to implementing legislation by 2005. The Commonwealth prepared the bill in consultation with the States and Territories. Some of the jurisdictions applied the Commonwealth's provisions.[187] Other jurisdictions chose to

184 Road Transport (Safety and Traffic Management) Regulation 2000 (ACT) reg 6.

185 Traffic Regulations 1999 (NT); Transport Operations (Road Use Management - Road Rules) Regulation 2009 (Qld); Road Rules 2009 (Tas); Road Safety Road Rules 2009 (Vic).

186 PCC Protocol (n 72) Appendix 5.

187 *Water Efficiency Labelling and Standards Act 2005* (Cth); *Water Efficiency Labelling and Standards Act 2005* (ACT); *Water Efficiency Labelling and Standards (New South Wales) Act 2005* (NSW); *Water Efficiency Labelling and Standards Act 2005* (NT); *Water Efficiency Labelling and Standards Act 2005* (Qld); *Water Efficiency Labelling and Standards Act 2006*

legislate mirror Acts in an essentially uniform way,[188] which has ensured a substantially uniform scheme overall.

IX Conclusion

Although national uniform legislation can be divided into a variety of structures with diverse uniformity, flexibility, and consistency, three main structures have predominantly been used. Referred, applied, and mirror legislation have provided a sufficient range of forms for development and drafting of national uniform legislation. If required, any combination of these structures could be used to achieve the optimal result. The main contribution of this article is in offering classification of structures that links the historical analysis of classification with the existing legislation. The figure developed based on analysis of the most comprehensive and up to date database of national uniform legislation can serve as a practical evaluation tool for policymakers, legislative drafters and legal practitioners when working through inherent ambiguity and complexity surrounding national uniform legislation. It can enable transparent, evidence-based decisions in the process of a federation's harmonisation to progress regulatory best practices in cases where a national approach is sought.

(SA); Water-Efficiency Labelling and Standards Act 2005 (Tas); *Water Efficiency Labelling and Standards Act 2005* (Vic); *Water Efficiency Labelling and Standards Act 2006* (WA).

188 *Water Efficiency Labelling and Standards Act* 2005 (Vic); *Water Efficiency Labelling and Standards Act 2006* (WA).