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Guzyal Hill
Charles Darwin University

Avoiding a 'Catch 22'—Major Lessons From a Meta-Analysis of Reports of the Parliament of Western Australia on Threats to Sovereignty by National Uniform Legislation

GUZYAL HILL*

National uniform legislation has served as an instrument to attune federalism to new realities. The enactment of national uniform legislation is not a panacea. However, it is critical that when harmonisation is necessary, it is efficient and effective, results in long-lasting uniformity and does not encroach on the sovereignty of the State and Territory Parliaments. The problem is that national uniform legislation is often called to address complex legal issues, respond to a multifaceted debate and meet the demands of actors from divergent ideological backgrounds. This testing backdrop results in politically charged arguments that often is presented as a false dilemma between sovereignty and national uniform legislation, 'catch 22'. To date, there has been lack of systematic objective analysis on what would be an example of this encroachment on sovereignty before the allegation of encroachment arise in the State or Territory Parliaments. This article seeks to address this gap through empirical methods. To ensure objectivity, a meta-analysis of 173 reports was undertaken. Contrary to political statements, the empirical findings suggest the cases of encroachment were rare and were isolated to specific practices. Legislative drafters, policymakers and law reformers must refrain from these practices if they wish to avoid the 'catch 22' of choosing between uniformity and sovereignty.

* Asia Pacific College of Business and Law, Charles Darwin University.
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I Introduction

> Although the Australian States have always moved to standardise laws, a new imperative has emerged with the globalisation of the economy and rapid technological change.[1]

The trend for the proliferation of national uniform legislation is 'not likely to diminish'.[2] The challenges of today rarely discriminate in its impact on the federal jurisdictions. In Australia, COVID-19 pandemic creates disruption across all jurisdictions, the bushfires and floods do not stop at Western Australian border, the hackers do not hack systems located in the Northern Territory only and the social media posts published in the New South Wales do not affect people residing in New South Wales only. In addition, Australia now has a 'highly geographically mobile population' estimated as the highest 'residentially mobile' nation in the world.[3] Technological progress has expanded information sharing across the States and Territories, contributing to a rise in the 'national conscience'. Australia, as other federations, face a myriad of emerging policy challenges requiring a national approach. These have ranged from day-to-day personal security issues of domestic violence to issues of national security relating to counter-terrorism legislation. The growth of national uniform legislation is foreseeable. With the growth in the volume and complexity of national uniform legislation, law reform agencies, the Commonwealth, State and Territory governments and policy institutions have more, not less, work to do. 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 sometimes irreconcilable differences over values and perspectives.

The growth of national uniform legislation means that the problems that occurred on a smaller scale when there was less national uniform legislation will begin to occur on a larger scale as more sets of national uniform acts are introduced. Further, more policymakers and legislative drafters will need to find guidance in lessons from the past. Thus, the search for the exact practices that threaten sovereignty as identified by parliamentary scrutiny warrants rigorous academic attention. If national

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1 Uniform Legislation and Intergovernmental Agreements Committee, Parliament of Western Australia, *Committee Report of Activities November 1996–October 1999* (Report, October 1999) 10.

2 Robert French, 'The Incredible Shrinking Federation—Voyage to a Singular State?' (Conference Paper, The Future of Australian Federalism Conference, 10–12 July 2008) 5.

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

uniform legislation is growing, then once conceptual questions become practical questions. Additionally, more professionals will need to become involved with national uniform legislation and have knowledge of what actions are problematic in this context.

However, discussions on the issue of encroachment on sovereignty are not always objective. Decision making in federations has been criticised for its 'opaque' qualities.[4] Saunders[5] has noted the need for transparency, emphasising the harm done by the 'opaque intergovernmental decision-making processes' in which transparency and accountability are diminished.[6] In such circumstances, it was deemed particularly important that an analysis of existing parliament reports on the topic be undertaken. The evidence-based solutions are the key: 'Without evidence, policymakers must fall back on intuition, ideology, or conventional wisdom, or at best, theory alone, and many policy decisions have indeed been made in those ways'.[7] However, while evidence-based knowledge and decision making are finally being applied to policy content,[8] the procedure for implementing policy has been largely unexplored by empirical studies. Indeed, little is known about evidence-based approaches to harmonisation in a federation, particularly in relation to the effects that such approaches have on the sovereignty of State and Territory Parliaments. To address this issue and ensure objectivity, a meta-analysis of 173 reports was undertaken to determine whether certain pieces of uniform legislation encroached on the sovereignty of the Western Australian Parliament. The argument proceeds in the following main sections: (1) examination of federalism as an aspiration to maintain both unity and diversity with national uniform legislation being an instrument to preserve the balance; (2) explanation of methodology that is not traditional for legal research but necessary to examine 173 reports; (3) conceptual reconciliation of contemporary relationship of national uniform legislation and sovereignty with the finding that the encroachment on sovereignty of the Parliaments is theoretical definitions of encroachment on sovereignty by national uniform legislation in abstract do not lead to satisfactory conclusions; (4) empirical findings from examination of the reports leading to main lessons on when the encroachment on sovereignty was found to take place. Contrary to political statements,

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

5 See Cheryl Saunders and Michelle Foster, 'The Australian Federation: A Story of the Centralization of Power' in Daniel Halberstam and Mathias Reimann (eds) *Federalism and Legal Unification* (Springer, 2014) 87.

6 Cheryl Saunders and Michael Crommelin, 'Reforming Australian Federal Democracy' (Research Paper No 711, Legal Studies, University of Melbourne, 2015) 1.

7 Ibid 110.

8 Demissie Alemayehu and Marc L Berger, 'Big Data: Transforming Drug Development and Health Policy Decision Making' (2016) 16(3) *Health Services and Outcomes Research Methodology* 92.

the empirical findings suggest the cases of encroachment identified in this research were rare and were isolated to specific practices. These practices should be considered by law reformers, policymakers and legislative drafters who wish to avoid the false dilemma or 'catch 22' of having to choose between uniformity and the sovereignty of the State and Territory Parliaments.

II What is the 'Catch 22' of Choosing Between Uniformity and Sovereignty?

National uniform legislation has a number of benefits, as discussed in section VI. However, national uniform legislation also has a serious obstacle to overcome: it cannot encroach upon the sovereignty of the State and Territory Parliaments. State and Territory Parliaments have raised concerns about the effects of uniformity on state rights on numerous occasions.[9] The dilemma between uniformity and sovereignty is demonstrated in the following, almost humorous, exchange, which occurred during a public hearing of the Fair Trading Bill in Western Australia:

> Hon Linda Savage: That is a bit of a catch 22, is it not?
>
> Mr Newcombe: There is no way around it. This is the conundrum that we are in: either there is uniformity or there is State sovereignty and the State exercises its sovereignty. When it exercises its sovereignty, you will lose uniformity.[10]

Such a reading of sovereignty or uniformity could paralyse the workings of federations in the modern world. Stated in these broad terms, the argument that uniformity encroaches on sovereignty is not only an obstacle to harmonisation, it could also create a dead-end for federations. Thus, a more objective understanding of sovereignty in the context of drafting national uniform legislation is needed. However, any such understanding seems to be lacking. This is illustrated in the following exchange, documented in a report, in which an official was asked whether the encroachment on sovereignty exists:

> When asked whether there are any further safeguards or checks that 'might be desirable to at least be considered in order to preserve Western

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9 See, for example, 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, 31 August 1995); Karen Sampford et al. 'National Scheme Legislation' (Research Brief No 27, Parliamentary Library, Parliament of Queensland, 2007).

10 Department of Commerce, Transcript of the Public Hearing (1 November 2010) 28–9 cited in Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Fair Trading Bill 2010 and Acts Amendment Fair Trading Bill 2010* (Report No 56, November 2010) 74.

> Australia's flexibility, its sovereignty, its scope of action to look after its interests?', Dr Thomson SC advised:
>
> I think the answer to that is no.[11]

The official's answer also included a statement no encroachment would exist in a situation in which the Commonwealth Parliament could make amendments to the final bill prior to Royal Assent without any input from the Western Australian Parliament. Thus, the official overlooked the existence of an encroachment from the Commonwealth and was of the view that no encroachment existed in a situation with a clear encroachment.

National reforms and harmonisation in federations are complex, 'highly contested and, as with all areas of social regulation, involve difficult trade-offs between competing social and economic values and interests producing both winners and losers'.[12] Consequently, it is critical that when harmonisation is necessary, it is efficient and effective, results in long-lasting uniformity and does not encroach on the sovereignty of the State and Territory Parliaments. To date, there has been lack of systematic objective analysis on what would be an example of this encroachment on sovereignty before the allegation of encroachment arise in the State or Territory Parliaments. This article seeks to address this gap. This article contributes by proposing a slightly different approach – it is proposed to define encroachment on sovereignty by national uniform legislation through the practices that must be avoided by law reformers and legislative drafters. The list of these practices includes:

- 'fiscal imperatives to pass uniform legislation; limited time frames for consideration of uniform legislation and lack of notice and detailed information as to negotiation's inhibiting Members formulating questions and performing their legislative scrutiny role.'[13]
- imposing deadlines for scrutiny and enabling the Executive to control the commencement dates;
- adopting an applied (template) structure for the legislation that could either be:
    - amended 'from time to time'; or

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11 Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018* (Report No 118, November 2018) 25.

12 See Eric Larry Windholz, 'Harmonisation of Social Regulation in the Australian Federation: A Case Study of Occupational Health and Safety' (PhD Thesis, Monash University, 2013).

13 Legislative Council Standing Committee on Uniform Legislation and General Purposes, Parliament of Western Australia, *Uniform Legislation and Supporting Documentation* Report No19 (2004) 11.

    - included strict limitations on the mechanism for amending the legislation, which was related to an inability to scrutinise the amendments;
- Henry VIII clauses that enabled acts to be amended by subsidiary legislation;
- the employment of skeletal legislation; and
- the absence of review provisions.

The list is not exhaustive; but its value is in providing an evidence-based solution to an often politically charged arguments. Another benefit of this approach is its proactive nature. The law reformers and legislative drafters can consult the list before encountering the problem of encroachment at the time of developing the policy rather than presenting a Bill for scrutiny by the Parliament.

III Constitutional Design and Theoretical Foundations for Sovereignty in the Australian Federation

Any discussion of national uniform legislation must take into account the fact that Australia was established as a federation that values diversity and that its defining characteristic is its concurrency of powers. National uniform legislation is a by-product of the federal system and the *Australian Constitution* and has usually been called on to bring about national coherence in areas in which the Commonwealth Government has limited power or no power to legislate under the *Australian Constitution*. The *Australian Constitution* lists most of the legislative powers of the Commonwealth Government in Section 51; however, everything that falls outside these powers is left to be regulated by the States and Territories. Section 107 of the *Australian Constitution* preserves the legislative powers of the States and Territories. Thus, Australian federalism is characterised by duality, concurrency and 'divided sovereignty'.[14] The duality arises because the State, Territory and Commonwealth Governments act as agents for the people at the same time and in the same fields. Consequently, there is a need for both a 'delegation of powers to a higher level and [the] devolution of other powers to the local level'[15] and 'concomitant centrifugal and centripetal forces of State dissolution and reformulation'.[16] Thus, 'federalism balances the interests of the nation as a whole with the rights of the States by dividing power between the two levels of government in accordance with local and national

[14] Andrew Parkin and John Summers, 'The Constitutional Framework' in Dennis Woodward, Andrew Parkin and John Summers (eds) *Government, Politics, Power and Policy in Australia* (Pearson Australia, 2010) 102.

[15] James D Wilets, 'Unified Theory of International Law, the State, and the Individual: Transnational Legal Harmonization in the Context of Economic and Legal Globalization' (2010) 31(3) *University of Pennsylvania Journal of International Law* 753, 819.

[16] Ibid 821.

issues'.[17] Similarly, the American theorist Vile defined federalism as a 'system of government in which central and regional authorities are linked in a mutually interdependent political relationship; in this system, a balance is maintained such that neither level of government becomes dominant … however, each can influence, bargain with, and persuade the other'.[18]

The definition of federalism most relevant to this research is 'an aspiration and purpose simultaneously to generate and maintain both unity and diversity'.[19] When discussing federalist theory, 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 founding fathers. Both beliefs and circumstances are different from the past. Diverse realities surround the current participants debating 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

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17 M Evans, 'Rethinking the Federal Balance: How Federal Theory Supports States' Rights' (2010) 1 *The Western Australian Jurist* 14, 34.

18 Maurice John Crawley Vile, *The Structure of American Federalism* (Oxford University Press, 1962). 199.

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

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.

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.

Differing beliefs stem from the different starting points. At the beginning of the federation, the most feasible option for the founding fathers was to accept an element of disunity as 'the lesser of two evils'.[23] The notion of a unified state was too big a proposition for those times. The States were viewed as not wanting to 'sacrifice any of their existing powers, other than those … necessary [to] be surrendered in the national interest … We shall make no request for a surrender which cannot be justified on the score of the requirements of the national interest'.[24] The participants in those early debates insisted that there should be no intention 'to diminish States' authority, except in so far as it is absolutely necessary in view of the great end to be accomplished, which, in point of fact, will not be material as diminishing their rights'.[25] However, it cannot be said that the debate participants were ignorant of the possible risks of federalism: 'We know that the tendency is always towards the central authority, that the central authority constitutes a sort of vortex to which power gradually attaches itself. Therefore, all the buttresses and all the ties should be the other way'.[26]

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'.[27] Wheare's view was that integration and the union of jurisdictions would deliver security and economic advantages to the States.[28] He predicted that developments in mobility could lead to an increase in the influence of 'the centre' in social spending.[29] 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

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23 Gregory Craven, 'The States- Decline, Fall, or What' in Gregory Craven (ed), *Australian Federation: Towards the Second Century* (Melbourne University Press, 1992) 51.

24 *Official Record of the Debates of the Australasian Federal Convention,* Sydney, 6 March 1891, 1:117 (Charles Cameron Kingston).

25 Sir Henry Parkes, Convention Debates, Sydney, 1891, 24 cited in John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 930.

26 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 3 April 1891, 1:707-708 (John Alexander Cockburn).

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

28 K C Wheare, *Federal Government* (Oxford University Press, 4th ed, 1963) 35-50.

29 Ibid 113.

have emphasised the need for centralisation and even the abolition of the States.[30]

The above theoretical underpinnings of federalism are vital. However, some limits to federalism theory are worth noting. For instance, States' rights arguments in the United States of America have, in the past, been invoked to 'defend some of the most despicable institutions in American history, most notably slavery and segregation of races'.[31] Similarly, in Australia, the Bjelke-Petersen government of Queensland obstructed the rights of minorities under the veil of 'States' rights', vehemently arguing against the expansion of Commonwealth powers.[32] One proponent of States' rights in Australia has been Eric Butler, founder of the Australian League of Rights (a movement once described as neo-Nazi).[33] Such examples highlight the disadvantage of adhering too vehemently to any one particular theoretical model. At the same time, they demonstrate the need to provide an empirically tested framework to improve the workings of Australian federalism, thereby generating and sustaining substantial future benefits for the Australian community.

IV Methodology, Foundational Assumptions, Research Scope and Limitations

Consideration of the research question revealed that a one-dimensional methodology would be insufficient to understand and address the issues at hand. Further, due to the proliferation of national uniform legislation, carrying out doctrinal case studies, as scholars have done previously,[34] would have restricted this research to drawing inferences that only applied to specific pieces of legislation. Thus, an expanded methodology was adopted.[35] The 'law-as-data' movement[36] represents an alternative approach to doctrinal and case study methods. Viewing legislation as data or text, rather than rules, allows important empirical

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30 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.

31 Heather K Gerken, 'A New Progressive Federalism' (2012) 24 *Democracy: A Journal of Ideas* 37, 37.

32 *Koowarta v Bjelke-Petersen and Others* 153 CLR 168.

33 Albert J Jongman, *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature* (Routledge, 2005), 505; Loane, Sally 'How the Right Gets it Wrong' *The Age* (21 October 1988).

34 See Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Harmonisation of Legal Systems within Australia and between Australia and New Zealand* (Report, November 2006).

35 This was done in accordance with recent developments in legal research; for example, more recent research uses the Delphi method as a way of decision making in policy development. See Evgeny Guglyuvatyy and Natalie P Stoianoff, 'Applying the Delphi Method as a Research Technique in Tax Law and Policy' (2015) 30 *Australian Tax Forum* 179.

36 Dru Stevenson and Nicholas J Wagoner, 'Bargaining in the Shadow of Big Data' (2015) 67 *Florida Law Review* 1337, 1352.

data to be introduced and statistical methods adopted to analyse the data collected. Rather than examining the substance of the legislation being studied, the 'law-as-data' approach enables the practices that have affected sovereignty (as identified by parliamentary scrutiny) to be analysed.

Consequently, a mixed-methods approach was adopted. In the first part of this research, a doctrinal method was used to establish a conceptual framework. In the second part of this research, empirical methods were used to examine parliamentary reports. Specifically, a content analysis of the data collected was undertaken (statistical methods were used in the data analysis). The content analysis sought to identify patterns and themes in the large amounts of data that had been extracted from reports. Technically, the content analysis includes establishing categories and systematically calculating the number of its occurrences in text. [37] Creating categories allows data to be methodically systematised. This increases objectivity and pierces politically charged arguments.

The standard for empirical studies, including meta-analyses, 'is not perfection but rather benchmarking against alternative comparative models. Simply put, if one person has an almanac and the other does not, in the long run, the one with the almanac is likely to outperform'.[38] As the data grows, it is likely that 'more experience can be captured than a single human mind might be able to consume'.[39] In the future, bigger datasets and better algorithms are likely to lead to the development of new analytical techniques [40] that will allow policymakers to engage with new developments. Thus, while evidence-based decision making is not new, with better technology and access to data, policymakers can 'put their jurisdictions on a sustained path of evidence-based decision-making'.[41] This is not only applicable to a policy's substance but to the process of implementing the policy, especially when complex issues of harmonisation are involved.

The methodology adopted in this research was built on a foundational assumption: once a decision on the desirability of national uniform legislation for a certain area of legislation is reached, there is a public benefit to ensuring that harmonisation is achieved in an efficient,

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37 Hall, Mark A and Ronald F. Wright, 'Systematic Content Analysis of Judicial Opinions' California Law Review 96.1 (2008) 63, 64.

38 Daniel Martin Katz, 'Quantitative Legal Prediction or How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry' (2012) 62 *Emory Law Journal* 909, 963.

39 Lyria Bennett Moses and Janet Chan, 'Using Big Data for Legal and Law Enforcement Decisions: Testing the New Tools' (2014) 37(2) *University of New South Wales Law Journal* 643, 665.

40 Ibid.

41 *Evidence-based Policymaking. A Guide for Effective Government* (Report from the Pew-MacArthur Results First Initiative, November 2014), 2 <http://www.pewtrusts.org/~/media/assets/2014/11/evidencebasedpolicymakingaguideforeffectivegovernment.pdf>.

reliable and enduring way that does not encroach upon sovereignty. Given the skills, time and money expended on harmonising legislation, it must have substantial longevity if it is to be beneficial, even in cases where policy refinement is required through further amendments.

This research focused on the problems related to encroachments on sovereignty by national uniform legislation, even though it may sometimes be the outcome of federalism and constitutional design. It should be noted that this paper does not explore issues related to federalism in great detail. However, there is consensus in the literature that some change to Australian federalism is required.[42] The debate is complex, multifaceted and interdisciplinary, but the short-term response has been to 'co-ordinat[e] and harmonis[s] … government action, largely through inter-governmental schemes',[43] including national uniform legislation.

In scope, this research recognises the necessity and importance of local solutions and the fact that not every solution lies in adopting national uniform legislation. There are certain countervailing forces against national uniform legislation and pro-local approaches. Policy innovation in different Australian jurisdictions in response to COVID-19 pandemic is one of examples. Another example is innovation of the States in an area of renewable resources. Yet another recent example is the progress of States and Territories towards Treaty or Treaties with Indigenous Australians. National uniform legislation is not a panacea.

In terms of limitations, the scope of the empirical portion of this research was restricted by (a) the sample size of the reports by the Western Australian Committee; and (b) its focus on the argument that sovereignty was being encroached upon. In relation to the sample size, the research only examined pieces of national uniform legislation (173 in total) that had been considered in reports by the Western Australia Parliament. It should be noted that the reports only provide an account of the more nuanced ways in which pieces of national uniform legislation have encroached upon sovereignty. Had the attempts to encroach upon sovereignty been more blatant, the legislation would not have reached this stage of consideration. Indeed, such pieces of legislation would have been estopped from entering this (almost final) stage of parliamentary scrutiny. Thus, the sample size is not exhaustive; however, it is sufficient due to its high volume and the importance of the legislation included. The study's focus on any encroachment to the

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42 See, for example, Alan Fenna, 'The Division of Powers in Australian Federalism: Subsidiarity and the Single Market' (2007) 2(3) *Public Policy* 175; Anne Twomey, 'Federalism and the Use of Cooperative Mechanisms to Improve Infrastructure Provision in Australia' (2007) 2(3) *Public Policy* 211; The Commonwealth Government, *Reform of the Federation. White Paper—A Federation for our Future* (Issues Paper No 1, September 2014).

43 Cheryl Saunders, 'The Constitutional, Legal and Institutional Foundations of Australian Federalism' in Robert Carling (ed), *Where to for Australian Federalism* (The Centre for Independent Studies, 2008) 25.

sovereignty of the Western Australian Parliament ensured that this research had a tight focus. Due to the nature of conducting a meta-analysis, there was some risk that the nuances would be lost in the process of seeking the 'big picture'. However, the focus enabled the main factors threatening sovereignty to be identified. The paper provides key insights into national uniform legislation and the institutions that frame it. Methodologically, this is the first research to undertake a meta-analysis of reports (using a combination of doctrinal and empirical methods, including undertaking a content analysis of the reports) to examine encroachments of sovereignty by pieces of national uniform legislation.

V Definitions of National Uniform Legislation and Sovereignty

In extreme terms it has been argued that 'Uniform schemes and resulting legislation by their very nature have the capacity to erode or undermine the sovereignty of the Western Australian State Parliament'.[44] In such wide terms, the mere existence of any national uniform legislation amounts to a derogation of the State or Territory Parliaments' sovereignty. As 'derogation involves detracting from or taking away part of what has previously existed, in a sense, all uniform legislation has this effect'.[45] This argument has created a false dilemma in which a choice must be made between sovereignty or uniformity. That is why, it is argued that the definitions of sovereignty, encroachment on sovereignty and its traditional and contemporary understandings have to be explored with the view of constructing the definitions with a workable solutions that do not paralyse the working of the federation. Therefore, this section focuses on conceptual reconciliation of definitions of national uniform legislation and sovereignty. The argument progresses in the following parts: firstly, brief examination of definition of national uniform legislation; secondly, examination of the contemporary sovereignty and two directions in which the encroachment on sovereignty can take place – encroachment by the Commonwealth and encroachment by the executive branch. The theoretical search, however, yields little, leading to the conclusion that encroachment of sovereignty is better conceptualised as certain examples of when such encroachment took place are provided in section VIII that reports on results of the empirical research.

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44 Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, Personal Property Securities (Commonwealth Laws) Bill 2011 and Personal Property Securities (Consequential Repeals and Amendments) Bill 2011 (Report No 59, 22 March 2011) 6.

45 Standing Committee on Uniform Legislation and Statutes, Parliament of Western Australia, *Rail Safety Bill 2009* (Report No 46, 1 April 2010) 12.

Generally, national uniform legislation is defined by referring to the concept of harmonisation. For example, the Australian Senate defines 'national uniform legislation' as legislation that is intended to 'harmonise legislation across a number of jurisdictions'.[46] Conversely, the Uniform Legislation and Statutes Review Committee of the Parliament of Western Australia defines 'uniform legislation' as 'bills that ratify or give effect to a bilateral or multilateral intergovernmental agreement' intended, 'by reason of its subject matter, (to) introduce a uniform scheme or uniform laws throughout the Commonwealth'.[47] The term 'national uniform legislation' is also used to refer to 'legislation which is substantially the same in all or a number of jurisdictions'.[48] Adopting a synthesis of definitions, which reveal the different facets of national uniform legislation, for the purposes of this research, national uniform legislation is defined as legislation with a degree of uniformity that is implemented to give effect to an intergovernmental agreement or a decision of a ministerial council. Therefore, if the encroachment on sovereignty takes place, the encroachment is directed from two main sources: (1) the Commonwealth; and (1) by nature of the definition, the executive branch of power because the legislation itself is the result of the decision of the ministerial council. The encroachment of sovereignty by the Commonwealth is best examined conceptually with reference to modern reality in this section and empirically. The encroachment on sovereignty by the executive, however, is best examined through empirical examples provided in section VIII of this article.

As for the encroachment from the Commonwealth, some states' rights theory proponents believe that 'the States must retain their powers and independence as much as possible').[49] These advocates support a strong States approach wherein federalism (as intended by the founders of Australia in the *Constitution*) refers to the States being 'equal partners with the new national government'.[50] This 'equal partners' perspective has tended to reflect the historical debate examined in section III. Its proponents have urged the federal government to 'keep out of areas that belong to States according to the Constitution',[51] with the national government holding only a narrowly

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46 Scrutiny of Bills Committee, Parliament of Australia, *The Future Direction and Role of the Scrutiny of Bills Committee* (Report, May 2012) 39.

47 Uniform Legislation and Statutes Review Committee, Parliament of Western Australia, *Information Report: Scrutiny of Uniform Legislation* (Report No 63, June 2011) 12.

48 Standing Committee on Uniform Legislation and Intergovernmental Agreements, Parliament of Western Australia, *Uniform Legislation* (Report No 21, 1998) 6.

49 Evans (n 17).

50 Kenneth Wiltshire, 'Chariot Wheels Federalism' (2008) 20 *Upholding the Australian Constitution* 76, 76. <http://www.samuelgriffith.org.au/papers/html/volume20/v20chap11.html>.

51 Sir Harry Gibbs, 'Australia Day Message, 26 January 2005' (2005) 17 *Upholding the Australian Constitution*, (2005) Appendix 2 <http://www.samuelgriffith.org.au/papers/html/volume 17/v17appendix2.html>.

defined list of exclusive powers (mainly found in sections 51 and 52 of the *Australian Constitution*).[52] More recently, however, there has been an increasing tendency for matters of national concern to depend on cooperative effort. Indeed, the history of Australian federalism throughout the 20th century has been one of 'gradual centralisation of power in favour of the Commonwealth'.[53] Responsibility for the centralisation trend has sometimes been levelled at the States, who have been blamed for a 'decline in State leadership'.[54] Some have accused the Commonwealth of 'usurping the power of States'.[55] Others have placed responsibility for centralisation on the High Court for 'failing to interpret federal powers with a view to maintaining the federal balance'.[56] There has also been another perspective, holding that States' rights have not been declining but rather have been changing in nature. In a world where technology and mobility transcends the borders, the States and Territories have adapted by cooperating. The objectives have been the optimal distribution of resources for harmonisation (or where distinctive laws have been required) and to 'enable rapid response to international [and local] threats or opportunities'.[57]

An adequate response to the current challenges faced by the Australian nation (e.g., environmental challenges, artificial intelligence and cybersecurity) 'is to recognise that de facto shared jurisdiction is both current realities and to some extent inevitable and that there is, therefore, a need for closer and more effective co-operation between governments'.[58] This approach recognises that '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'.[59] It must be acknowledged 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

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52 Ibid.

53 Kenneth Wiltshire, 'Australian Federalism: The Business Perspective' (2008) 31(2), *University of New South Wales Law Journal* 583, 588.

54 Julian Leeser, *Sir Harry Gibbs and Federalism: The Essence of the Constitution*, Menzies Research Centre (26 June 2008) <http://www.mrcltd.org.au/research/economic-reports/federalism.pdf>.

55 Alan Fenna, 'Centralising Dynamics in Australian Federalism' (2012) 58(4) *Australian Journal of Politics and History* 580.

56 Evans (n 17) 34. See *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129. In this landmark decision, the majority of the High Court (1) overturned the doctrines of 'implied intergovernmental immunities' and 'reserved State powers', thereby diminishing the position of the States; (2) construed Commonwealth powers broadly and let the Commonwealth assume the dominant position vis-a-vis the States; and (3) severed Australian constitutional law from American precedents.

57 Pablo Bello, 'Security and International Cooperation Dominate Today's Cyber Policy Landscape' (2016) 1(1) *Journal of Cyber Policy* , 135.

58 J Phillimore and Alan Fenna, 'Intergovernmental Councils and Centralization in Australian federalism' (2017) *Regional and Federal Studies* 1, 6.

59 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.

one's own empire, free from interference' does not reflect the world or Australia anymore.[60] To the contrary, both levels of government must regulate a space that 'is constantly negotiated and contested'.[61] Cooperation in this contested space is not clearly delineated or neatly coordinated. The shared space requires 'plasticity, innovation, and adaptation as key aspects'.[62] Cooperative federalism and joint regulation dominate the regulative landscape. This is not a situation in which there are winners and losers; rather, the relationships are much more complex. The approach is opaque rather than black and white. Thus, a different perspective is required that takes into consideration the multidimensional forms of pragmatic 'reciprocal learning and adjustment' emerging incrementally across Australia.[63]

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

> 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.[64]

Rather than approaching national uniform legislation as an encroachment on sovereignty, the argument must revolve around achieving the 'appropriate balance' by 'weighing the pros and cons' of certain approaches to national uniform legislation.[65] Given the changing reality and the 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; however, this would be an encroachment. National uniform legislation is the mechanism that prevents encroachment. National uniform legislation used to be 'dismissed as unnecessary, impractical, and undesirable';[66] however, this position would not be supported today. As

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

61 Ibid 1700.

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

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

64 Ibid 1722–1723.

65 Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Fair Trading Bill 2010 and Acts Amendment Fair Trading Bill 2010* (Report No 56, November 2010) 100 (emphasis in original).

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

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.[67] Neither reflect a devious intent of the Commonwealth or the Executive to usurp the powers of the State or Territory Parliaments. To summarise this section, it is difficult to see how the argument of 'keeping within the limits of jurisdiction delineated by the *Australian Constitution*' can work now given the realities of the modern world of shared problems and expansion of areas of control for all jurisdictions.

It seems theoretical definitions of encroachment on sovereignty by national uniform legislation in abstract do not lead to any satisfactory conclusions. That is not to say that encroachment on sovereignty does not take place. It does. This encroachment, however, is best conceptualised as certain practices, discussed in section VIII, rather than blank refusal to cooperate for development of national policies with plausible imperatives discussed in the next section.

VI Imperatives for National Uniform Legislation

This section examines imperatives for national uniform legislation. National uniform legislation has a number of benefits that make the attempt to implement it a worthwhile exercise. Such benefits must be considered in wide terms, as any specific benefits cannot be discussed in the abstract and must be considered on a case-by-case basis. The wide range of purposes and goals of the various sets of uniform acts make it impossible to capture every specific advantage; however, the general benefits can be examined. The consensus is 'that there is a strong economic and "equality" case for regulatory uniformity … [which is], if anything, growing stronger'.[68] One of the main advantages of national uniform legislation relates to the logical convenience of having a single set of rules for the same process throughout the entire country. However, it also has a number of other advantages, including that it provides a single set of rules for a homogeneous population, increases conformity with the rule of law, unites legal talent in one pool and is subject to detailed scrutiny.

Australia is a large country geographically; however, it is small in terms of population. This has given rise to numerous calls for harmonisation and uniformity. As Saunders stated, 'Harmonisation ... is

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

68 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) 111.

widely perceived as good, in a country with a small population, at a considerable distance from major world markets, in which the component States and Territories are relatively homogenous'. [69] Similarly, observing that Australia has a relatively small and homogenous population, Williams noted that 'there are some areas where cooperation tends to transcend competition because we recognise there is a need for harmonised laws'.[70] In this context, harmonisation (particularly, in the area of private law) and uniformity are the ultimate goals. This was emphasised by Sir Owen Dixon in the context of the Australian federation when he posed the following questions: 'Is it not unworthy of Australia as a nation to have varying laws affecting the relations between man and man? Is it beyond us to make some attempt to obtain a uniform system of private law in Australia?' [71] The benefits of harmonisation have also been analysed as follows: 'the costs and distress resulting from legal conflict can be mitigated by reducing differences in legal systems so that the same or similar "rules of the game" apply to all participants regardless of physical location'.[72]

In addition to mitigating costs, national uniform legislation can spread benefits to the population equally. For example, Section 3 of the *National Environment Protection Council (New South Wales) Act 1995* (NSW) states that the objective of the Act is to ensure that 'people enjoy the benefit of equivalent protection from air, water or soil pollution and from noise, wherever they live in Australia'. Thus, by applying the same laws across all the jurisdictions, uniform legislation not only results in the equal distribution of benefits but also removes obstacles for a mostly homogenous Australian population.

Another benefit of harmonisation and national uniform legislation is greater conformity to the rule of law, which is directly related to the predictability and coherence that national uniform legislation provides. As Opeskin stated:

> All things equal, a greater degree of conformity to the rule of law is preferable to a lesser degree of conformity because it enables people to better plan their lives. It is for this reason that attempts to unify the substantive law and choice of law rules … ought not to be disparaged. In particular subject areas, individuals are able to make their plans in the knowledge that stable and predictable laws will apply to their actions, wherever a subsequent dispute might be litigated.[73]

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69 Saunders (n 43) 25.

70 George Williams, Foundation Director, Gilbert and Tobin Centre for Public Law, *Committee Hansard*, 2 December 2010, 15–16.

71 Sir Owen Dixon quoted in KO Shatwell, 'Some Reflections on the Problems of Law Reform' (1957) 31 *Australian Law Journal* 325, 340.

72 Colin B Picker and Guy I Seidman, The Dynamism of Civil Procedure-Global Trends and Developments (Springer, 2015) 39.

73 Brian R Opeskin, 'The Price of Forum Shopping: A Reply to Professor Juenger' (1994) 16 *Sydney Law Review* 14, 18.

When legislation is harmonised, different jurisdictions can speak with one voice when preparing materials to explain the legislation to the citizens. Given the information overload being experienced by individuals and companies today, clearer legislation should facilitate compliance with the law.[74] Some artificial intelligence systems, such as Eunomos[75] and Regorous,[76] have the capacity to help organisations navigate compliance requirements; however, this does not eliminate the government's obligation to help individuals and companies comply with legal requirements.

As they are developed and drafted, centralised policies not only benefit from harmonisation but from bringing together legal talent from various jurisdictions.[77] This undoubtedly saves time and costs, as legal reform and modernisation can be immensely complicated and expensive, especially when carried out at the local level. Uniformity ensures fairness and equality, as each jurisdiction is provided with complete, high-quality legal text, regardless of its own resources and drafting talent. Uniformity also makes additional resources available that can aid in the interpretation and application of legislation. For example, numerous resources on the Internet explain the harmonisation of the work health and safety laws, which are accessible across all jurisdictions in which these laws have been enacted. Thus, the national uniform legislation enables each State and Territory to access a larger number of resources, which can be used to interpret and implement the concepts expressed in the legislation.

Additionally, as national policy requires intra-jurisdictional discussion, the resulting policy is subject to 'a great deal more scrutiny'.[78] Hypothetically, scrutiny should result in better policies for the jurisdictions involved. It also leads to a wider pool of talent working to draft high-quality legislation that is up-to-date and modern.[79]

The benefits of national uniform legislation have been particularly apparent in a number of major projects. In the final report of the Royal Commission on the building and construction industry, Commissioner Cole addressed the role of national uniform legislation in facilitating

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74 R Kent Weaver, 'Compliance Regimes and Barriers to Behavioral Change' (2014) 27(2) *Governance* 243.

75 Guido Boella et al, 'Eunomos, A Legal Document and Knowledge Management System for the Web to Provide Relevant, Reliable and Up-to-date Information on the Law' (2016) 24(3) *Artificial Intelligence and Law* 245.

76 Silvano Colombo Tosatto, Guido Governatori and Pierre Kelsen. 'Business Process Regulatory Compliance is Hard' (2015) 8(6) *The Institute of Electrical and Electronics Engineers and Engineers Transactions on Services Computing* 958.

77 Peter B Maggs, 'The Process of Codification in Russia: Lessons Learned from the Uniform Commercial Code' (1999) 44(2) *McGill Law Journal* 281.

78 Anne Twomey and Glenn Withers, *Federalist Paper. Australia's Federal Future. Delivering Growth and Prosperity* (Report for the Council for the Australian Federation, April 2007) 15 <http://www.caf.gov.au/Documents/AustraliasFederalFuture.pdf>.

79 Peter B Maggs, 'The Process of Codification in Russia: Lessons Learned from the Uniform Commercial Code' (1998) 44(2) *McGill Law Journal* 281, 283.

major projects that span several jurisdictions, including construction projects. In remarking on the security of payment reforms, he stated:

> National consistency in this area is important because it reduces the cost of businesses moving between jurisdictions and operating in different jurisdictions. It minimizes duplication and reduces the cost of education campaigns. It means that the cost of subcontractors and the cost of building are not inflated in those States or Territories where there is a higher risk that subcontractors will not get paid. Furthermore, from the standpoint of principle it is not obvious why subcontractors in one State or Territory should have better prospects of receiving payment for their work than subcontractors working in any other State or Territory.[80]

In the context of legal reform in electronic commerce, the Australian Law Reform Commission (ALRC) has noted that electronic commerce has become 'an emerging priority for cross border legal initiatives'.[81] More importantly, the Commonwealth Department of the Attorney General has been working to ensure simple and reliable electronic communications in transactions[82] and has considered acceding to the United Nations Convention on the Use of Electronic Communications in International Contracts.[83]

In conclusion, the divergence of law and procedure have been 'costly and bothersome' in some cases.[84] However, the benefits of national uniform legislation are numerous and include the logical convenience of having a single set of rules for the same processes throughout the entire country, greater conformity to the rule of law, policy development, the bringing together of legislative drafting talent and increasing Australia's prosperity.

VII The Committee and its Scrutiny of National Uniform Legislation to Identify any Threats of Encroachment on the Sovereignty of the State Parliament

In the Australian federation, no specific body is dedicated to the drafting and development of national uniform legislation. Conversely, Canada has the Uniform Law Conference and the United States of America has the Uniform Law Commission. In the majority of cases, the work of developing policy and drafting national uniform has historically been performed by the ALRC and the Parliamentary Counsel's Committee. However, the Parliament of Western Australia,

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80 Royal Commission into the Building and Construction Industry (*Final Report*, 2003) vol 8, 255.

81 Australian Law Reform Commission, *Legal Risk in International Transactions* (Report No 80, 1996) para 5.2.

82 'E-commerce', *Attorney-General's Department (Cth)* (Web page, 2015) <https://www.ag.gov.au/RightsAndProtections/ECommerce/Pages/default.aspx>.

83 Ibid.

84 Eleanor M Fox, 'Harmonization of Law and Procedures in a Globalized World: Why, What, and How?' (1991) 60(2) *Antitrust Law Journal* 593, 593.

via the Standing Committee on Uniform Legislation and Statutes Review (the Committee) of the Legislative Council, has produced a large body of work scrutinising national uniform legislation and cases of encroachment on sovereignty by the Commonwealth and the executive branch of power.

This section examines the cases in which a level of derogation was identified. To achieve this objective, 173 reports of the Parliament of Western Australia were examined. These reports were selected for analysis, as: (1) Western Australia is historically viewed as a 'reluctant state'[85] that engages in close scrutiny of the issues of sovereignty; and (2) they provide a rich basis for analysis. Additionally, no other parliament in Australia has a committee that engages in equivalent reporting.

Strictly speaking, the reports of two different committees were considered in the meta-analysis. The first committee was established by the Legislative Assembly in 1993. While the second Committee was established by the Legislative Council in 2002. The main function of both these committees has remained unchanged and can be summarised as investigating 'whether [a] Bill may impact upon the sovereignty and law-making powers of the Parliament of Western Australia.'[86] On 4 August 1993, the Legislative Assembly established the Standing Committee on Uniform Legislation and Intergovernmental Agreements. This Committee produced reports between 1993–2002, including two fundamental reports in which national uniform legislation was scrutinised: 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, 31 August 1995) and Standing Committee on Uniform Legislation and Intergovernmental Agreements, Parliament of Western Australia, *Uniform Legislation* (Report No 21 1998).

The Uniform Legislation and General Purposes Committee established by the Legislative Council of the Parliament of Western Australia (2002–2005) produced 25 reports, including Legislative Council Standing Committee on Uniform Legislation and General Purposes, Parliament of Western Australia, *Uniform Legislation and Supporting Documentation* (Report No 19, 2004). The current Committee has produced 123 reports, including Legislative Council Standing Committee on Uniform Legislation and General Purposes, Parliament of Western Australia, *Information Report: Scrutiny of*

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85 Augusto Zimmermann, 'The Still Reluctant State: Western Australia and the Conceptual Foundations of Australian Federalism', in N Aroney, G Appleby and T John (eds), *The Future of Australian Federalism: Comparative and InterDisciplinary Perspectives* (Cambridge University Press, 2012) 75.

86 Clause 6.4, Schedule 1 of the Legislative Council Standing Orders of the Parliament of Western Australia.

Uniform Legislation (Report No 63, 2011) and Legislative Council Standing Committee on Uniform Legislation and General Purposes, Parliament of Western Australia, *Information Report on Uniform Scheme Structures* (Report No 64, 2011). The current Committee tabled its latest report on 20 August 2019 (Fair Trading Amendment Bill 2019) and currently has one inquiry before it into the form and content of the Statute Book. When this report is released, it will be the Committee's 124th report.

The Legislative Council of Western Australia established the current Committee on 17 August 2005. The name of this Committee has not changed since that date. Schedule 1, Clause 6.3 of the Legislative Council Standing Orders states that the functions of this Committee are:

1. to consider and report on [Uniform Legislation] Bills referred under Standing Order 126;
2. on reference from the Council, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to Standing Order 126;
3. to review the form and content of the statute book; and
4. to consider and report on any matter referred by the Council.

Additionally, Clause 6.4 of Schedule 1 of the Legislative Council Standing Orders states that: 'In relation to function 6.3(a) and (b), the Committee is to confine any inquiry and report to an investigation as to whether a Bill or proposal may impact upon the sovereignty and law-making powers of the Parliament of Western Australia'.

The above terms of reference were adopted by the Legislative Council on 1 December 2011 and commenced operation on 6 March 2012. They differ from the Committee's previous terms of reference. The most significant difference between the form and current terms of reference is the scope of the term of reference (a), which in its current terms of reference limits the Committee's inquiries to questions of a bill's impacts on Parliamentary sovereignty and law-making powers. The Committee's previous terms of reference were:

1. to consider and report on Bills referred under SO 230A [the equivalent of current Standing Order 126];
2. of its own motion or on a reference from a Minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;
3. to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;
4. to review the form and content of the statute book;

5. to inquire into and report on any proposal to reform existing law that may be referred by the House or a Minister; and
6. to consider and report on any matter referred by the House or under SO125A.

In summation, the Western Australian Parliament has a committee specifically dedicated to scrutinising uniform legislation on the topic of the encroachment of sovereignty. The work of this Committee is unique and the reports produced by the Western Australian Parliament have provided a rich foundation for this research. The rationale for the Committee's work has been summarised as follows: 'National Schemes appear to challenge the sovereignty of the Western Australian Parliament itself and so the work of the Committee is an attempt to preserve the role of Parliament as the legislature'.[87]

VIII The Results of the Meta-Analysis

The results of the meta-analysis of the reports revealed that: (1) an encroachment on sovereignty was only found in a minority of the reports; and (2) all of the encroachments related to a limited number of practices. A detailed explanation of each finding is provided below.

The meta-analysis showed that in the majority of reports, including those that scrutinised uniform acts and uniform amendments to such acts, there was 'no encroachment on sovereignty'.[88] The passage summarising the cases of in which a derogation in sovereignty can be found has been cited in a number of reports. The practices impinging on sovereignty identified by the passage include: 'fiscal imperatives to pass uniform legislation; limited time frames for consideration of uniform legislation and lack of notice and detailed information as to negotiation's inhibiting Members formulating questions and

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87 Legislative Council Standing Committee on Uniform Legislation and General Purposes, Parliament of Western Australia, *Co-Operative Schemes (Administrative Actions) Bill 2001* and the *Agricultural and Veterinary Chemicals (Western Australia) Amendment Bill 2001* (Report No 2, 28 June 2001) 5.

88 See, for example:
Reports regarding the uniform amendments of existing national uniform legislation: Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2016* (Report No 97, June 2016) 7; Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Financial Transaction Reports Amendment Bill 2018* (Report No 113, June 2018) 9;
Reports regarding bills introducing national uniform legislation: Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Aquatic Resources Management Bill 2015* (Report No 102, August 2016) 2; Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Tobacco Products Control Amendment Bill 2017* (Report No 108, October 2017) ii; Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Electronic Conveyancing Bill 2013* (Report No 85, February 2014) 18; Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Working With Children (Criminal Record) Amendment Bill 2009* (Report No 45, March 2010) 64.

performing their legislative scrutiny role.' [89] This list should not be considered exhaustive.

In addition to the aforementioned practices, the meta-analysis of the reports revealed some other instances in which sovereignty had been found to be encroached, each of which fell into one of several distinct categories. The practices included:

1. imposing deadlines for scrutiny and enabling the Executive to control the commencement dates;
2. adopting an applied (template) structure for the legislation that could either be:
    a. amended 'from time to time'; or
    b. included strict limitations on the mechanism for amending the legislation, which was related to an inability to scrutinise the amendments;
3. Henry VIII clauses that enabled acts to be amended by subsidiary legislation;
4. the employment of skeletal legislation; and
5. the absence of review provisions.

The most complained about issues in the reports related to the time allowed for scrutiny or the commencement of the legislation. For example, the Report on the Health Practitioner Regulation National Law Bill 2010 (WA) provided a limited period for scrutiny. However, 'the Bill was tabled in the Legislative Council on 20 May 2010 (only six weeks before the National Scheme became operational on 1 July 2010). There was a considerable delay between the signing of the Intergovernmental Agreement (in March 2008) and the tabling of this Bill in the Legislative Assembly on 5 May 2010'.[90] The cases in which the Committee identified encroachment included those in which the Committee and the Parliament had had only a limited time for scrutiny.[91] Issues were also found where the date of commencement was under the control of the Executive or when a certain set of uniform acts was required to commence in different jurisdictions at the same time. In such cases, the commencement date was usually 'to be fixed by way of proclamation'. [92] This practice was viewed as an

[89] Legislative Council Standing Committee on Uniform Legislation and General Purposes, Parliament of Western Australia, *Uniform Legislation and Supporting Documentation* Report No 19 (2004) 11.

[90] Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Health Practitioner Regulation National Law Bill (WA) 2010* (Report No 52, June 2010) 21.

[91] Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Petroleum Legislation Amendment Bill 2017* (Report No 106, August 2017); Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Health Practitioner Regulation National Law Bill (WA) 2010* (Report No 52, June 2010) 21.

[92] Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Statutes (Minor Amendments) Bill 2017* (Report No 105, June 2017); Standing

encroachment because in the first case, sufficient time was not allotted for parliamentary scrutiny and in the second case, the commencement of the act was not within the control of the Parliament.

The second most mentioned threat to sovereignty includes the mechanism of amendment of legislation in applied structure. By way of clarification, applied legislation is a structure allowing for the adoption or application of laws enacted in other jurisdictions.[93] Applied structures can be 'extremely complicated'[94] 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 Western Australian Parliament will not enact sets of uniform acts in an applied structure from other jurisdictions that include default amendments by other jurisdictions (including provisions that the act can be 'amended from time to time').[95] The criticism is directed towards amendments that can be made without parliamentary scrutiny.[96] As one report stated, 'Applying the laws of another jurisdiction … [where] the Parliament of Western Australia cannot amend or repeal [legislation], which may be inconsistent with the equivalent Western Australia legislation is inconsistent with State parliamentary sovereignty'.[97] A more recent report stated:

> The Committee found that the 'from time to time' approach ensures immediate uniformity across jurisdictions. However, it also found that it would unquestionably erode Western Australian Parliamentary sovereignty. This was primarily because there would be no opportunity for the Parliament of Western Australia to consider a Commonwealth law before it was applied as a law of the State.[98]

As Criddle noted, parliaments have become weary of such arrangements. One member of the Legislative Assembly of Western

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Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Fair Trading Amendment Bill 2013* (Report No 80, August 2013) 2; Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Directors' Liability Reform Bill 2015* (Report No 92, April 2015).

93 PCC Protocol, 1.

94 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.

95 See discussion in Chapter 4.2 for the manner of implementing amendments in sets of uniform acts in applied structure.

96 Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, National Electricity (Western Australia) Bill 2016; National Gas Access (WA) Amendment Bill 2016; Energy Legislation Amendment and Repeal Bill (Report No 103, September 2016).

97 Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Gene Technology (Western Australia) Bill 2014* (Report No 89, March 2015) 21.

98 Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Fair Trading Amendment Bill 2019* (Report No 123, August 2019) 3.

Australia stated: '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'.[99] When amendments are implemented in other jurisdictions, another issue may also arise in relation to the notification and implementation of the amendments. A uniform amendment to keep legislation consistent with the other jurisdictions requires additional effort. Such effort adds to the workload of policymaking bodies who must ensure they remain abreast of the amendments enacted in other jurisdictions. Due to resource allocations, public service capacity and pressures to downsize and outsource, this is not always possible.[100] Thus, when amendments have been made to applied legislation, there is not always a mechanism by which other parliaments are notified.

The preferred position is that 'the Western Australian Parliament retains at all times the power to amend or repeal the Act'.[101] This was not the case in the Rail Safety application law in which could not 'be amended by the Parliament of Western Australia', as the South Australian Minister has the power 'to appoint an Acting Regulator who [would] have all the powers of the Regulator to affect rail safety in Western Australia'.[102] It is objectionable that another jurisdiction's laws be applied without giving Parliament the ability or time to scrutinise the amendment.[103] Western Australia's position has already been communicated and is widely known. Conversely, other jurisdictions have approached sets of uniform acts in an applied structure on a case-by-case basis. This approach adds another dimension to the complexities experienced in relation to applied legislation, especially given the issues related to the notification of uniform amendments. However, this approach will not necessarily bar uniformity if an appropriate mechanism is implemented that ensures notification of the amendments is provided or the amendments can be monitored.

Western Australia has implemented a solution to overcome this problem. The Consumer Credit (Western Australia) Amendment Bill 2002 included the implementation of hybrid legislation[104] and the

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

100 See, for example, Brian Head and Kate Crowley, *Policy Analysis in Australia* (Policy Press, 2015) 55.

101 Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Wills Amendment (International Wills) Bill 2012* (Report No 72, June 2012) 2.

102 Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Rail Safety National Law (WA) Bill 2014* (Report No 91, March 2015) ii.

103 Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Gene Technology (Western Australia) Bill 2014* (Report No 89, March 2015) 21; Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Health Practitioner Regulation National Law Bill (WA) 2010* (Report No 52, June 2010) 21.

104 Western Australia enacted mirror legislation.

requirement that the Minister provide the clerks of each house of the Western Australian Parliament with the amended legislation, including a copy of the bill or regulation that amended the Consumer Credit Code or regulation.[105] This measure was 'deemed to have the effect of tabling the bill or regulations in both Houses of Parliament'.[106] Other mechanisms have been suggested to address this issue, including 'a mechanism that purports to preserve the sovereignty of the Western Australian Parliament, by providing that all future Commonwealth amendments to the ACL must be tabled in both Houses of the Western Australian Parliament and which will be subject to disallowance by either House.'[107]

The third issue that arose relates to legislation that relies heavily on delegated legislation, including instances in which substantive parts of legislation were left to be drafted in the regulations (rather than in the primary act). For example, in the case of the Community Protection (Offender Reporting) Amendment Bill 2011 (WA), it was observed that substantial parts of the policy were to be included in the regulations and not the primary act. Specifically, section 38(1)(a) of the Bill allows Regulations to prescribe other forms of identification'.[108]

In addition to leaving substantial parts of the policy to the regulations, in some cases, primary acts have allowed for an act to be amended by delegated legislation (in such instances Henry VIII clauses are relied on).[109] The Committee has been concerned with the unnecessary inclusion of Henry VIII clauses in the Acts. By way of clarification:

> Henry VIII clauses are clauses of an Act of Parliament which enables the Act to be amended by subordinate or delegated legislation. They are objectionable as they
>
> - offend the theory of the separation of powers; and
> - give insufficient regard to the institution of Parliament as the supreme Legislature by eroding the sovereign function of Parliament to legislate.

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

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

107 Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Fair Trading Amendment Bill 2018* (Report No 119, November 2018) 13.

108 Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Community Protection (Offender Reporting) Amendment Bill 2011* (Report No 73, 2011).

109 Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, Personal Property Securities (Commonwealth Laws) Bill 2011 and Personal Property Securities (Consequential Repeals and Amendments) Bill 2011 (Report No 59, March 2011) 5–6.

> This means that the capacity of the Parliament to scrutinise Henry VIII clauses is limited … The object of subsidiary legislation is to complement and carry out the objects and purposes of an Act; to fill in the detail. Henry VIII clauses go beyond this by enabling Acts to be amended by subsidiary legislation.[110]

Provisions are expressed as a 'Henry VIII clause' when these allow amendment of an Act through Regulation. The provisions are called 'Henry VIII clauses' because under Henry VIII, the *Statute of Sewers 1531* (UK) had a provision where the Commissioner of Sewers could make the rules to impose taxes. By its nature, the authority to raise revenue is a power vested in Parliament (under the enabling legislation passed under a Constitutional head of power). The use of this has been discouraged by the PCC Protocol.[111]

The fourth issue that arose relates to situations in which only a skeletal legislative framework has been provided. In such cases, much of the detail of the legislation is left to administrative determination through the wide discretionary powers provided to the Ministerial Council and National Boards. However, such bills generally fail to specify how this discretion is to be exercised and do not require that this issue be prescribed in the regulations. This has had the effect of excluding the State parliament entirely from any oversight of and involvement with the national scheme. [112]

Skeletal legislation can be objectionable from the perspective of parliamentary sovereignty. In preparing regulations, considerable discretion has been given to the Executive rather than the Parliament to scrutinise primary legislation. 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. Generally, the practice of drafting legislation with a skeletal framework has been discouraged. However, no recent examples of skeletal legislation were found in the reports. This suggests that this legislation is more a product of the past than a preferred current practice.

The Committee also criticised the lack of review clauses in uniform legislation.[113] These clauses allow for the review of an act's operations after a certain period of time by the Parliament of Western Australia. These are standard provisions in the drafting manual. These are not

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110 Ibid 7.

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

112 Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Health Practitioner Regulation National Law Bill (WA) 2010* (Report No 52, June 2010) 21.

113 Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Co-Operatives Amendment Bill 2015* (Report No 96, February 2016) i.

included at times in cases of national uniform legislation. The Parliament finds this practice objectionable.

In summary, the threats to sovereignty identified by the meta-analysis were grouped in six general practices. Overall, these practices appear to arise due to the processes and mechanisms associated with parliamentary involvement with national uniform legislation. They include issues related to cooperation (which is often related to the timeframes and deadlines), the amount of detail that has been included in the legislation and the executive pressure placed on the parliaments. These issues reveal the need to improve communication and cooperation to ensure that adequate processes are implemented and enforced by parliaments in the development, drafting and communication of policies for future national uniform schemes and potential legislation.

Excluding situations in which legislation cannot be amended and local parliaments are used to 'rubber stamp' the law, the cases of encroachment identified in this research were quite rare and were isolated to the specific cases described above. Indeed, the States and Territories are far from powerless and wield 'substantial power within these regulatory structures'.[114] Notably, even legislation in referred structures can be repealed if a state parliament revokes the reference.[115]

Rather than considering the strict delineation between the sovereignty of the State and Territory Parliaments, consideration needs to be given to the modern reality of mutual interdependence. Previously, States and Territories have had greater autonomy. However, as Australia has developed into an integrated country with shared problems, an inability to deliver uniform regulations throughout the country could hinder its progress. Thus, rather than being a bar to federalism, national uniform legislation has had quite the opposite effect. Indeed, national uniform legislation has served as an instrument to attune federalism to new realities. Even when subject to the close scrutiny of the Western Australian Committee, cases in which sovereignty has potentially been encroached upon have been rare. When this has occurred, the cases have been isolated to several categories of derogation that appear to be related to specific practices, processes and mechanisms. Such practices could be alleviated by developing a common understanding and building cooperation among the various actors involved in developing and drafting national uniform legislation.

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114 Gerken (n 60) 1701.

115 However, the consequences of amendments to legislation referring power are unresearched. Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Succession to the Crown Bill 2014* (Report No 88, February 2015) 11.

IX Conclusions and Implications

National uniform legislation will likely continue to grow in volume. As it grows in volume and complexity, law reform agencies, the Commonwealth, State and Territory Governments and policy institutions will have more (not less) work. Policymakers, law reformers and legislative drafters will have to navigate a labyrinth of issues and uncertain conditions involving a wide range of stakeholders while seeking to increase uniformity. They will also need to respond to a multifaceted debate and meet the demands of actors from divergent ideological backgrounds, who may sometimes have diverse or irreconcilable differences, values or perspectives. The focus on uniformity has to be negotiated within the existing constitutional design and the distribution of powers to ensure that the sovereignty of the State and Territory Parliaments is not impacted.

In this research, a meta-analysis of reports scrutinising national uniform legislation was conducted to examine any threats to the sovereignty of the Western Australian Parliament. The results revealed several lessons that law reformers, policymakers and legislative drafters could use as a checklist to ensure that the important principles of federal distribution of powers are observed. A number of major threats to sovereignty were identified in relation to numerous pieces of proposed primary national uniform legislation. Some of the threats were summarised in the reports and included 'fiscal imperatives to pass uniform legislation; limited time frames for consideration of uniform legislation and lack of notice and detailed information as to negotiation's inhibiting Members formulating questions and performing their legislative scrutiny role.'[116] The major categories of threats to sovereignty identified through this research can be summarised in the following lessons: (1) imposition of deadlines for scrutiny and enabling the Executive to control the commencement dates; (2) limitation of scrutiny of amendments in applied structure; (3) inclusion of Henry VIII clauses that enable primary legislation to be amended by subsidiary legislation; (4) drafting legislation as skeletal; and (5) non-inclusion of the review provisions.

The enactment of national uniform legislation should not be seen as a panacea for all the legal challenges facing the Australian federation today. However, this research provided insights into how an effective and efficient national response can be made if so required. Notably, the findings simplified and gave meaning to the major lessons that can be learned in relation to uniform national legislation encroaching on the sovereignty of State and Territory Parliaments by showing that there

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[116] Legislative Council Standing Committee on Uniform Legislation and General Purposes, Parliament of Western Australia, *Uniform Legislation and Supporting Documentation* Report No 19 (2004) 11.

are general lessons for legislative drafters, policymakers and law reformers, who wish to avoid the 'catch 22' of choosing between uniformity and sovereignty.