

HOW DOES THE AREA OF LAW PREDICT THE PROSPECTS OF HARMONISATION?

ABSTRACT

Although each set of uniform Acts is unique, sets within an area of law have some common traits that impact the prospects for achieving uniformity in the process of harmonisation. Identifying these areas to explain how uniformity can be achieved offers valuable insights. This study is based on an empirical examination of 84 sets of uniform Acts. The key findings suggest that specific areas of the law could be susceptible to higher or lower levels of uniformity. Legislation in the following areas has been found to be ‘highly uniform’: commercial and corporate law, government, and energy and resources. In contrast, legislation concerning child protection, the regulation of road transport and criminal law have the lowest uniformity.

This study has unique practical and valuable research implications. In some policy areas, a uniform national response will be important. If consensus between the jurisdictions is lacking, and the area of law has historically had low uniformity, achieving a national response will require additional effort, resources and time. This may or may not be attainable. The key findings of this study are expected to help policymakers, law reformers and legislative drafters overcome the uncertainty related to developing strategic directions for harmonisation.

I INTRODUCTION

Most studies have approached national uniform legislation by classifying it according to structure.¹ At the same time, there has been a limited focus on how the area of law impacts the prospects for harmonisation within the federation. Indeed, some areas of law might be more susceptible to harmonisation than others. Public policy and federalist theories have explored how governments operate and what happens before and after legislation is introduced into parliaments. What has been missing is the link between the macro approaches to national uniform

* Lecturer in Law, Asia Pacific College of Business and Law, Charles Darwin University. The author may be contacted at guzyal.hill@cdu.edu.au.

¹ Australasian Parliamentary Counsel’s Committee, *Protocol on Drafting National Uniform Legislation* (4th ed, 21 February 2018) (‘PCC Protocol’).

legislation (as examined within those theories), and a micro approach that is more familiar to legislative drafters and policymakers working with a particular set of uniform Acts on a specific topic, for instance, e-conveyancing. It is precisely this terrain that needs to be adequately analysed.

Harmonisation, as a process within the federation (and national uniform legislation as a result), is often complex and riddled with uncertainty. At times, controversial topics have led to the abandonment of harmonisation initiatives.² However, if a better understanding of the effort and support needed for national reform to succeed can be achieved prior to embarking on the expensive exercise of harmonisation it can add some predictability. Knowing how susceptible a specific area of law is to harmonisation can foster this understanding.

It is contended that although every set of national uniform legislation is unique, the sets of uniform Acts within an area of law have some common traits that influence the ability to achieve uniformity. Identifying these areas to explain how sustainable uniformity can be achieved offers valuable insights that can help policymakers, law reformers and legislative drafters overcome the uncertainty related to sustaining uniformity and develop strategic directions for harmonisation.

II GAPS IN LITERATURE AND THE ‘LAW AS DATA’ APPROACH TO ANALYSIS OF NATIONAL UNIFORM LEGISLATION

What makes a study of uniformity within a particular area of law 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 distribution 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. Yet policymakers, legislative drafters and law reformers must still work within the confines of the *Australian Constitution* and its distribution of law-making powers. 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’,³ the seemingly impossible has been achieved through

² *Occupational Licensing (Adoption of National Law) Act 2010* (NSW); *Occupational Licensing National Law (Queensland) Act 2010* (Qld); *Occupational Licensing National Law (South Australia) Act 2011* (SA); *Occupational Licensing National Law Act 2011* (Tas); *Occupational Licensing National Law Act 2010* (Vic). See John Sutton, ‘Productivity? Who Cares, as National Licensing Trashed by COAG’, *The Fifth Estate* (Web Page, 26 February 2014) <<https://www.thefifthestate.com.au/columns/spinifex/productivity-who-cares-as-national-licensing-trashed-by-coag>>. Sutton is a former board member of the National Occupational Licensing Authority.

³ Sir Owen Dixon, ‘Sources of Legal Authority’ in Severin Woinarski (ed), *Jesting Pilate: and Other Papers and Addresses by Sir Owen Dixon* (Law Book, 1965) 198, 201.

collaborative efforts among the Commonwealth, state and territory governments. National uniform legislation has resolved problems of international prison transfers within a federation in which federal prisons do not exist.⁴ 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, achieving ‘objects that neither [jurisdiction] alone could achieve’.⁵ Without national uniform legislation, the advancement of the Australian federation would have been impeded.

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. Uniformity is not a panacea, and uniformity alone cannot cure deficiencies in the law. As the Productivity Commission pointed out, ‘[n]ational 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.’⁶ Uniformity must therefore be supported by adopting best practices for both policy and drafting.

The drafting of national uniform legislation has been referred to as ‘the art of the possible’.⁷ 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 multifaceted debate among actors from divergent ideological backgrounds with diverse and sometimes irreconcilable values and perspectives. Issues are often strongly contested, exemplified by the debates over euthanasia and 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.

⁴ *International Transfer of Prisoners Act 1997* (Cth); *Crimes (Sentence Administration) Act 2005* (ACT) pt 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).

⁵ *R v Duncan; Ex parte Australian Iron & Steel Pty Ltd* (1983) 158 CLR 535, 580 (Brennan J).

⁶ Productivity Commission, *Chemicals and Plastics Regulation: Lessons for National Approaches to Regulation* (Supplement to Research Report, January 2009) 5.

⁷ 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) vii (‘*Harmonisation of Legal Systems*’).

Most studies have approached national uniform legislation by classifying it through structures: referred, applied and mirror.⁸ At the same time, there has been limited focus on how these structures differ in various areas of law. Indeed, some areas of law might have helped or hindered uniformity. Public policy and federalist theories study how governments operate and what happens before and after legislation is introduced to parliaments. Missing is the link between the macro approaches to national uniform legislation as studied within those theories, and a micro approach that is more familiar to legislative drafters and policymakers working with a particular set of uniform Acts. It is precisely this terrain that needs to be adequately analysed. Although every set of national uniform legislation is unique, the sets of uniform Acts can be grouped by areas of law. The prospects of identifying these areas offers valuable insights, which are expected to help policymakers, law reformers and legislative drafters overcome the uncertainty related to sustaining uniformity and develop strategic directions for harmonisation.

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 contended that a uniform approach should be contained to specific areas;⁹ (2) those who have asserted that uniform or referred legislation is preferable, with deviations allowed only when a clear ‘states’ right’ issue has been identified;¹⁰ and (3) others who have been passionate advocates of the independence of the states.¹¹ These camps have arrived at a stalemate and they might have missed opportunities to constructively explore solutions. Therefore, this article contributes to understanding the inner workings of uniformity through ‘law as data’ approach without insisting on normative advantages or disadvantages of uniformity.

The research problem this article addresses can be summarised as follows: the development and drafting of national uniform legislation is riddled with practical

⁸ Australasian Parliamentary Counsel’s Committee, *PCC Protocol* (n 1) 2–4. Referred structures include legislation drafted by the Commonwealth in relation to subject matters for which the states and territories refer their legislative powers pursuant to s 51(xxxvii) of the *Australian Constitution*. Conversely, applied legislation is a structure that allows for the adoption or application of laws enacted in other jurisdictions. Applied structures can be extremely complicated due to the variety of ways in which jurisdictions may ‘apply’ the law. Acts are usually composed of two parts. Mirror legislation is the most versatile of the three structures and grants maximum freedom to the states and territories. Mirror legislation is drafted by one jurisdiction as a model for other jurisdictions to follow.

⁹ See, eg, John Wanna et al, *Common Cause: Strengthening Australia’s Cooperative Federalism* (Final Report, May 2009).

¹⁰ See, eg, 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) 414.

¹¹ See, eg, Michelle Evans, ‘Rethinking the Federal Balance: How Federal Theory Supports States’ Rights’ (2010) 1 *The Western Australian Jurist* 14, 14.

and conceptual problems. The complexity involved means a substantial effort is required to develop and draft national uniform legislation. This analysis might assist decision-makers in allocating resources for harmonisation when a national approach is sought in a particular area of law.

Following a thorough examination of the research problem, it became clear that a one-dimensional methodology would be insufficient to understand and address the issues at hand. To rely entirely on a doctrinal method would be cumbersome and limited to the areas of the law previously studied. Further, due to the proliferation of national uniform legislation, carrying out doctrinal case studies as scholars have done in the past,¹² would restrict this article to inferences that could only be drawn from these specific Acts. The methodology had to be expanded.¹³ With more information available, evidence-based and transparent approaches are now accessible (and needed). Thus, rather than justifying binary state-centred or Commonwealth-centred positions, it is more fitting to follow a ‘mixed methods’ approach to studying national uniform legislation, incorporating doctrinal, empirical and reflexive methods.

The ‘law-as-data’ movement¹⁴ offers an alternative to the doctrinal and case study methods. Viewing legislation as data or text, rather than rules, allows important empirical data to be introduced and statistical methods to be used to analyse the data. Rather than examining the substance of the legislation, a ‘law as data’ approach allows for analysis of the factors affecting national uniform legislation.

Introducing evidence into the decision-making process partially resolves the issues related to the ‘inherently fluid and ambiguous’ system of policymaking.¹⁵ As Brian Head noted, policy-driven evidence ‘is an inevitable part of democratic debate’.¹⁶ However, policymakers usually make decisions under circumstances of ambiguity, basing their decisions on the ‘available evidence’.¹⁷ Thus, despite support for evidence-based policymaking in the literature, Giada De Marchi points out that it is not easy to introduce evidence into policymaking, adding that ‘supporting the

¹² See *Harmonisation of Legal Systems* (n 7).

¹³ This was done in line with recent developments in legal research; more recent research uses, for instance, 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(1) *Australian Tax Forum* 179.

¹⁴ Dru Stevenson and Nicholas J Wagoner, ‘Bargaining in the Shadow of Big Data’ (2015) 67(4) *Florida Law Review* 1337, 1352.

¹⁵ David Adams, HK Colebatch and Christopher K Walker, ‘Learning about Learning: Discovering the Work of Policy’ (2015) 74(2) *Australian Journal of Public Administration* 101, 107.

¹⁶ Brian W Head, ‘Toward More “Evidence-Informed” Policy Making?’ (2015) 76(3) *Public Administration Review* 472, 475.

¹⁷ *Ibid* 474.

design, implementation and assessment of public policies is such a hard problem'.¹⁸ Nevertheless, there have been calls for an increase in substantive, evidence-based policymaking.¹⁹ As Gary Banks observed, '[w]ithout evidence, policy makers 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'.²⁰ However, even though evidence-based knowledge and decision-making are finally being applied to policy content,²¹ the procedure for implementing policy has been largely unexplored in empirical studies. Therefore, a gap exists in the knowledge of evidence-based approaches to harmonisation and its procedural process. Recent developments in the 'law as data' movement have opened a new era in policymaking. Unfortunately, in Australia the processes of national reform and harmonisation have not yet benefitted from this new development.

The benefits of this approach include turning "data into insights" for better decision making'.²² Policymakers are likely to benefit from this development because even with the most experienced professionals, the 'ability to make sound judgments takes years of practice to develop and a lifetime to master'.²³ The 'law as data' movement 'invites lawyers to make a fundamental change in their approach to the law itself by looking to statistical patterns, predictors, and correlations'.²⁴ Complex decisions need not be subjected to a process of trial and error. As Dru Stevenson and Nicholas Wagoner concluded, '[c]onsidering what is at stake, it seems imprudent to rely on experience, intuition, or instinct alone in predicting the path of the law ... however, lawyers are not entirely to blame'.²⁵ Only a few years ago, this study would not have been possible. However, with advances in technology and the increased availability of data, it can now be carried out.

In terms of limitations, the scope of the empirical portion of this article has been restricted by: (1) the sample size; and (2) the focus on textual uniformity. In relation to sample size, the article only considers national uniform legislation provided in the Parliamentary Counsel's Committee (PCC) table, which lists 84 sets of the most

¹⁸ Giada De Marchi, Giulia Lucertini and Alexis Tsoukiàs, 'From Evidence-Based Policy Making to Policy Analytics' (2016) 236(1) *Annals of Operations Research* 15, 15.

¹⁹ See Gary Banks, 'Evidence-Based Policy Making: What Is It and How Do We Get It?' in John Wanna (ed), *Critical Reflections on Australian Public Policy: Selected Essays* (ANU Press, 2009) 107.

²⁰ *Ibid* 110.

²¹ See 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.

²² Fatima Dargam et al, 'The Role of Decision Making in the Big Data Era' (Conference Paper, EWG-DSS International Conference on Decision Support System Technology on Big Data Analytics for Decision Making, 27–29 May 2015) 3.

²³ Stevenson and Wagoner (n 14) 1345.

²⁴ *Ibid* 1342.

²⁵ *Ibid* 1347.

significant uniform Acts. The sample size is thus not exhaustive, but it is sufficient. The focus on textual uniformity provides a good indication of the level of uniformity in Australia, based on the similarities in legal traditions among Australian jurisdictions and other mechanisms supporting national uniform legislation projects. There is no set definition of uniformity but the uniformity of national uniform legislation can be divided by types into ‘textual uniformity’ (having identical text provisions)²⁶ and ‘applied uniformity’ (uniformity of an outcome once the text has been applied to the circumstances of a particular situation).²⁷ This distinction was first made by Roscoe Pound, discerning ‘law on the books’ from ‘law in action’ and giving examples of the difference between the two.²⁸ Textual uniformity has ‘a profound effect on the applied uniformity’.²⁹ There is no guarantee, however, that similar texts will have the same effect in application.³⁰ Theoretically, it is possible to assume that in some cases where there are almost identical provisions, the effect of legislation may be different when applied in practice due to various factors, including the impact of other Acts (for example, Bill of Rights legislation³¹ or Interpretation Acts³²). By focusing on textual uniformity, there is some risk that the nuances (for example, differences in definitions that rely on other state or territory legislation not included in the text of the compared act) will be lost in the process of seeking the ‘big picture’. Nevertheless, this focus can identify the main factors that impact uniformity, and with a sample of 84 sets of uniform Acts, the article can still unlock key insights into national uniform legislation.

III THE DEFINITION OF PRIMARY FACTORS FOR EMPIRICAL STUDY

As this study uses empirical methods, it is important to provide definitions from the outset. This section provides definitions for structures of national uniform legislation, area of law, level of uniformity, level of implementation, and clarifies terminology for the sets of uniform Acts.

²⁶ Camilla Baasch Andersen, ‘Applied Uniformity of a Uniform Commercial Law: Ensuring Functional Harmonisation of Uniform Texts Through a Global Jurisconsultorium of the CISG’ in Mads Andenas and Camilla Baasch Andersen (eds), *Theory and Practice of Harmonisation* (Edward Elgar Publishing, 2012) 31–3.

²⁷ *Ibid.*

²⁸ Roscoe Pound, ‘Law in Books and Law in Action’ (1910) 44(1) *American Law Review* 12, 13.

²⁹ Andersen (n 26) 33.

³⁰ *Ibid.*

³¹ *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld); *Charter of Human Rights and Responsibilities 2006* (Vic).

³² *Acts Interpretation Act 1901* (Cth); *Legislation Act 2001* (ACT); *Interpretation Act 1987* (NSW); *Interpretation Act 1978* (NT); *Acts Interpretation Act 1954* (Qld); *Acts Interpretation Act 1915* (SA); *Acts Interpretation Act 1931* (Tas); *Interpretation of Legislation Act 1984* (Vic); *Interpretation Act 1984* (WA).

A *Structures for National Uniform Legislation*

The structures of national uniform legislation are flexible in form but primarily comprise of three structures: referred, applied and mirror. Referred structures include legislation drafted by the Commonwealth in relation to subject matters for which the states and territories refer their legislative powers pursuant to s 51(xxxvii) of the *Australian Constitution*. From the perspective of uniformity, referred structures are highly uniform and very rigid and may require extensive ‘political lobbying and negotiation’.³³ To date, the states and territories have only referred to the Commonwealth the power to legislate on the following matters: consumer credit;³⁴ corporations;³⁵ mutual recognition;³⁶ the resolution of financial disputes in de facto relationships;³⁷ and counter-terrorism.³⁸

Conversely, applied legislation is a structure that allows for the adoption or application of laws enacted in other jurisdictions.³⁹ Applied structures can be ‘extremely complicated’⁴⁰ due to the variety of ways in which jurisdictions may ‘apply’ the law.

³³ Gerard Carney, ‘Uniform Personal Property Security Legislation for Australia: A Comment on Constitutional Issues’ (2002) 14(1) *Bond Law Review* 5:1–5, 1–2.

³⁴ *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).

³⁵ *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).

³⁶ *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 Recognition (Victoria) Act 1998* (Vic); *Mutual Recognition (Western Australia) Act 2010* (WA).

³⁷ *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).

³⁸ *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).

³⁹ Australasian Parliamentary Counsel’s Committee, *PCC Protocol* (n 1) 1.

⁴⁰ 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) 85, 96.

These Acts are usually composed of two parts. The first part is jurisdiction specific and the second part (which usually appears in the appendix or schedule) is the applied law. From a policy development and drafting perspective, there is also the option to ‘adopt’ [the legislation] as amended from time to time or apply the legislation on an ‘as is’ basis; however, in such cases, future amendments must be enacted separately. Reviews of applied sets of uniform Acts are usually undertaken by a lead jurisdiction (ie, the jurisdiction that was initially responsible for drafting the legislation), or via the mechanism of a ministerial council or national regulator.

It is possible that after a lead jurisdiction drafts a bill, some jurisdictions will ‘apply’ it and others will ‘adopt’ it. This occurred in relation to the *Health Practitioner Regulation National Law Act 2009* (Qld) (‘the Queensland Act’), for which Queensland was the leading jurisdiction responsible for the drafting of the Act. The Northern Territory passed the *Health Practitioner Regulation (National Uniform Legislation) Act 2010* (NT)) (‘the Northern Territory Act’) to adopt the Queensland Act. Notably, s 4 of the Northern Territory Act provides for any amendments to the Queensland Act to be automatically adopted in the Northern Territory. Conversely, Western Australia applied the Queensland Act by passing the *Health Practitioner Regulation National Law Act 2010* (WA). However, as the Act was applied rather than adopted, a separate Act would have to be passed by both Houses of the Western Australian Parliament before any amendments could be implemented.

Mirror legislation is the most versatile of the three structures and grants maximum freedom to the states and territories. Mirror legislation is drafted by one jurisdiction as a model for other jurisdictions to follow.⁴¹ In the academic literature and government reports, ‘mirror legislation’ and ‘model legislation’ have been used interchangeably.⁴² However it should be noted that the term ‘model’ has sometimes been used to describe a model draft bill that is centrally drafted by the PCC or developed by one of the jurisdictions. To avoid any confusion, this paper uses the term ‘mirror’ throughout when referring to this structure of national uniform legislation. Mirror legislation can be flexible and adapted in each jurisdiction to allow for local differences. The degree of uniformity required is expressed by the relevant ministerial council and may be incorporated into an intergovernmental agreement.

Notably, none of these structures exist in a vacuum. If necessary, any structure can be modified to achieve the optimal result in a particular case. Some of the Acts have continued to exist in their pure form; however, a certain percentage have become hybrids (eg, a combination of applied and mirror legislation). These three structures represent the predominant forms of legislation today.⁴³

⁴¹ Australasian Parliamentary Counsel’s Committee, *PCC Protocol* (n 1) 1.

⁴² See John Phillimore, ‘Intergovernmental Relations in Australia: Increasing Engagement’ in Rupak Chattopadhyay and Karl Nerenberg (eds), *A Global Dialogue on Federalism* (McGill-Queen’s University Press, 2011) vol 8, 13.

⁴³ Australasian Parliamentary Counsel’s Committee, ‘National Uniform Legislation: Acts of Jurisdictions Implementing Uniform Legislation’ (Web Page, March 2015) <<http://www.pcc.gov.au/uniform/National%20Uniform%20Legislation%20table.pdf>> (‘National Uniform Legislation’).

B *Area of Law*

The area of law could be an important factor influencing sustainable uniformity, however, the extent of its influence is currently unknown. It is possible that the sustainable uniformity of national uniform legislation could be explained based on the area of law because some areas of law might be more prone to uniformity than others. If this is so, then uniformity could simply be unachievable in certain areas of the law.

Resolving this conundrum has been hindered by the inability to find a set of classifications for different areas of the law. In this study, several electronic databases were explored in the hope of finding and adopting such a classification system. Among the databases used at the time the search was conducted (July to December 2016), AustLII did not have a function to browse legislation by subject or area of law. Two databases, Westlaw and CCH, specialised in specific areas, but failed to cover some topics. The two remaining electronic databases were LawLex by SAI Global and LexisNexis AU. LawLex was found to be the most suitable database, as it provided an open access system specifically designed to work with legislation and had an intuitive index. One limitation experienced with this database was double classification. In some cases, a set of uniform Acts fell into two areas of law. When this happened, the primary area was entered for the purpose of this research.

Table 1: LawLex Subject Index (First Level)⁴⁴

Banking and Finance	Business, Trades and Professions
Commercial and Corporate Law	Criminal Law
Culture and Recreation	Education, Training and Research
Employment and Industrial Law	Energy and Resources
Environment	Family Law and Relationships
Government	Government Financing
Health	Human Rights
Immigration and Citizenship	Indigenous Australians
Insurance	Intellectual Property
International Law	Legal System
Media and Communications	Primary Industry
Privacy	Property, Housing and Development
Social Services	Superannuation
Taxation	Transport
Wills and Estates	

⁴⁴ SAI Global, 'Legislation Alerts and Research', *LawLex* (Web Page) <<http://my.lawlex.com.au>>.

The research for this study followed a simple protocol, based on the LawLex data. Once an Act was located in the database, the area listed by LawLex was adopted. For example, the Agricultural and Veterinary Chemicals legislation⁴⁵ was indexed by LawLex under Primary Industries. The Work Health and Safety legislation⁴⁶ was indexed under Employment and Industrial Law. The Uniform Evidence Acts were indexed under Legal Systems.⁴⁷

C *Level of Uniformity*

Each area of law was examined against the measurement of uniformity. Defining the level of uniformity is not easy, as the definition of uniformity is somewhat ambiguous. National uniform legislation is usually defined as ‘legislation which is the same, or substantially the same, in all or a number of jurisdictions’.⁴⁸ The author was unable to locate a source describing the meaning of ‘substantially the same’. As Mads Andenas and Camilla Andersen observed, ‘[i]t is important to note that uniformity is not an absolute but a variable ... the definition has to encompass the concept of varying degrees’.⁴⁹ A review of national and international sources produced no clear indication of any set levels of uniformity. However, there may be room for intentional ambiguity in defining uniformity. Therefore, rather than defining the term using a dictionary, a classification is proposed based on the degree of uniformity. To add some clarity and to facilitate the empirical study, it is proposed that the degree of uniformity be classified as follows:

- (1) ‘Almost identical’: legislation where all provisions or nearly all provisions are uniform (minimal differences, for instance, relating to drafting style, gender neutral language, fines or the order of provisions). Ultimate uniformity could be an illusory goal. Therefore, in this research, ‘almost’ is used as a qualifier.

⁴⁵ *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).

⁴⁶ *Work Health and Safety Act 2011* (Cth); *Work Health and Safety Act 2011* (ACT); *Work Health and Safety Act 2011* (NSW); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT); *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2012* (SA); *Work Health and Safety Act 2012* (Tas); *Work Health and Safety Bill 2014* (WA).

⁴⁷ *Evidence Act 1995* (Cth); *Evidence Act 2011* (ACT); *Evidence Act 2004* (NI); *Evidence Act 1995* (NSW); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic).

⁴⁸ Renee Gastaldon, *National Scheme Legislation* (Research Brief No 27/2011, Parliamentary Library, Queensland Parliament, 2011) 1.

⁴⁹ Andersen (n 26) 31.

- (2) ‘Substantially uniform’: legislation where the majority of provisions are uniform. Examples include commercial arbitration⁵⁰ and sports drug testing.⁵¹ In quantitative terms, more than half the textual provisions were similar between jurisdictions.
- (3) ‘Partially uniform’: largely consistent legislation with distinct differences between jurisdictions. Arguably, this could be the stage at which national uniform legislation is no longer considered uniform, and therefore might not be counted as national uniform legislation. However, this proposition must be tested using the database. Birth, death and marriage legislation⁵² is classified as ‘partially uniform’ because less than a majority of the provisions are the same.
- (4) ‘Some similarities’: legislation with only some similar provisions or uniformity in principle only. Surrogacy legislation exemplified the ‘some similarities’ category⁵³ because the provisions are similar in principle but were still classified as national uniform legislation by the *Protocol on Drafting National Uniform Legislation* (‘PCC Protocol’).

The current level of textual uniformity was determined by assessing the level of similarity between the text of Acts in different jurisdictions. Based on the foregoing, national uniform legislation, as the product of harmonisation, can be dynamic and sufficiently versatile to include sets of uniform Acts with high uniformity and legislation that has only some similarity in its provisions.

D *Level of Implementation*

The level of uniformity is interconnected with the level of implementation. In some cases, however, there have been serious obstacles to enacting national uniform legislation across all jurisdictions. Therefore, both the level of uniformity and the level of implementation must be assessed. In cases where most jurisdictions have enacted

⁵⁰ *International Arbitration Act 1974* (Cth); *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2013* (Qld); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 2012* (WA).

⁵¹ *Drugs in Sport Act 1999* (ACT); *Sports Drug Testing Act 1995* (NSW); *Sports Anti-Doping Act 2003* (Qld); *Sports Drug Testing Act 2000* (SA); *Sports Drug Testing Act 1995* (Vic); *Sports Drug Testing Act 2001* (WA).

⁵² *Births, Deaths and Marriages Registration Act 1997* (ACT); *Births, Deaths and Marriages Registration Act 1995* (NSW); *Births, Deaths and Marriages Registration Act 1996* (NT); *Births, Deaths and Marriages Registration Act 2003* (Qld); *Births, Deaths and Marriages Registration Act 1996* (SA); *Births, Deaths and Marriages Registration Act 1999* (Tas); *Births, Deaths and Marriages Registration Act 1996* (Vic); *Births, Deaths and Marriages Registration Act 1998* (WA).

⁵³ *Parentage Act 2004* (ACT); *Surrogacy Act 2010* (NSW); *Surrogacy Act 2010* (Qld); *Family Relationships Act 1975* (SA) pt 2B; *Surrogacy Act 2012* (Tas); *Status of Children Act 1974* (Vic) pt IV; *Surrogacy Act 2008* (WA).

national uniform legislation, even if legislation in the participating jurisdictions has been ‘almost identical’, the overall national regime has been treated as non-uniform because some jurisdictions have not participated in the uniform scheme. Simply put in mathematical terms, instead of one regime, there might be two or three. An example of this would be national heavy vehicle regulation,⁵⁴ where the Northern Territory and Western Australia refused to participate.

In Australia, there are nine jurisdictions. However, in this study the implementation count has been adjusted in some cases. Such adjustments have been based on the inability of the Commonwealth to enact certain Acts due to the unavailability of the head of power under the *Australian Constitution*. When this has occurred, the count has been adjusted to treat eight jurisdictions as ‘all jurisdictions’. In other cases, national uniform legislation has been agreed to by a specific number of jurisdictions. For instance, cross-border justice mirror legislation was agreed to by three jurisdictions and implemented by all jurisdictions that agreed. The level of implementation was entered as ‘adjusted as all jurisdictions’. Mirror legislation for cross-border justice was called on to address the particular problem of law enforcement between three jurisdictions: Western Australia, the Northern Territory and South Australia, with regard to the Ngaanyatjarra Pitjantjatjara Yankunytjatjara (‘NPY’) Lands.⁵⁵ All three jurisdictions enacted the legislation, which is why the implementation in this case had to be adjusted to reflect the intention: enactment of national uniform legislation relevant to three jurisdictions. In other words, this adjusted implementation shows that all relevant jurisdictions did enact the national uniform legislation.

Finally, s 122 of the *Australian Constitution* empowers the Commonwealth Parliament to make laws related to the territories. Only two territories are currently self-governed:⁵⁶ the Northern Territory,⁵⁷ and the Australian Capital Territory.⁵⁸ 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.

By level of implementation, the sets of uniform Acts were calculated and divided into the following classes:

⁵⁴ *Road Transport (General) Act 1999* (ACT) s 96; *Road Transport (Vehicle Registration) Act 1997* (NSW) pt 24; *Vehicle and Traffic Act 1999* (Tas) s 34A, sch 2; *Road Traffic Act 1974* (WA).

⁵⁵ *Cross-Border Justice Act 2009* (NT); *Cross-Border Justice Act 2009* (SA); *Cross-Border Justice Act 2008* (WA).

⁵⁶ 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.

⁵⁷ *Northern Territory (Self-Government) Act 1978* (Cth).

⁵⁸ *Australian Capital Territory (Self-Government) Act 1988* (Cth).

- (1) ‘All jurisdictions’: in cases where nine jurisdictions, or in cases where the Commonwealth has no head of power, all states and territories.
- (2) ‘Adjusted as all jurisdictions’: in cases where
 - (a) jurisdictions that have committed to uniform legislation have implemented a set of uniform Acts; or
 - (b) all jurisdictions have implemented the set of uniform Acts except the Territories due to s 122 of the *Australian Constitution*.
- (3) ‘Most jurisdictions’: referring to five jurisdictions or more (in cases where legislation has only been intended for some jurisdictions and the majority of those who committed to it have implemented it).
- (4) ‘Some jurisdictions’: referring to four or fewer jurisdictions.

E Sets of Uniform Acts

The unorthodox nature of this empirical study is in approaching the sets of uniform Acts as a unit of reference. The *PCC Protocol* informed this research because it contains a comprehensive and up to date database of ‘some of the more significant’ sets of uniform Acts.⁵⁹ The terminology for the sets of uniform Acts used in this research is borrowed word for word from the *PCC Protocol*. The sets of uniform Acts were updated where necessary. The PCC’s database of national uniform legislation comprises 84 sets of the most important national uniform legislation initiatives.⁶⁰

F Key to Interpret Tables

The following key should be used to interpret the Tables:

Structure	Symbol	Level of Uniformity	Symbol
Referred	R	Almost Identical	AI
Applied	A	Substantially Uniform	SU
Mirror	M	Partially Uniform	PU
Hybrid	H	Substantially Similar	SS

Jurisdictional Implementation	Symbol
All Jurisdictions	All
All Relevant Jurisdictions	Adj. All
Most Jurisdictions	Most
Some Jurisdictions	Some

⁵⁹ Australasian Parliamentary Counsel’s Committee, *Protocol on Drafting National Uniform Legislation* (2nd ed, July 2007) app 4.

⁶⁰ Australasian Parliamentary Counsel’s Committee, ‘National Uniform Legislation’ (n 43).

IV SPECIFIC AREAS OF LAW

A simple frequencies statistical analysis was used to identify the number of sets of uniform Acts that belonged to certain areas of the law. The findings indicate that in some areas, the need for national uniform legislation has been more notable, and more importantly, the area of law has had a direct impact on sustainable uniformity. However, there have been variations within areas of law, indicating the importance of not over-relying on any one area of law for uniformity. Data from all 84 sets of uniform Acts were used. Areas of law with three sets of uniform Acts or less were not analysed in this study.

Table 2: Distribution of sets of uniform Acts by area of law in LawLex Index

Area of law	Number of sets of uniform Acts
Criminal law	12
Commercial and corporate law	10
Legal systems	9
Transport	9
Government	7
Energy and resources	7
Health	5
Family law and relationships	5
Business, trades and professions	4
Property, housing and development	3
Employment and industrial law	3
Education, training and research	2
Environment	2
Taxation	2
Media and communications	1
Immigration and citizenship	1
Primary industry	1
Wills and estates	1
Banking and finance, culture and recreation, government financing, human rights, indigenous Australians, insurance, intellectual property, privacy, social services, superannuation, international law	0

A Criminal Law

The area of law with the greatest amount of national uniform legislation is criminal law. One possible explanation for this is that the *Australian Constitution* does not expressly empower the Commonwealth to legislate in matters of criminal law. Therefore, criminal law has traditionally been within the remit of the states and

territories. However, ‘crime knows no borders’⁶¹ and ‘sophisticated criminals’ are able to ‘transcend’ state and national borders.⁶² Further, changes in technology and communication have allowed for new forms of cybercrime and the need to find ways to combat it.

In addition to being the most prevalent, criminal law has been represented at all levels of uniformity. There has also been an apparent preference for ‘mirror structure’ in criminal law, with only anti-terrorism legislation using a referred structure. The preference for a mirror structure in criminal law is partially explained by the desire of the states and territories to remain independent and flexible, agreeing to refer only in exceptional circumstances.⁶³ However, the preference has not only been due to aspects of centralisation. Legislation in general has grown and crime threats have expanded in all jurisdictions.⁶⁴

Table 3: Criminal Law

	Acts	Structure	Level of Uniformity	Jurisdictional Implementation
Crimes at sea	<i>Crimes at Sea Acts 2000</i> (Cth); 1998 (NSW); 2000 (NT); 2001 (Qld); 1998 (SA); 1999 (Tas); 1999 (Vic); 2000 (WA).	M	AI	All
Prisoners, international transfer	<i>International Transfer of Prisoners Act 1997</i> (Cth); <i>Crimes (Sentence Administration) Act 2005</i> (ACT); <i>International Transfer of Prisoners (New South Wales) Act 1997</i> (NSW); <i>(Northern Territory) Act 2000</i> (NT); <i>(South Australia) Act 1998</i> (SA); <i>International Transfer of Prisoners (Tasmania) Act 1997</i> (Tas); <i>International Transfer of Prisoners (Victoria) Act 1998</i> (Vic); <i>Prisoners International Transfer (Queensland) Act 1997</i> (Qld); <i>Prisoners (International Transfer) Act 2000</i> (WA).	M	AI	All
Terrorism	<i>Criminal Code Act 1995</i> (Cth); <i>Terrorism (Commonwealth Powers) Acts 2002</i> (NSW); 2002 (Qld); 2002 (SA); 2002 (Tas); 2003 (Vic); 2002 (WA); <i>Terrorism (Northern Territory) Request Act 2003</i> (NT).	R	AI	Adj. All

⁶¹ Simon Bronitt and Mark Finnane, ‘Comparative Perspectives on Australian-American Policing’ (2012) 46(3) *Journal of California Law Enforcement* 18, 20.

⁶² Nikos Passas, ‘Globalization, Criminogenic Asymmetries and Economic Crime’ (1999) 1(4) *European Journal of Law Reform* 399, 399.

⁶³ As discussed below regarding the ‘fear of insignificance’ phenomenon.

⁶⁴ See Gary F Manison, ‘Policing in the Australian Federation 1970–2010: A Changed Paradigm’ (PhD Thesis, Curtin University, 2015).

	Acts	Structure	Level of Uniformity	Jurisdictional Implementation
Fines (reciprocal enforcement against bodies corporate)	<i>Magistrates Court Act 1930</i> (ACT); <i>Fines Act 1996</i> (NSW); <i>Fines and Penalties (Recovery) Act 2001</i> (NT); <i>State Penalties Enforcement Act 1999</i> (Qld); <i>Cross-Border Justice Act 2009</i> (Qld); <i>Monetary Penalties Enforcement Act 2005</i> (Tas); <i>Magistrates' Court Act 1989</i> (Vic); <i>Fines Penalties and Infringement Notices Enforcement Act 1994</i> (WA).	M	SU	All
Prisoners, interstate transfer	<i>Crimes (Sentence Administration) Act 2005</i> (ACT); <i>Prisoners (Interstate Transfer) Acts 1982</i> (NSW); 1983 (NT); 1982 (Qld); 1982 (SA); 1982 (Tas); 1983 (WA).	M	SU	All
Community based sentencing orders (transfers)	<i>Crimes (Sentence Administration) Act 2005</i> (ACT) ch 12; <i>Crimes (Interstate Transfer of Community Based Sentences) Act 2004</i> (NSW); <i>Interstate Transfer (Community-Based Sentences) Act 2009</i> (Tas); <i>Sentence Administration (Interstate Transfer of Community Based Sentences) Act 2009</i> (WA).	M	PU	Some
Criminal code	<i>Criminal Code Acts 2002</i> (Cth); 2002 (NT) pt IIAA; <i>Criminal Code 2002</i> (ACT).	M	PU	Some
DNA database	<i>Crimes Acts 1914</i> (Cth); 1958 (Vic) pt III div 1 sub-div 30A; <i>Crimes (Forensic Procedures) Acts 2000</i> (ACT) pt 2.11; 2000 (NSW) pt 11; <i>Police Administration Act 1978</i> (NT) pt VII div 7; <i>Police Powers and Responsibilities Act 2000</i> (Qld) ch 17 pt 5; <i>Criminal Law (Forensic Procedures) Act 2007</i> (SA) pt 5; <i>Forensic Procedures Act 2000</i> (Tas) pt 8; <i>Criminal Investigation (Identifying People) Act 2002</i> (WA) pt 10.	M	PU	All
Forensic procedures	<i>Crimes (Forensic Procedures) Acts 2000</i> (ACT); 2000 (NSW); <i>Police Administration Act 1978</i> (NT) pt VII div 7; <i>Criminal Law (Forensic Procedures) Act 2007</i> (SA); <i>Forensic Procedures Act 2000</i> (Tas); <i>Crimes Act 1958</i> (Vic) pt III div 1 sub-div 30A; <i>Criminal Investigation (Identifying People) Act 2002</i> (WA).	M	PU	All
Child protection (offender prohibition orders)	<i>Crimes (Child Sex Offenders) Act 2005</i> (ACT) pt 5A; <i>Child Protection (Offenders Prohibition Orders) Act 2004</i> (NSW); <i>Child Protection (Offenders Reporting and Registration) Act 2004</i> (NT); <i>Child Protection (Offender Prohibition Order) Act 2008</i> (Qld); <i>Community protection (Offender Reporting) Act 2004</i> (WA).	M	SS	Adj. All
Child protection (offender registration)	<i>Crimes (Child Sex Offenders) Act 2005</i> (ACT); <i>Child Protection (Offenders Registration) Act 2000</i> (NSW); <i>Child Protection (Offenders Reporting and Registration) Act 2004</i> (NT); <i>Child Protection (Offender Reporting) Act 2004</i> (Qld); <i>Child Sex Offenders Registration Act 2006</i> (SA); <i>Community Protection (Offender Reporting) Act 2005</i> (Tas); <i>Sex Offenders Registration Act 2004</i> (Vic); <i>Community Protection (Offender Reporting) Act 2004</i> (WA).	M	SS	Adj. All

	Acts	Structure	Level of Uniformity	Jurisdictional Implementation
Child protection orders (children and young persons (reciprocal arrangements))	<i>Children and Young People Act 2008</i> (ACT) ch 17; <i>Children and Young Persons (Care and Protection) Act 1998</i> (NSW) ch 14A; <i>Care and Protection Act 1999</i> (Qld) ch 7; <i>Children's Protection Act 1993</i> (SA) pt 8; <i>Children, Young Persons and Their Families Act 1997</i> (Tas) pt 8; <i>Children, Youth and Families Act 2005</i> (Vic) sch 1; <i>Children and Community Services Act 2004</i> (WA) pt 6.	M	SS	Adj. All

Minimal jurisdictional differences may be perceived as easier to overcome. However, in practice that has not always been the case, as an examination of Saskia Hufnagel's theory illustrates. Minor differences may become a point of dispute, due to 'fear of insignificance' (the situation in which jurisdictional differences become a point of identity and minor differences become almost impossible to harmonise).⁶⁵ In other words, it is 'the fear of state actors to lose their individual identities in the process of harmonisation' that may be the problem.⁶⁶ Hufnagel conducted interviews with Australian police enforcement practitioners from various jurisdictions to gain insight into their views on harmonising criminal procedure. According to the interviews, the respondents perceived the development of uniform criminal procedure legislation as encroaching on their powers.⁶⁷ Beyond the loss of identity, in cases where differences between jurisdictions are not significant, jurisdictions may be less enthusiastic about going through the negotiation process because there is not much to be gained.⁶⁸

To illustrate a typical set of uniform Acts in this area, the *Child Protection (Offender Prohibition Orders and Offender Registration)*⁶⁹ sets of uniform Acts are illustrative. The sets of Acts regulating sex offender registration have minimal textual similarity. The legislation is based on the New South Wales model, with some revisions.⁷⁰ It was agreed to by the Australasian Police Ministers' Council on 30 June 2004.⁷¹ The goal of the legislation was to reduce the probability of re-offending by requiring sex offenders to register with the police and regularly provide information on their

⁶⁵ Saskia Hufnagel, "'The Fear of Insignificance': New Perspectives on Harmonising Police Cooperation in Europe and Australia' (2010) 6(2) *Journal of Contemporary European Research* 165, 190.

⁶⁶ *Ibid* 165.

⁶⁷ *Ibid* 170.

⁶⁸ *Ibid* 165.

⁶⁹ See Table 3 for *Child Protection (Offender Prohibition Orders and Offender Registration)* legislative framework.

⁷⁰ Victorian Law Reform Commission, *Sex Offenders Registration* (Final Report, 2011) 21.

⁷¹ NSW Ombudsman, *Review of the Child Protection Register* (Report, May 2005) 3.

location within Australia or overseas. There have been substantial differences in regulations between jurisdictions because the legislation must fit into the existing framework of laws and advocacy coalitions within the corresponding police force units, departments of corrections, departments of children and families, departments of justice, local communities of Crime Stoppers and other interest groups within the area. These sets of uniform Acts regulate the two most controversial areas of harmonised legislation in Australia: children and criminal law. Thus, there is only minimal uniformity among jurisdictions in this area.

The set of uniform Acts called *Court Information Technology (Video Link)*⁷² is another typical case. The textual similarity within the set of uniform provisions is minor and would be classified as ‘some similarities’. The textual differences between jurisdictions have mostly related to the different types of technology used, pointing to the strong beliefs held by advocacy coalitions within the court system and corresponding departments in terms of the necessary policy.

Notwithstanding other difficulties, the jurisdictions have been willing to act swiftly and uniformly in the face of national crises. An atypical case of uniformity within the area of criminal law is counter-terrorism legislation. In the historically unsustainable area of criminal law, counter-terrorism legislation has been promptly implemented by all jurisdictions in the most uniform referred structure without any consecutive harmonisation efforts. Counter-terrorism legislation is the only set of uniform Acts in criminal law that falls into the referred structure, and it is categorised as ‘almost identical’. Prior to 2002, counter-terrorism regulations relied heavily on the criminal law of the states and territories, with the underlying assumption that the Commonwealth could rely on the criminal laws of general application, for instance the provisions regulating murder or grievous bodily harm.⁷³ Following the terrorist attacks on 11 September 2001, the Australian Government commissioned the then Secretary of the Attorney-General’s Department, Robert Cornall, to lead a review of counter-terrorism arrangements (‘Cornall Review’) to ensure that Australia had sufficient capability to respond to a terrorist threat.⁷⁴

On 5 April 2002, the heads of the Commonwealth, states and territories agreed ‘to take whatever action is necessary to ensure that terrorists can be prosecuted under the criminal law, including a reference of power so that the Commonwealth may enact specific, jointly-agreed legislation’.⁷⁵ The Australian Bills were modelled on

⁷² See Table 6 for *Court Information Technology (Video Link)* legislative framework.

⁷³ See generally Anthony Reilly, ‘The Processes and Consequences of Counter-Terrorism Law Reform in Australia: 2001–2005’ (2007) 10(1) *Flinders Journal of Law Reform* 81.

⁷⁴ Daryl Williams, ‘Upgrading Australia’s Counter-Terrorism Capabilities’ (News Release 1080, 18 December 2001).

⁷⁵ Council of Australian Governments, *Agreement on Counter-Terrorism Laws* (Inter-governmental Agreement, 25 June 2004) recital 1.

UK legislation, with some modifications.⁷⁶ The standalone *Anti-Terrorism Act 2005* (Cth) was enacted in 2004. The states and territories referred certain matters related to terrorist acts to the Commonwealth Parliament in accordance with s 51(xxxvii) of the *Constitution*.⁷⁷ It was also agreed that any amendment to the Commonwealth legislation would be subject to consultation between the jurisdictions.⁷⁸ The action was prompt, and sustainability in this case was secured by both the referred structure and a national regulator: the Australian Criminal Intelligence Commission.

Counter-terrorism legislation has been somewhat controversial because it has given the law enforcement agencies wide powers to detain and question.⁷⁹ Nevertheless, the jurisdictions have agreed to cooperate to prevent terrorist attacks, and the implementation of counter-terrorism legislation has been quite effective. The Commonwealth Attorney-General's website states: 'Effective laws are a critical component of Australia's response to threatened or actual terrorist acts'.⁸⁰ Yet further harmonisation of the criminal law affixed to counter-terrorism cooperation has continued to be criticised. To counter that, in 2017, then Prime Minister Malcolm Turnbull urged, '[i]t's vital that we have nationally consistent terrorism laws. I'm asking state and territory leaders to work with me to deliver safety and security'. He also asserted that

[p]eople who are using the internet to spread terrorist propaganda and instructions will be tracked down and caught. ... We need nationally consistent pre-charge detention laws so that those who seek to do us harm can be held to account no matter where they are.⁸¹

⁷⁶ Andrew Lynch, 'Control Orders in Australia: A Further Case Study in the Migration of British Counter-Terrorism Law' (2008) 8(2) *Oxford University Commonwealth Law Journal* 159.

⁷⁷ *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).

⁷⁸ Council of Australian Governments (n 75).

⁷⁹ See Michael Head, 'Another Threat to Democratic Rights: ASIO Detentions Cloaked in Secrecy' (2004) 29(3) *Alternative Law Journal* 127.

⁸⁰ Attorney-General (Cth), *Australia's Counter-Terrorism Laws* (Web Page) <<https://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Pages/AustraliascounterterrorismLaws.aspx>>.

⁸¹ James Massola, 'Malcolm Turnbull Pushes for Law to Detain Terror Suspects for Up To 14 Days before Charges', *The Sydney Morning Herald* (online, 3 October 2017) <<http://www.smh.com.au/federal-politics/political-news/malcolm-turnbull-pushes-for-law-to-detain-terror-suspects-for-up-to-14-days-before-charges-20171003-gytil.html>>.

The idea of toughening counter-terrorism laws currently appears to be well supported by the jurisdictions,⁸² with concerns over the threat to multiculturalism fading. Taking this into consideration, it is unlikely the policy will be changed or that sustainable uniformity will be reversed based on the arguments raised by the policy's opponents.

Overall, criminal law can be characterised as the most voluminous and least uniform area of law with a lower level of implementation. It is highly likely that it will undergo even more serious shifts, given the opportunities created by the internet for a range of illegal enterprises. This may result in state and territory borders becoming less important, and national and international responses becoming more important. For example, the infamous 'Silk Road' website has an electronic platform for selling narcotics, fake identification documents and other illegal goods.⁸³ Peter Nash, an Australian citizen convicted for his involvement with the website, gave instructions in a discussion thread on how to bypass Australian customs authorities when trafficking narcotics.⁸⁴ The common threats and challenges faced by all Australian jurisdictions suggest that cooperation is becoming increasingly important for challenges that go beyond the state, territory and national borders.

B *Commercial and Corporate Law*

Commercial and corporate law has been a highly publicised area of harmonisation due to the widely-recognised importance of economic integration, increased mobility and technological advances. These have all contributed to erasing legal boundaries and inconsistent regulations. In addition, there have been powerful lobbying proponents supporting the full harmonisation of commercial and corporate law. These have included organisations such as major banks, large corporations,⁸⁵ advocates like the Business Council of Australia,⁸⁶ and various associations representing the rights of business persons and consumers.

⁸² 'Leaders Vow to Toughen Anti-terror Laws', *SBS News* (online, 9 June 2017) <<http://www.sbs.com.au/news/article/2017/06/09/leaders-vow-toughen-anti-terror-laws>>.

⁸³ James Ball, 'Silk Road: The Online Drug Marketplace That Officials Seem Powerless to Stop', *The Guardian* (online, 22 March 2013) <<https://www.theguardian.com/world/2013/mar/22/silk-road-online-drug-marketplace>>.

⁸⁴ Peter Mitchell, 'Australian Peter Nash to Be Sentenced Over Role in Silk Road Drug-Trafficking Website', *The Sydney Morning Herald* (online, 26 May 2015) <<http://www.smh.com.au/world/australian-peter-nash-to-be-sentenced-over-role-in-silk-road-drugtrafficking-website-20150525-gh9jes.html>>.

⁸⁵ See ANZ Bank, Submission No 82 to the Productivity Commission, *Review of Australia's Consumer Policy Framework* (May 2007); Telstra Corporation Ltd, Submission No 7 to House of Representatives Standing Committee on Legal and Constitutional Affairs, *Harmonisation of Legal Systems within Australia and Between Australia and New Zealand* (November 2006).

⁸⁶ 'Towards a Seamless Economy', *Business Council of Australia* (Web Page, 2008) <<http://bca.com.au/towards-a-seamless-economy>>.

Commercial and corporate legislation is highly uniform, falling within either the ‘almost identical’ or ‘substantially uniform’ categories. Table 4 illustrates the harmonisation of commercial and corporate law, highlighting its uniformity and high degree of consensus across jurisdictions. The Hon Michael Kirby AC CMG stressed that, ‘although uniformity is not an end in itself or desirable in every area of the law, there is little doubt that in areas of business law and commercial law there is much to be said for greater uniformity’.⁸⁷ All sets of uniform Acts fall within the category of ‘almost identical’ or ‘substantially uniform’, and have a very high level of implementation in all jurisdictions. The legislation has largely been subject to consecutive harmonisation, with most sets of uniform Acts represented by referred and applied structures. One set of uniform Acts represented by mirror legislation is electronic transactions legislation. This points to a wider consensus between jurisdictions on the benefits of harmonising commercial and corporate law.

Table 4: Commercial and Corporate Law

Sets of Uniform Acts	Acts	Structure	Level of Uniformity	Jurisdictional Implementation
Business names	<i>Business Names Registration (Transition to Commonwealth) Act 2012 (ACT); Business Names (National Uniform Legislation) Request Act 2011 (NT); Business Names (Commonwealth Powers) Acts 2011 (Qld); 2012 (SA); 2011 (Tas); 2011 (Vic); 2012 (WA); 2011 (NSW).</i>	R	AI	All
Competition policy reform	<i>Competition Policy Reform Act 1996 (ACT); (New South Wales) Act 1995 (NSW); (Northern Territory) Act 1996 (NT); (Queensland) Act 1996 (Qld); (South Australia) Act 1996 (SA); (Tasmania) Act 1996 (Tas); (Victoria) Act 1995 (Vic); (Western Australia) Act 1996 (WA); (Taxing) Act 1996 (WA).</i>	A	AI	All
Consumer protection	<i>Competition and Consumer Act 2010 (Cth) sch 2; Fair Trading (Australian Consumer Law) Act 1992 (ACT), amended by Fair Trading (Australian Consumer Law) Amendment Act 2010 (ACT); Fair Trading Act 1987 (NSW), amended by Fair Trading Amendment (Australian Consumer Law) Act 2010 (NSW); Consumer Affairs and Fair Trading Act 1990 (NT); Fair Trading Act 1989 (Qld), amended by Fair Trading (Australian Consumer Law Amendment) Act 2010 (Qld); Fair Trading Act 1987 (SA), amended by Statutes Amendment and Repeal (Australian Consumer Law) Act 2010 (SA); Australian Consumer Law (Tasmania) Act 2010 (Tas); Fair Trading Act 1999 (Vic), amended by Fair Trading Amendment (Australian Consumer Law) Act 2010 (Vic); Fair Trading Act 2010 (WA).</i>	A	AI	All

⁸⁷ Michael Donald Kirby, *Reform the Law: Essays on the Renewal of the Australian Legal System* (Oxford University Press, 1983) 55.

Sets of Uniform Acts	Acts	Structure	Level of Uniformity	Jurisdictional Implementation
Corporations	<i>Corporations Act 2001</i> (Cth); <i>Corporations (Commonwealth Powers) Acts 2001</i> (NSW); <i>2001</i> (Qld); <i>2001</i> (SA); <i>2001</i> (Tas); <i>2001</i> (Vic); <i>2001</i> (WA); <i>Corporations (Northern Territory Request) Act 2001</i> (NT).	R	AI	Adj. All
Mutual recognition	<i>Mutual Recognition Act 1992</i> (Cth); <i>(Australian Capital Territory) Act 1992</i> (ACT); <i>(New South Wales) Act 1992</i> (NSW); <i>(Northern Territory) Act 1992</i> (NT); <i>(Queensland) Act 1992</i> (Qld); <i>(South Australia) Act 1993</i> (SA); <i>(Tasmania) Act 1993</i> (Tas) (adopted); <i>(Victoria) Act 1998</i> (Vic) (adopted); <i>(Western Australia) Act 2010</i> (WA), replacing <i>Mutual Recognition (WA) Act 1995</i> (WA) (applied).	R	AI	All
Trans-Tasman mutual recognition	<i>Trans-Tasman Mutual Recognition Acts 1997</i> (Cth); <i>1997</i> (ACT); <i>(New South Wales) Act 1996</i> (NSW); <i>1998</i> (NT); <i>(Queensland) Act 2003</i> (Qld); <i>(South Australia) Act 1999</i> (SA); <i>(Tasmania) Act 2003</i> (Tas) (adopting); <i>(Victoria) Act 1998</i> (Vic); <i>(Western Australia) Act 2007</i> (WA).	R	AI	All
Co-operatives	<i>Co-Operatives (Adoption of National Law) Act 2012</i> (NSW); <i>Co-Operatives (National Uniform Legislation) Act 2015</i> (NT); <i>Co-Operatives National Law (South Australia) Acts 2013</i> (SA); <i>(Tasmania) Act 2015</i> (Tas); <i>2013</i> (Vic).	A	SU	Most
Electronic transactions	<i>Electronic Transactions Acts 1999</i> (Cth); <i>2001</i> (ACT); <i>2000</i> (NSW); <i>Electronic Transactions (Northern Territory) Act 2000</i> (NT); <i>(Queensland) Act 2001</i> (Qld); <i>2000</i> (SA); <i>2000</i> (Tas); <i>(Victoria) Act 2000</i> (Vic); <i>2003</i> (WA).	M	SU	All
Price exploitation	<i>Price Exploitation Code (New South Wales) Act 1999</i> (NSW); <i>New Tax System Price Exploitation Code (Northern Territory) Act 1999</i> (NT); <i>(Queensland) Act 1999</i> (Qld); <i>(South Australia) Act 1999</i> (SA); <i>(Tasmania) Act 1999</i> (Tas); <i>(Victoria) Act 1999</i> (Vic); <i>(Western Australia) Act 1999</i> (WA); <i>(Taxing) Act 1999</i> (WA).	A	SU	All

Business names legislation is an example of a typical progression that has experienced several waves of harmonisation. In the 1960s, the first wave of intended harmonisation produced mirror legislation based on a model Bill developed by the Standing Committee of Attorneys-General of the Commonwealth and states.⁸⁸ At that stage, the registration of business names was administered by the state and territory governments. On 3 July 2008, the Council of Australian Governments ('COAG') agreed to the development of a single national system for registering and regulating business names as part of the Commonwealth Government's seamless national economic

⁸⁸ See Table 4 for *Business Names* legislative framework.

reforms.⁸⁹ The states and territories would refer matters to the Commonwealth, and the Commonwealth would maintain online registration for both Australian Business Numbers and business names. Instead of the state and territory governments administering the register, it would be done by the Australian Securities and Investments Commission ('ASIC'). All jurisdictions have made the referral.⁹⁰ This register currently allows businesses to register once for all jurisdictions and identify a unique business name that can be used to build a brand throughout Australia. In addition, the register can be used to determine the identity of the entity behind the business name and its contact details.

Unlike business names, the trajectory of growth in uniformity through consecutive harmonisation of corporations legislation has been atypical. This legislation has gone through spontaneous harmonisation from a mirror to applied and then to a referred structure. The Acts went through the stages of spontaneous uniformity in the 1800s, when most of the Australian jurisdictions enacted company legislation based on the *Companies Act 1862* 25 & 26 Vict c 89 borrowed from England.⁹¹ From 1960 to 1969, each jurisdiction enacted uniform mirror legislation.⁹² Later, in an effort to bring greater uniformity, an applied structure was implemented: the *Corporations Act 1989* (Cth). State and territory legislation applied the laws of the *Corporations Act 1989* (Cth) in their jurisdictions and conferred powers on the Australian Securities Commission, now known as ASIC. As a result of case law putting constitutionality of cross-vesting provisions in doubt,⁹³ the *Corporations Act 2001* (Cth) in referred structure superseded the *Corporations Act 1989* (Cth) in applied structure to become the legislation governing corporations today. State and territory jurisdictions referred their powers to make laws to the Commonwealth with respect to the relevant subject matters through the uniform legislative framework.⁹⁴

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. In theory, the enactment of the *Corporations Act 2001* (Cth) should have resulted in 'a fully unified system'.⁹⁵ However, as argued by The Hon Reginald Barrett AO, although Australia has come a long way, 'we have not reached and will probably never reach a point of perfectly harmonised

⁸⁹ Explanatory Memorandum, Business Names Registration Bill 2011 (Cth) 3.

⁹⁰ See Table 4 for *Business Names* legislative framework.

⁹¹ *Companies Act 1874* (NSW); *Companies Act 1863* (Qld); *Companies Act 1864* (SA); *Companies Act 1869* (Tas); *Companies Act 1864* (Vic).

⁹² *Companies Ordinance 1962* (ACT); *Companies Ordinance 1963* (NT); *Companies Act 1961* (NSW); *Companies Act 1961* (Qld); *Companies Act 1962* (SA); *Companies Act 1962* (Tas); *Companies Act 1961* (Vic); *Companies Act 1961* (WA).

⁹³ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *R v Hughes* (2000) 202 CLR 535.

⁹⁴ See Table 4 for *Corporations* legislative framework.

⁹⁵ Tom Bathurst, 'The Historical Development of Corporations Law' (Speech, Francis Forbes Society for Australian Legal History: Introduction to Australian Legal History Tutorials, 3 September 2013) 18 [57].

uniformity’.⁹⁶ Examples of divergence include Tasmanian legislation in which additional preclusions were added for the appointment of an auditor. Specifically, an auditor could be anyone other than a particular office-holder.⁹⁷ 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).⁹⁸ In addition, due to the insertion of pt 1.1A into 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.

Overall, the area of commercial and corporate law has been characterised by a high level of uniformity and implementation. Absolute uniformity, however, even for legislation in referred structure might still be an elusive goal for the Australian federation.

C *Transport Law*

Transport law is the third most important area regulated by national uniform legislation. It regulates all types of transport: air, sea, road and rail. Legislative powers on matters of transport are not expressly assigned in the *Australian Constitution*. However, the regulation of transport has been treated as falling under s 51(i) ‘trade and commerce’ in some cases. ‘Trade and commerce’ was defined in the early case of *W & A McArthur Ltd v Queensland*,⁹⁹ in which the court found ‘the mutual communing, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery are all, but not exclusively, parts of that class of relations between mankind which the world calls “trade and commerce”’.¹⁰⁰

The need for inter-jurisdictional cooperation in ‘trade and commerce’ (in accordance with s 51(i) of the *Australian Constitution*), involves a vital distinction: interstate transport can fall within the remit of the Commonwealth, but transport within a state or territory is regulated by state or territory law. This distinction has not been clear in some circumstances. Given the advances in modern transport, as Dixon CJ pointed out, ‘[t]he distinction which is drawn between inter-State trade and the domestic trade of a State ... may well be considered artificial and unsuitable to modern times’.¹⁰¹

The constitutional head of power covers both interstate and intra-state activities, where they are ‘inseparably connected’.¹⁰² The mere fact that it might be uneco-

⁹⁶ RI Barrett, ‘Towards Harmonised Company Legislation: “Are We There Yet?”’ (2012) 40(2) *Federal Law Review* 141, 159.

⁹⁷ *Irrigation Company Act 2011* (Tas).

⁹⁸ *Dust Diseases Tribunal Act 1989* (NSW).

⁹⁹ (1920) 28 CLR 530.

¹⁰⁰ *Ibid* 547.

¹⁰¹ *Wragg v New South Wales* (1953) 88 CLR 353, 385–6.

¹⁰² *Redfern v Dunlop Rubber Australia Ltd* (1964) 110 CLR 194, 221 (Menziez J).

nomical to offer a purely intra-state service has been considered insufficient for the Commonwealth to regulate travel and transportation nationally.¹⁰³ Nevertheless, a remedy for this is now being sought through national uniform legislation.¹⁰⁴ Although the states and territories have mostly enacted applied legislation and vested powers regulating air transport to the Commonwealth,¹⁰⁵ other types of transport have been subject to recent major reforms. For instance, on 19 August 2011, ‘in a major step forward in improving the efficiency of transport regulation’,¹⁰⁶ COAG approved three intergovernmental agreements on heavy vehicles, rail and maritime safety.

The level of uniformity in transport law varies, as seen in Table 5. The regulation of air transport is the most uniform, regulation of sea and rail transport is less uniform, and regulation of road transport is divergent. As for consensus, only the set of Acts regulating heavy vehicle registration charges have had a low level of implementation. The level of the remaining sets of Acts has been high. Nonetheless, the low implementation of legislation of heavy vehicle registration charges has been changing as this article is being written. The National Transport Commission has announced its approval of amendments to the Heavy Vehicle Charges Model Law conceived by the COAG Transport and Infrastructure Council.¹⁰⁷ All Australian jurisdictions are expected to implement the model law and delegated legislation.¹⁰⁸

Table 5: Transport Law

Sets of Uniform Acts	Acts	Structure	Level of Uniformity	Jurisdictional Implementation
Air navigation	<i>Air Navigation Act 1920</i> (Cth); <i>1938</i> (NSW); <i>1937</i> (Qld); <i>1937</i> (SA); <i>1937</i> (Tas); <i>1958</i> (Vic); <i>1937</i> (WA).	A	AI	Adj. All
Civil aviation (carriers' liability)	<i>Civil Aviation (Carriers' Liability) Act 1959</i> (Cth); <i>1967</i> (NSW); <i>1964</i> (Qld); <i>1962</i> (SA); <i>1963</i> (Tas); <i>1961</i> (Vic); <i>1961</i> (WA).	A	AI	Adj. All

¹⁰³ *A-G (WA) v Australian National Airlines Commission* (1976) 138 CLR 492, 500–501 (Barwick CJ).

¹⁰⁴ Regulations under the *Air Navigation Act 1938* (NSW); *Air Navigation Act 1937* (Qld); *Air Navigation Act 1937* (SA); *Air Navigation Act 1937* (Tas); *Air Navigation Act 1937* (WA).

¹⁰⁵ See Table 5 for *Air navigations* legislative framework.

¹⁰⁶ *Council of Australian Governments* (Web Page) <<https://www.coag.gov.au/meeting-outcomes/coag-meeting-communicue-19-august-2011>>.

¹⁰⁷ ‘Heavy Vehicle Charges Model Law’, *National Transport Commission* (Web Page) <<https://www.ntc.gov.au/laws-and-regulations/heavy-vehicle-charges-model-law>>.

¹⁰⁸ *Ibid.*

Sets of Uniform Acts	Acts	Structure	Level of Uniformity	Jurisdictional Implementation
Domestic commercial vessels	<i>Marine Safety Act 1998</i> (NSW) pt 1A; <i>Marine Safety (Domestic Commercial Vessel) (National Uniform Legislation) Act 2013</i> (NT); <i>Marine Safety (Domestic Commercial Vessel) National Law (Application) Act 2013</i> (SA); <i>Marine Safety (Domestic Commercial Vessel National Law Application) Acts 2013</i> (Tas); 2013 (Vic).	R	AI	Adj. All
Bills of lading	<i>Sea-Carriage Documents Act 1997</i> (NSW); 1998 (NT); 1996 (Qld); 1998 (SA); 1997 (Tas); 1998 (Vic); 1997 (WA).	M	SU	Adj. All
Heavy vehicle regulation	<i>Heavy Vehicle National Law Act 2012</i> (Qld); (<i>ACT</i>) <i>Act 2013</i> (ACT); (<i>South Australia</i>) <i>Act 2013</i> (SA); (<i>Tasmania</i>) <i>Act 2013</i> (Tas); <i>Heavy Vehicle National Law Application Act 2013</i> (Vic); <i>Heavy Vehicle (Adoption of National Law) Act 2013</i> (NSW).	A	SU	Most
Rail safety	<i>Rail Safety (Adoption of National Law) Act 2012</i> (NSW); <i>Rail Safety (National Uniform Legislation Act 2012</i> (NT); <i>Rail Safety National Law (South Australia) Act 2012</i> (SA); 2015 (WA); (<i>Tasmania</i>) <i>Act 2012</i> (Tas); (<i>ACT</i>) <i>Act 2014</i> (ACT); 2000 (Vic), as amended by <i>Transport Legislation Amendment (Rail Safety Local Operations and Other Matters) Act 2013</i> (Vic).	A	SU	Most
Road transport legislation (road rules)	<i>Road Transport (Safety and Traffic Management) Regulation 2000</i> (ACT) cl 6; <i>Road Rules 2008</i> (NSW); 2009 (Tas); <i>Traffic Regulations 1999</i> (NT) sch 3; <i>Transport Operations (Road Use Management — Road Rules) Regulation 2009</i> (Qld); <i>Road Traffic Act 1961</i> (SA); 1974 (WA) (and regulations); <i>Road Safety Road Rules 2009</i> (Vic).	H	SU	All
Heavy vehicles registration charges	<i>Road Transport (General) Act 1999</i> (ACT) s 96; <i>Road Transport (Vehicle Registration Act 1997</i> (NSW) pt 24; <i>Vehicle and Traffic Act 1999</i> (Tas) s 34A, sch 2; <i>Road Traffic Act 1974</i> (WA).	M	PU	Some
Road and rail (dangerous goods)	<i>National Transport Commission (Model Legislation — Transport of Dangerous Goods by Road or Rail) Regulations 2007</i> (Cth); <i>Dangerous Goods (Road Transport) Act 2009</i> (ACT); <i>Dangerous Goods (Road and Rail Transport) Act 2008</i> (NSW); <i>Act 2010</i> (Tas); <i>Transport of Dangerous Goods by Road and Rail (National Uniform Legislation) Act 2011</i> (NT); <i>Dangerous Goods Act 1985</i> (Vic).	H	PU	All

Overall, the area of transport law is characterised by high uniformity and implementation, with the exception of road transport regulation.

D Legal Systems

Table 6 displays the level of uniformity, structure, and implementation in the area of legal systems. As shown, ‘legal systems’ mostly covers legislation that regulates

the judicial system. It is also an area of law that has traditionally been regulated at the state and territory levels. All of these Acts fall within the mirror structure. The regulation allowing higher flexibility appears to be the preferred approach of jurisdictions in this area of the law. However, as Table 6 illustrates, even if all sets of Acts in this area are mirror in structure, the levels of uniformity range from ‘almost identical’ to ‘some similarities’. Further, legal systems have high implementation, with only one set of uniform Acts (the *Evidence Acts*) enacted in ‘most jurisdictions’. All other sets of uniform Acts in the area of legal systems have been enacted by ‘all jurisdictions’ or ‘adjusted as all jurisdictions’.

Table 6: Legal Systems

Sets of Uniform Acts	Acts	Structure	Level of Uniformity	Jurisdictional Implementation
Cross vesting	<i>Jurisdiction of Courts (Cross-vesting) Acts</i> 1987 (Cth); 1993 (ACT); 1987 (NSW); 1987 (NT); 1987 (Qld); 1987 (SA); 1987 (Tas); 1987 (Vic); 1987 (WA).	M	AI	Adj. All
Federal Courts (State jurisdiction)	<i>Federal Courts (State Jurisdiction) Acts</i> 1999 (NSW); 1999 (Qld); 1999 (SA); 1999 (Tas); 1999 (Vic); 1999 (WA).	M	AI	Adj. All
Commercial arbitration	<i>International Arbitration Act</i> 1974 (Cth); <i>Commercial Arbitration Acts</i> 2010 (NSW); 2013 (Qld); (SA); 2011 (Tas); 2011 (Vic); 2012 (WA); <i>Commercial Arbitration (National Uniform Legislation) Act</i> 2011 (NT).	M	SU	All
Evidence	<i>Evidence Acts</i> 1995 (Cth); 2011 (ACT); 1995 (NSW); 2001 (Tas); 2008 (Vic); <i>Evidence (National Uniform Legislation) Act</i> 2011 (NT).	M	SU	Most
Proportionate liability	<i>Civil Law (Wrongs) Act</i> 2002 (ACT) ch 7A; <i>Civil Liability Acts</i> 2002 (NSW) pt 4; 2003 (Qld) ch 2 pt 2; 1936 (SA); 2002 (Tas) pt 9A; 2002 (WA) pt 1F; <i>Wrongs Act</i> 1958 (Vic) pt IVAA.	M	SU	All
Cross-border justice	<i>Cross-Border Justice Acts</i> 2009 (NT); 2009 (SA); 2008 (WA).	M	PU	Adj. All
Defamation	<i>Defamation Acts</i> 2005 (NSW); 2006 (NT); 2005 (Qld); 2005 (SA); 2005 (Tas); 2005 (Vic); 2005 (WA).	M	PU	Adj. All
Court information technology (video link)	<i>Crimes Act</i> 1914 ss 15YU–15UV, inserted by <i>Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act</i> 2005 (Cth); <i>Evidence (Miscellaneous Provisions) Acts</i> 1991 (ACT) pt 3; 1958 (Vic) pt IIA; <i>Evidence (Audio and Audio Visual Links) Acts</i> 1998 (NSW); 1999 (Tas); <i>Evidence (National Uniform Legislation) Act</i> 2011 (NT) (Part VA); <i>Evidence Acts</i> 1977 (Qld) pt 3A; 1929 (SA) pt 6C; 1906 (WA) ss 120–123.	M	SS	All
Crown proceedings	<i>Court Procedures Act</i> 2004 (ACT) pt 4; <i>Crown Proceedings Acts</i> 1988 (NSW); 1993 (NT); 1980 (Qld); 1992 (SA); 1993 (Tas); 1958 (Vic); <i>Crown Suits Act</i> 1947 (WA).	M	SS	All

E *Government*

Table 7 illustrates legislation in the area of government regulation. The high level of uniformity in this area is comparable to commercial and corporate law, and the level of implementation is the highest compared to all other areas of law.

Table 7: Government Regulation

Sets of Uniform Acts	Act	Structure	Level of Uniformity	Jurisdictional Implementation
Australia Acts	<i>Australia Act 1986</i> (Cth); <i>Australia Acts (Request) Acts 1985</i> (NSW); 1985 (Qld); 1985 (SA); 1985 (Tas); 1985 (Vic); 1985 (WA).	M	AI	Adj. All
Coastal waters	<i>Coastal Waters (State Powers) Act 1980</i> (Cth); <i>Constitutional Powers (Coastal Waters) Acts 1979</i> (NSW); 1980 (Qld); 1979 (SA); 1979 (Tas); 1980 (Vic); 1979 (WA).	M	AI	Adj. All
Commonwealth places (mirror tax)	<i>Commonwealth Places (Mirror Taxes) Act 1998</i> (Cth); <i>Commonwealth Places (Mirror Taxes Administration) Acts 1998</i> (NSW); 1999 (Qld); 1999 (SA); 1999 (Tas); 1999 (Vic); 1999 (WA).	A	AI	Adj. All
Succession (Crown)	<i>Succession to the Crown Acts 2015</i> (Cth); 2013 (Qld); 2015 (WA); <i>Succession to the Crown (Request) Acts 2013</i> (NSW); 2014 (SA); 2013 (Tas); 2013 (Vic); <i>Succession to the Crown (Request) (National Uniform Legislation) Act 2013</i> (NT).	R	AI	Adj. All
Trade measurement	<i>National Measurement Act 1960</i> (Cth); <i>Trade Measurement (Repeal) Act 2009</i> (NSW); 2010 (Tas); <i>Trade Measurement Legislation Repeal Act 2010</i> (Cth); 2009 (Qld); <i>Statutes Amendment and Repeal (Trade Measurement) Act 2009</i> (SA).	R	AI	All
Australian Crime Commission	<i>Australian Crime Commission Act 2002</i> (Cth); <i>(ACT) Act 2003</i> (ACT) (mirror); <i>(New South Wales) Act 2003</i> (NSW) (applied); <i>(Northern Territory) Act 2005</i> (NT); <i>(Queensland) Act 2003</i> (Qld); <i>(South Australia) Act 2004</i> (SA); <i>(Tasmania) Act 2004</i> (Tas) (mirror); <i>(State Provisions) Act 2003</i> (Vic); <i>(Western Australia) Act 2004</i> (WA).	H	SU	All
Standard time	<i>Standard Time and Summer Time Act 1972</i> (ACT); <i>Standard Time Acts 1987</i> (NSW); 2005 (NT); 1894 (Qld); 2009 (SA); 1895 (Tas); 2005 (WA); <i>Supreme Court Act 1986</i> (Vic) s 43.	M	SU	All

Three sets of uniform Acts in this area are directed at the resolution of an isolated problem: the *Australia Acts*, *Commonwealth Places (Mirror Tax)* and *Succession (Crown) Acts*. All of these sets are in the ‘almost identical’ category and are represented by various structures.

This section considers the *Australia Acts* first.¹⁰⁹ The Federal Parliament has no specific power to legislate on 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 s 3 of the *Australia Acts (Request) Act 1985* (NSW). It stated, '[t]he 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 simultaneous enactment of the *Australia Act 1986* (Cth) and the *Australia Act 1986* (UK).

Questions were raised about the constitutionality of these enactments.¹¹⁰ However, the High Court confirmed the validity of the *Australia Act* in its two versions, together with the state request and consent legislation.¹¹¹ Pursuant to this decision, Australian independence was established on the date the *Australia Act 1986* (Cth) came into operation, 3 March 1986.

The High Court's decision served as a focusing event in the *Commonwealth Places (Mirror Tax)* set of uniform Acts.¹¹² This set of uniform Acts was enacted in response to the High Court decision of *Allders International Pty Ltd v Commissioner of State Revenue (Vic)*,¹¹³ and was aimed at protecting the states. The High Court had held that tobacco franchise fees were excise duties and were thus constitutionally invalid. The legislation introduced the 'essential elements of safety net arrangements ... to ensure the continuation of appropriate taxation arrangements for Commonwealth Places'.¹¹⁴ All jurisdictions enacted legislation in an applied structure that was classified as 'almost identical'. Uniformity has remained almost unchanged from the outset with minimal or no amendments by the jurisdictions.

Another area of government regulation, *Coastal Waters* legislation,¹¹⁵ falls under the 'almost identical' level of uniformity. It resulted from the Offshore Constitutional Settlement of 1979, which included an intricate distribution of powers between the jurisdictions and was viewed as a 'milestone in cooperative federalism'.¹¹⁶ *Coastal Waters* legislation represents the consensus of the Australian jurisdictions on regulating offshore areas after a decade of disputes between the Commonwealth and states over sovereignty, culminating in the landmark High Court decision in

¹⁰⁹ See Table 7 for *Australia Acts* legislative framework.

¹¹⁰ *Sue v Hill* (1999) 199 CLR 462; *A-G (WA) v Marquet* (2003) 217 CLR 545.

¹¹¹ *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28.

¹¹² See Table 7 for *Commonwealth Places* legislative framework.

¹¹³ (1996) 186 CLR 630.

¹¹⁴ Queensland, *Parliamentary Debates*, Legislative Assembly, 25 May 1999, 1823 (David Hamill).

¹¹⁵ See Table 7 for *Coastal Waters* legislative framework.

¹¹⁶ Marcus Haward, 'The Australian Offshore Constitutional Settlement' (1989) 13(4) *Marine Policy* 334, 334.

the *Seas and Submerged Lands Act Case*.¹¹⁷ The Offshore Constitutional Settlement ‘reinforced shared jurisdiction in offshore areas’,¹¹⁸ offering a cooperative yet practical solution:¹¹⁹

[T]he 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 sea should be the responsibility of the States.¹²⁰

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’.¹²¹ As Marcus Haward recounted, ‘the [Offshore Coastal Settlement] has been the most ambitious and significant intergovernmental framework for Australian marine resources policy ... in both scope and complexity’.¹²² 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),¹²³ the institutional support provided has allowed high levels of uniformity to be achieved.

Finally, due to government regulation, two sets of uniform Acts relating to measurement and time are now uniform. Trade measurement legislation was recently raised to the level of utmost uniformity, with jurisdictions ‘clearing the field’ for Commonwealth regulation.

Standard time legislation has achieved a ‘substantially uniform’ level, although, it has taken decades to come to a uniform position. This legislation dates back to 1892, when jurisdictions enacted uniform legislation related to standard Greenwich Mean Time. At that stage, the legislation and regulations were consistent. This continued until the Premiers’ Conference in May 1915, where the prospect of a national daylight savings regime was discussed.¹²⁴ During World War I and World War II national

¹¹⁷ *New South Wales v Commonwealth* (1976) 135 CLR 337 (‘*Seas and Submerged Lands Act Case*’).

¹¹⁸ Haward (n 116) 334.

¹¹⁹ Attorney-General’s Department, *Offshore Constitutional Settlement: Selected Statements and Documents 1978–79* (Australian Government Publishing Services, 1980) 5.

¹²⁰ *Ibid* 16.

¹²¹ *Ibid* 5.

¹²² Haward (n 116) 347.

¹²³ *Ibid*.

¹²⁴ Premiers’ Conference, *Report of the resolutions, proceedings and debates of the Premiers’ Conference held at Sydney May 1915* (Parliament of Victoria Paper No 24, Session 1915) 64–5.

daylight time operated throughout Australia. Tasmania and Victoria introduced it in 1916. In Tasmania, the Act was later repealed by the *Daylight Saving Repeal Act 1917* (Tas), but daylight savings was reintroduced in 1967.

By 1990, the jurisdictions were changing the dates on which to introduce daylight savings and their positions were not uniform. Senator Paul Calvert described the ‘maze of different times’ as a ‘shackle on the economy, as well as causing interruptions to work and family balance’.¹²⁵ Starting on 1 September 2005, all jurisdictions adopted the Coordinated Universal Time (UTC) standard, and following long deliberations, in April 2007, they agreed on a uniform start and end date. However, Queensland, Western Australia and the Northern Territory still do not have daylight savings. The sets of uniform Acts enjoy high uniformity because the legislation was initially mirror and only some changes have been required, even though it has taken decades to convince the jurisdictions to come to a consensus.

Overall, the level of uniformity and implementation is very high in the government area of law. There has been a high level of consensus when jurisdictions have been faced with challenges that impact the nation in a similar manner.

F *Energy and Resources*

Table 8 represents sets of Acts in areas related to energy and resources. Several of the Acts have resulted from the COAG reform agenda. These include the first three sets of uniform Acts — electricity, energy retail and gas — which came out of the COAG energy market reforms (overseen by the COAG Energy Council). Similarly, sets of uniform Acts regulating water resources have come from COAG’s national water initiative. The initiative covers ‘a range of areas where best-practice and nationally consistent approaches to water management will bring substantial benefits’.¹²⁶

As can be seen in Table 8, although energy and resources legislation falls under various structures, the level of uniformity is high. The best explanation for this is that legislation has been drafted within a highly uniform applied structure where there have also been rigid mechanisms limiting amendment and ensuring sustainable uniformity. In addition to the robust mechanism of amendment, the Australian Energy Regulator (‘AER’) has strong enforcement powers.¹²⁷

¹²⁵ Chris Pearce, *The Great Daylight Saving Time Controversy* (Australian eBook Publisher, 2017) 261.

¹²⁶ John Howard, ‘Council of Australian Governments’ Meeting 25 June 2004, Canberra Communique’ (Media Release 21340, Department of Prime Minister and Cabinet, 25 June 2004) <<https://pmtranscripts.pmc.gov.au/release/transcript-21340>>.

¹²⁷ ‘Enforcement Matters’, *The Australian Energy Regulator* (Web Page) <<https://www.aer.gov.au/wholesale-markets/enforcement-matters>>.

Table 8: Energy and Resources

Sets of Uniform Acts	Acts	Structure	Level of Uniformity	Jurisdictional Implementation
Electricity	<i>Electricity (National Scheme) Act 1997</i> (ACT); <i>Electricity – National Scheme (Queensland) Act 1997</i> (Qld); <i>National Electricity (New South Wales) Act 1997</i> (NSW); <i>(South Australia) Act 1996</i> (SA).	A	AI	Most
Energy retail	<i>Australian Energy Market Act 2004</i> (Cth), as amended by <i>Australian Energy Market Amendment (National Energy Retail Law) Act 2011</i> (Cth); <i>National Energy Retail Law (ACT) Act 2012</i> (ACT); <i>(Adoption) Act 2012</i> (NSW); <i>(South Australia) Act 2011</i> (SA); <i>(Tasmania) Act 2012</i> (Tas); <i>National Energy Retail Law (Victoria) Bill 2012</i> (Vic).	A	AI	Most
Gas	<i>National Gas (ACT) Act 2008</i> (ACT); <i>(New South Wales) Act 2008</i> (NSW); <i>(Northern Territory) Act 2008</i> (NT); <i>(Queensland) Act 2008</i> (Qld); <i>(South Australia) Act 2008</i> (SA); <i>(Tasmania) Act 2008</i> (Tas); <i>(Victoria) Act 2008</i> (Vic); <i>National Gas Access (WA) Act 2009</i> (WA).	A	AI	All
Water	<i>Water Act 2007</i> (Cth); <i>Water (Commonwealth Powers) Acts 2008</i> (NSW); <i>2008</i> (Qld); <i>2008</i> (SA); <i>2008</i> (Vic).	R	AI	Adj. All
Offshore minerals	<i>Offshore Minerals Acts 1994</i> (Cth); <i>1999</i> (NSW); <i>1998</i> (Qld); <i>2000</i> (SA); <i>2003</i> (WA).	M	SU	Adj. All
Petroleum (offshore/ submerged lands)	<i>Petroleum (Submerged Lands) Act 1967</i> (Cth) as redrafted in <i>Offshore Petroleum Act 2006</i> (Cth); <i>Petroleum (Offshore) Act 1982</i> (NSW); <i>Petroleum (Submerged Lands) Acts 1981</i> (NT); <i>1982</i> (Qld); <i>1982</i> (SA); <i>1982</i> (Tas); <i>1982</i> (Vic); <i>1982</i> (WA).	M	SU	All
Water efficiency labelling	<i>Water Efficiency Labelling and Standards Act 2005</i> (Cth); <i>2005</i> (ACT); <i>(New South Wales) Act 2005</i> (NSW); <i>2005</i> (NT); <i>2005</i> (Qld); <i>2006</i> (SA); <i>2005</i> (Vic) (mirror); <i>2006</i> (WA) (mirror).	H	SU	All

Energy regulation has been one of the most rigid in terms of structure, and yet adaptable in terms of implementing the changes, schemes for uniformity in applied legislation. The following case study illustrates how sustainability has been ensured through a combination of the COAG reform agenda, amending provisions in the Act, and national regulators. The legislative framework for energy includes three sets of uniform Acts, all with an applied structure: the National Electricity Law; National Gas Law; and National Energy Retail Law.¹²⁸ Each element of this framework secures high uniformity and streamlined amendment provisions.

¹²⁸ See Table 8 for *National Electricity*, *Natural Gas* and *National Energy* legislative frameworks.

Following reforms to regulate competition, the COAG Energy Council proposed a new government structure to regulate energy markets. Three national bodies were created to replace the state and territory bodies: the Australian Energy Market Commission ('AEMC') and the AER in 2005 and the Australian Energy Market Operator ('AEMO') in 2009. Together, these three bodies share the functions of providing broad policy direction, rulemaking and market development, economic regulation and compliance, and market operations.¹²⁹

The mechanisms relied on to secure and sustain high uniformity have included the COAG reform agenda, applied structure, national regulators and the amendment provisions of legislation. In addition to these factors, regular forums are held to ensure the dissemination of streamlined knowledge and expertise. In this case study, sustainability most closely reflects the law's adaptability to new circumstances as opposed to stagnant laws or conferrals of jurisdiction. Indeed, the area is far from stagnant; it is quite dynamic, with amendments constantly taking place. In May 2020, the current consolidated version of the national electricity rules was at version 139,¹³⁰ and for the national gas rules it was version 54.¹³¹ It is unlikely that this level of uniformity would be achievable (or sustainable) in other applied schemes without the additional mechanisms deployed by the energy framework.

To summarise, energy and resources law has substantial uniformity, but this uniformity is not the result of historical consensus. Rather there is a complex architecture supporting this uniformity. The advantages of national uniform legislation in cases of shared natural resources include creating an 'even playing field',¹³² creating equality for all Australians,¹³³ and bringing together legal talent from various jurisdictions.¹³⁴ The wider relevance of these national reforms has been made possible by national uniform legislation that benefits the economic development of Australia.¹³⁵

¹²⁹ Australian Energy Regulator, *Australian Energy Regulator Annual Report 2015–16* (Report, October 2016) 12–13.

¹³⁰ 'National Electricity Rules', *The Australian Energy Market Commission*, (Web Page) <<http://www.aemc.gov.au/Energy-Rules/National-electricity-rules/Current-Rules>>.

¹³¹ 'National Gas Rules', *The Australian Energy Market Commission* (Web Page) <<https://www.aemc.gov.au/regulation/energy-rules/national-gas-rules/current>>.

¹³² Elizabeth Bluff and Neil Gunningham, 'Harmonising Work Health and Safety Regulatory Regimes' (2012) 25(2) *Australian Journal of Labour Law* 85, 87.

¹³³ Glenn Patmore and Kim Rubenstein, *Law and Democracy: Contemporary Questions* (ANU Press, 2014) 111.

¹³⁴ Peter B Maggs, 'The Process of Codification in Russia: Lessons Learned from the Uniform Commercial Code' (1998) 44(2) *McGill Law Journal* 281, 281.

¹³⁵ Rod Sims, 'Australia's Experience Driving Economic Growth through Competition Policy Reforms' (Speech, World Bank Forum - Making Markets Work for Development: A Reform Agenda on Competition, 23 April 2013) <<https://www.accc.gov.au/speech/australia%E2%80%99s-experience-driving-economic-growth-through-competition-policy-reforms>>.

However, it must also be noted that the costs of harmonisation have been high, and it might be impossible to accumulate the resources needed to achieve harmonisation in areas of law that are deemed less essential to the nation as a whole.

G Health

Table 9 presents sets of uniform Acts in the area of health law. As can be observed, the predominant structure is ‘applied’, the level of uniformity is at the medium level (ranging from substantially to partially uniform), and implementation is at the ‘most jurisdictions’ level. Health is an area of law that has historically been within the remit of the states and territories, but with the development of new technologies and new chemicals, national regulation might be more efficient. However, this would only be possible if jurisdictions agreed to legislate in applied structure. If legislation is in mirror structure, there is a high probability that the level of uniformity would diminish over the years, as occurred with human cloning legislation, discussed below. This area of law has a predominance of applied structure, something that was not observed in any other area of law researched for this study. Applied structure usually includes rigid mechanisms that limit amendment and ensure sustainable uniformity going forward.

Table 9: Health

Sets of Uniform Acts	Acts	Structure	Level of Uniformity	Level of Implementation
Human cloning	<i>Prohibition of Human Cloning for Reproduction Act 2002</i> (Cth); <i>Human Cloning and Embryo Research Act 2004</i> (ACT); <i>Human Cloning for Reproduction and Other Prohibited Practices Act 2003</i> (NSW); <i>Research Involving Human Embryos and Prohibition of Human Cloning Act 2003</i> (Qld); <i>Prohibition of Human Cloning Act 2003</i> (SA); <i>Human Cloning and Other Prohibited Practices Act 2003</i> (Tas); <i>Infertility Treatment Act 1995</i> (Vic) pt 4A; <i>Human Reproductive Technology Act 1991</i> (WA).	M	SU to SS	Most
Human embryo research	<i>Research Involving Human Embryos Act 2002</i> (Cth); <i>Human Cloning and Embryo Research Act 2004</i> (ACT); <i>Research Involving Human Embryos (New South Wales) Act 2003</i> (NSW) (applied); <i>Prohibition of Human Cloning Act 2003</i> (Qld); <i>Research Involving Human Embryos Act 2003</i> (SA); <i>Human Embryonic Research Regulation Act 2003</i> (Tas); <i>Infertility Treatment Act 1995</i> (Vic) pt 2A (mirror); <i>Human Reproductive Technology Act 1991</i> (WA).	A	SU	Most
Food safety	<i>Food Standards Australia New Zealand Act 1991</i> (Cth); <i>Food Acts 2001</i> (ACT); <i>2003</i> (NSW); <i>2004</i> (NT); <i>2006</i> (Qld); <i>2001</i> (SA); <i>2003</i> (Tas); <i>1984</i> (Vic); <i>2008</i> (WA).	H	SU	All

Sets of Uniform Acts	Acts	Structure	Level of Uniformity	Level of Implementation
Therapeutic goods/poison	<i>Therapeutic Goods Act 1989</i> (Cth); <i>Medicines, Poisons and Therapeutic Goods Acts 2008</i> (ACT); <i>2012</i> (NT); <i>Poisons and Therapeutic Goods Act 1966</i> (NSW); <i>Controlled Substances Act 1984</i> (SA) pt 2A; <i>Therapeutic Goods Act 2001</i> (Tas); <i>Therapeutic Goods (Victoria) Act 2010</i> (Vic); <i>Medicines and poisons Act 2014</i> (WA).	A	PU	Most
Sports drug testing	<i>Australian Sports Anti-Doping Authority Act 2006</i> (Cth); <i>Drugs in Sport Act 1999</i> (ACT); <i>Sports Anti-Doping Acts 2003</i> (Qld); <i>2005</i> (Vic); <i>Sports Drug Testing Acts 2000</i> (SA); <i>2001</i> (WA).	A	SU	Most

As can be observed from Table 9, jurisdictions are less likely to harmonise legislation in this area. With anti-doping regulation, the jurisdictions responded to pressure imposed by the Commonwealth. The set of uniform Acts was enacted in mirror structure but included conferral from the outset. In 1990, the *Australian Sports Drug Agency Act 1990* (Cth) established an independent statutory agency, the Australian Sports Drug Agency, to address the issue of drug use in sport following a Senate inquiry.¹³⁶ This prompted action by the Commonwealth government, resulting in a further increase in sustainable uniformity. In 2006, the Agency was replaced by the Australian Sports Anti-Doping Authority with increased powers to conduct investigations, present cases before sporting tribunals, recommend sanctions and approve and monitor sporting organisations' anti-doping policies. In 2013, the *Australian Sports Anti-Doping Authority Amendment Act 2013* (Cth) granted the Authority the right to increase its investigatory powers.

Due to its highly controversial nature, human cloning legislation is one set of uniform Acts that is not in 'applied' structure and has experienced diminished uniformity over time. Prior to 2002, no Commonwealth regulations existed in this area and the state and territory jurisdictions all had different regulations with regard to human tissue and embryo research. In 2002, as a result of a conscience vote,¹³⁷ legislation was enacted that included the *Research Involving Human Embryos Act 2002* (Cth) and the *Prohibition of Human Cloning Act 2002* (Cth). On 5 April 2002, COAG agreed that the Commonwealth, states and territories would introduce nationally consistent legislation. From the outset, agreement was achieved through consistent legislation with the implication that any legislation would be uniform in principle only. The uniformity in this area has diverged over time and is less uniform now than it was at the time of its enactment. In 2006, following a review, the legislation was

¹³⁶ Senate Standing Committee on Environment, Recreation and the Arts, Parliament of Australia, *Drugs in Sport*, (Report No 2, May 1990).

¹³⁷ Susan Dodds and Rachel Ankeny, 'Regulation of hESC Research in Australia: Promises and Pitfalls for Deliberative Democratic Approaches' (2006) 3(1) *Journal of Bioethical Inquiry* 95, 98.

amended to allow somatic cell nuclear transfers or ‘therapeutic cloning’.¹³⁸ The prohibition against human embryo research remained. All jurisdictions, except Western Australia, have followed this development by preparing uniform amendments.

Strong support mechanisms, such as applied structure, have been used in the area of health regulation to support harmonisation. However, not all jurisdictions have been amenable to enacting applied legislation. Therefore, the implementation level is not high in this area.

H *Family Law and Relationships*

Table 10 displays sets of Acts in areas related to family law and relationships. Two sets of uniform Acts are in referred structure and are highly uniform, and two sets of uniform Acts fall under the ‘some similarities’ category, with only some similar provisions across jurisdictions. The level of implementation is at either the ‘adjusted as all jurisdictions’ or ‘most jurisdictions’ level. With the two extremes in structure (referred and mirror) there appears to be no inclination of jurisdictions to enact legislation in this area of law in an applied structure. Moreover, there seems to be a high level of divergence unless legislation is enacted in a referred structure. Thus, family law and relationships is the area of the law with the fewest prospects for achieving high uniformity.

Table 10: Family Law and Relationships

Sets of Uniform Acts	Acts	Structure	Level of Uniformity	Jurisdictional Implementation
Surrogacy	<i>Parentage Act 2004</i> (ACT); <i>Surrogacy Acts 2010</i> (NSW); <i>2010</i> (Qld); <i>2012</i> (Tas); <i>2008</i> (WA); <i>Family Relationships Act 1975</i> (SA) pt 2B; <i>Status of Children Act 1974</i> (Vic) pt IV.	M	SS	Most
Parentage presumptions	<i>Family Law Reform Act 1995</i> (Cth); <i>Parentage Act 2004</i> (ACT); <i>Status of Children Acts 1996</i> (NSW); <i>1978</i> (NT); <i>1978</i> (Qld) pt 3; <i>1974</i> (Tas); <i>1974</i> (Vic); <i>Family Court Act 1997</i> (WA) pt 5 div 11 sub-div 3.	M	SS	Most
De facto financial matters	<i>Family Law Act 1975</i> (Cth); <i>De Facto Relationships Act 1991</i> (NT); <i>Commonwealth Powers (De Facto Relationships) Acts 2003</i> (Qld); <i>2009</i> (SA); <i>2006</i> (Tas); <i>2004</i> (Vic); <i>2006</i> (WA); <i>2003</i> (NSW).	R	AI	Adj. All

¹³⁸ *Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Act 2006* (Cth).

Sets of Uniform Acts	Acts	Structure	Level of Uniformity	Jurisdictional Implementation
Family law	<i>Family Law Act 1975</i> (Cth); <i>Commonwealth Powers (Family Law — Children) Acts 1986</i> (NSW); 1986 (Vic); 1990 (Qld); <i>Commonwealth Powers (Family Law) Acts 1986</i> (SA); 1987 (Tas); <i>Family Court Act 1997</i> (WA) (not referred).	R	AI	Adj. All
Child protection (international measures; Hague Convention)	<i>Family Law Act 1975</i> (Cth) sch 1; <i>Child Protection (International Measures) Acts 2006</i> (NSW); 2003 (NSW); 2003 (Tas).	M	SU	Adj. All

Examples of three sets of uniform Acts are given in this section: most uniform, medium uniform and least uniform.

The most uniform is the *De Facto Financial Matters* set of uniform Acts,¹³⁹ which was enacted in referred structure from the outset. The referral of powers over property rights was raised at the Australian Constitutional Convention in 1998. The time for referral came when the *Family Law Legislation Amendment (Superannuation) Act 2001* (Cth) was enacted, allowing the distribution of superannuation for married couples. This resulted in uncertainty over superannuation splitting orders for de facto couples across jurisdictions. The problem stream was characterised as follows:

Under the present regime, de facto couples in different States may have their property treated differently for no good reason. Even if States intend to enact and maintain uniform legislation, process delays can result in legislative anomalies. Such an approach would be highly complex, time-consuming, and impracticable.¹⁴⁰

As a result, the policy stream included a set of Acts in referred structure to refer these matters to the Commonwealth for regulation, particularly parenting and financial matters under the *Family Law Act 1975* (Cth). The legislation was enacted in referred structure from the outset by all jurisdictions. As Western Australia is the only jurisdiction with a State Family Court, it has some differences, but other than that, the current legislative regime has been characterised by high uniformity.

Another example of national uniform legislation in this area of law falls under the ‘substantially uniform’ set of uniform Acts in legislation intended to ratify the *Hague*

¹³⁹ See Table 10 for *De Facto Financial Matters* legislative framework.

¹⁴⁰ New South Wales, *Parliamentary Debates*, Legislative Council, 15 October 2003, 3843 (John Hatzistergos, Minister for Justice).

Convention on Child Protection (the ‘*Convention*’).¹⁴¹ Soon after the *Convention* was ratified, the Commonwealth Parliament passed legislation allowing the Family Court to register and enforce orders in accordance with the *Convention*. Regulation 4 of the *Family Law (Child Protection Convention) Regulations 2003* (Cth), under the *Family Law Act 1975* (Cth), included roll back provisions specifying that once a jurisdiction enacted the same or similar legislation, such legislation would prevail. The roll back provision was included not only to give expediency to the obligations under the *Convention*, but also to recognise that child protection had traditionally been within the remit of the state and territory Parliaments. This might have been the only case in which the non-enactment of national uniform legislation resulted in almost complete uniformity between jurisdictions due to Commonwealth regulation.

To implement the *Convention* at the state and territory level, Queensland drafted a model Bill. The Bill was approved by the PCC, the Standing Committee of Attorneys-General, and the Community Services Ministers Committee.¹⁴² The model Bill was subsequently enacted in Queensland and Tasmania, and later in New South Wales.¹⁴³ The Queensland and Tasmanian legislation followed the model. The New South Wales version had ‘two minor points’ of difference, related to the definition of ‘interested person’, and providing a ‘mechanism whereby the Director-General of the Department of Community Services can obtain relevant information necessary to prepare a report ... on the consultations undertaken prior to child being placed in foster care in a convention country’.¹⁴⁴ In a second reading speech in the New South Wales Legislative Assembly, it was noted that

since 2003 [the *Convention*] ... has been administered in Australia through the Commonwealth *Family Law Act 1975*. It has always been the intention that each State and Territory would also put in place its own legislation to implement these measures in its jurisdiction.¹⁴⁵

None of the remaining jurisdictions followed by enacting mirror legislation, allowing the Commonwealth legislation to apply.

The least uniform set of uniform Acts categorised under ‘some similarities’ is the regulation of surrogacy.¹⁴⁶ Although all jurisdictions except the Northern Territory

¹⁴¹ *The Hague Convention on the Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*, signed 19 October 1996 (entered into force 1 January 2002).

¹⁴² Legislation Review Committee, Parliament of New South Wales, *Legislation Review Digest* (No 2 of 2006, 7 March 2006) 7.

¹⁴³ See Table 10 for *Child Protection* legislative framework.

¹⁴⁴ New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 February 2006, 20737 (Alison Megarrity).

¹⁴⁵ *Ibid* 20736 (Alison Megarrity).

¹⁴⁶ *Parentage Act 2004* (ACT); *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).

allow altruistic surrogacy and prohibit commercial surrogacy, there have been great 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). Variations in the substantive provisions have been quite significant. The Australian Capital Territory allows same sex couples to become parents of a surrogate child, but not single persons.¹⁴⁷ New South Wales prohibits advertising of surrogacy arrangements.¹⁴⁸ In Victoria, certain surrogacy arrangements must be approved by a patient review panel.¹⁴⁹ In Western Australia, approval must be granted by the Western Australian Reproductive Technology Council.¹⁵⁰ This disparity among regulations has caused inequities, because some Acts within the set contain discriminatory provisions.¹⁵¹ Thus, only the general principles of this set of uniform Acts are consistent, and the set itself has ‘some similarities’.

Thus, in the area of family law and relationships, jurisdictions have historically had disparate regulations and the only path to higher uniformity has been the almost coercive interference by the Commonwealth, with rigid structures such as referred legislation. In other circumstances, lobbying forces within jurisdictions have argued for different approaches and regulation has depended on the political distribution of the forces on the day.

I *Business, Trades and Professions*

Table 11 represents sets of Acts in areas related to business, trades and professions. Although the structures vary from mirror to applied, the level of uniformity is ‘substantially uniform’ for all four sets of uniform Acts. It must be noted from the outset that sets of uniform Acts for occupational licensing have been the only sets of uniform Acts where the harmonisation effort has been reversed, as will be outlined in the case study below. National reform of the legal profession is happening as this article is being written. Although mirror sets of uniform Acts have been enacted Australia-wide, only three jurisdictions have committed to the new set of uniform Acts in applied structure.

¹⁴⁷ *Parentage Act 2004* (ACT) s 24.

¹⁴⁸ *Surrogacy Act 2010* (NSW) s 10.

¹⁴⁹ *Assisted Reproductive Treatment Act 2008* (Vic) s 39.

¹⁵⁰ *Surrogacy Act 2008* (WA) s 16.

¹⁵¹ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Surrogacy Matters Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (Report, April 2016) 5.

Table 11: Business, Trades and Professions

Sets of Uniform Acts	Acts	Structure	Level of Uniformity	Jurisdictional Implementation
Health practitioner regulation	<i>Health Practitioner Regulation (Adoption of National Law) Act 2009</i> (NSW); <i>Health Practitioner Regulation (National Uniform Legislation) Act 2010</i> (NT); <i>Health Practitioner Regulation National Law (ACT) Acts 2010</i> (ACT); <i>2009</i> (Qld); <i>(South Australia) Act 2010</i> (SA); <i>(Tasmania) Act 2010</i> (Tas); <i>(Victoria) Act 2009</i> (Vic); <i>(WA) Act 2010</i> (WA).	A	SU	All
Occupational licensing	<i>Occupational Licensing (Adoption of National Law) Act 2010</i> (NSW); <i>Occupational Licensing National Law (Queensland) Act 2010</i> (Qld); <i>(South Australia) Act 2011</i> (SA); <i>2011</i> (Tas); <i>2010</i> (Vic).	A	SU	Most
Legal profession	<i>Legal Profession Acts 2006</i> (ACT); <i>2006</i> (NT); <i>2007</i> (Qld); <i>2007</i> (Tas); <i>2008</i> (WA); <i>Legal Profession Act Uniform Law Application Act 2014</i> (NSW); <i>Legal Profession Act 2014</i> (Vic).	M to A	SU to AI	All to 3
Professional standards	<i>Civil Law (Wrongs) Act 2002</i> (ACT) sch 4; <i>Professional Standards Acts 1994</i> (NSW); <i>2004</i> (NT); <i>2004</i> (Qld); <i>2004</i> (SA); <i>2005</i> (Tas); <i>2003</i> (Vic); <i>1997</i> (WA).	M	SU	All

To illustrate how harmonisation operates to regulate trades and professions, this section compares two harmonisation attempts: occupational licensing and the legal profession. What can be observed from these two examples is that the area of law regulating professions has strong advocacy coalitions with set views on the rules and customs for operating professions and trades within certain jurisdictions. The jurisdictions are ready to cooperate but not under strict deadlines. This is not an area of law where the Commonwealth incentive can ‘speed up’ the process of harmonisation. Rather, time and genuine effort must be spent to find consensus among jurisdictions, under pressure from consumers for change. These are the appropriate conditions for national reforms in this area of the law.

This section first provides an analysis of a national reform that has been cancelled. That is what occurred in the case of occupational licensing reform. A national occupational licensing system was planned to regulate the entry requirements for the trades.¹⁵² The foundation for reform was supported by the National Partnership Agreement to Deliver a Seamless National Economy and financial incentives for

¹⁵² For example, electricians and plumbers. See *Occupational Licensing (Adoption of National Law) Act 2010* (NSW); *Occupational Licensing National Law (Queensland) Act 2010* (Qld); *Occupational Licensing National Law (South Australia) Act 2011* (SA); *Occupational Licensing National Law Act 2011* (Tas); *Occupational Licensing National Law Act 2010* (Vic).

meeting (or penalties for missing) progressive milestones.¹⁵³ The initial regulatory area was quite diverse, with all states and territories developing licensing requirements in cooperation with local businesses, occupational bodies and consumers.

Diversity has been and remains quite substantial within jurisdictions taking ‘pride’ in the regulatory regime.¹⁵⁴ This diversity has also been quite problematic in the context of Australia’s skills shortage. The ‘tyranny of diversity’ has included more than 27 licensing regimes, little consistency in training requirements and almost no unifying themes for fees.¹⁵⁵ As Delia Lawrie stated in the second reading speech for the Northern Territory Bill, ‘[t]here are currently 800 licence types ... This COAG reform will make it easier for occupational licensees to operate across State and Territory borders ... This will benefit the Territory in attracting skilled labour’.¹⁵⁶

The progress of reform has been riddled with difficulties. Nevertheless, even after continued lack of support and the inability to find consensus between jurisdictions, a Bill was produced. It received strong criticism for being ‘underdeveloped’ and putting ‘more detail into regulations than would be normal’.¹⁵⁷ As a result, regardless of the strong need for a consistent national regime, consensus has not been achieved, and occupational licensing legislation¹⁵⁸ has become the only example of recent national uniform Acts to be scheduled for intentional winding down. As one former official remarked: ‘In short, an unlikely unity ticket between those who wanted no change and those who wanted maximum, rapid change won the day and killed off the steady progress option.’¹⁵⁹ COAG’s decision to discontinue the proposed reform was made in December 2013.¹⁶⁰ Member of the New South Wales Legislative Council, Rick Colless, stated the reasons for its discontinuation during the second reading speech of the Occupational Licensing National Law Repeal Bill 2015 (NSW). In his words, the Bill ‘gives effect ... to the decision of the Council of Australian Governments to terminate the national occupational licensing reform in favour of

¹⁵³ COAG Business Advisory Forum Taskforce, *Report Card for National Partnership Agreement to Deliver a Seamless National Economy* (Report Card, April 2013).

¹⁵⁴ Janet Tyson, *Case Program the National Occupational Licensing Project* (Discussion Paper, Australia and New Zealand School of Government, 2016) 1 <<https://www.anzso.gov.au/preview-documents/case-study-level-1/930-national-occupational-licensing-project-the-nola-a-2016-177-1/file>>.

¹⁵⁵ *Ibid* 2.

¹⁵⁶ Northern Territory, *Parliamentary Debates*, Legislative Assembly, 30 November 2010, 7009–10 (Delia Lawrie).

¹⁵⁷ Standing Committee on Uniform Legislation and Statutes Review, Parliament of Western Australia, *Occupational Licensing National Law (WA) Bill 2010* (Report No 61, April 2011) 2, 20.

¹⁵⁸ See Table 11 for *Occupational Licensing* legislative framework.

¹⁵⁹ Sutton (n 2).

¹⁶⁰ Council of Australian Governments, *COAG Meeting Communiqué* (13 December 2013) <<https://www.coag.gov.au/meeting-outcomes/coag-meeting-communique-13-december-2013>>.

jurisdictions minimising licensing impediments to labour mobility'.¹⁶¹ Thus, rather than continuing with harmonisation that established a national regime for regulation, the jurisdictions continued with harmonisation that minimised the differences. As a result, work on the set of uniform Acts was discontinued.

In this area of the law, harmonisation takes time, and this must be accompanied by a constant effort for consecutive harmonisation. Initial harmonisation of the legal profession took around 20 years, with the law of evidence taking more than 30 years to become 'substantially uniform'. Work health and safety harmonisation took decades, with constant administrative reforms. Corporations law went through cycles of consecutive harmonisation for almost a century, and it is still not identical law. Occupational licensing reform was rolled out and abandoned within less than five years.¹⁶² In a similar way, consecutive reform in the legal profession (requiring a change of structure from mirror to applied) was rolled out and opposed by jurisdictions within three years.¹⁶³ The general rule has been the constant search for consensus and the refinement of policy through cooperative federalism with adequate institutional support, rather than the opportunistic use of institutions or incentive measures to gain consensus in the area of law related to business, trades and professions.

The recent attempt to reform the legal profession was set on a similar rocky path in 2011, but it now appears to have promise due to the 2018 developments. In the first round of harmonisation, a model Bill was prepared by the Law Council of Australia in conjunction with the Standing Committee of Attorneys-General. Work on the Bill included consensus-building that started with the harmonisation of education and training requirements for legal practitioners. Thereafter, it followed the 'Blueprint for the Structure of the Legal Profession: A National Market for Legal Services'.¹⁶⁴ Between 2004 and 2006, all of the jurisdictions except South Australia incorporated the model.¹⁶⁵ These Acts can be classified as 'substantially uniform'.

Since then, an attempt at further harmonisation has been undertaken by New South Wales and Victoria. The *Legal Profession Uniform Law 2015* (Vic) and the *Legal Profession Uniform Law 2015* (NSW) were enacted to replace, respectively, the *Legal Profession Act 2004* (Vic) and *Legal Profession Act 2004* (NSW). Following COAG's decision in February 2009, the National Legal Profession Reform Taskforce

¹⁶¹ New South Wales, *Parliamentary Debates*, Legislative Council, 28 October 2015, 5169 (Rick Colless on behalf of John Ajaka).

¹⁶² Council of Australian Governments, *COAG Meeting Communiqué* (30 April 2009) <<https://www.coag.gov.au/meeting-outcomes/coag-meeting-communique-30-april-2009>>.

¹⁶³ COAG's decision on formulating the National Legal Profession Reform Taskforce was made in February 2009. On 3 October 2012, the Attorney-General of Queensland announced that Queensland would not participate.

¹⁶⁴ Law Council of Australia, *Blueprint for the Structure of the Legal Profession: A National Market for Legal Services* (1994) 33.

¹⁶⁵ David Robertson, 'An Overview of the Legal Profession Uniform Law' [2015] (Summer) *Bar News* 36, 36.

was appointed to make recommendations and propose draft legislation. The goals of the Taskforce included achieving uniformity and enhancing the clarity of and accessibility to consumer protection.¹⁶⁶ At its meeting on 13 February 2011, COAG ‘agreed in principle to settle reforms to legal profession regulation by May 2011 (with the exception of Western Australia and South Australia)’.¹⁶⁷ These reforms offered ‘the prospect of significantly reduced interstate barriers to seamless national legal practice, while improving consumer protections and safeguarding an independent legal profession’.¹⁶⁸ However, they did not receive wide support from the jurisdictions. In 2011, it was reported that Tasmania and the Australian Capital Territory had ‘reservations about the scheme’.¹⁶⁹ On 3 October 2012, the Attorney-General of Queensland announced that Queensland would not participate in the reforms.¹⁷⁰ On 5 December 2013, the New South Wales and Victorian governments executed an intergovernmental agreement continuing the harmonisation effort and formalising their joint participation in the new scheme.¹⁷¹ Subsequently, although the level of uniformity post-harmonisation has been at an ‘almost identical’ level, the level of implementation has been low for this reform. The New South Wales and Victoria initiative has not received much attention from the other jurisdictions, and the level of implementation has remained at two jurisdictions. The legislation has all of the factors needed to achieve a high level of uniformity, and it has achieved a very high level of sustainable uniformity. The weakness of the consecutive harmonisation effort has not been that it is low in uniformity but that it has lacked implementation by other jurisdictions. New South Wales and Victoria have argued that an estimated three-quarters of Australian lawyers are now regulated by this uniform legislation.¹⁷² Nevertheless, the overall Australian regime is fractured, with two jurisdictions following one set of regulations and six jurisdictions following another.

¹⁶⁶ Consultative Group for COAG Taskforce, *National Legal Profession Reform* (Working Paper, 4 August 2009) <https://www.justice.nsw.gov.au/Documents/LPR_Documents/pdf/Consultative_Group_Paper_Background_Information.pdf>.

¹⁶⁷ Council of Australian Governments, *COAG Meeting Communiqué* (13 February 2011) <<https://www.coag.gov.au/meeting-outcomes/coag-meeting-communique-13-february-2011>>.

¹⁶⁸ New South Wales, *Parliamentary Debates*, Legislative Council, 13 May 2014, 28546 (David Clarke).

¹⁶⁹ The Law Society of New South Wales, *A New Framework for Practising Law in NSW* (Web Page) <<https://www.lawsociety.com.au/practising-law-in-NSW/rules-and-legislation/legal-profession-uniform-law/new-framework>>.

¹⁷⁰ Queensland Government, Attorney-General and Minister for Justice, ‘Queensland not signing up to National Legal Profession Reform’ (Media Statement, 3 October 2012) <<http://statements.qld.gov.au/Statement/2012/10/3/queensland-not-signing-up-to-national-legal-profession-reform>>.

¹⁷¹ NSW Attorney-General, ‘A New Era for Legal Services in NSW and Victoria’ (Media Release, Government of New South Wales, 1 July 2015).

¹⁷² Justine Rogers, Dimity Kingsford Smith and John Chellew, ‘The Large Professional Service Firm: A New Force in the Regulative Bargain’ (2017) 40(1) *University of New South Wales Law Journal* 218, 222.

The question has remained open whether any additional jurisdictions would implement this uniform legislation. However, it has now been several years and it is still unclear whether other state and territory jurisdictions will follow Victoria and New South Wales. On the one hand, sustainable uniformity has improved in two jurisdictions. On the other hand, from the position of Australia as a federation, sustainable uniformity has diminished because there are two distinct regimes rather than one.

In 2018, the reforms progressed without pressure from COAG. In June 2018, the Western Australian Government, with the support of the Law Society of Western Australia, announced its intention to join the Legal Profession Uniform Law.¹⁷³ ‘There are hopes that South Australia will follow the lead of Western Australia during the next year. However, there is still limited enthusiasm for the national scheme in Queensland, the third-largest jurisdiction, with almost 13,000 lawyers.’¹⁷⁴ This shows that pressuring jurisdictions into implementing legislation rarely works, even in cases where the legislation is a ‘good model’,¹⁷⁵ ‘eases the regulatory burden’¹⁷⁶ and protects consumers.

In this regard, institutional support from the Law Council has produced long-standing results. The continued involvement of the Council, with respect to the national regulation of the legal profession, and the presence of strong advocacy coalitions in the area of business, trades and professions, have prevented hasty changes. However, they could allow room for rational consensus if uniformity is given enough time to be negotiated and developed.

V POLICY IMPLICATIONS AND CONCLUSION

The inherent complexity surrounding national uniform legislation and its sustainable uniformity requires conceptual simplification to guide research, enable communication among scholars and practitioners, and develop effective decision-making strategies. This study has empirically examined how the area of law impacts the prospects for harmonisation. Some areas of law have not required national uniform legislation due to the clear distribution of power in the *Constitution*. Underpinning this has been the absence of consensus between jurisdictions on the need for a

¹⁷³ ‘Western Australia to Join Legal Profession Uniform Law Scheme’, *Queensland Law Society*, (WebPage, 13 June 2018) <https://www.qls.com.au/About_QLS/News_media/News/Western_Australia_to_join_Legal_Profession_Uniform_Law_scheme>.

¹⁷⁴ Michael Pelly, Western Australia to Join National Lawyers Scheme, *Financial Review* (online, 6 June 2018) <<https://www.afr.com/companies/professional-services/western-australia-to-join-national-lawyers-scheme-20180606-h1123m>>.

¹⁷⁵ Dale Boucher, ‘LSC Defends National Uniform Law’, *Lawyers Weekly* (online, 10 May 2016) <<https://www.lawyersweekly.com.au/opinion/18537-lsc-defends-national-uniform-law>>.

¹⁷⁶ *Ibid.*

national response in a given area, or the inability to find a policy model that would satisfy every jurisdiction involved.

The quantitative findings from this study support the direct impact of the area of law on the volume of national uniform legislation and its level of uniformity. Specific areas of the law were found to be more susceptible to higher or lower levels of uniformity. Whether these were based on an historical position, reflected consensus achieved among the Australian states and territories over the need for a national response or were partially the result of the most recent reforms, commercial and corporate law, government and energy and resources were found to be highly uniform.

In contrast, legislation regulating family law and relationships, road regulation and criminal law (with the notable exception of counter-terrorism legislation) was mostly non-uniform and unsustainable, even in cases where some uniformity had been achieved, and considerable effort and resources had been expended on harmonisation. In the area of energy and resources, the jurisdictions have only come to consensus when there has been strong institutional support, with some sets of uniform Acts requiring up to three national regulators. This level of resource provision in the harmonisation effort is extraordinary and would be harder to achieve in other areas of law. In the area of family law and relationships, the jurisdictions have preferred to maintain divergent regulations unless faced with strong actions from the Commonwealth. Without a rigid structure of referred legislation enacted from the outset, it is more likely that the regulation will remain at the 'some similarities' level in this area of law. The law of business, trades and professions has required time and a constant consensus searching effort to reach a higher level of uniformity, due to the presence of strong advocacy coalitions. Under these circumstances, set deadlines and incentives would not be effective measures.

Although national uniform legislation is not a panacea for all the legal challenges the Australian federation faces today, this article takes a step towards understanding those areas in which a national response might be most effective and efficient.