

# Law Reform and the Insolvency Regime

ALRC presentation to  
Australian Restructuring Insolvency and Turnaround Association

11 November 2021

The Hon. Justice Sarah Derrington (President)



Australian Government

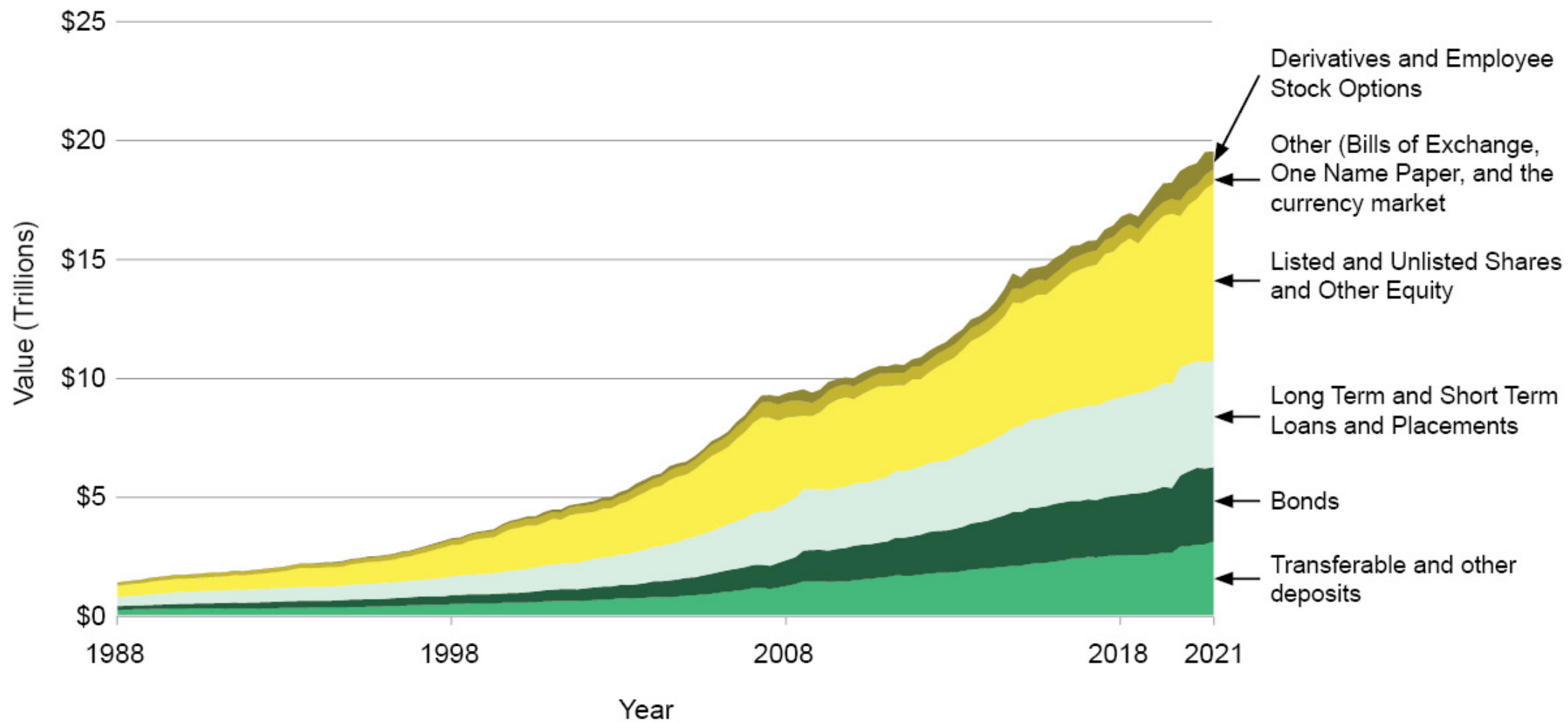
Australian Law Reform Commission

# Background

- General Insolvency Inquiry (ALRC Report No 45) – tabled 13 December 1988
- Considered the provisions of the *Bankruptcy Act 1966* (Cth)
- Five year inquiry



## Financial markets in Australia (June 1988–March 2021)



# Outline

- Highlights from Harmer Report
- Background on ALRC current Inquiry into financial services and corporations
- Explain how ALRC would undertake Inquiry into insolvency laws



# Harmer Report - principles

- the fundamental purpose of an insolvency law is to provide a fair and orderly process for dealing with the financial affairs of insolvent individuals and companies;
- the insolvency law should provide mechanisms that enable both debtor and creditor to participate with the least delay and expense;
- insolvency law should, as far as convenient and practical, support the commercial and economic processes of the community; and
- as far as is possible and practical, insolvency laws should not conflict with the general law.



# FSI Inquiry - Terms of Reference

Simplifying the law ‘within the context of existing policy settings’:

- A. The use of definitions in corporations and financial services legislation.
- B. Regulatory design and the hierarchy of laws.
- C. How Chapter 7 of the Corporations Act could be reframed or restructured.



# FSI Inquiry – problems

- Extensive consultations have revealed:
  - problem one – incomplete understanding of legislative complexity;
  - problem two – complex use of definitions;
  - problem three – difficulties navigating definitions;
  - problem four – overly prescriptive legislation;
  - problem five – obscured policy goals and norms of conduct; and
  - problem six – difficulties administering complex legislation.



# FSI Inquiry - principles

- principle one – it is essential to the rule of law that the law should be clear, coherent, effective, and readily accessible.
- principle two – legislation should identify what fundamental norms of behaviour are being pursued.
- principle three – legislation should be designed in such a manner as to promote meaningful compliance with the substance and intent of the law.
- principle four – legislation should provide an effective framework for conveying how the law applies.
- principle five – the legislative framework should be sufficiently flexible to address atypical or unforeseen circumstances, and unintended consequences of regulatory arrangements.



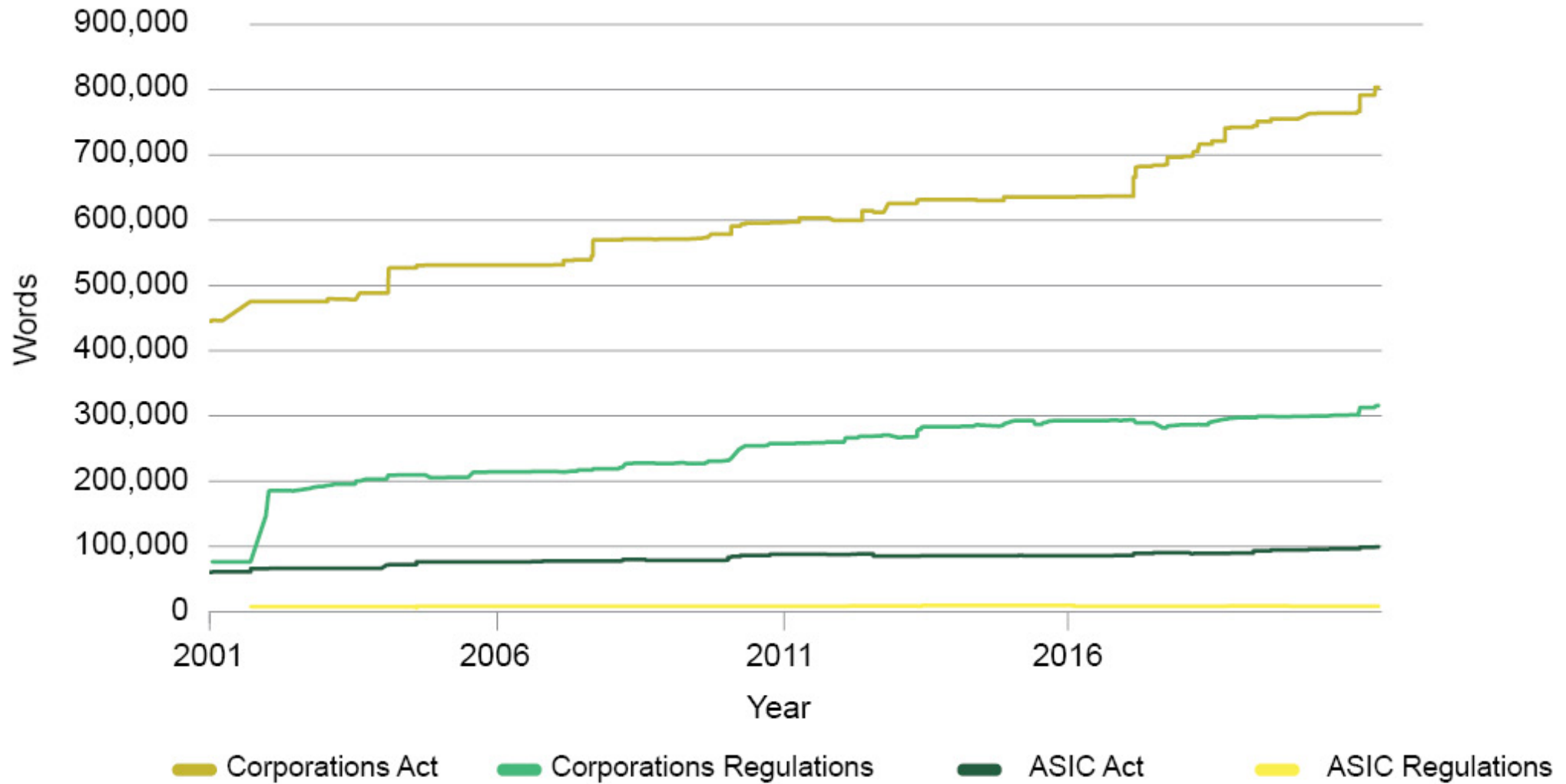


# Approach to law reform

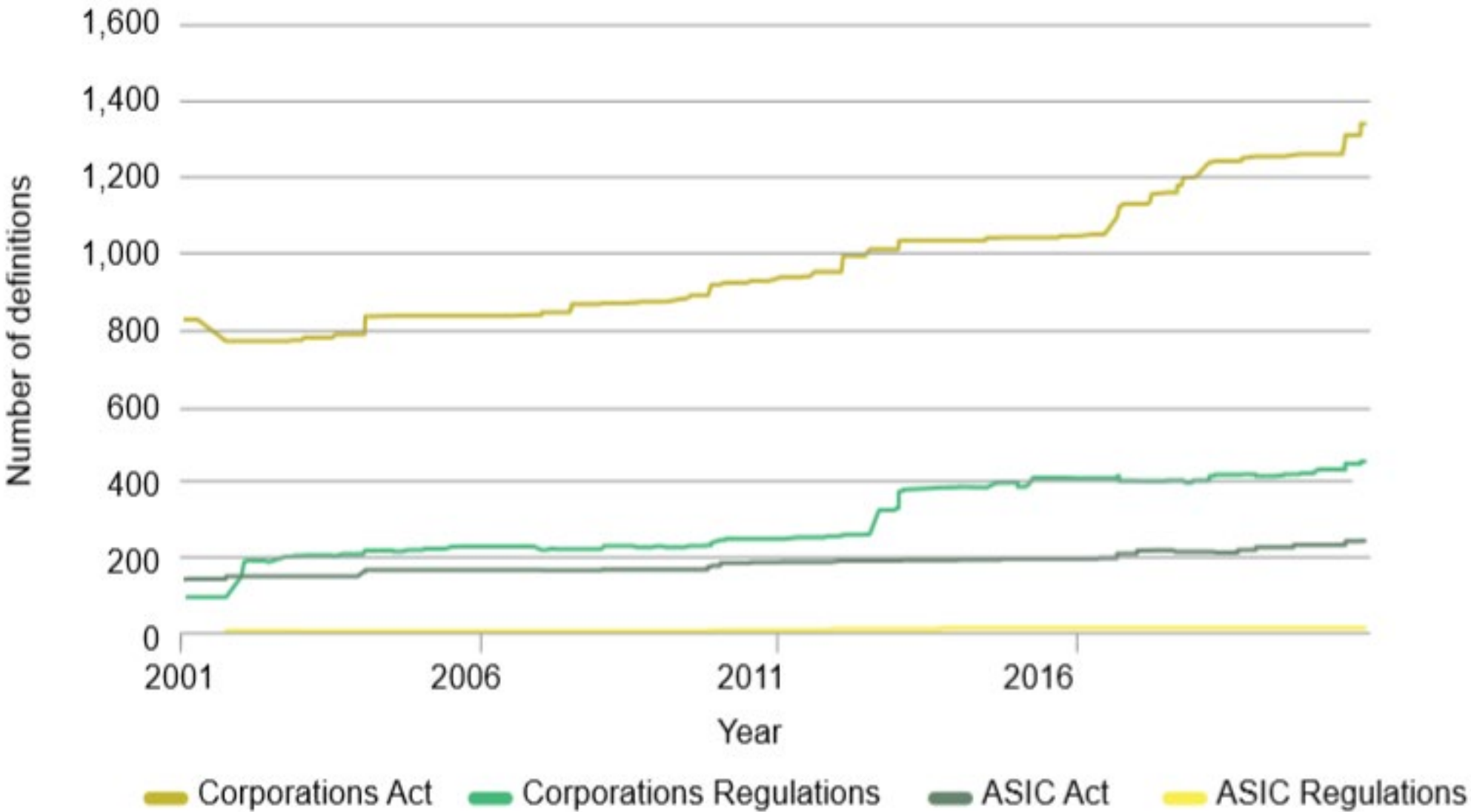
- Primary legal analysis
- Engaging legal scholars
- Comparing the law in multiple jurisdictions
- Quantitative analysis



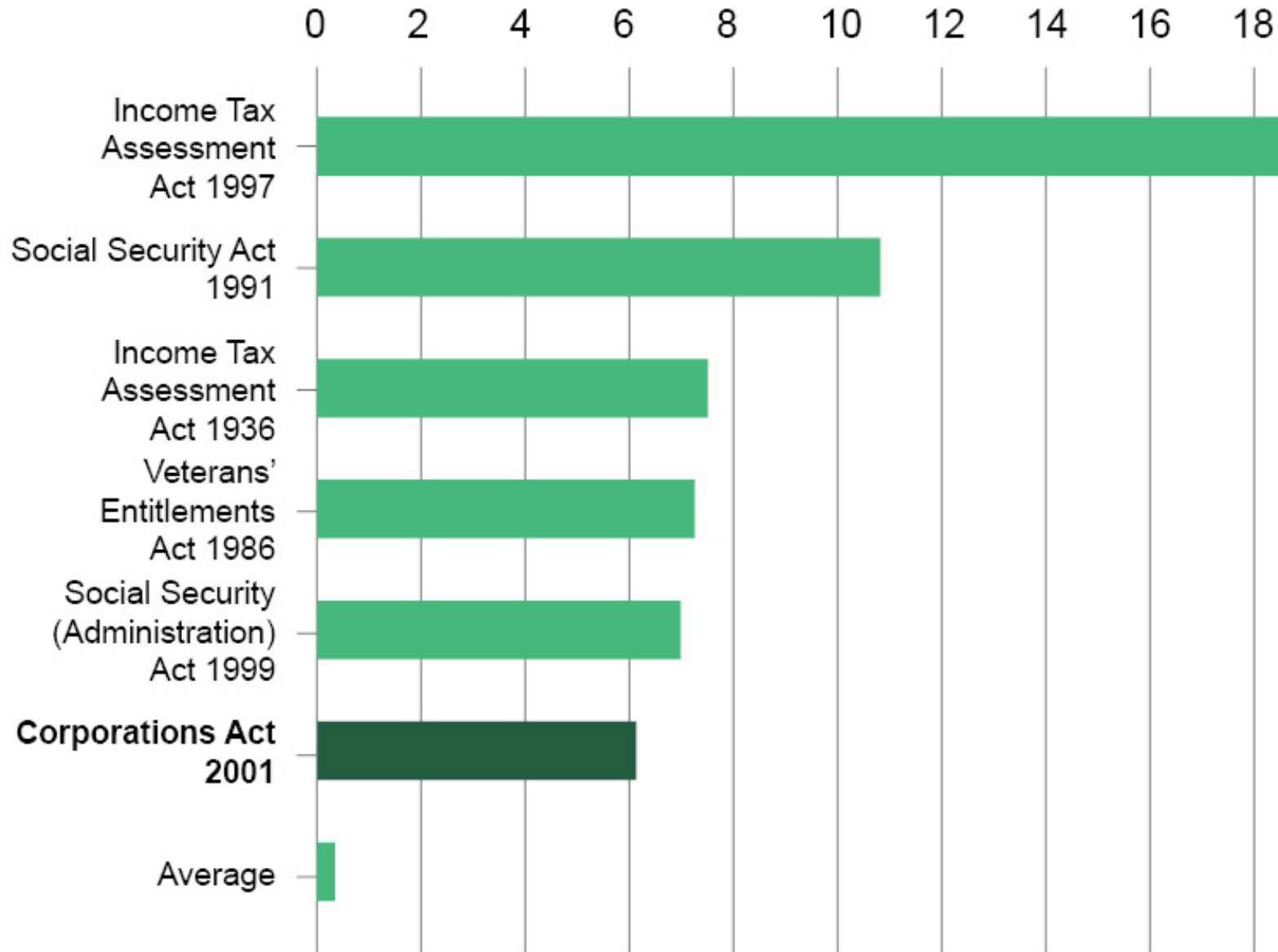
## Length of key Inquiry legislation



**Definitions in key Inquiry legislation**



**Figure 3.15: Amendments per year — Commonwealth Acts**



# Consultations

- Over 135 consultees to date, including a number of roundtables with legal practitioners and academics.
- Written submissions to be accepted from 30 November 2021



# Timeline

Terms of Reference received September 2020

- Initial consultations and public webinars

First Interim Report due 30 November 2021

- First call for formal submissions

Second Interim Report due 30 September 2022

- Second call for formal submissions

Third Interim Report due 1 June 2023

- Third call for formal submissions

Consolidated Final Report due 30 November 2023

