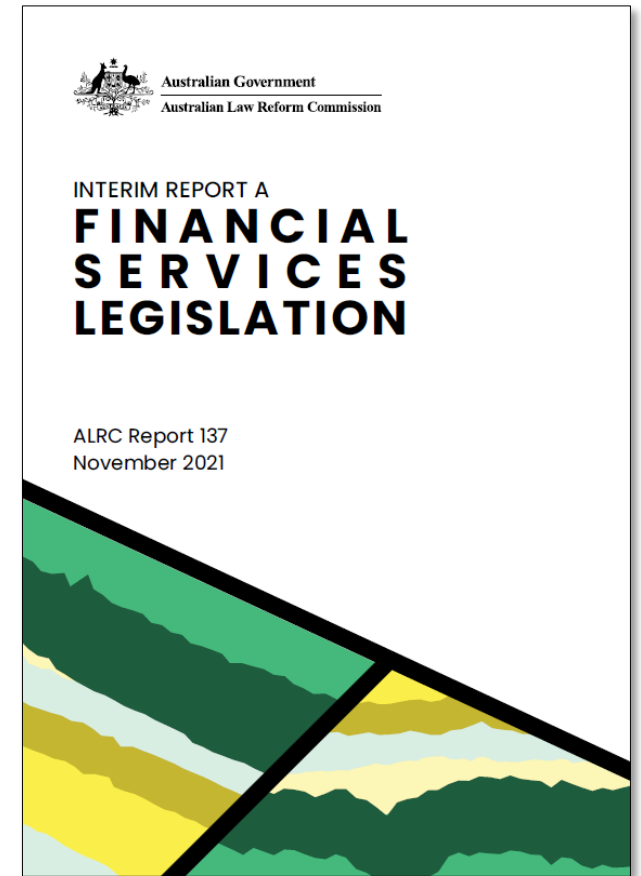


Designing the law for change

Review of the Legislative Framework for Corporations and Financial Services Legislation

5 June 2022



Australian Government
Australian Law Reform Commission

Inquiry progress



Thinking through the problem

- A key objective of law design over the past twenty years:
 - *Corporations and financial services law needs to be flexible and adaptive*
- But how we achieve this goal — how we design the law and the legislative hierarchy — matters.



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The current model for flexibility

- Notional amendment powers
 - Dozens of powers resulting in over 100 ASIC legislative instruments and 277 regulations with notional amendments
 - More than 1,200 distinct notional amendments
 - Over 20,000 individual instruments
- Proliferating powers to make delegated legislation for other purposes
 - Over 970 powers to make delegated legislation in the *Corporations Act*
 - 290+ ASIC legislative instruments
 - 500 regulation-making powers have been exercised over 1,200 times across more than 1,100 provisions of the *Corporations Regulations*.



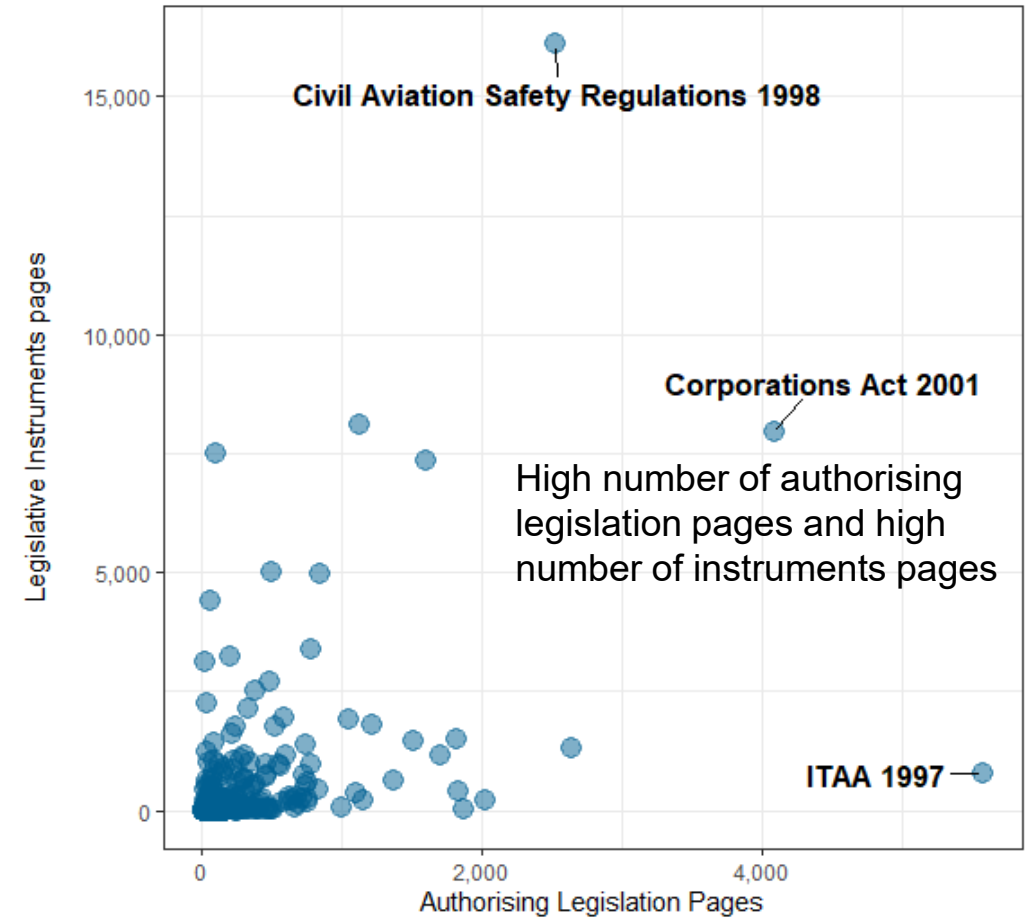
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The worst of both worlds

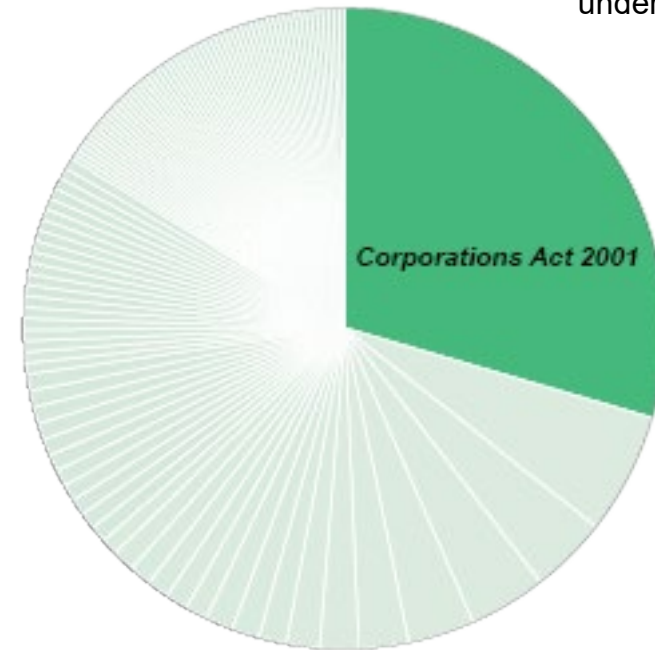
A large and complex Act *and* a vast body of delegated legislation.

Highly networked legislation – the Act often makes little sense without understanding the delegated legislation



Interim Report A: The initial outlines of a new model

- The ALRC's key proposals were to:
 - Remove existing powers to notionally amend Chapter 7 of the *Corporations Act* by delegated legislation.
 - Facilitate the consolidation of exclusions and exemptions from obligations in Chapter 7 of the *Corporations Act* in a consolidated legislative instrument.
 - Consider the insertion of a power to make 'rules'.
- Submissions noted the complexity, but some thought the existing powers are necessary.
- Submissions generally agreed that creating a consolidated legislative instrument for exemptions and exclusions would make the law easier to navigate and understand.
- There was strong support for a rule-making power, with the majority supporting ASIC having such a role.

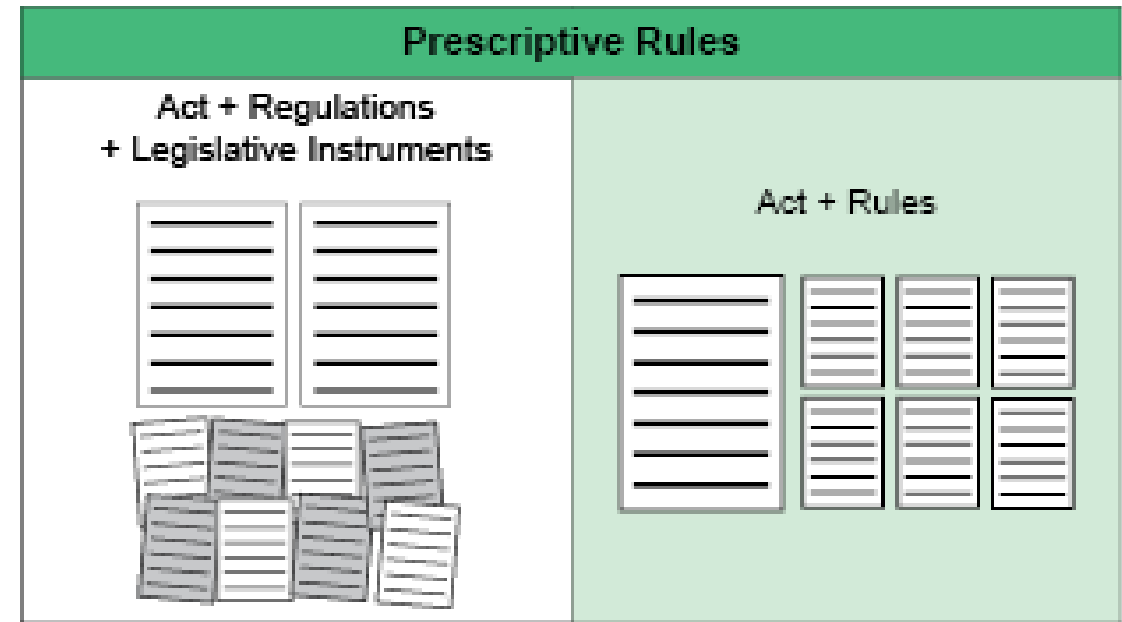


30% of all instruments containing notional amendments are made under the Corporations Act.



Next steps – Interim Report B, focusing on legislative design and hierarchy

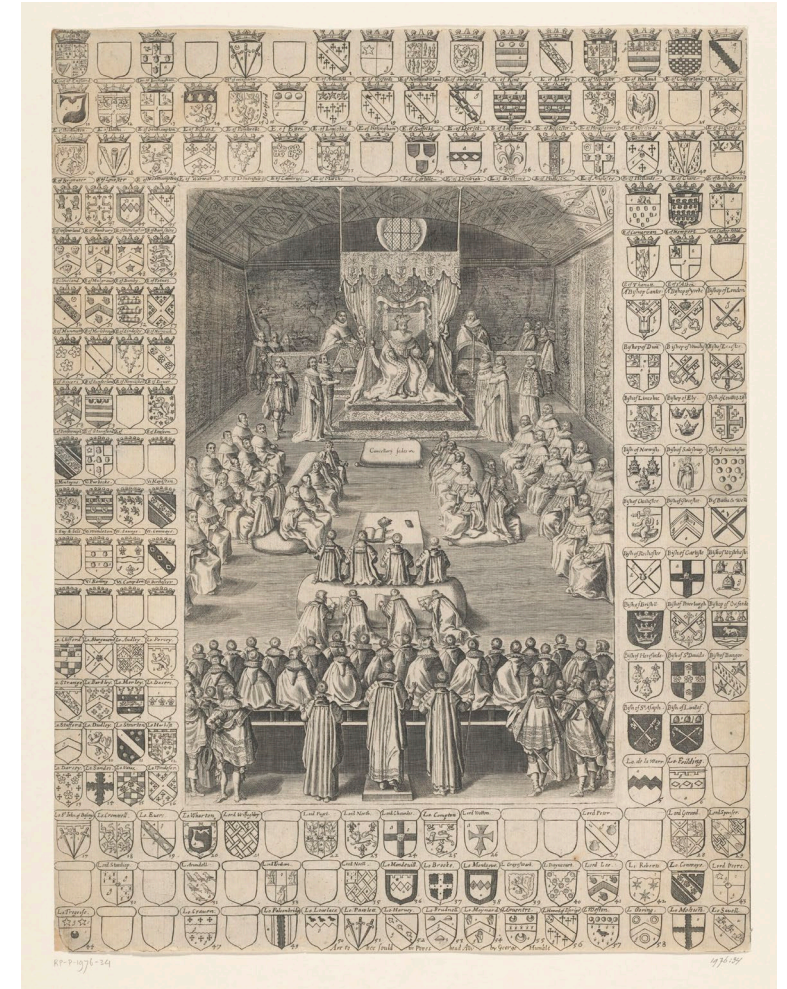
- There is a need for a pragmatic but consistent approach to legislative design.
- The last 20 years suggests that putting too much detail in the Act hasn't worked well.
- The ALRC is giving thought to a more principled use of legislative hierarchy, in order to improve clarity and navigability.
- The ALRC's new proposed model will be outlined in greater detail in Interim Report B, to be released after September 2022.



What goes where?

Offences and penalties

- Law must be known and predictable
- Parliament's role
- Parliamentary and drafting guidance on location of penalties and offences



Existing parliamentary guidance

- Serious offences, significant civil penalties, and administrative penalties should generally be in primary legislation.
- Delegated legislation – no imprisonment, no more than 50 penalty units (individual), 250 penalty units (corporation).
- Offence should generally be clear on the face of the provision.



Constitutional context

- Different constitutional context to other jurisdictions
- Determination of penalties for established contravention of the law is an exercise of judicial power – regulator cannot determine fines on a discretionary case by case basis

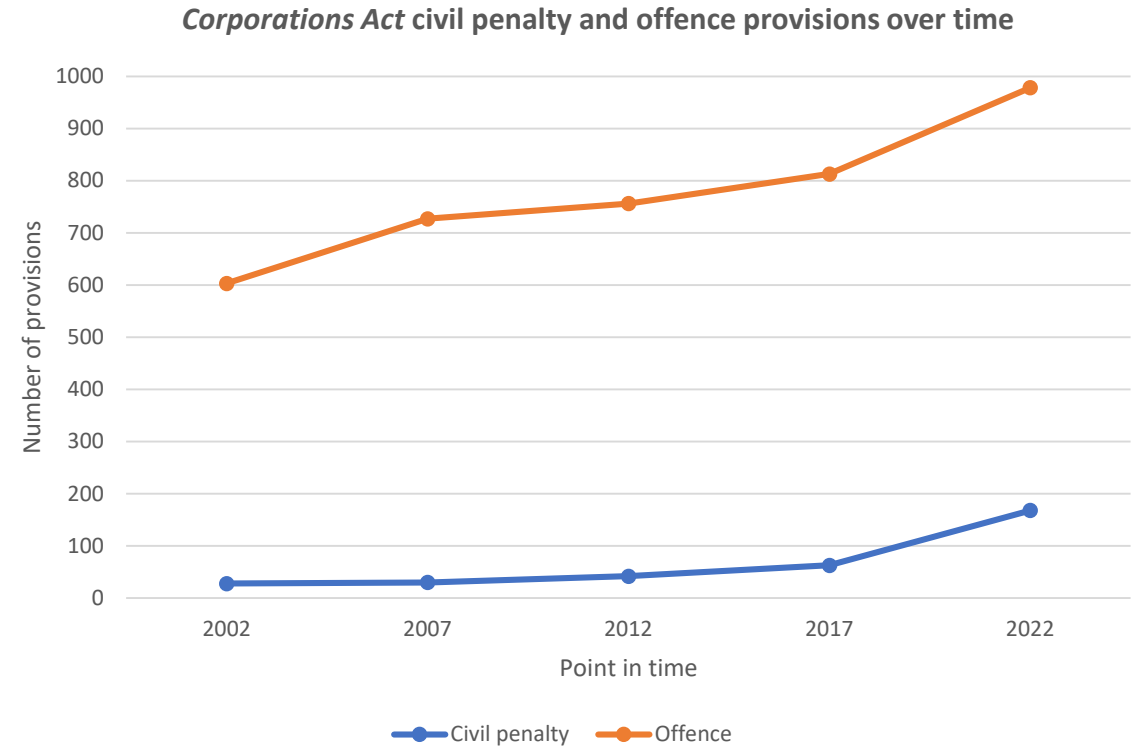


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Offences and penalties – existing architecture

- Large number of detailed offence and penalty provisions
- Significant overlap
- Recently increased and standardised penalties
- Some delegation of content



Penalty unit provisions in delegated legislation

Subject	Number of penalty unit provisions	Average penalty unit
Civil Aviation	1816	45 PU
Maritime	911	52 PU
Agriculture, Food and Fisheries	246	18 PU
Public Administration and the Courts	233	8 PU
Environmental Protection	226	48 PU
Workplace Relations	144	12 PU
Energy and minerals	137	50 PU
Corporations and Financial Services	101	1021 PU
Consumers and Competition	108	279 PU
Tax	98	50 PU
Trade, Customs, Tariffs, and Excises	64	19 PU
Defence	62	16 PU
Other	165	22 PU



Problematic delegation?

- Statutory instruments creating offences subject to imprisonment
 - eg. *ASIC Credit (Flexible Credit Cost Arrangements) Instrument 2017/780*
- Notional amendments modifying existing offence and penalty provisions in primary legislation
 - eg. *ASIC Corporations (Design and Distribution Obligations—Exchange Traded Products) Instrument 2020/1090*
- Legislative instruments unsuccessfully attempting to create offences?
 - eg. *ASIC Corporations (Short Selling) Instrument 2018/745* – inserting ss 1020B(7B) and (7H) to the *Corporations Act*, but not included in Schedule 3 (see s 1311(1A))



Implementing the model for penalties and offences

CHALLENGES

- Number of provisions, level of prescription, and high penalties
- Interaction with breach reporting requirements
- Understanding the role of different types of provisions in compliance and enforcement

OPPORTUNITIES

- Streamlining penalties and offences to promote meaningful compliance
- Consolidation of instruments to improve findability and oversight
- Defining circumstances where delegation of content is appropriate in this context
- Identifying what best supports compliance and enforcement



Engaging with the Inquiry

- You can find out more about the Inquiry at the ALRC website:
www.alrc.gov.au
- Subscribe to our mailing list to receive regular updates on events, publications and public consultations.
- You can contact the Inquiry at any time:
financial.services@alrc.gov.au

