



Australian Government

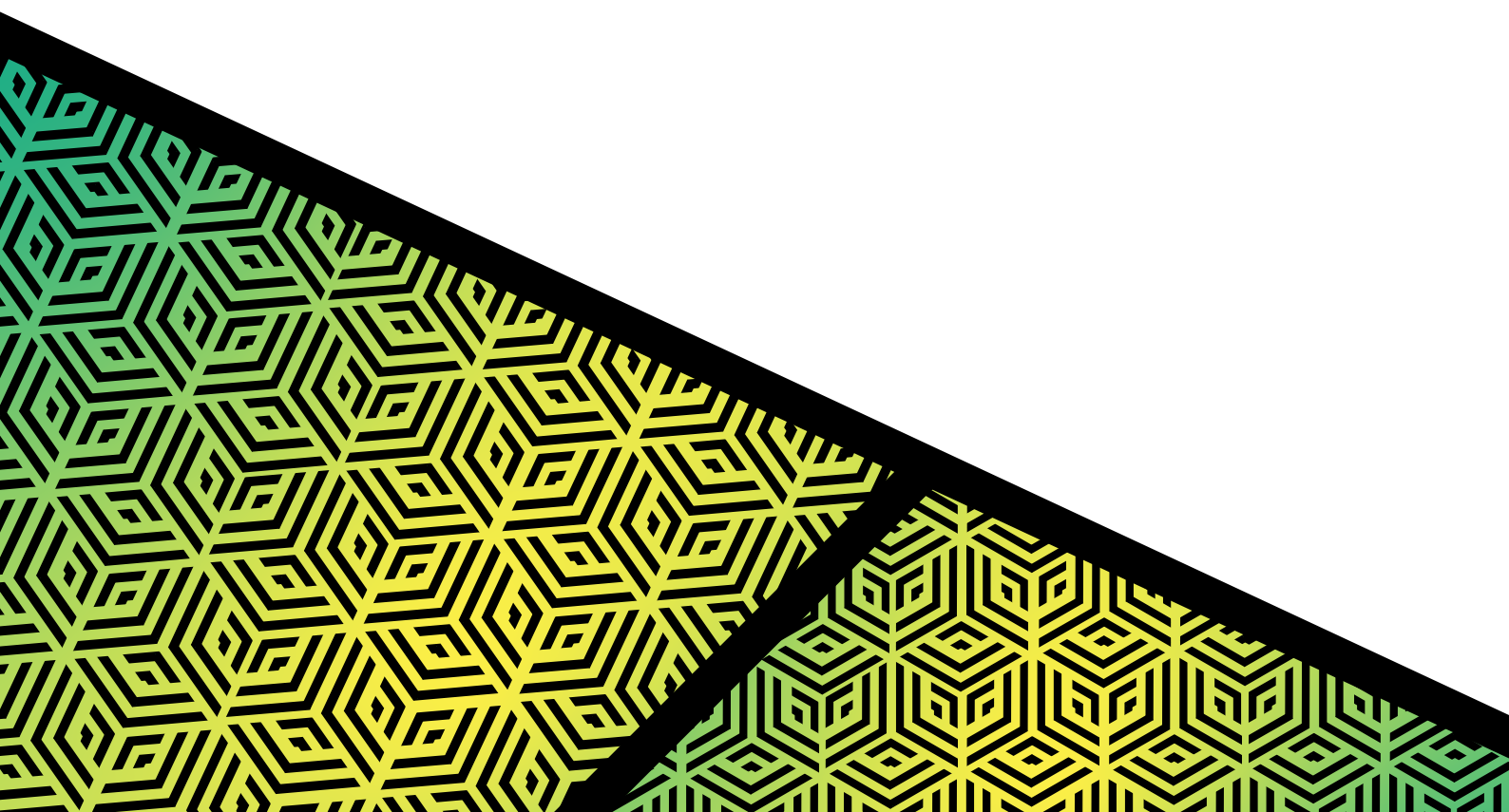
Australian Law Reform Commission

INTERIM REPORT B – ADDITIONAL RESOURCES

LEGISLATIVE FRAMEWORK FOR CORPORATIONS AND FINANCIAL SERVICES REGULATION

Data Methodology

September 2022



Interim Report B is the second of three Interim Reports to be published as part of the Australian Law Reform Commission's Review of the Legislative Framework for Corporations and Financial Services Regulation. This document is one of several additional resources, published on the ALRC's website, which provide further detail relevant to particular aspects of Interim Report B.

[View Interim Report B and the Summary Report](#)

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 and operates in accordance with the *Australian Law Reform Commission Act 1996* (Cth).

The office of the ALRC is at Level 4, Harry Gibbs Commonwealth Law Courts Building, 119 North Quay, Brisbane QLD 4000.

Postal Address:

PO Box 12953,
George Street QLD 4003

Telephone: within Australia (07) 3248 1224

International: +61 7 3248 1224

Email: info@alrc.gov.au

Website: www.alrc.gov.au

Contents

Introduction	1
The ALRC's legislative data	1
General approach to analysing LegData	4
Delegated legislation made under authorising legislation	5
Powers to make delegated legislation in the Corporations Act	5
Offences and penalties	8
Notional amendments	11
Scrutiny data	11

Introduction

1. As part of the Review of the Legislative Framework for Corporations and Financial Services Regulation, the ALRC has generated and analysed data to provide unique insights into the legal framework for corporations and financial services legislation.¹ This data formed the basis of elements of Interim Report B, particularly relating to the ALRC's problem analysis, the design of legislative hierarchies, and offences and penalties.² This document provides a high level overview of the methodology that underpins the ALRC's data collection and analysis. Abbreviations used in this document are defined in the Glossary for Interim Report B.

The ALRC's legislative data

2. The ALRC maintains a collection of databases and documents (referred to in this methodology as 'LegData') that is the principal source of data for Interim Report B. At over 12GB, LegData is comprised of a series of databases containing various data on Commonwealth legislation, as well as documents containing plaintext HTML or, when HTML is unavailable, PDF versions of legislation.³

Key terminology from the Federal Register of Legislation⁴

A **modification** is an alteration to the text of a law that is not permanent or only applies to particular locations or cases. Modifications have effect as if they were amendments, but do not actually amend. It is quite possible for a number of modifications, inconsistent with one another, to be applied to the same provision for various different cases. Modifications are not compiled into the principal legislation. For more information on any modifications, see the series page on the Federal Register of Legislation.

1 In this methodology, when the ALRC is described as having done a particular task (such as 'webscraping'), that generally means that the ALRC wrote a computer program in the 'R' programming language that performed the specified task.

2 See, eg, Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) Chapter 6.

3 The ALRC made extensive use of HTML versions of legislation in Interim Report A. The benefits of analysing legislation in HTML are explained in Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) Appendix D.

4 Federal Register of Legislation, 'Glossary' <<https://www.legislation.gov.au/content/whatisit>>.

3. In total, the ALRC has five core databases, which the ALRC uses for analysis, data-matching, and for deriving other data and databases:

- **Legislation database:** This database has one row for each Act and legislative instrument in LegData. Dozens of columns provide various data on each piece of legislation, such as name, administrator, pages, date of making, and a unique identifier (Register ID). The Register ID, discussed further below, supports data matching.
- **Modifications database:** This database maps relationships in which one piece of legislation modifies another piece of legislation, with one row for each relationship. Modifications, also referred to as notional amendments, are not counted as amendments.
- **Amendments database:** This database maps relationships in which one piece of legislation amends another piece of legislation, with one row for each relationship.
- **Repeals database:** This database maps relationships in which one piece of legislation repeals all or part of another piece of legislation, with one row for each relationship.
- **Enabled by database:** This database maps relationships in which one piece of legislation enables all or part of another piece of legislation, with one row for each relationship.

4. LegData is currently based on the law as it appeared on the Federal Register of Legislation on 30 June 2022. However, due to delays in updating the Federal Register of Legislation, LegData is best understood as being accurate as at the last week of June 2022. The ALRC acknowledges that its empirical analysis of legislation was enabled by the use of open access standards on the Federal Register of Legislation, operated by the Office of Parliamentary Counsel (Cth), and the comprehensiveness of the Federal Register of Legislation.

Key terminology from the Federal Register of Legislation⁵

As made legislation is legislation in the form in which it was originally made. The text may not reflect in force as it will not include any later amendments that may have been made.

A **compilation** is a version of a law that shows the text of the law as amended at a particular point in time. For example, the in force *Corporations Act* is a compilation of the original 'as made' Act with all amendments that have been made to it since 2001.

5. LegData includes data on:

- all as made Acts since 1901 (13,247 Acts);
- all as made legislative instruments (87,780 legislative instruments), including regulations (which have been made since 1904), and other legislative instruments (which were first registered in 2005);
- a selection of Act compilations (16,429 Acts) since 1973,⁶ based on compilations that were in force on each occasion the ALRC scraped the Federal Register of Legislation and also including selected compilations, such as for all compilations of the *Corporations Act*; and
- a selection of legislative instrument compilations (8,769 legislative instruments), based on compilations that were in force on each occasion the ALRC scraped the Federal Register of Legislation and also including selected compilations, such as for all compilations of the *Corporations Regulations*.

6. The selection of Act and legislative instrument compilations includes all in force compilations on the Federal Register of Legislation as at 30 June 2022. This allowed the ALRC to analyse the

⁵ Ibid.

⁶ The Federal Register of Legislation only includes compilations since 1973.

Commonwealth statute book as at that day, including both compilations and unamended as made Acts and legislative instruments.

Obtaining the data

7. The ALRC created LegData by webscraping the Federal Register of Legislation. The ALRC performed a first scrape of the Federal Register of Legislation from January–May 2022. LegData was updated weekly between May 2022 and June 2022, before a final scrape was conducted on 30 June 2022. These updates means that LegData contains the statute book as at each of the occasions the ALRC scraped the Federal Register of Legislation, with repealed legislation updated to reflect its repeal and new as made legislation and compilations added to LegData as they are added to the Federal Register of Legislation.

8. In total, over one million webpages have to date been scraped by the ALRC. The ALRC webscraped the home page for each piece of legislation, irrespective of whether the legislation was as made or a compilation. Additionally, the following webpages were webscraped for all as made legislation:

- the ‘Amends’ webpage, which lists legislation that is amended by the legislation that is being webscraped;
- the ‘Enabled By’ webpage, which lists legislation that enables the legislation that is being webscraped;
- the ‘Modifies’ webpage, which lists legislation that is modified by the legislation that is being webscraped; and
- the ‘Repeals’ webpage, which lists legislation that is repealed by the legislation that is being webscraped.

9. All Acts and legislative instruments published on the Federal Register of Legislation include a Register ID assigned by the Federal Register of Legislation. This enables the ALRC to match data between different databases in LegData. Legislation compilations always form part of a ‘Series’, which begins with the original piece of legislation as made and is followed by compilations that reflect the legislation as amended. For example, the latest version of the *Corporations Act* on 30 June 2022 was Register ID C2022C00149, but the as made Register ID for the *Corporations Act* is C2004A00818. This as made Register ID is used for the *Corporations Act* Series. LegData links each piece of legislation to its Series, which enables data matching between as made versions and later compilations.

Counting pages of older instruments

10. Some older legislative instruments published on the Federal Register of Legislation do not include a page count on the ‘Download’ webpage for the instrument. Where possible, the ALRC analysed the PDF version of the legislative instrument to obtain a page count. Where the instrument was only available in HTML, the ALRC calculated the total word count of the instrument and divided this by 300 to give a page count:

$$\text{Page count} = \text{Total word count of instrument} / 300$$

11. In other words, the ALRC assumed an average word count of 300 words per page. Given the significant amount of white space in legislation, this figure was considered appropriate. A sampling of legislation published on the Federal Register of Legislation showed that 300 was conservative, with most pages containing fewer than 300 words.

General approach to analysing LegData

12. The ALRC applies some general rules when analysing data from LegData.

Excluded legislative instruments

13. The ALRC does not include Tariff Concession Orders and Tariff Concession Revocation Orders in its analyses. These Orders ceased to be registered as legislative instruments in 2013. As there are over 8,000 Tariff Concession and Revocation Orders, including these in the analysis of legislative instruments would inflate the number of instruments created in the period before 2013. Including these instruments in analyses therefore suggests a sudden decline in the number of legislative instruments created after 2013, which is simply the product of reclassifying tariff instruments.

Point in time statute book analysis

14. When analysing the statute book as in force at a particular time, the ALRC only analyses principal legislation and excludes amending legislation. The Federal Register of Legislation classifies legislation as either principal or amending. It is necessary to exclude amending legislation to avoid double counting because compilations of principal legislation should include all textual amendments made by amending legislation. Notional amendments (modifications) are not counted as amendments for the purposes of classifying legislation.

As made legislation analysis

Key terminology from the Federal Register of Legislation⁷

Principal legislation is the legislation that deals with a particular topic or area of the law. While principal legislation may amend other legislation, its primary job is to set out new law rather than amend other laws.

Amending legislation is legislation that primarily amends or makes changes to other legislation. The changes may affect a few words, replace entire sections, or repeal a complete piece of legislation. It is generally easy to recognise amending legislation from the title, which will usually include the word 'Amendment' or 'Amending'. An exception to this is that occasionally principal legislation may also amend (including repeal and revoke) other legislation. Amending legislation may include application, savings, or transitional provisions. If amending instruments include these types of provisions, the instrument is not regarded as solely amending for the purposes of automatic repeal.

15. In analysing the 'flow' of as made legislation,⁸ the ALRC includes both amending and principal legislation. This approach compensates for the fact that compilations are not included in analyses of the flow of legislation. In analysing the flow of legislation, the ALRC must identify a date on which the legislation was made. For Acts, this is always the date of Royal Assent. Identifying a date of making for a legislative instrument is more complex. Where a legislative instrument Gazettal date is available, this date is used. However, in most cases, and for almost all post-2010 legislative instruments, there is no Gazettal date and the ALRC uses instead the date of registration.

16. The date of making may not be the date of commencement, as both Acts and legislative instruments may have deferred commencement dates. The ALRC is unable to identify deferred commencement from the Federal Register of Legislation. A person is required to read a particular piece of legislation to identify the commencement dates, which may differ for particular provisions

⁷ Federal Register of Legislation (n 4).

⁸ The concepts of 'flow' and 'stock' are defined in Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) 167.

of the legislation. Analyses of in force principal legislation may therefore include legislation that has been registered but not yet commenced. Amending legislation is not ordinarily compiled into the legislation it amends until commencement.

Delegated legislation made under authorising legislation

17. The ALRC analysed the number of pages of in force delegated legislation made under each in force Act and legislative instrument.⁹

18. The ALRC used LegData to create a database (the **delegated legislation database**) of all delegated legislation made under each Act and legislative instrument. This database links each legislative instrument to its authorising legislation by matching data from the legislation and enabled by databases. The enabled by database is based on the relationship data available on the 'Enabled by' webpage for each as made legislative instrument.

19. Some in force legislative instruments are compilations rather than as made. The ALRC used the Register ID to link each in force legislative instrument compilation to the relationship data available for the as made version of the legislation.

20. Consider, for example, the *ASIC Corporations (Disregarding Technical Relief) Instrument 2016/73* (Cth). This instrument is in force as a compilation with the Register ID F2021C00411. The in force compilation is seven pages long. To link this instrument to its authorising legislation, the ALRC:

- linked F2021C00411 to its as made (Series) Register ID, F2016L00327;
- searched the enabled by database for F2016L00327, and identified that this was made under C2004A00818 (the *Corporations Act*); and
- assigned the seven pages to the body of delegated legislation authorised under the *Corporations Act*.

21. In instances where a legislative instrument was made under multiple pieces of legislation, the pages were counted towards each of its authorising Acts. For example, the *ASIC Corporations and Credit (Internal Dispute Resolution—Transitional) Instrument 2019/965* (Cth) is made under three Acts. The instrument's four pages were counted separately towards each Act's total volume of authorised delegated legislation.

Powers to make delegated legislation in the Corporations Act

22. The ALRC analysed the *Corporations Act* to obtain data on the number of powers it contains to make delegated legislation.¹⁰

23. The ALRC created a database of all powers to make delegated legislation in the *Corporations Act* (the **delegated legislation database**). To create this database, the ALRC first undertook a computational analysis of the *Corporations Act* to identify all sections that refer to any of the following terms: 'regulations', 'by legislative instrument', 'is a legislative instrument', 'Gazette', 'class order', 'prescribed manner', 'prescribed form', 'determination', and 'notifiable instrument'. The ALRC then manually reviewed each result to identify whether the reference actually constituted a power to make delegated legislation and, if so, whether in the form of regulations, ASIC legislative instruments, or some other form (such as Ministerial or Reserve Bank of Australia legislative instrument).

24. Powers that appeared intended to be exercisable only in relation to specified entities, such as s 65 of the *Corporations Act*, were not included. Some provisions that *prima facie* only apply to specified persons, such as ss 111AS and 111AJ, have in practice been exercised in relation to classes

⁹ See, eg, *Ibid* [6.10]–[6.12], Figure 6.2.

¹⁰ *Ibid* [6.40]–[6.41].

of persons and so were counted in the analysis. Powers to make instruments should be interpreted broadly under s 33(3A) of the *Acts Interpretation Act 1901* (Cth), which allows instruments to specify matters by class. This provision means that matters in a legislative instrument can be specified by class. A similar provision also appears in s 13(3) of the *Legislation Act 2003* (Cth).

25. The ALRC's methodology arguably undercounted in identifying in the *Corporations Act* approximately 950 powers to make delegated legislation. For example, the ALRC counted s 1364 as providing a single power to make regulations. However, s 1364(2) includes a list of dozens of distinct items in relation to which regulations may be made. For the above reasons, the figure of 950 is a conservative estimate of the number of powers to make delegated legislation in the *Corporations Act*.

Exercises of regulation-making powers

26. The ALRC analysed the *Corporations Regulations* to identify which regulation-making powers in the *Corporations Act* have been exercised, and how often they have been exercised.¹¹

27. The ALRC created a database (the **exercised powers database**) of all exercised regulation-making powers by computationally analysing the text of the *Corporations Regulations*. The ALRC undertook two separate searches of the *Corporations Regulations*:

- a search ('the provision search') for a list of powers to make regulations, using the list of powers identified for the delegated legislation database; and
- a search (the 'phrase search') using regular expressions for certain phrases,¹² such as [Ff]or [Ss]ection.*?[0-9].*?the Act.

28. The ALRC also 'cleaned' the exercised powers database so that only section numbers were present. Consider, for example, a result such as the following from reg 7.9.61AA(5):

For paragraph 1020G(1)(c) of the Act

29. This was cleaned so that only '1020G(1)(c)' remained in the database.

30. The ALRC's program also provided the provision number in which each result appeared. The ALRC deleted all results from the phrase search that also appeared in the provision search, thereby ensuring there were no duplicates.

31. Having created the exercised powers database, the ALRC was able to analyse how many times each power in the Act had been exercised in the relevant version of the *Corporations Regulations*.

Unexercised regulation-making powers

32. In Interim Report B, the ALRC makes reference to the number of regulation-making powers that have not been used to create regulations in the *Corporations Regulations*, as published on 30 June 2022.¹³ This number was generated by matching data from the delegated legislation database and the exercised powers database. The ALRC was able to identify regulation-making powers that appeared in the delegated legislation database and that did not appear in the exercised powers database.

33. The ALRC also undertook a manual analysis of each of the unused regulation-making powers to ensure they had not been exercised. This was necessary because the automated data-matching

11 Ibid [6.44].

12 The exact search terms were the following: '[Ff]or [Ss]ection.*?[0-9].*?the Act', '[Ff]or [Ss]ubsection.*?[0-9].*?the Act', '[Ff]or [Pp]aragraph.*?[0-9].*?the Act', '[Ff]or [Ss]ubparagraph.*?[0-9].*?the Act', 'Act s\\s.*?[0-9].*?\\b', 'for the purposes of [Ss]ection.*?[0-9].*?the Act', 'for the purposes of [Ss]ubsection.*?[0-9].*?the Act', 'for the purposes of [Pp]aragraph.*?[0-9].*?the Act', 'for the purposes of [Ss]ubparagraph.*?[0-9].*?the Act'. The ALRC used the 'str_extract_all' function from the stringr package.

13 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.44].

was imperfect as a result of different practices in citing authorising powers. For example, the delegated legislation database identified s 901F(1) of the *Corporations Act* as a regulation-making power. However, the *Corporations Regulations* instead cite only s 901F.¹⁴ The data-matching therefore did not pick up that s 901F(1) has been exercised. The manual review allowed the ALRC to address these issues.

The subject matter of legislation

34. The ALRC has undertaken the first comprehensive analysis to classify all as made legislation according to its subject matter.¹⁵ These classifications were used to classify compilations. Classifying legislation was a significant and largely manual task that often required judgements to be made. The ALRC included the subject matter of legislation in the legislation database and could therefore undertake data-matching based on subject matter across multiple databases.

35. The ALRC classified all legislation according to a potential subject. In assigning a subject matter, instruments were not analysed based on their purpose or function. Identifying a subject matter was easy in many cases based on the name of the legislation or other information contained in the ALRC's legislation database. For example, almost 18,000 legislative instruments could be clearly identified as having been made by the Civil Aviation Safety Authority ('CASA'), and were therefore classified as related to civil aviation. Classification was often based on the maker of a legislative instrument — instruments made by APRA were by default classified as corporations and financial services. In other cases, the ALRC identified classes of instruments, such as those assigned an 'IMMI' designation on the Federal Register of Legislation. These are related to immigration, and were classified as 'migration' subject matter. Similarly, the ALRC could identify Territory-related legislation based on its name, such as 'A.C.T', 'CKI', 'CI', and 'Norfolk Island'.

36. In some cases, instruments could justifiably be classified in more than one category for the purposes of analysis. A primary category was selected for the purposes of analysis. For example, omnibus Acts covering multiple subject matters were difficult to classify. The ALRC used the 'description' data available on the Federal Register of Legislation to assist, and manually reviewed legislation to identify a primary subject matter in limited cases.

37. Once legislation had been assigned a subject matter, some general rules were applied that overrode the initial classification. These were considered an overriding primary subject matter. These rules were not applied to legislation related to a Territory of the Commonwealth, such as the ACT or Cocos Islands. The rules were that all:

- appropriation legislation would be classified as 'Financial Management';
- legislation related to taxes or excises would be assigned to the 'tax and excise' category; and
- trade, customs, tariffs, and export charges legislation were assigned to the 'Trade, Customs, and Tariffs' category (other than sanctions-related and wildlife protection legislation).

The maker of delegated legislation

38. The ALRC has undertaken the first comprehensive analysis to identify the maker of all as made legislative instruments.¹⁶ The ALRC used this data to identify the maker of compilations, based on the series in which each compilation appears. The ALRC included the maker of the instrument in the legislation database and could therefore undertake data-matching based on subject matter across multiple databases.

14 *Corporations Regulations 2001* (Cth) reg 7.5A.102.

15 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.15], [6.24], [6.27], Figures 6.3, 6.5.

16 *Ibid* [6.17], Figure 6.4.

Key terminology

Regular expressions (also known as regex or regexp) are ‘combinations of special character operators, which are symbols that control the search, that you can use to construct search strings for advanced find and/or replace searches’.¹⁷ For example, ‘gr[ae]y’ and ‘gr.y’ use regular expressions in the R programming language to find both ‘grey’ and ‘gray’. Significantly more sophisticated regular expressions can find and extract patterns in language.

39. The ALRC computationally analysed the text of every as made legislative instrument to identify the maker of the instrument. In general, legislative instruments have a relatively standard form of words for identifying the maker of the instrument. The ALRC undertook an iterative process to identify phrases that indicated the maker of an instrument. The search phrases selected by the ALRC often used regular expressions to identify words, proximate words, and phrases. For regulations, the maker was always the Governor-General. Some instruments remained unclassified by the ALRC program. These were manually reviewed to identify their maker.

Offences and penalties

40. The ALRC generated various novel data on offences and penalties in the *Corporations Act* and in Commonwealth delegated legislation.

Offences and civil penalties in the *Corporations Act*

41. The ALRC analysed the *Corporations Act* to identify the number of offences and civil penalty provisions in the *Corporations Act* at five points in time, and to identify the penalties for each penalty provision,¹⁸ whether that be pecuniary or a term of imprisonment.

42. The ALRC created a database (the **point in time penalties database**) of offences and civil penalties covering the following compilations of the *Corporations Act*:

- C2004C03060 (11 Mar 2002)
- C2007C00201 (01 Apr 2007)
- C2012C00447 (20 Apr 2012)
- C2017C00129 (05 Apr 2017)
- C2022C00043 (01 Jan 2022)

43. The ALRC selected the compilation as at 11 March 2002 because it was the first compilation after the commencement of the *Financial Services Reform Act 2001* (Cth), which replaced Chapter 7 of the *Corporations Act* as made.

44. The ALRC created the point in time penalties database in two stages.

- First, the ALRC analysed Schedule 3, for offences, and s 1317E, for civil penalties. This produced an initial database. This first stage identified all civil penalties, based on s 1317E.¹⁹ However, the *Corporations Act* has a complex architecture for creating offences.²⁰ The initial database covered all offences that appear in Schedule 3, which does not include all offences

17 Intel, ‘Regular Expressions Definition’ <https://www.intel.com/content/www/us/en/programmable/quartushelp/17.0/reference/glossary/def_reg_express.htm>.

18 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.67]–[6.69], Figure 6.7, Table 6.2.

19 Section 1317E is exhaustive, unlike Schedule 3 to the *Corporations Act*.

20 Australian Law Reform Commission, ‘Corporations Act Offence and Penalty Architecture’ <<https://www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Corps-Act-offence-and-penalty-architecture.pdf>>.

in the Act. Some provisions create offences in the provision itself, while other provisions have an offence created by virtue of s 1311(1) without a reference being included in Schedule 3.²¹

- Secondly, the ALRC undertook a manual analysis of provisions of the *Corporations Act* to review each reference to 'offence'. The ALRC reviewed provisions that do not appear in s 1311(1A), because offences outside these provisions are not required to appear in Schedule 3. The stage two review allowed the ALRC to identify additional offences that do not appear in Schedule 3.

45. The point in time penalties database is not exhaustive because s 1311(1) provides that any breach of a *Corporations Act* obligation or prohibition is an offence, unless the obligation or prohibition appears in the list of provisions in s 1311(1A) (in which case the offence must be created in a provision or Schedule 3 to the *Corporations Act*). While large parts of *Corporations Act* are included in s 1311(1A), the ALRC's database likely significantly undercounts the number of offences that appear in the *Corporations Act*, and includes only those that are explicitly created in a provision or that appear in Schedule 3. A qualitative analysis of each provision of the *Corporations Act* that does not appear in s 1311(1A) would be necessary to identify all offences.

Offences created in delegated legislation

46. The ALRC analysed the number of offences that are created in delegated legislation.²²

47. The ALRC created a database (the **delegated legislation offences database**) by computationally analysing the text of all in force legislative instruments from the Federal Register of Legislation, as contained in LegData. The ALRC searched for selected terms using regular expressions,²³ and the database produced one row for each legislative instrument and search term.

48. For example, the database produced the following results:

Name	Series ID	Register ID	Search Term	Results
<i>Primary Industries Levies and Charges (National Residue Survey Levies) Regulations 1998</i>	F1998B00137	F2018C00419	an offence under.{0,25}? is an offence	8
<i>Primary Industries Levies and Charges Collection Regulations 1991</i>	F1996B02519	F2021C00314	an offence against. {0,25}?is an offence of strict liability	36

49. The ALRC removed results that appeared in Territory-related instruments, such as ordinances for Jervis Bay or Christmas Island. The Commonwealth directly administers territories and has plenary power over their administration, and it is not unusual for legislative instruments to contain offences, such as for theft or littering. In their very limited jurisdictional scope, these instruments are unusual and were not considered useful in understanding the use of offences across Commonwealth delegated legislation. The ALRC also removed model legislation, such as the *National Transport Commission (Model Legislation — Transport of Dangerous Goods by Road or Rail) Regulations 2007* (Cth). These pieces of legislation do not directly create offences, but rather states must adopt the model legislation by enacting state legislation.

21 Offences can be created by s 1311(1) if a provision does not appear in the list in s 1311(1A).

22 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.59]–[6.60], Table 6.1.

23 'commits an offence if', 'commits an offence under', 'statement of offences', 'contravention of.{0,25}?is an offence', 'offence against.{0,25}?is a strict liability offence', 'an offence against.{0,25}?is an offence of strict liability', 'summary of strict liability offence', 'commits an offence of strict liability if', 'is a serious offence to provide', 'person is guilty of an offence if', 'you will commit an offence if', 'offence for failure to comply with', 'it is an offence to', 'an offence under.{0,25}? is an offence'.

50. The ALRC manually reviewed more than 3,400 results. The ALRC removed 420 results that were judged not relevant. The figures produced by the ALRC's analysis should be treated as an approximation. The methodologies used were novel and the design and identification of offences in Commonwealth legislation is inconsistent. Some offences are created in a way that cannot be easily computationally detected. For example, some provisions simply prohibit or require particular conduct, and provide a penalty for non-compliance, and do not make reference to an 'offence'.

51. Similarly, some legislation lists offences in a schedule or a single section of an instrument or Act. The offence provision itself may therefore not indicate that breach is an offence, and regard must be had to the schedule or other section to determine whether breach of a particular provision is an offence. Additionally, reviewing each offence was a qualitative process, and a level of human error, across more than 3,400 results, is likely.

52. Nonetheless, the data generated by the ALRC provides the first insight into the potential scale of offences in Commonwealth delegated legislation, and is the best data currently available.

Penalties in delegated legislation

53. The ALRC analysed the number of penalty provisions that appear in delegated legislation, and the value of each applicable penalty,²⁴ whether that be pecuniary or a term of imprisonment.

54. The ALRC created a database (the **delegated legislation penalties database**) by computationally analysing the text of all in force legislative instruments from the Federal Register of Legislation, as contained in LegData. The ALRC searched for selected terms using regular expressions,²⁵ and the database produced one row for each result. By cleaning the data, including the context immediately preceding the results, the ALRC was able to identify the value of penalties or terms of imprisonment for each penalty provision.

55. For example, a result might look like the following:

Name	Series ID	Register ID	Preceding text	Search Term
<i>National Consumer Credit Protection Regulations 2010</i>	F2010L00631	F2022C00106	likely contravention. Civil penalty: 5,000	penalty units.

56. The ALRC was able to clean this data so that the database included the value of the penalty units for each result. In the above case, this was 5,000 penalty units. The ALRC used this data to produce the median and average penalties that appear in Table 6.1 of Interim Report B.

57. The ALRC removed Territory and model legislation from the delegated legislation penalties database, as discussed at [49]. The identification of penalties is more standardised than the identification of offences, because the provision will need to refer to 'penalty unit' or 'imprisonment'. The ALRC nevertheless undertook a targeted review of results, including all 145 results where the penalty exceeded 250 penalty units. The ALRC also manually reviewed all 300 references to 'imprisonment', and identified that the vast majority did not relate to the imposition of imprisonment as a penalty by the legislative instrument. The ALRC also identified that tax-related legislative instruments often include a note that a failure to lodge a document, such as a tax return, is an offence under the Act that attracts a penalty. The ALRC removed these results.

58. The delegated legislation penalties database is likely an undercount of penalty provisions, for reasons such as those given in [51]. The design of legislation, in which a single provision may provide a penalty for dozens of separate provisions, makes it impossible to computationally identify each

24 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.62]–[6.66], Table 6.1.

25 'penalty unit.*', 'imprisonment'.

penalty provision individually. For example, while the ALRC program might identify a provision that provides that breach of certain other provisions is an offence subject to 20 penalty units, the ALRC program is not able to identify that this covers 15 provisions. A detailed manual review of each result would be necessary, and this would likely still be an undercount given the various ways in which penalty provisions are created and the size of all legislative instruments, at over 179,000 pages.

59. In other ways, the value of corporations and financial services penalties may have been slightly over-counted relative to other legislative instruments. Corporations and financial services legislative instruments often specify separate penalties for individuals and bodies corporate. In the context of the ALRC's data analysis, this may increase the apparent value of corporations and financial services penalties compared to areas of legislation in which no penalty for a body corporate is separately specified.²⁶

Notional amendments

Identifying instruments containing notional amendments

60. The ALRC analysed the number of in force legislative instruments that notionally amend a Commonwealth Act, and the total number of pages contained in these legislative instruments.²⁷

61. The ALRC created a database (the **statute book notional amendments database**) by matching data from the legislation database and the modifications database. The modifications database uses the 'Modifies' webpage for each Act or instrument that modifies another Act or instrument. The process for matching legislative instruments to the Acts they modify was identical to that for matching instruments to their authorising legislation (see [20]–[21]).

Identifying notional amendments

62. The ALRC analysed the number of distinct notional amendments in the *Corporations Regulations* and every principal in force ASIC legislative instrument. The methodology for this is contained in Appendix B to the ALRC's 'Notional amendments note'.²⁸

Scrutiny data

63. The ALRC analysed the proportion of legislative instruments made each year that were subject to scrutiny concerns from the Senate Standing Committee for the Scrutiny of Delegated Legislation.²⁹

64. The ALRC undertook this analysis by matching data from the legislation database, which includes all legislative instruments made in a given year, and the Senate Committee's annual 'Index of instruments' (formerly the 'Index of Matters').³⁰ The ALRC webscraped all Register IDs from each Index of instruments. Legislation from the legislation database that appeared in any Index of instruments was classified as having been subject to Senate Committee concerns.

26 Where a penalty is not expressly specified in a particular provision for a body corporate, the authorising Act may provide for a formula for determining the value of penalty units. If the Act does not provide a formula then the value of the penalty unit is worked out in accordance with a formula under s 4B of the *Crimes Act 1914* (Cth).

27 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.33].

28 Australian Law Reform Commission, Recommendation 18 — Notional Amendments Note <<https://www.alrc.gov.au/wp-content/uploads/2022/09/ALRC-FSL-B-notional-amendments.pdf>>.

29 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.72], Table 6.3.

30 See, eg, Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, 'Index of Instruments 2020' <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Index/Index_2020>.