



Australian Government
Financial Reporting Panel

2 December 2011

The Manager
Corporate Reporting and Accountability Unit
Corporations and Capital Markets Division
The Treasury
Langton Crescent
PARKES ACT 2600

frpdiscussionpaper@treasury.gov.au

Dear Sir/Madam

FUTURE OF FINANCIAL REPORTING PANEL

The Financial Reporting Panel (“FRP”) believes that it should remain in place but feels strongly that substantial change is required to the referral process in order to take advantage of the FRP’s proven ability to provide effective, low cost and timely resolution to disputes

The FRP is pleased to offer comment on the Discussion Paper issued on 4 November 2011 by the Treasury of the Australian Government.

The FRP was seen as an important component of the financial regulatory structure in Australia at its inception. The FRP believes that it should, with changes in arrangements, be retained as a feature of the Australia regulatory environment.

The FRP is in a unique position to provide comment on certain aspects of the process leading to referrals.

Firstly, it is independent from ASIC, reporting entities, the audit profession and other interested parties. Many parties will have a vested interest in their submissions and this needs to be balanced, in any evaluation, between them in order to provide an equitable solution to the issues raised in the discussion paper.

Secondly, the FRP is not commenting nor has it been asked to comment on its own performance. It has been well documented and accepted that the FRP performed its duties well when the four cases were brought to it by ASIC. No question has been raised about these aspects of the FRP. The problem of a lack of referrals is the essence of the discussion paper and the very reason for this fundamental review.

Thirdly, the FRP has a detailed knowledge of the cases that have been referred and is best placed to draw conclusions regarding a lack of referrals from these. The facts are that the cases referred were untimely and too late in the regulatory process to maximize effectively and fully enhance disclosure to the market place.

Fourthly, the FRP has every motivation to recommend changes that will lead to an improvement in the number of referrals forthcoming. It is not in the best interest of the FRP's reputation and/or the individual members to remain idle, as has been the case.

In summary, the FRP believes it should remain in place, but feels strongly that substantial change is required to the referral process in order to take advantage of the FRP's proven ability to provide effective, low cost and timely resolution to disputes.

The FRP, therefore, recommends putting both ASIC and reporting entities on an "equal playing field". This would require corporations, as well as ASIC, to be able to refer disputes to the FRP. This would be one step towards improvement and in itself provides a platform for the FRP to be more active. However, there is the question of when does a dispute exist for either ASIC and/or a lodging entity to be able to refer it to the FRP. This mystique is simply another aspect of ASIC's power to determine the timing and escalation of issues emanating from the surveillance of the reports lodged with ASIC. Whilst there is every reason for appropriate resolution to be mutually agreed between ASIC and a lodging entity in the first instance, the resolution needs to be timely in order to keep shareholders, debt holders and all interested parties effectively informed.

Thus, the FRP strongly feels that timeframes need to be put in place to ensure that neither ASIC nor lodging entities are allowed to delay timely resolution of a dispute into reporting periods beyond those being examined. That is to say, deadlines provide definition to a dispute. If ASIC has been unable to satisfy itself within a certain period then the issue would be put to the FRP. Equally if, within a specified timeframe, reporting entities have been unable to satisfy ASIC that their disclosure is correct, then the issue would be put to the FRP for resolution. Equal responsibility and opportunity to resolve any issues between ASIC and a lodging entity would provide incentive to both parties to find a timely and effective solution or else to pass the issue to the FRP for its hearing of the matter.

An efficient and effective market place must be based on the provision of timely and accurate information.

The safety net to capture irregularities and inappropriate reporting needs to be continually improved. The FRP's recommendations are a step in the right direction. There is enough evidence to hand to suggest changes are required.

A modification to the referral process must be enacted. The absence of referred cases in the past illustrates the problems with maintaining the FRP without change.

A lack of referrals is frustrating for those involved in the Panel and reflects poorly on the FRP's reputation. On the other hand, the FRP's successful performance last year when 4 cases were referred, demonstrates that there is clearly merit in its existence.

Hence, the absence of referred cases is the problem. Any modification to be adopted by government must address the cause of this and involve an initiative that improves the probability of a steady flow of disputes being referred.

POSSIBLE REASONS FOR UNDER UTILIZATION OF THE FRP

Q1. Why do you believe the level of FRP referrals has been less than initially anticipated?

The dearth of referrals emanates from ASIC's approach of trying to resolve all disputes itself rather than involving an independent party, being the FRP. Whilst resolution between ASIC and the reporting entity is preferred, it cannot come at the cost of timeliness and effectiveness for the interested parties. If disputed matters continue to be debated for lengthy periods, it likely leads to reporting entities assuming resolution is somewhat irrelevant. The factor requiring the most urgent attention is the timeliness of dispute resolution – from when the issue is first questioned by ASIC through to referral to the FRP. Relying on ASIC to agree to refer a matter to the FRP effectively means that the process is solely effectively at the determination of ASIC. This lack of an "equal playing field" is a major impediment to referrals. In the initial CLERP submissions, leading to the formation of the FRP, certain parties strongly opposed the power of referral residing with ASIC, and supported proposals that a lodging entity could also refer a matter to the FRP. With hindsight, it would appear this view has merit. Time deadlines would also stress the importance of disclosing timely and relevant information.

Lack of awareness of the FRP's existence could be a factor here but it is unlikely to be a major factor. It would probably be resolved if a steady stream of referrals were to be forthcoming. Activity would increase awareness. The FRP sought to increase awareness of its existence through relevant publications but this has not resulted in an increase in the number of referrals coming forward.

Q2. What factors do you believe may need to be addressed in order for the FRP to function more effectively?

As set out in the response to Q1, the modification to the referral process needs to be a combination of reporting entities being able to refer, in addition to ASIC, and timeframes being set to ensure matters are referred if they remain unresolved within a reasonable period. An "equal playing field" approach to referral and equal deadlines placed on the parties to ensure timeliness are the factors to be addressed.

OPTIONS FOR THE FUTURE OF THE FRP

Q3. Do you believe that the current process and powers of the FRP are effective and appropriate, and do not require any significant reform?

The successful completion of the four matters referred to the FRP in August 2010 demonstrated the current powers and processes of the FRP are effective. The FRP's

problem is the lack of referrals. If the FRP continues to operate and the number of matters referred increases, experience may demonstrate ways in which its powers and processes can be improved but at the present time no significant modifications appear to be necessary.

The FRP believes that its current processes and powers are effective and appropriate, and do not require significant reform.

MODIFICATION OF THE REFERRAL PROCESS

Q4. Do you believe that disputes should be automatically referred to the FRP after a specified time period?

Yes. Specifying a time period before automatic referral to the FRP would ensure that ASIC and reporting entities would not act to prolong an issue and negotiations/discussions would be encouraged to be addressed “fully” in the first instance. In general, until a dispute has been resolved, the market and interested parties are deprived of potentially market-sensitive information.

Q5. If so, what is an appropriate point for the period to commence, and how long, should ASIC and the entity have to resolve the issue directly?

Under relevant provisions of the Corporations Act and ASX and NSX Listing Rules, public companies and other disclosing entities are required to prepare and lodge reports within prescribed periods. The FRP itself is also required to deal with matters referred to it within a defined period. It does not appear unreasonable that ASIC and reporting entities should also be subject to prescribed time limits.

Under section 323EL of the Corporations Act, the FRP has the power, at any stage of a proceeding, to dismiss a referral. If it appeared to the Panel on an application by either ASIC or a lodging entity, that there had been insufficient time for ASIC’s investigations to be completed or for a lodging entity to present its arguments to ASIC, the Panel could dismiss the referral.

Alternatively, if the legislation is amended to mandate a deadline for a matter that has arisen between a lodging entity and ASIC to be referred to the FRP, the legislation could include a power for the FRP, on application by either party, to extend that deadline.

Apart from expediting the disclosure of potentially market sensitive information, see paragraphs 40 and 41 of the discussion paper, mandating a deadline may provide an additional incentive for disclosing entities to respond promptly to requests by ASIC for information and to resolve matters directly with ASIC: see paragraph 43 of the discussion paper.

ALLOWING COMPANIES TO REFER MATTERS WITHOUT ASIC CONSENT

Q6. Do you believe that companies should be allowed to refer cases to the FRP without ASIC's consent?

Yes, the FRP does believe an "equal playing field" for referrals should be mandated.

Q7. Do you believe that such a change would have a material impact on the number of referrals coming forward?

There is evidence to support the view that a change would have a positive effect on the number of referrals coming forward.

When the Takeovers Panel (then named the Corporations and Securities Panel) was established in 1991, only the Australian Securities Commission (now ASIC) could refer matters to the Panel.

During the period 1991 to 2000, the Commission only referred four matters to the Panel and the Panel was widely regarded as unsuccessful.

In 2000 new functions and powers were conferred on the Panel. One of the key changes made by the 2000 amendments was that parties other than the Commission were able to refer disputes to the Panel.

In the eleven years since the 2000 amendments, the Takeovers Panel has dealt with more than 300 matters and is widely regarded as having made a very important contribution to the effective regulation of takeovers in Australia.

One might anticipate that permitting entities to refer matters to the FRP without having to obtain ASIC's consent could result in a similar increase in the number of referrals to and the status of the FRP.

A change to legislation is likely to improve the resolution process overall, including before any referral and in the period when resolution can be obtained between ASIC and the reporting entity directly.

One should not judge the success of the FRP solely by the number of referrals made to it. Rather it should be viewed as a dispute resolution process and its existence provides support to companies and their auditors in their dealings with ASIC. Equally, it provides support to ASIC in this regard..

REPEALING THE FRP FUNCTIONS AND CLOSING THE PANEL

Q8. Do you believe that the FRP's functions should be repealed and the Panel closed?

Provided that the changes to the referral process outlined earlier are made, the FRP does not believe that the FRP's functions should be repealed and the Panel closed.

The FRP can, and does, play an important role in improving the quality and timeliness of information disclosed by reporting entities. We do not accept that the FRP is costly to operate. The FRP provides a low cost alternative to resolving disputes between a company and the regulator rather than undergoing court action. In considering the potential cost savings to the Government from Option 3, it is instructive to compare the total expenses of the FRP, the CALDB and the Takeovers Panel as disclosed in their annual reports for the year ended 30 June 2011.

	FRP	CALDB	Takeovers Panel
Total Expenses (including overheads)	\$297,381	\$483,494	\$1,978,557
No of Referrals	4	3	28
Average Cost/ Referral	\$74,345	\$161,165	\$70,663

The average cost per referral of the matters considered by the FRP during the year ended 30 June 2011 thus compares favourably with the average cost per application of the matters considered by the CALDB and the Takeovers Panel.

As pointed out in paragraph 54 of the discussion paper, the annual costs of the FRP are significantly less than a single major case proceeding through the Court system.

However, if there is no preparedness to change, without modification to the referral process, FRP's functions should be repealed and the Panel closed.

CONCLUSION

In conclusion, the FRP feels strongly that substantial change is required to the referral process in order to take advantage of the FRP's proven ability to provide effective, low cost and timely resolution to disputes.

The FRP, therefore, recommends putting both ASIC and lodging entities on an "equal playing field".

This would require lodging entities to be able to refer to the FRP in addition to ASIC. However, there is the question of when does a dispute exist for either ASIC and/or a

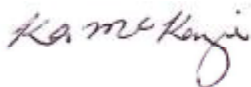
reporting entity to be able to refer to the FRP. Whilst there is every reason for appropriate resolution to be mutually agreed between ASIC and a lodging entity in the first instance, the resolution needs to be timely in order to keep shareholders, debt holders and all interested parties effectively informed.

The FRP also strongly feels that timeframes need to be put in place to ensure neither ASIC nor lodging entities are allowed to delay timely resolution with the unresolved matter being repeated in reporting periods beyond those being first examined. Deadlines provide definition to a dispute. If ASIC has been unable to satisfy itself within a certain period then the issue would be put to the FRP. Equally if reporting entities have been unable to satisfy ASIC that their accounting and/or disclosure is correct by a certain period then the issue would be put to the FRP for resolution. Equal responsibility and opportunity to resolve any issues between ASIC and a lodging entity would provide incentive to both parties to find a timely and effective solution or else to pass the resolution to the FRP for its hearing of the matter.

The ability to refer and deadlines on the process are not mutually exclusive. Instead, they complement each other to strengthen the overall referral process.

Thank you for the opportunity to comment.

The Chairman and Panel members are available to provide clarity to the recommendations submitted should this be required or to assist.



Kenneth A McKenzie
Chairman of the FRP