



ASIC
Australian Securities &
Investments Commission

Committee	Parliamentary Joint Committee on Corporations and Financial Services
Inquiry	Oversight of ASIC, the Takeovers Panel and the Corporations Legislation
Question No.	039
Topic	PwC – application of section 1041H
Reference	Spoken, 20 October 2023, Hansard page 57
Committee member	Senator Paul Scarr

Question

Senator SCARR: A short supplementary question: what about misleading and deceptive conduct? If an organisation says it is going to comply with the requirements of a listed public company and it goes to issues of governance—including having a majority of independent non-executive directors, et cetera—and it doesn't, could that trigger action on the basis of 'misleading and deceptive conduct'?

Mr Savundra: Senator, you are testing my recall. We have 'misleading and deceptive conduct' under the ASIC Act. It needs to be where the corporation or the person is involved in a financial product or service. Under the Corporations Act, there is 1041H. One of my colleagues might tell me whether that applies to listed entities or corporations. We will come back to you.

Answer

Pursuant to s12DA of the ASIC Act, a person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

Pursuant to subsection 1041H(1) of the Corporations Act, a person must not engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

The definition of a person can apply to a natural person, any corporation, or pursuant to section 761F, a partnership as if the members of a partnership was a single person, or pursuant to section 761FA, where a trust has more than one trustees, all of the trustees as if they were a single person.

The reference in subsection (1) to engaging in conduct in relation to a financial product includes (but is not limited to) dealing in a financial: subsection 1041H(2).

The courts have given a wide meaning to the phrase “in relation to”, for the purpose of section 1041H and s12DA, requiring only “an indirect or less than substantial connection” between the conduct and the financial service.

While the conduct will need to be determined objectively having regard to all the circumstances of the case, it is possible that misleading statements made by a licensee or corporate representative about the governance model of its financial services business may contravene the misleading or deceptive conduct regime, including section 12DA of the ASIC Act or s1041H of the Corporations Act.

Failure to comply with subsection 1041H(1) may lead to civil liability under section 1041I. Section 1041I gives investors compensation for loss or damage caused by conduct that breaches section 1041H(1). Failure to comply with subsection 12DA(1) of the ASIC Act may also lead to civil liability.