Officer or Not? - Australian Security Investments Commission v King

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This week the High Court in *Australian Securities and Investments Commission v King & Anor* [2020] HCA 4, decided an appeal from the Supreme Court of Queensland concerning the construction of the word ‘officer’ in section 9 of the *Corporations Act 2001* (Cth).

This much anticipated decision has provided clarity as to the construction of the term; a decision which will be well received by ASIC.

The relevant section provides that:

> *‘officer of the corporation means:*
>
> > *(b) a person:*
> >
> > > *(ii) who has the capacity to affect significantly the corporations financial standing’*

In essence, the High Court held that an ‘officer’ of a corporation is not limited to those who hold or occupy a named office in the corporation to be captured under the section 9(b)(ii) definition. The relevant test is instead a matter of fact and circumstance which will determine whether a person has the requisite capacity to significantly affect the financial standing of the corporation.

Mr King was found to have been the ‘overall boss’ of the MFS Group, with ‘overall responsibility’ which amounted to the capacity to significantly affect the financial standing of the company.

Prior to this determination, the courts adopted a much stricter approach to constructing ‘officer ‘. This decision now means that the title of officer is not constrained to a strict reading of section 9, but comes from an objective determination of the influence of the person within the corporation.

This is an important decision for corporate groups, as consideration will be given to the overall position of influence of the person within the group, rather than any title held or not held by that person.

The practical impact will be that regulators, such as ASIC, will have larger scope to commence actions against an officer for breaches of duties by looking at individuals with practical capacity to significantly influence the financial standing of the corporation, rather than only named roles

with attached rights and duties.

Matthews Folbigg Lawyers has a specialist team dedicated to Insolvency, Restructuring and Debt Recovery. If you would like more information or advice in relation to any of these practice areas, please contact Stephen Mullette or Jeffrey Brown on (02) 9806 7459 or (02) 9806 7446, or email stephenm@matthewsfolbigg.com.au or jeffreyb@matthewsfolbigg.com.au.