

When does an employee of a company become an "officer"?

Date : May 30, 2019

By Jeffrey Brown, a Principal of Matthews Folbigg, in our Insolvency, Restructuring and Debt Recovery Group.

Later this year the High Court will turn its attention to what makes a person an "officer" of a corporation. Their judgment will be eagerly awaited by those advising companies and their senior management staff.

Earlier this month the High Court of Australia granted special leave to the Australian Securities & Investments Commission (ASIC) to appeal the decision of the Queensland Supreme Court, Court of Appeal in **ASIC v King** [2019] HCA Trans 104 (17 May 2019).

The *Corporations Act* imposes civil and criminal penalties on "officers" of corporations if they contravene the Act or neglect their duties.

Mr King was a senior employee of the MFSIM Group of Companies. He, along with a number of other senior employees, was prosecuted by ASIC for contravention of their responsibilities as "officers" of MFSIM.

The Court of Appeal in Queensland concluded that, although Mr King was involved in the management of the affairs of the corporate group and in particular its parent company, in order for him to be an "officer" of the corporation he had to hold a formal "office" or recognised position. Having concluded that he held no such formal recognised office, the Court of Appeal declined to impose a penalty on him under the Act.

ASIC have appealed that decision to the High Court, and the High Court has agreed to hear the appeal later this year.

We will be monitoring the progress of this case through the High Court carefully, as it will provide us with binding authority at the highest level as to when an employee or other senior figure in a company becomes liable to prosecution as an "officer" of the company. This has huge ramifications for the management of companies and the decision making of a company's senior management team.

In the meantime, if you have any questions concerning corporate governance generally, please do not hesitate to contact one of our experts.