

# Meaning of an 'Officer' in ASIC v King [2020] HCA 4

## 1. Significance

The High Court of Australia has confirmed the definition of 'officer' in section 9 of the *Corporations Act 2001* (Cth) ('Act') in the case of *Australian Securities and Investments Commission v King* [2020] HCA 4.

The High Court unanimously held that there is no requirement that a person be a named officer of a corporation to fall within the ambit of section 9(b)(ii) of the Act. The relevant test will be as a matter of fact and circumstance to determine whether a person has the requisite capacity to significantly affect the financial standing of the company.

In the case of corporate groups, the overall position of influence the person had within that group's affairs will be emphasised, rather than a strict interpretation of the 'office' that person held/ holds.

## 2. Legislation

Section 9 of the *Corporations Act 2001* (Cth) states as follows:

*"officer of a corporation means:*

- (a) A director or secretary of the corporation; or*
  - (b) A person:*
    - (i) Who makes, participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or*
    - (ii) Who has the capacity to affect significantly the corporation's financial standing; or*
    - (iii) In accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation);*
- or*
- ....."*

## 3. ASIC v King [2020]

The case considered the question of whether a group CEO, who did not hold a formal 'officer' role in a subsidiary company, but who was nevertheless 'overall responsible' for the subsidiary, fell within the definition of 'officer' for that subsidiary. If established, could then

be liable under s601FD of the *Corporations Act 2001* (Cth)<sup>1</sup> and what is needed to establish this.

### 3.1. Background

Mr King was CEO and executive director of MFS Ltd (Octaviar Ltd), the parent company of the MFS Group. Premium Income Fund (PIF) was the largest registered managed investment scheme in the MFS Group and MFS Investment Management Pty Ltd (MFSIM) was the responsible entity.

In June 2007, MFSIM entered into a \$200 million loan facility with the Royal Bank of Scotland (RBS). The loan facility was to be used solely for the purpose of PIF, and not for the purpose of other companies in the MFS Group. In November of 2007, MFSIM and senior personnel in the MFS Group, including Mr King arranged for \$150 million to be drawn from the RBS facility, \$103 million of which was then used to pay a debt owed by another company in the MFS Group. The debt in question was unrelated to either PIF or MFSIM and PIF received no benefit or consideration for it. The use was authorised by Mr King.

### 3.2. Appeal to High Court

ASIC argued that even though Mr King was not an 'officer' of MFSIM in name, Mr King was one in effect. The reliance was placed on the definition of 'officer' in section 9, being that '*a person... who has the capacity to affect significantly the corporation's financial standing*'.

ASIC also argued that the QCA's reasoning was misinterpreted in relation to *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, for that a formal 'position' did not need to be held to be considered an 'officer'.

## 4. High Court Reasoning

### 4.1. Affect the financial standing

The High Court established that Mr King, has sufficient capacity to affect significantly the financial standing of MFSIM. Keifel CJ, Gageler J and Keane J stated:

---

<sup>1</sup> **S601FD of the Corporations Act 2001 (Cth); 'Duties of officers of responsible entity'; (1)** An officer of the responsible entity of a registered scheme must: **(a)** act honestly; and **(b)** exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position; and **(c)** act in the best interests of the members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests; and **(d)** not make use of information acquired through being an officer of the responsible entity in order to: **(i)** gain an improper advantage for the officer or another person; or **(ii)** cause detriment to the members of the scheme; and **(e)** not make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme; and **(f)** take all steps that a reasonable person would take, if they were in the officer's position, to ensure that the responsible entity complies with: **(i)** this Act; and **(ii)** any conditions imposed on the responsible entity's Australian financial services licence; and **(iii)** the scheme's constitution; and **(iv)** the scheme's compliance plan.

*'If the CEO of the parent company of a group of companies is allowed to act in relation to other companies in the group untrammelled by the duties that attach to officers of each of the other companies, shareholders and creditors would be left exposed to an obvious risk. It would be an extraordinary state of affairs if those who actually determine the course of a company's financial affairs could avoid responsibility for their conduct by the simple expedient of deliberately eschewing any formal designation of their responsibilities.'*

Section 601FD of the Corporations Act 2001 (Cth) was enacted to provide protection to members of managed investment schemes by imposing duties and responsibilities on the officers of responsible entities.

Mr King's conduct and influence was determined by the fact that through his actions he demonstrated the capacity to affect the financial standing of the subsidiary by exercising it to the detriment of the subsidiary and its creditors and shareholders.

#### 4.2. Acted in the position

The HC held that the Court of Appeal had erred in giving 'officer' the meaning of holder of an office. Whilst they agreed that the definition in section 9 did encompass individuals who hold a named office within a corporation, paragraph (b) of the definition captures those who do not hold such an office. This interpretation is defined by the relationship between an individual and a corporation and the subsequent affairs of that corporation.

#### 5. What does this mean for you?

The High Court decision provides clarity on 'who is an officer' and sends a clear signal to anyone running a company, through name or influence, that they will be held accountable for their actions. Despite not holding the position within a company of a named 'officer', the Court will still consider the effect one has on the company and the duties and responsibilities of an officer under s 601FD of the Corporations Act 2001 (Cth) can be contributable.

The Courts will reach this conclusion if the individual has the *capacity to affect the financial standing* and decision making abilities of the company. Individuals in this position should be weary of their influence and decision making as they may be regarded as 'officers' within the company.

#### 6. Work Health and Safety Comparison

Under the *Work Health and Safety Act 2011* (Cth) ('WHS Act') the definition of 'officer' is equated to that as interpreted under s9 of the Corporations Act 2001 (Cth). In comparing the WHS Act in terms of defining what is an 'officer', the interpretation of one 'who makes, or participates in making, decisions that affect the whole or substantial part, of the business of the corporation' is unilaterally present.