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An adviser warning with prohibited share self ownership

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One key issue which advisers must be aware of whenever reviewing existing structures or establishing new entities, is that under the *Corporations Act 2001* there is a prohibition on companies from owning shares in themselves.

As one example, this issue can arise in instances where a trustee company is incorrectly established with the trust (for which it is trustee) owning some or all of the shares. As the legal owner of those shares is the trustee, this results in the trustee owning shares in itself.

In particular, section 259A, provides as follows:

"A company must not acquire shares (or units of shares) in itself except:

(a) in buying back shares under section 257A; or

(b) in acquiring an interest (other than a legal interest) in fully-paid shares in the company if no consideration is given for the acquisition by the company or an entity it controls; or

(c) under a court order; or

(d) in circumstances covered by subsection 259B(2) or (3)."

Under section 259F of the Act, if a contravention has occurred, a person who was involved (which is widely defined and includes any person who was, directly or indirectly, knowingly concerned in or party to the contravention) in the contravention may be subject to a civil penalty of up to $1.65M (or 3 times the benefit derived, whichever is larger). There are also potential criminal consequences that can flow from the breach.

Due to the potentially significant penalties that can arise under the Act, together with the likely adverse commercial ramifications, any identified breach of section 259A should be remedied as soon as practical following identification of the issue.

One option is for the persons involved in the contravention to apply to ASIC for a no-action letter, whereby ASIC confirms it does not intend to take any steps as a result of a particular contravention of the Act.

As flagged above, a breach of the Act in the SME space most typically arises where a trustee company of a family discretionary trust is listed under ASIC records as having its shares owned by the trust. That is, the trustee of the trust owns shares in itself. While "circular" ownership arrangements can be beneficial from an asset protection perspective, they must still comply with the Act.

The preferred approach therefore, where the shares in a corporate beneficiary are to be owned by a trust, is for a structure along the following lines:

1. the shares in the corporate trustee should be owned by individuals with a low risk profile;
2. the corporate trustee should undertake no activities other than its trusteeship and the value of the shares in the trustee company should therefore be limited to their issue price; and
3. the trustee company in its capacity as trustee should own all of the shares in the corporate beneficiary.

The decision in *Commissioner for ACT Revenue v O'Neill* [2026] ACTSC 105 highlights both a situation where related section 259D was identified as having been breached (by a financier) and the second order consequences that can arise when steps are taken to remedy the breach.

In this case the shares in the trustee company of a discretionary trust were owned by another company – and the shares in that company were owned by the trustee company.

To remedy the breach of section 259D, shares in the trustee were transferred to the directors of the company personally. While this addressed the breach, as the trustee company was a potential beneficiary of the discretionary trust, the company was deemed under the A.C.T. stamp duty legislation to in fact own all the assets of the trust, triggering a landholder duty impost of in excess of $1M. The taxpayer was, via litigation, ultimately able to rely on another exemption under the legislation to avoid the duty impost, despite the transfer otherwise creating a dutiable event.

The case of *In the matter of Wollongong Coal Limited* [2017] NSWSC 201 is an example of a court application to exempt a company from the prohibition on acquisition of an interest in its own shares, or from compliance with the statutory regime for buy-backs under the Corporations Act. The decision confirmed that section 259A(c) of the Corporations Act does not confer a freestanding discretionary jurisdiction on the courts to ignore the general prohibition on self ownership, despite an earlier case that suggested the opposite (see *U&D Coal Ltd v Australian Kunqian International Energy Co Pty Ltd* [2014] VSC 386).

Similarly, in *Artcam Enterprises Pty Ltd v Campbell McLaren & Ors* [2023] VSC 196 the related section 259A provision in section 259D - which prohibits a company from controlling an entity that holds shares in itself (that is ownership via interposed entities) - was considered. The case was another litigation related to the Jalna Dairy Foods sale (the relevant trust in this case owned 66.66 per cent of the issued shares in Jalna and received approximately $65m as a result of the sale).

In this decision, the court held that there was a breach of section 259D where the trustee company of a discretionary trust owned shares in a company, and that company then in turn owned shares in the trustee company.

This breach, while not of itself affecting the validity of any transaction, helped support a wider application for the removal of the trustee company as trustee of the trust.

Ultimately, each of these reported decisions provide a stark reminder to all SME advisers of how critical holistic considered structuring is, including with reference to the Corporations Act, whenever a company is involved.