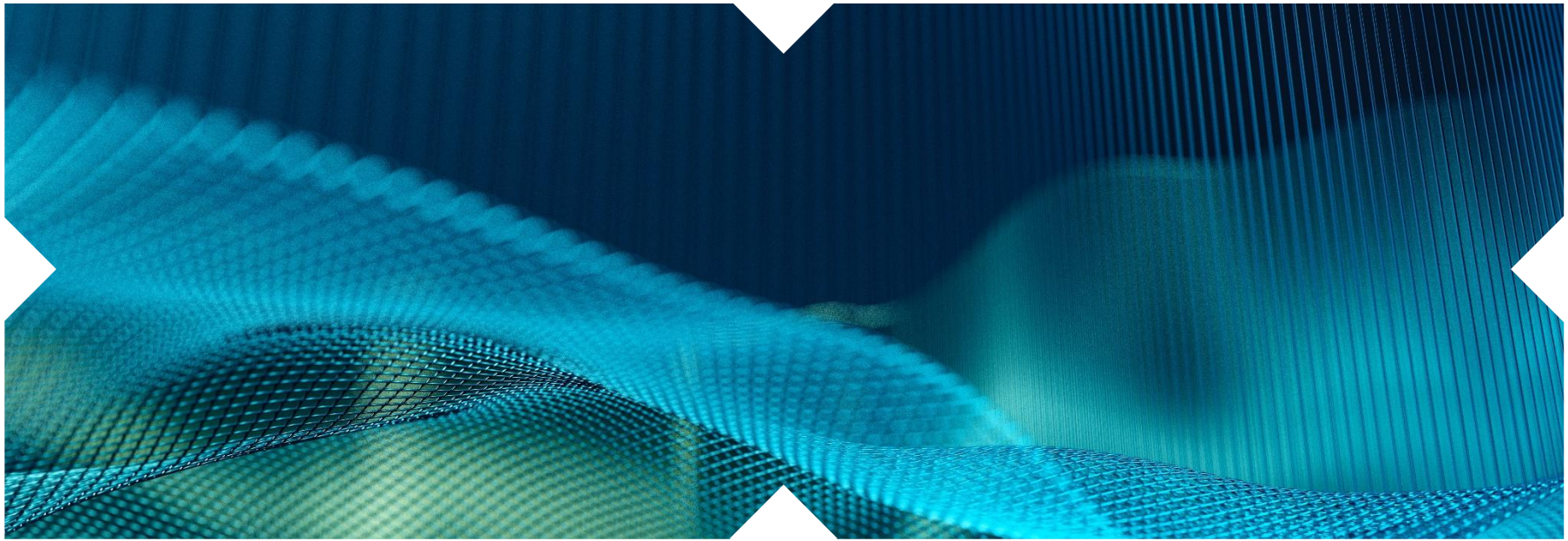
ASX Listing Rules Compliance Course

Module 4: Transactions with persons in a position of influence



Before we begin

An important legal notice

The information provided in this course module is for educational purposes only.

This module does not purport to cover all aspects of the Listing Rules relevant to the subject matter in its title. There may also have been changes to a Listing Rule, or to ASX's policy or guidance on the application of a Listing Rule, mentioned in this module since the module was last updated.

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ASX Listing Rules Compliance Course

Module 4 – Transactions with persons in a position of influence

- Welcome to module 4 of the ASX Listing Rules Compliance Course.
- This module covers transactions with persons in a position of influence. It should take you around 20 minutes to complete.



Module	Name of module
Module 1	Continuous disclosure
Module 2	Periodic reporting
Module 3	Issue of equity securities
Module 4	Transactions with persons in a position of influence
Module 5	Significant transactions
Module 6	Corporate governance disclosures
Module 7	General meetings
Module 8	Lodging documents with ASX
Module 9	Trading halts and suspensions
Module 10	Waivers and in-principle advice
Module 11	Directors' interest notifications

Transactions with persons in a position of influence

Introduction



- In this module, we cover:
  - the requirement for security holder approval of certain transactions involving persons in a position of influence under rules 10.1, 10.11 and 10.14
  - the exceptions to rules 10.1, 10.11 and 10.14
  - notice of meeting requirements for approvals under rules 10.1, 10.11 and 10.14
  - the time limit to issue securities approved under rules 10.11 and 10.14
  - the regulation of non-executive director fees in rule 10.17, and
  - the restraints on termination benefits in rules 10.18 and 10.19.
- For further information on these matters, please refer to GN 24 *Acquisitions and Disposals of Substantial Assets Involving Persons in a Position of Influence* ('GN 24') and GN 25 *Issues of Equity Securities to Persons in a Position of Influence* ('GN 25').

Transactions with persons in a position of influence

An overview of chapter 10 of the rules

- Chapter 10 of the rules requires entities to obtain security holder approval for various transactions involving parties in a position of influence. Key among these are:
  - rule 10.1, which regulates acquisitions of substantial assets from, and disposals of substantial assets to, persons in a position of influence
  - rule 10.11, which regulates issues of equity securities to persons in a position of influence, and
  - rule 10.14, which regulates issues of equity securities to directors and/or their associates under an employee incentive scheme ('EIS').
- A word of forewarning – these rules draw heavily on the concepts of 'related party', 'substantial holder' and 'associate', aspects of which can be quite complex and technical. We explore the meanings of these terms shortly.

Asset acquisitions/disposals involving persons in a position of influence

Rule 10.1

- Rule 10.1 provides:

  *An entity must not, and must ensure that its child entities do not, **acquire** or agree to acquire a **substantial asset** from, or **dispose of** or agree to dispose of a **substantial asset** to, any of the following persons without the approval of the holders of the entity's ordinary securities:*

  *10.1.1 A **related party** of the entity.*

  *10.1.2 A **child entity** of the entity.*

  *10.1.3 A person who is, or was at any time in the 6 months before the transaction, a **substantial (10%+) holder** in the entity.*

  *10.1.4 An **associate** of a person referred to in rules 10.1.1 to 10.1.3.*

  10.1.5 A person whose relationship to the entity or a person referred to in rules 10.1.1 to 10.1.4 is such that, in ASX's opinion, the transaction should be approved by security holders.

- We will explain the meaning of the highlighted terms above shortly.

Issues of equity securities to persons in a position of influence

Rule 10.11

- Rule 10.11 provides:

… an entity must not issue or agree to issue equity securities to any of the following persons without the approval of the holders of its ordinary securities:

*10.11.1 A **related party** of the entity.*

*10.11.2 A person who is, or was at any time in the 6 months before the issue or agreement, a **substantial (30%+) holder** in the entity.*

*10.11.3 A person who is, or was at any time in the 6 months before the issue or agreement, a **substantial (10%+) holder** in the entity and who has nominated a director:*

(a) if the entity is a company, to the board of the entity, or

(b) if the entity is not a company, to the board of its governing body,

pursuant to a relevant agreement which gives them a right or expectation to do so.

*10.11.4 An **associate** of a person referred to in rules 10.11.1 to 10.11.3.*

10.11.5 A person whose relationship to the entity or a person referred to in rules 10.11.1 to 10.11.4 is such that, in ASX's opinion, the issue or agreement should be approved by security holders.

Issues of equity securities to directors under an employee incentive plan

Rule 10.14

- Rule 10.14 provides:

  *An entity must not permit any of the following persons to **acquire** equity securities under an **employee incentive scheme** without the approval of the holders of its ordinary securities.*

  10.14.1 If:

  (a) the entity is a company – a director of the entity, or

  (b) the entity is not a company – a director of its governing body.

  10.14.2 An associate of a person referred to in rule 10.14.1.

  10.14.3 A person whose relationship with the entity or a person referred to in rule 10.14.1 or 10.14.2 is such that, in ASX's opinion, the acquisition should be approved by security holders.

- We will now explain the meaning of the highlighted terms in this and the preceding two slides.

Key concepts underpinning rules 10.1, 10.11 and 10.14

The meaning of ‘asset’, ‘acquire’ and ‘dispose’

‘Asset’

Not defined but clearly includes:

- the assets that make up all or part of a business; and
- any tangible or intangible property or right that has value and that is capable of being recognised as a current or non-current asset in an entity’s accounts.

Eg, freehold and leasehold interests in land; interests in mining or petroleum tenements; intellectual property rights; interests in child entities; investments; debts and other receivables; plant and equipment; and inventory.

‘Acquire’

Defined in rule 19.12 to mean to acquire, directly or indirectly through another person, by any means, including:

- granting, being granted or exercising an option
- being the beneficiary of a declaration of trust over an asset
- enforcing collateral and taking an asset
- increasing an economic interest, or
- acquiring part of an asset.

‘Dispose’

Defined in rule 19.12 to mean to dispose of, directly or indirectly through another person, by any means, including:

- granting, being granted or exercising an option
- declaring a trust over an asset
- using an asset as collateral
- decreasing an economic interest, or
- disposing of part of an asset.

Key concepts underpinning rules 10.1, 10.11 and 10.14

The meaning of ‘substantial asset’ (rules 10.2 and 10.2.1)

- An asset is ‘substantial’ if its value or the value of the consideration being paid or received by the entity for it is, or in ASX’s opinion is, 5% or more of the equity interests of the entity, as set out in the latest accounts given to ASX under the rules (rule 10.2).
- The term ‘equity interests’ refers to the equity of an entity, as determined in accordance with generally accepted accounting principles (rule 19.12). It is effectively the same as ‘net assets’ (ie the difference between total assets and total liabilities).
- In determining whether an asset meets the threshold in rule 10.2 to be a substantial asset:
  - whether an asset is classified as a tangible or intangible asset is irrelevant
  - if ASX accepts that an asset should be valued using its book value, any provisions for depreciation and amortisation and any impairment charges affecting the asset are to be deducted from its value
  - liabilities assumed by the entity as part of an acquisition or assumed by someone else as part of a disposal are not to be deducted from the value of the asset being acquired or disposed of, and
  - separate acquisitions or disposals will be aggregated if, in ASX’s opinion, they form part of the same commercial transaction (rule 10.2.1).

Key concepts underpinning rules 10.1, 10.11 and 10.14

The meaning of ‘related party’

- ‘Related party’ is defined in rule 19.12.
- The definition is based on the definition of the same term in the related party transaction provisions in chapter 2E of the Corporations Act (section 228) but has some subtle differences (see section 4.1 of GN 24).
- The following is a high level summary of the ‘related parties’ of a listed company:
  - (i) an entity that controls the listed company
  - (ii) if the listed company is controlled by a body corporate, the directors of that body corporate
  - (iii) if the listed company is controlled by an entity that is not a body corporate, the persons making up that entity
  - (iv) the directors of the listed company
  - (v) spouses and de facto spouses of anyone referred to in (ii) – (iv) above
  - (vi) parents and children of anyone referred to in (ii) – (v) above

Key concepts underpinning rules 10.1, 10.11 and 10.14

The meaning of ‘related party’ (cont.)

(vii) an entity controlled by anyone referred to in (i) – (vi) above unless it is also controlled by the listed company

(viii) anyone who has fallen within (i) – (vii) above within the past 6 months

(ix) anyone who believes or has reasonable grounds to believe that they are likely to fall within (i) – (vii) at any time in the future, and

(x) anyone acting in concert with someone referred to in (i) – (ix) above.

- The list of related parties for other types of listed entities is similar to the list above but with some differences depending on whether the entity is internally or externally managed.
- It is important to study the full definition of related party in rule 19.12. A listed entity must validate whether any transaction it proposes to enter into involves a related party.

Key concepts underpinning rules 10.1, 10.11 and 10.14

The meaning of ‘related party’ (cont.)

- The ‘related parties’ of a natural person are:
  - (i) the person’s spouse or de facto spouse
  - (ii) a parent or child of the person or of a spouse or de facto spouse of the person
  - (iii) an entity controlled by the person or anyone referred to in (i) or (ii)
  - (iv) anyone who has fallen within (i) – (iii) above within the past 6 months
  - (v) anyone who believes or has reasonable grounds to believe that they are likely to fall within (i) – (iii) above at any time in the future, and
  - (vi) a person acting in concert with the person or anyone referred to in (i) – (v) above.
- The definition of ‘related party’ in relation to a natural person is important – the definition of ‘associate’ in rule 19.12 (addressed on the next slide) provides that a related party of a natural person (such as a director) is to be taken to be an associate of the natural person unless the contrary is established.

Key concepts underpinning rules 10.1, 10.11 and 10.14

The meaning of ‘associate’

- ‘Associate’ is defined in rule 19.12.
- The associates of a natural person include an entity that the natural person controls. It also includes a related party of the natural person, unless the contrary is established.
- The associates of a company (or other entity) include:

  (i) an entity the company controls

  (ii) an entity that controls the company, or

  (iii) an entity that is controlled by an entity that controls the company.
- A person’s associates also include anyone with whom they act in concert in relation to a listed entity’s affairs and may include people with whom they have certain agreements in relation to the listed entity. It is important to study the full definition of associate in rule 19.12. An entity must validate whether any transaction it proposes to enter into involves an associate of one of the parties mentioned in rules 10.1, 10.11 and 10.14.

Key concepts underpinning rules 10.1, 10.11 and 10.14

Rule 19.12 definitions

'child entity'

For a listed company, 'child entity' means an entity that is controlled by, or a subsidiary of, the listed entity.

For other types of entities, see the definition of 'child entity' in rule 19.12.

'control'

Defined in essentially the same terms as section 50AA of the Corporations Act.

'substantial (30%+) holder'

A person who, together with their *associates* (as defined in rule 19.12), has a holding in the entity of 30% or more.

See the full definition in rule 19.12

'substantial (10%+) holder'

A person who, together with their *associates* (as defined in rule 19.12), has a holding in the entity of 10% or more.

See the full definition in rule 19.12

Key concepts underpinning rules 10.1, 10.11 and 10.14

The meaning of ‘employee incentive scheme’

- ‘Employee incentive scheme’ (EIS) is defined in rule 19.12. They are essentially schemes for the issue or acquisition of equity securities in the entity by or for the benefit of employees, directors or their related parties.
- The fact that an employee incentive scheme allows participating employees or non-executive directors to elect to have equity securities issued to, or held for the benefit of, a relative or an entity controlled by them or a relative (such as a private company or family trust) does not prevent it from being an employee incentive scheme for the purposes of the rules. Nor does the fact that an employee incentive scheme may also provide for the participation of consultants and contractors, as well as employees and/or non-executive directors.

The exceptions to rule 10.1

Rule 10.3

- Rule 10.3 exempts from the operation of rule 10.1:
  - an agreement or transaction between the entity and a wholly owned child entity or between wholly owned child entities of the entity
  - an agreement or transaction between the constituent members of a stapled group and/or their wholly owned child entities
  - an issue of, or agreement to issue, securities by the entity for cash
  - an acquisition or disposal under an agreement to acquire or dispose of a substantial asset
  - an agreement to acquire or dispose of a substantial asset that is conditional on the holders of the entity's ordinary securities approving the transaction under rule 10.1 before the agreement is given effect to, and
  - an agreement or transaction between the entity and a person who would not otherwise be a related party but for the fact that they believe, or have reasonable grounds to believe, that they are likely to become a related party in the future because of the agreement or transaction.

The exceptions to rule 10.11

Rule 10.12

- Rule 10.12 lists 12 different types of security issues (referred to as numbered ‘exceptions’) to which rule 10.11 does not apply. Those issues can therefore be made without security holder approval under rule 10.11.
- In summary, the exceptions in rule 10.12 are:

1. A pro rata issue to ordinary security holders and to any other security holders entitled to participate in such an issue
2. An issue under an agreement to underwrite a pro rata issue of the type referred to in 1 above
3. An issue under a dividend/distribution reinvestment plan (but not an issue under an agreement to underwrite the shortfall on such a plan)
4. An issue under a qualifying security purchase plan (but not an issue under an agreement to underwrite the shortfall on such a plan)
5. An issue under a regulated takeover or merger
6. An issue approved under item 7 of section 611 of the Corporations Act
7. An issue resulting from the conversion of convertible securities.

The exceptions to rule 10.11

Rule 10.12 (cont.)

8. An issue under an EIS that has been approved by security holders under rule 10.14 (see below)

9. A grant of options or other rights to acquire securities under an EIS where the securities to be acquired on the exercise of the options or in satisfaction of the rights are required by the terms of the EIS to be purchased on-market

10. An issue under an agreement to issue securities

11. An agreement to issue equity securities that is conditional on the holders of its ordinary securities approving the issue under rule 10.11 before the issue is made, and

12. An issue of equity securities under an agreement or transaction between the entity and a person who would not otherwise be a related party but for the fact that they believe, or have reasonable grounds to believe, that they are likely to become a related party in the future because of the agreement or transaction.

- The list of exceptions in rule 10.12 on this and the preceding slide is a high-level summary. Many of the exceptions (including exceptions 2, 3, 4, 7 and 10) have conditions that must be met before they apply. It is important that an entity validates that an issue of equity securities it is proposing to make under an exception in that rule in fact meets the conditions applicable to that exception.

The exceptions to rule 10.14

Rule 10.16

- **Rule 10.16 excludes from the operation of rule 10.14:**
  - securities purchased on-market by or on behalf of directors or their associates under an EIS where the terms of the EIS permit such purchases
  - the grant of options or other rights to acquire securities to directors or their associates under an EIS, where the securities to be acquired on the exercise of the options or in satisfaction of the rights are required by the terms of the EIS to be purchased on-market, and
  - an issue of equity securities pursuant to the exercise of an option or in satisfaction of a right to acquire such securities granted to directors or their associates under an EIS where the entity issued the option or right:
    - before it was listed and disclosed certain information in relation to the option or right in its listing prospectus, PDS or information memorandum, or
    - after it was listed and with the approval of the holders of its ordinary securities under rule 10.14.

The exceptions to rules 10.1, 10.11 and 10.14

Rules 10.3, 10.12 and 10.16

- Many of the exceptions in rules 10.3, 10.12 and 10.16 have a number of conditions that must be met before they apply. It is important that an entity validates that a transaction it is proposing to enter into under an exception in those rules in fact meets the conditions applicable to that exception.
- For example, to fall within the exception in rule 10.3(e) (an acquisition or disposal under an agreement to acquire or dispose of a substantial asset) or exception 10 of rule 10.12 (an issue under an agreement to issue securities), the entity must have entered into the agreement:
  - before it was listed and disclosed the existence and material terms of the agreement in its listing prospectus, PDS or information memorandum, or
  - after it was listed and complied with the rules when it did so.

Notice of meeting requirements for rule 10.1, 10.11 and 10.14 resolutions

Rules 10.5, 10.13 and 10.15

- A notice of meeting seeking security holder approval of an acquisition or disposal of a substantial asset under rule 10.1 must include:
  - the information set out in rules 10.5.1 to 10.5.8
  - a voting exclusion statement (rule 10.5.9), and
  - an independent expert's report that complies with rule 10.6 and opines on whether the transaction is fair and reasonable to security holders to whom the voting exclusion statement does not apply (rule 10.5.10).
- A notice of meeting seeking security holder approval of an issue of equity securities under rule 10.11 must include:
  - the information set out in rules 10.13.1 to 10.13.9, and
  - a voting exclusion statement (rule 10.13.10).

Notice of meeting requirements for rule 10.1, 10.11 and 10.14 resolutions

Rules 10.5, 10.13 and 10.15 (cont.)

- A notice of meeting seeking security holder approval of an issue of equity securities under rule 10.14 must include:
  - the information set out in rules 10.15.1 to 10.15.11, and
  - a voting exclusion statement (rule 10.15.12).
- A notice of meeting seeking security holder approval of a transaction with a person in a position of influence under rule 10.1, 10.11 or 10.14 must also include a summary of the relevant rule and what will happen if security holders give, or do not give, the approval sought under that rule (rule 14.1A).
- An approval under rule 10.1, 10.11 and 10.14 is not valid if the notice does not meet the applicable requirements set out in this and the preceding slide (rule 14.6).
- A notice of meeting that includes a resolution under rule 10.1, 10.11 or 10.14 must be provided to ASX in draft and not finalised until ASX tells the entity that it does not object to the notice (rule 15.1).

Time limit to issue securities approved under rules 10.11 and 10.14

Rules 10.13.5 and 10.15.7

- An issue or agreement to issue equity securities approved by security holders under rule 10.11 must be completed by no later than 1 month after the date of the meeting granting that approval (rules 10.13.5, 14.6 and 14.7).
    - This requirement is designed to strike a balance between giving entities the time practically necessary to complete an issue of equity securities and ensuring that the securities are issued within a reasonable time frame after security holder approval so that the approval can still be considered to be current and not rendered stale by subsequent events.
    - ASX will generally only grant a waiver of this time limit where there is a clear and compelling commercial reason for the issue to be made at a later date, and security holders are in a positon to know with reasonable certainty at the time they approve the issue or agreement the dilutive impact the issue or agreement will have on their security holdings.
- An issue of equity securities under an EIS approved by security holders under rule 10.14 must be completed by no later than 3 years after the date of the meeting granting that approval (rules 10.15.7 and 14.6).
- The 3-year period permitted under rule 10.15.7 compared to the 1 month permitted period under rule 10.13.5 reflects the longer time frame over which most EIS awards are generally made.

Non-executive director fees

Rule 10.17

- Rule 10.17 provides:

  … an entity must not increase the total aggregate amount of directors' fees payable to all of its non-executive directors without the approval of holders of its ordinary securities.

  The notice of meeting must include … :

  - *the amount of the increase*
  - *the maximum aggregate amount of directors' fees that may be paid to all of the entity's non-executive directors*
  - *details of any securities issued to a non-executive director under rule 10.11 or 10.14 with the approval of the holders of the entity's ordinary securities at any time within the preceding 3 years, and*
  - *a voting exclusion statement.*

  For the purposes of this rule, "directors' fees" means all fees payable by the entity or any of its child entities to a non-executive director for acting as a director of the entity or any child entity (including attending and participating in any board committee meetings) and includes superannuation contributions for the benefit of a non-executive director and any fees which a non-executive director agrees to sacrifice for other benefits. ...

Non-executive director fees

Rule 10.17 (cont.)

It does not include reimbursement of genuine out-of-pocket expenses, genuine "special exertion" fees paid in accordance with the entity's constitution, or securities issued to a non-executive director under rule 10.11 or 10.14 with the approval of the holders of the entity's ordinary securities).

- Under rule 10.17A, the total amount of directors' fees paid to the non-executive directors of an entity by the entity or any of its child entities must not exceed the total amount of directors' fees approved by the holders of its ordinary securities under rule 10.17.
- Rules 10.17 and 10.17A do not apply to the remuneration of an executive director. However, under rule 10.17B, an executive director's remuneration must not include a commission on, or percentage of, operating revenue.

Termination benefits

Rules 10.18 and 10.19

- Rule 10.18 provides:

  An entity must ensure that no officer of the entity or of any of its child entities will be entitled to termination benefits (or any increase in them) if a change occurs in the holding of securities or control of the listed entity or child entity.

- Rule 10.19 provides:

  Without the approval of holders of ordinary securities, an entity must ensure that no officer of the entity or any of its child entities will be, or may be, entitled to termination benefits if the value of those benefits and the termination benefits that are or may become payable to all officers together exceed 5% of the equity interests of the entity as set out in the latest accounts given to ASX under the Listing Rules.

- The notice of meeting seeking an approval under rule 10.19 must include a voting exclusion statement.

Transactions with persons in a position of influence

End of module 4

- Congratulations you have reached the end of module 4. In it we covered:
  - the need for security holders to approve certain transactions involving persons in a position of influence under rules 10.1, 10.11 and 10.14
  - the exceptions to rules 10.1, 10.11 and 10.14
  - notice of meeting requirements for approvals under rules 10.1, 10.11 and 10.14
  - the time limit to issue securities approved under rules 10.11 and 10.14
  - the provisions regulating non-executive director fees in rule 10.17, and
  - the provisions regulating termination benefits in rules 10.18 and 10.19.



- For further information on these matters, please refer to GN 24 *Acquisitions and Disposals of Substantial Assets Involving Persons in a Position of Influence* and GN 25 *Issues of Equity Securities to Persons in a Position of Influence*.
- If you wish, you can now move on to module 5 of the course, which covers significant transactions. Alternatively, click here to return to the home page for the course.

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