

## ACQUISITIONS AND DISPOSALS OF SUBSTANTIAL ASSETS INVOLVING PERSONS IN A POSITION OF INFLUENCE

<p><b>The purpose of this Guidance Note</b></p>	<ul style="list-style-type: none"> <li>To assist listed entities to understand and comply with the framework regulating acquisitions and disposals of substantial assets involving persons in a position of influence</li> </ul>
<p><b>The main points it covers</b></p>	<ul style="list-style-type: none"> <li>The requirement in Listing Rule 10.1 for an entity's security holders to approve an acquisition or disposal of a substantial asset involving a person in a position of influence</li> <li>The exceptions to Listing Rule 10.1 in Listing Rule 10.3</li> <li>The application of Listing Rule 10.1 to put and call options</li> <li>The application of Listing Rule 10.1 to takeovers and mergers</li> <li>The requirements for notices of meeting proposing a resolution to approve an acquisition or disposal of a substantial asset under Listing Rule 10.1</li> <li>The powers ASX may exercise if an entity acquires or disposes of a substantial asset in breach of the Listing Rule 10.1</li> </ul>
<p><b>Related materials you should read</b></p>	<ul style="list-style-type: none"> <li>Guidance Note 11 <i>Restricted Securities and Voluntary Escrow</i></li> <li>Guidance Note 17 <i>Waivers and In-Principle Advice</i></li> <li>Guidance Note 25 <i>Issues of Equity Securities to Persons in a Position of Influence</i></li> <li>Guidance Note 35 <i>Security Holder Resolutions</i></li> </ul>

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**Important notice:** ASX has published this Guidance Note to assist listed entities to understand and comply with their obligations under the Listing Rules. Nothing in this Guidance Note necessarily binds ASX in the application of the Listing Rules in a particular case. In issuing this Guidance Note, ASX is not providing legal advice and listed entities should obtain their own advice from a qualified professional person in respect of their obligations. ASX may withdraw or replace this Guidance Note at any time without further notice to any person.

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### 1. Introduction

This Guidance Note is published by ASX Limited (“ASX”) to assist listed entities admitted to the ASX official list as an ASX Listing<sup>1</sup> to understand and comply with the framework in Listing Rules 10.1 – 10.9 regulating acquisitions and disposals of substantial assets involving persons in a position of influence.

Listing Rule 10.1 provides:

*An entity (in the case of a trust, the responsible entity) must ensure that neither the entity, nor any of its child entities, acquires or agrees<sup>2</sup> to acquire a substantial asset from, or disposes of or agrees 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.*

*The notice of meeting to obtain approval must comply with rule 10.5.*

In this Guidance Note, for convenience, the parties mentioned in Listing Rules 10.1.1 – 10.1.5 are collectively referred to as “10.1 parties”, while the parties mentioned in Listing Rule 10.1.5 are referred to as “closely connected parties”.

### 2. The policy underpinning Listing Rule 10.1

The policy that underpins Listing Rule 10.1 starts from the premise that a 10.1 party is likely to be in a position to influence whether the entity acquires a substantial asset from them, or disposes of a substantial asset to them, as well as the terms on which the acquisition or disposal takes place. The harm it seeks to protect against is that the 10.1 party will exercise that influence to favour themselves at the expense of the entity.

To address the potential conflicts involved and to minimise the risk of this harm occurring, Listing Rule 10.1 displaces the general rule that the board of directors (or, in the case of a listed trust, the responsible entity<sup>3</sup> (“RE”) of the trust) is responsible for managing the business of the entity to the exclusion of its security holders and requires the transaction to be approved by the holders of its ordinary securities. The counterparty to the transaction and their associates are precluded from voting on the resolution to approve the transaction.

<sup>1</sup> Listing Rules 10.1 – 10.9 do not apply to entities admitted to the official list as an ASX Debt Listing or as an ASX Foreign Exempt Listing (see Listing Rules 1.10 and 1.15.1). Unless otherwise indicated, references in this Guidance Note to a listed entity or entity mean an entity admitted to the ASX official list as an ASX Listing.

<sup>2</sup> Where an agreement with a 10.1 party to acquire or dispose of a significant asset is approved by the holders of its ordinary securities under Listing Rule 10.1, the subsequent acquisition or disposal of the asset pursuant to that agreement does not require any further approval by security holders: see Listing Rule 10.3(e).

<sup>3</sup> “Responsible entity” means: (a) in relation to a managed investment scheme registered under the Corporations Act, the responsible entity of that scheme under that Act; or (b) in relation to a trust that is not a registered managed investment scheme, the entity that in ASX’s opinion performs a substantially equivalent role in relation to the trust as the responsible entity performs in relation to a registered managed investment scheme (Listing Rule 19.12).

Listing Rule 10.1 operates side-by-side with Chapter 2E of the Corporations Act 2001 (Cth),<sup>4</sup> which regulates transactions between a public company or registered managed investment scheme<sup>5</sup> on the one hand and its related parties on the other. Chapter 2E seeks to protect the interests of members by requiring the company or scheme to obtain approval from its members before it gives a financial benefit to a related party unless an exception applies.<sup>6</sup>

Listing Rule 10.1, however, is different in scope to Chapter 2E. Listing Rule 10.1 only applies to an acquisition or disposal of a substantial asset, whereas Chapter 2E applies to all forms of financial benefits, including a purchase or sale of assets.<sup>7</sup> Conversely, Listing Rule 10.1 extends to a broader range of “connected” parties than just related parties and also does not include the broad exclusion that Chapter 2E has for transactions on arm’s length terms.<sup>8</sup>

### 3. The meaning of key terms

#### 3.1 “Asset”

The term “asset” is not defined in the Listing Rules. In ASX’s opinion, given the reference to accounting concepts and values in Listing Rule 10.2, the term should be understood as including any tangible or intangible property or right that has value and that would ordinarily be recognised as a current or non-current asset in an entity’s accounts.<sup>9</sup> It includes, without limitation, freehold and leasehold interests in land; interests in mining or petroleum tenements; intellectual property rights; interests in child entities; investments; debts<sup>10</sup> and other receivables; plant and equipment; and inventory. It also includes the assets that make up all or part of a business.<sup>11</sup>

For the avoidance of doubt, this does not require the asset to be recognised as a line item in the entity’s statement of financial position – it is sufficient that its value is, was, or in due course will be, recognised or incorporated in the entity’s statement of financial position. Also, the fact that an asset may have been fully written off in the entity’s

<sup>4</sup> Referred to in this Guidance Note as the ‘Corporations Act’. Unless otherwise indicated, references in this Guidance Note to sections of an Act are to sections of the Corporations Act.

<sup>5</sup> On its face, Chapter 2E only applies to transactions between a public company and its related parties. Part 5C.7 of the Corporations Act, however, extends Chapter 2E to transactions between a registered managed investment scheme and its related parties, with some modifications.

It should be noted that Chapter 2E and Part 5C.7 of the Corporations Act only apply to public companies established, and managed investment schemes registered, in Australia under that Act. Related party transactions by companies and trusts formed elsewhere may be subject to additional regulation in their country of formation, over and above Chapter 10 of the Listing Rules.

<sup>6</sup> See sections 208 and 601LA.

<sup>7</sup> See section 229(3)(b).

<sup>8</sup> Section 210.

<sup>9</sup> This issue was addressed by the ASX Appeals Tribunal in *In the matter of Golden West Resources Limited and ASX Market Supervision Pty Limited* 12 March 2010 at page 3:

“It is clear from the definition of substantial asset in Listing Rule 10.2 that the term “asset” in Listing Rule 10.1 is being used in the sense of something which would be recognised as an asset in [the entity’s] accounts and financial statements drawn up in accordance with the applicable accounting principles and lodged with the ASX under the listing rules.”

ASX agrees with the statement above. However, ASX does not agree with the Tribunal’s conclusion in that case that Listing Rule 10.1 did not apply to an iron ore offtake agreement. The Tribunal based its decision on the fact that the iron ore agreed to be disposed of under the offtake agreement had not yet been extracted from the ground and therefore was not yet recorded as an asset on the entity’s balance sheet. The Tribunal sought to support its view by adopting an argument of the appellant that Listing Rule 10.1 does not provide any mechanism by which an asset that doesn’t currently exist and isn’t currently recorded as an asset in an entity’s accounts is to be valued for the purpose of determining whether it is a ‘substantial asset’. In ASX’s view, the thing agreed to be disposed of under the offtake agreement was plainly an asset – namely, inventory – that in due course would be recorded on the entity’s balance sheet. Further, Listing Rule 10.2 does in fact provide a method for valuing such an asset – namely, the value of the consideration being received by the entity for the asset.

<sup>10</sup> To avoid doubt, the reference here to a debt or other receivable being an asset is not intended to suggest that Listing Rule 10.1 applies to the making of a loan by an entity to a 10.1 party, or the receipt of a loan by an entity from a 10.1 party, even where the principal of the loan is 5% or more of the equity interests of the entity. In ASX’s opinion, the receiving or making of a loan is not the acquisition or disposal of an asset for the purposes of Listing Rule 10.1 (noting that the asset represented by the loan does not exist until the loan has been made and a debt incurred). An entity should note, however, if it makes a loan to a related party, that the transaction may require security holder approval under Chapter 2E of the Corporations Act (or its equivalent in overseas jurisdictions) if the loan is not on arm’s length terms. In this regard, section 229(3)(a) specifically includes providing finance within the definition of “financial benefit”.

<sup>11</sup> References in the Listing Rules to the singular include the plural: Listing Rule 19.3(c).

accounts through depreciation, amortisation or impairment charges does not, in ASX's opinion, alter its status as an asset.

### 3.2 "Substantial asset"

Listing Rule 10.2 provides that an asset is substantial if, in ASX's opinion, its value or the value of the consideration being paid or received by the entity for it is 5% or more of the equity interests of the entity, as set out in the latest accounts given to ASX under the Listing Rules.

The term "equity interests" refers to the equity of an entity, as determined in accordance with generally accepted accounting principles. It is effectively the same as "net assets" (ie the difference between total assets and total liabilities).<sup>12</sup>

In determining whether an asset meets the threshold in Listing Rule 10.2 to be a substantial asset, Listing Rule 10.2.1 provides that:

- 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.

Consistent with the use of accounting concepts and terminology in Listing Rules 10.2 and 10.2.1, where an asset is being disposed of, ASX will generally use the value ascribed to the asset in the latest accounts given to ASX under the Listing Rules to determine whether it passes the value threshold to be a substantial asset.<sup>13</sup> However, ASX may use a different measure of value if the asset has been fully written off in the entity's latest accounts or if ASX considers that the value ascribed to the asset in the latest accounts is materially lower than its true value. One indicia of this would be if the consideration being received by the entity for the asset is materially higher than its book value.

Where an asset is being acquired, ASX will generally use the value of the consideration being paid by the entity for the asset to determine whether it passes the value threshold to be a substantial asset. Again, however, ASX may use a different measure of value if ASX considers that the consideration being paid by the entity for the asset is materially lower than the true value of the asset being acquired. An example would be where the entity is acquiring the shares in a company with substantial assets but also substantial liabilities for a relatively low consideration, reflecting the value of the net assets of the company. In that case, ASX is likely to look through the corporate veil of the company at the total value of the underlying assets being acquired, rather than the consideration attributable to the shares.

If ASX has concerns about whether an asset is a substantial asset under the Listing Rules, it may require the entity to provide any information that ASX asks for to enable it to determine whether that is the case. ASX may submit, or require the entity to submit, any such information to the scrutiny of an expert selected by ASX and paid for by the entity.

ASX has on occasions been asked to grant a waiver to allow the determination of whether an asset is a substantial asset to be made by reference to more up-to-date accounts than those most recently given to ASX under the Listing Rules. ASX will only grant such a waiver if the more up-to-date accounts have been audited and the entity provides

<sup>12</sup> The term "equity interests" is defined in Listing Rule 19.12 to mean the sum of paid up capital, reserves, and accumulated profits or losses, disregarding redeemable preference share capital and outside equity interests, as shown in the consolidated financial statements.

<sup>13</sup> If that value is not apparent on the face of the latest accounts given to ASX under the Listing Rules (as is often the case), ASX may require the entity to provide information about the value ascribed to the asset and any depreciation or amortisation attributable to the asset in those accounts (Listing Rule 18.7).

a letter from its auditor explaining how the determination has been affected by using the more up-to-date accounts, including by any change in accounting policy adopted for the purposes of those accounts.

ASX has also on occasions been asked to grant a waiver to allow the determination of whether an asset is a substantial asset to be made on the basis of total assets rather than equity interests (net assets). Typically, these requests are received from entities that have relatively large accumulated losses and therefore a low level of equity interests. Given the underlying intention and purpose of Listing Rules 10.1 and 10.2, ASX will not grant such a waiver. Listing Rule 10.2 sets the benchmark for whether an asset is a substantial asset at 5% of the entity's equity interests. If an entity has large accumulated losses and therefore a lower level of equity interests, then the threshold for an asset to be considered a substantial asset is appropriately lower than is the case for an entity with large accumulated profits and therefore a higher level of equity interests. The most ASX will do in such a case is to grant a waiver of Listing Rule 10.1 in relation to an acquisition or disposal of an asset that is of *de minimis* value. For these purposes, ASX will generally use the \$5,000 threshold for the small benefits exception in Chapter 2E<sup>14</sup> as an appropriate starting point to determine whether an asset is of *de minimis* value.

### 3.3 “Acquire”

“Acquire” has a broad meaning under the Listing Rules. It means 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.<sup>15</sup>

Hence an entity granting a put option to another person that will allow that person to dispose of an asset to the entity, or being granted a call option by another person that will allow the entity to acquire an asset from that person, is treated as an acquisition of that asset by the entity for the purposes of Listing Rule 10.1.

Similarly, taking an asset by enforcing a mortgage, charge or other security interest over the asset is treated as an acquisition of that asset for the purposes of Listing Rule 10.1, even where the mortgage, charge or other security interest was given in support of a bona fide loan on arm's length terms and the asset is taken via enforcement action upon a bona fide default.

The reference to acquiring an asset “indirectly through another person” is intended to capture the use of intermediaries in such transactions, such as where there is a pre-arrangement that a third party will acquire the asset from a 10.1 party and then the listed entity will acquire it from the third party. ASX will regard this as an acquisition of the asset by the listed entity from the 10.1 party for the purposes of Listing Rule 10.1 notwithstanding the intervention of the third party.<sup>16</sup>

### 3.4 “Dispose”

“Dispose” also has a broad meaning under the Listing Rules. It means to dispose of, directly or indirectly through another person, by any means, including:

- granting, being granted or exercising an option;

<sup>14</sup> See section 213 and regulation 2E.1.01.

<sup>15</sup> See the definition of “acquire” in Listing Rule 19.12.

<sup>16</sup> ASX may not take this view if: (a) there is a reasonable gap in time between the original acquisition by the third party from the 10.1 party and the subsequent acquisition by the entity from the third party; (b) the third party was clearly a bona fide acquirer for value from the 10.1 party and subsequently a bona fide disposer for value to the entity; and (c) there is no evidence of the parties acting in concert to achieve that outcome or of any other association between the 10.1 party and the third party.

- declaring a trust over an asset;
- using an asset as collateral;
- decreasing an economic interest; or
- disposing of part of an asset.<sup>17</sup>

Hence an entity granting a call option to another person that will allow that person to acquire an asset from the entity, or being granted a put option by another person that will allow the entity to dispose of an asset to that person, is treated as a disposal of that asset by the entity for the purposes of Listing Rule 10.1.

Similarly, granting a mortgage, charge or other security interest over an asset is treated as a disposal of that asset for the purposes of Listing Rule 10.1, even where it is given in support of a bona fide loan on arm's length terms.

Again, the reference to disposing of an asset "indirectly through another person" is intended to capture the use of intermediaries in such transactions, such as where there is a pre-arrangement that a listed entity will dispose of an asset to a third party and then the third party will dispose of it to a 10.1 party. ASX will regard this as a disposal of the asset by the listed entity to the 10.1 party for the purposes of Listing Rule 10.1, notwithstanding the intervention of the third party.<sup>18</sup>

## 4. The parties caught by Listing Rule 10.1

### 4.1 Listing Rule 10.1.1 – related parties

Listing Rule 10.1.1 applies where the counterparty to an acquisition or disposal of a substantial asset is a related party.

The term "related party" is defined in similar terms under the Listing Rules as it is under the Corporations Act.

Where the listed entity is a body corporate, its related parties include:

- (i) an entity that controls the listed entity;
- (ii) if the listed entity is controlled by an entity that is not a body corporate, the persons making up that entity;
- (iii) directors of the listed entity or of an entity that controls the listed entity;
- (iv) spouses and de facto spouses of anyone referred to in (ii) and (iii) above;
- (v) parents and children of anyone referred to in (ii), (iii) and (iv) above;
- (vi) an entity controlled by anyone referred to in (i) – (v) above unless it is also controlled by the listed entity;
- (vii) anyone who has fallen within (i) – (vi) above within the past 6 months;
- (viii) anyone who believes or has reasonable grounds to believe that they are likely to fall within (i) – (vi) at any time in the future; and
- (ix) anyone acting in concert with someone referred to in (i) – (viii) above.<sup>19</sup>

<sup>17</sup> See the definition of "dispose" in Listing Rule 19.12.

<sup>18</sup> Again, ASX may not take this view if: (a) there is a reasonable gap in time between the original disposal by the entity to the third party and the subsequent disposal by the third party to the 10.1 party; (b) the third party was clearly a bona fide acquirer for value from the listed entity and subsequently a bona fide disposer for value to the 10.1 party; and (c) there is no evidence of the parties acting in concert to achieve that outcome or of any other association between the 10.1 party and the third party.

<sup>19</sup> Paragraph (a) of the definition of "related party" in Listing Rule 19.12. This is essentially the same definition as in section 228 of the Corporations Act.

Where the listed entity is an internally managed<sup>20</sup> trust, its related parties include:

- (i) an entity that controls the trust;
- (ii) if the trust is controlled by an entity that is not a body corporate, the persons making up that entity;
- (iii) directors of the RE of the trust or of an entity that controls the trust;
- (iv) spouses and de facto spouses of anyone referred to in (ii) and (iii) above;
- (v) parents and children of anyone referred to in (ii), (iii) and (iv) above;
- (vi) an entity controlled by anyone referred to in (i) – (v) above unless it is also controlled by the RE of the trust in its capacity as RE of the trust;
- (vii) anyone who has fallen within (i) – (vi) above within the past 6 months;
- (viii) anyone who believes or has reasonable grounds to believe that they are likely to fall within (i) – (vi) above at any time in the future; and
- (ix) anyone acting in concert with someone referred to in (i) – (viii) above.<sup>21</sup>

Where the listed entity is an externally managed<sup>22</sup> trust, its related parties include:

- (i) the RE of the trust;
- (ii) an entity that controls the RE;
- (iii) if the RE is controlled by an entity that is not a body corporate, the persons making up that entity;
- (iv) directors of the RE or of an entity that controls the RE;
- (v) spouses and de facto spouses of anyone referred to in (iii) and (iv) above;
- (vi) parents and children of anyone referred to in (iii), (iv) and (v) above;
- (vii) an entity controlled by the RE of the trust other than in its capacity as RE of the trust;
- (viii) an entity controlled by anyone referred to in (ii) – (vii) above unless it is also controlled by the RE of the trust in its capacity as RE of the trust;
- (ix) anyone who has fallen within (ii) – (viii) above within the past 6 months;
- (x) anyone who believes or has reasonable grounds to believe that they are likely to fall within (ii) – (viii) above at any time in the future; and
- (xi) anyone acting in concert with someone referred to in (i) – (x) above.<sup>23</sup>

For convenience, a person's spouse or de facto spouse, their parents and children, and the parents and children of their spouse or de facto spouse, are referred to in this Guidance Note as "prescribed relatives". Controllers of the entity (or in the case of an externally managed trust, of the RE) and the other entities they control are referred to as "group entities".

<sup>20</sup> As defined in Listing Rule 19.12.

<sup>21</sup> Paragraph (b) of the definition of "related party" in Listing Rule 19.12.

<sup>22</sup> As defined in Listing Rule 19.12.

<sup>23</sup> Paragraph (c) of the definition of "related party" in Listing Rule 19.12. This is largely the same definition as in section 228 of the Corporations Act, as modified by section 601LA, but with the addition of paragraphs (i) and (vii), and the qualification of paragraph (viii) by the addition of the words "in its capacity as RE of the trust".

### 4.2 Listing Rule 10.1.2 – child entities

Listing Rule 10.1.2 applies where the counterparty to an acquisition or disposal of a substantial asset is a child entity. This is subject to the exceptions in Listing Rules 10.3(a) and (b) excluding from Listing Rule 10.1 transactions between the entity and a wholly owned child entity or between wholly owned child entities of the entity.<sup>24</sup>

Listing Rule 10.1.2 is intended to close a potential loophole in Listing Rule 10.1 that could arise if a 10.1 party has a material interest in a non-wholly owned child entity of a listed entity. In that scenario the 10.1 party could benefit from an acquisition by the listed entity (or another child entity) of a substantial asset from, or the disposal by the listed entity (or another child entity) of a substantial asset to, the non-wholly owned child entity in question. Given this purpose, ASX will generally grant a waiver from the application of Listing Rule 10.1.2 to a transaction upon being satisfied that none of the parties referred to in Listing Rules 10.1.1 or 10.1.3 – 10.1.5 have a material interest in the child entity in question.<sup>25</sup>

“Child entity” is defined to mean:

- in relation to a listed body corporate, an entity which is controlled by, or a subsidiary<sup>26</sup> of, the body corporate; or
- in relation to a listed trust, an entity which is controlled by the RE of the trust in its capacity as the RE of the trust.<sup>27</sup>

For these purposes, an entity controls<sup>28</sup> a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity’s financial and operating policies. In determining whether the first entity has this capacity:

- (a) the practical influence the first entity can exert (rather than the rights it can enforce) is the issue to be considered; and
- (b) any practice or pattern of behaviour affecting the second entity’s financial or operating policies is to be taken into account (even if it involves a breach of an agreement or a breach of trust).

A body corporate will not be taken to control a second entity if it is under a legal obligation to exercise its capacity to influence decisions about the second entity’s financial and operating policies for the benefit of someone other than its members.

A trust will be taken to control an entity that the RE of the trust controls in its capacity as RE of the trust. It will not be taken to control an entity that the RE of the trust controls in some other capacity.

### 4.3 Listing Rule 10.1.3 – substantial (10%+) holders

Listing Rule 10.1.3 applies where the counterparty to an acquisition or disposal of a substantial asset is, or was at any time in the 6 months before the transaction, a substantial (10%+) holder in the entity.

The Listing Rules define a “substantial (10%+) holder” to mean:

<sup>24</sup> See ‘5.1 Transactions involving wholly-owned child entities’ on page 14.

<sup>25</sup> See ‘8.2 Transactions involving non-wholly owned child entities’ on page 25.

<sup>26</sup> “Subsidiary” has the same meaning as in sections 46 – 48 of the Corporations Act (Listing Rule 19.3).

<sup>27</sup> See the definition of “child entity” in Listing Rule 19.12.

<sup>28</sup> See the definition of “control” in Listing Rule 19.12. Note that the first entity does not control the second entity merely because the first entity and a third entity jointly have the capacity to determine the outcome of decisions about the second entity’s financial and operating policies.

- in relation to an Australian company<sup>29</sup> or a trust which is a registered managed investment scheme, a person who would have a “substantial holding” in the company or scheme under paragraph (a) of the definition of that term in section 9 of the Corporations Act<sup>30</sup> if the reference in that paragraph to 5% was 10%;
- in relation to a trust which is not a registered managed investment scheme or which is a foreign trust,<sup>31</sup> a person who would have a “substantial holding” in the trust under paragraph (a) of the definition of that term in section 9 of the Corporations Act if the references in that paragraph to a scheme and interests in the scheme were references to the trust and units in the trust and the reference to 5% was 10%; and
- in relation to a foreign company,<sup>32</sup> a person who would have a “substantial holding” in the company under paragraph (a) of the definition of “substantial holder” in section 9 of the Corporations Act if the references in that paragraph to a company and its securities were references to the foreign company and its securities and the reference to 5% was 10%.

#### 4.4 Listing Rule 10.1.4 – associates

Listing Rule 10.1.4 applies where the counterparty to an acquisition or disposal of a substantial asset is an associate of a person referred to in Listing Rules 10.1.1, 10.1.2 or 10.1.3.

Under the Listing Rules, a person’s associates include:

- if the person is a natural person, any entity<sup>33</sup> the person controls;
- if the person is an entity:<sup>34</sup>
  - any entity the person controls;
  - any entity that controls the person;
  - any entity that is controlled by an entity that controls the person;
- any person with whom the person has, or proposes to enter into, a relevant agreement<sup>35</sup> for the purpose of controlling or influencing the composition of the listed entity’s board<sup>36</sup> or the conduct of the listed entity’s affairs; and

<sup>29</sup> “Australian company” means a body corporate that is formed or established in Australia (Listing Rule 19.12).

<sup>30</sup> Paragraph (a) of the definition of “substantial holding” in section 9 of the Corporations Act (as modified by ASIC Class Order 13/520) effectively provides that a person has a substantial holding in a company or a listed registered managed investment scheme if the total votes attached to voting shares in the body, or voting interests in the scheme, in which they or their associates have a relevant interest, or would have a relevant interest but for sections 609(6) (market traded options and derivatives), 609(7) (conditional agreements) or 609(11) (restricted securities), is 5% or more of the total votes attached to the voting shares in the company or the voting interests in the scheme.

<sup>31</sup> “Foreign trust” means a trust or similar overseas entity that is not formed or established in Australia and that is not a registered managed investment scheme under the Corporations Act (Listing Rule 19.12).

<sup>32</sup> “Foreign company” means a body corporate that is not formed or established in Australia (Listing Rule 19.12).

<sup>33</sup> “Entity” in this context means a body corporate, partnership, unincorporated body or a trust and includes, in the case of a trust, the RE of the trust (see the definition of “associate” in Listing Rule 19.12).

<sup>34</sup> See note 33 above.

<sup>35</sup> “Relevant agreement” has the same meaning as in section 9 of the Corporations Act (Listing Rule 19.3). It includes an agreement, arrangement or understanding: (a) whether formal or informal or partly formal and partly informal; (b) whether written or oral or partly written and partly oral; and (c) whether or not having legal or equitable force and whether or not based on legal or equitable rights.

<sup>36</sup> If the listed entity is an externally managed trust, the reference to controlling or influencing the composition of the listed entity’s board is taken to be a reference to controlling or influencing whether a particular entity becomes or remains the trust’s RE. If the listed entity is an internally managed trust, the reference to controlling or influencing the composition of the listed entity’s board is taken to be a reference to controlling or influencing the board of the trust’s RE.

- any person with whom the person is acting, or proposing to act, in concert in relation to the listed entity's affairs.<sup>37</sup>

Where the person is a natural person, their related parties are taken to be their associates unless the contrary is established. This provision exists as an evidentiary aid. It is based on the premise that because of the close connection between an individual and their related parties, it should be presumed that the individual is able to control a related party, or that a related party is acting in concert with the individual, unless the contrary is proven. Otherwise it is too easy for the individual and the related party simply to deny any association and to put others to the task of proving that they are associates.

The related parties of an individual include:

- (i) the individual's spouse or de facto spouse;
- (ii) the parents and children of the individual and the parents and children of the individual's spouse or de facto spouse;
- (iii) an entity controlled by the individual or anyone referred to in (i) or (ii) above;
- (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 who acts in concert with the individual or anyone referred to in (i) – (v) above.<sup>38</sup>

#### 4.5 Listing Rule 10.1.5 – ASX's discretion to apply Listing Rule 10.1 to other parties

Listing Rule 10.1.5 applies where the counterparty to an acquisition or disposal of a substantial asset is a person whose relationship to the entity or a person referred to in Listing Rules 10.1.1 to 10.1.4 is such that, in ASX's opinion, the transaction should be approved by security holders.

Listing Rule 10.1.5 effectively gives ASX a discretion to require that security holders approve an acquisition or disposal of a substantial asset under Listing Rule 10.1 where the counterparty is not one of the parties referred to in Listing Rules 10.1.1 to 10.1.4 but, in ASX's opinion, is nonetheless in a position to exert influence over the entity's decision to enter into the transaction.

Given the breadth of the parties captured by Listing Rules 10.1.1. to 10.1.4, this is not a discretion that ASX is often called upon to exercise and not one that it exercises lightly, since it imposes additional costs and delays on an entity in having to hold a meeting of security holders to approve a transaction that would otherwise be within the authority of the entity's board (or, in the case of a listed trust, its RE). Nevertheless, it is a discretion that ASX can exercise at any time, including after the transaction in question has been entered into.

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<sup>37</sup> See the definition of "associate" in Listing Rule 19.12. This definition is based on, but in some respects is broader than, the definition of "associate" in section 12 of the Corporations Act. For example, in the Listing Rules definition, the references to a body corporate in section 12(2)(a) have been replaced with references to an entity so as to capture trusts, partnerships and other unincorporated bodies (see note 33 above) and a new paragraph has been added specifying that if the primary person is a natural person, their associates include any entity they control.

The Listing Rules definition also includes a provision deeming a related party of a natural person to be their associate unless the contrary is proven. As mentioned in the text, this is intended to put the evidentiary burden on a person who asserts that they do not control and are not acting in concert with a related party to prove that is so.

The definition of "associate" in Listing Rule 19.12 has an equivalent carve-out to that provided in section 16 of the Corporations Act, which states that a person is not an associate of another person merely because of one or more of the following: (a) one gives advice to the other, or acts on the other's behalf, in the proper performance of the functions attaching to a professional capacity or a business relationship; (b) one, a client, gives specific instructions to the other, whose ordinary business includes dealing in financial products, to acquire financial products on the client's behalf in the ordinary course of that business; (c) one had sent, or proposes to send, to the other an offer under a takeover bid for securities held by the other; or (d) one has appointed the other, otherwise than for valuable consideration given by the other or by an associate of the other, to vote as a proxy or representative at a meeting of members, or of a class of members, of the listed entity.

<sup>38</sup> Paragraph (d) of the definition of "related party" in Listing Rule 19.12.

One situation where ASX may exercise its discretion under Listing Rule 10.1.5 involves connected transactions. For example, suppose entity A is disposing of a substantial asset to entity B. B is not a party referred to in Listing Rules 10.1.1 – 10.1.4 and so the disposal ordinarily would not require security holder approval under Listing Rule 10.1. However, suppose B is entering into a separate transaction<sup>39</sup> with entity C, who is a 10.1 party in relation to A, and that transaction is conditional on the disposal from A to B occurring. This creates an incentive for C to influence the terms of the disposal from A to B. ASX is likely to apply Listing Rule 10.1.5 to B in these circumstances and require security holder approval to the disposal of the substantial asset by A to B.

Another situation where ASX may exercise its discretion under Listing Rule 10.1.5 involves transactions between two otherwise unrelated externally managed trusts with unrelated responsible entities that have delegated investment decisions to the same investment manager or to two investment managers within the same corporate group. In such a case, since it is the manager making the investment decisions rather than the responsible entity, ASX is likely to consider this to be on all fours with the situation of two trusts with the same responsible entity or with responsible entities within the same corporate group.

Other examples of where ASX may apply Listing Rule 10.1.5 to an acquisition or disposal of a substantial asset include where the counterparty is:

- a person or entity who has a close connection to a person referred to in Listing Rules 10.1.1 – 10.1.3 but who is not technically a related party (and therefore is not an assumed associate<sup>40</sup>) of that person and ASX suspects that the transaction may have been deliberately structured in this way to avoid the operation of Listing Rule 10.1;<sup>41</sup>
- someone, or a person or entity that has a close connection with someone, who has not been formally appointed as a director of the entity but who ASX suspects is acting as a de facto director;<sup>42</sup> and
- someone who the entity is arguing is not a party referred to in Listing Rules 10.1.1 – 10.1.4 but ASX has a contrary view – in which case, ASX may resolve that argument by applying Listing Rule 10.1.5 to the person.

Ordinarily, ASX would not exercise its discretion to apply Listing Rule 10.1.5 to someone who is the chief executive officer (“CEO”) of an entity and who is not a director and not otherwise a 10.1 party, simply because of his or her position as CEO. This is on the premise that since the CEO is not a member of the board, the CEO is not in a position to influence the board’s determination on whether or not to acquire a substantial asset from, or dispose of a substantial asset to, the CEO and the board, acting in accordance with its statutory and common law duties,<sup>43</sup> can be presumed to have exercised an independent judgement on the appropriateness of any such transaction.

<sup>39</sup> Note that if A was disposing of the substantial asset to B and B was then disposing of that asset to C, under the expanded definition of “dispose” in Listing Rule 19.12, ASX would generally treat that as an indirect disposal from A to C and apply Listing Rule 10.1 accordingly.

<sup>40</sup> See the discussion of the provisions in the Listing Rules deeming an individual’s related parties to be their associates in ‘4.4 Listing Rule 10.1.4 – associates’ on page 10.

<sup>41</sup> An example would be where the counterparty to the acquisition or disposal of a substantial asset is a brother or sister of a director. A sibling is not a “prescribed relative” and therefore not a related party of a director who would be deemed to be an associate of the director in the absence of proof to the contrary. Nevertheless, if the entity is not able to give ASX a compelling commercial justification as to why it is transacting with the sibling and compelling evidence that the sibling is not in fact an associate of the director, ASX is likely to apply Listing Rule 10.1.5 to the sibling. In this scenario, ASX considers it not unreasonable to assume, in the absence of evidence to the contrary, that the transaction is intended indirectly to benefit the director and that it has been deliberately structured in this way in an attempt to avoid Listing Rule 10.1.

<sup>42</sup> In this context, “de facto director” means a person who acts in the position of director even though they have not been formally appointed to the role and any other person whose instructions or wishes are customarily followed by the board of the entity.

An example ASX has encountered in a related area is a person who was the largest shareholder in a company applying to list on ASX who had been appointed as the company secretary but not as a director of the company. Another example involved the largest investor in a company the subject of a back door listing who was known to have issues with his fame and character and who was being appointed as a consultant to the board when two other investors with smaller shareholdings were being appointed as directors. In each case, ASX considered this a fairly transparent attempt to circumvent ASX’s good fame and character requirements for directors of a new listing (Listing Rule 1.1 condition 20) but to allow the individual to attend board meetings in an official capacity and act as a de facto director.

<sup>43</sup> In common with all other powers exercisable by directors, the power to acquire or dispose of a substantial asset must be exercised by the directors in accordance with their statutory and common law duties to act with due care and diligence, in good faith, in the best interests of the entity and for a proper purpose. See, for example, sections 180 and 181 (officers of listed companies) and 601FD (officers of responsible entities of listed trusts) of the Corporations Act.

However, there may be circumstances where this premise does not hold true and where ASX will consider applying Listing Rule 10.1.5 to a CEO or to someone closely connected with a CEO. These include where:

- a close relative of the CEO or someone with whom the CEO has close business or personal ties is a director of the entity;
- ASX suspects that the CEO is acting as a de facto director; or
- the terms of the transaction are so uncommercial as to call into question whether the board has properly exercised an independent judgement.

#### 4.6 ASX's approach to giving in-principle advice on the application of Listing Rule 10.1.5

ASX is sometimes approached by an entity to give in-principle advice that it will not apply Listing Rule 10.1.5 in relation to a particular person proposing to acquire a substantial asset from, or dispose of a substantial asset to, the entity.

For ASX to give that advice, it has to be satisfied that there is no reasonable prospect of the person influencing the terms of the transaction to favour themselves at the expense of the entity. The entity seeking the advice must disclose candidly the full extent of the relationship between the person and their related parties on the one hand and the entity and its 10.1 parties on the other, and any influence that the person may have over the entity's board (or, in the case of a listed trust, over the RE of the trust).

Any in-principle advice that ASX provides in this regard will be expressed to be non-binding and based on the facts known at the time. If the entity omits or misrepresents material facts in its application for in-principle advice, or if other material facts come to light after ASX provides its advice, ASX may withdraw or change its advice.

If ASX decides that it will not apply Listing Rule 10.1.5 in relation to a particular person, it may impose conditions and, if it does so, the entity must comply with the conditions.<sup>44</sup> An example of a condition that ASX may impose is a condition that the entity disclose to the market the nature and extent of the relationship between the person and the entity or its 10.1 parties and the steps the board of the entity (or, in the case of a listed trust, the RE of the trust) has taken to satisfy itself that the transaction is being entered into on arm's length terms and is fair and reasonable from the perspective of the holders of the entity's ordinary securities.

#### 4.7 The responsibility for identifying 10.1 parties

It is the responsibility of a listed entity to identify whether the counterparty to an acquisition or disposal of a substantial asset is a 10.1 party.

This should not prove unduly onerous. An entity should already have arrangements in place to identify its related parties and their associates so that it can comply with Chapter 2E (or equivalent overseas legislation) and the various accounting requirements applicable to transactions with related parties.<sup>45</sup> It should be aware of which entities are its child entities. It should also be aware of the identity of substantial holders of its securities and their associates through the substantial shareholding notices they will have given to the entity under section 671B of the Corporations Act (or equivalent overseas legislation).

Directors of a listed entity (or, in the case of a listed trust, of the RE of the trust) have obligations to disclose any material personal interests they have in a matter that relates to the affairs of the entity<sup>46</sup> and to exercise due care and diligence to avoid causing the entity to breach the Listing Rules.<sup>47</sup> In ASX's view, this extends to disclosing any

<sup>44</sup> Listing Rule 18.5A provides that ASX may exercise, or decide not to exercise, any power or discretion conferred under the Listing Rules in its absolute discretion. It may do so on any conditions and, if it does so, the entity must comply with the conditions.

<sup>45</sup> See Accounting Standard AASB 124 *Related Party Disclosures*.

<sup>46</sup> See section 191 of the Corporations Act. While this section only applies to companies formed in Australia under that Act, companies formed in other jurisdictions are likely to be subject to an equivalent requirement under the governing legislation where they are formed or under the constitution of the company.

<sup>47</sup> See *ASIC v Macdonald (No 11)* [2009] NSWSC 287, where the court found that the non-executive directors, CEO, CFO and company secretary/general counsel of a listed company all breached their duties to the company under section 180(1) as a result of their involvement in a failure by the company to announce certain information in breach of Listing Rule 3.1 and section 674 and in the company making a

material personal interest they may have in an acquisition or disposal of a substantial asset and any other matter that they may be aware of that might trigger the application of Listing Rule 10.1 to a transaction.

## 5. The exceptions in Listing Rule 10.3

### 5.1 Transactions involving wholly-owned child entities

Listing Rule 10.1 does not apply to an agreement or transaction between the entity and a wholly owned child entity, or between wholly owned child entities of the entity.<sup>48</sup> These are excluded on the basis that the relevant acquisition or disposal takes place wholly within the same economic entity and so there is no prospect of any value shifting from the entity to a person in a position of influence.

This exception will normally apply to a “spin-out” or “de-merger”, that is, a transfer by an entity of an asset to a wholly-owned child entity, followed by a pro-rata in-specie distribution of the securities held by the entity in the child entity to the entity’s security holders.<sup>49</sup> If, however, the spin-out or de-merger involves 10.1 parties receiving differential treatment compared to ordinary security holders (for example, being issued securities or being paid success fees for facilitating the transaction), ASX may determine that the transaction is not one just between the entity and a wholly-owned child entity and therefore this exception does not apply.

### 5.2 Transactions between entities in the same stapled group

Listing Rule 10.1 does not apply to an agreement or transaction between:

- entities that are part of a stapled group;
- an entity that is part of a stapled group and a wholly owned child entity of that entity;
- an entity that is part of a stapled group and a wholly owned child entity of another entity in the stapled group;
- wholly owned child entities of an entity that is part of a stapled group; or
- a wholly owned child entity of an entity that is part of a stapled group and a wholly owned child entity of another entity in the stapled group.<sup>50</sup>

Again, these are excluded on the basis that the relevant acquisition or disposal takes place wholly within the same economic entity and so there is no prospect of any value shifting from the entity to a person in a position of influence. Generally, the stapling arrangements for stapled entities ensure that security holders have the same proportionate interest in each of the stapled entities. Hence, a transfer of an asset between the parties described above will have no impact on the proportionate economic interest of each security holder in that asset.

### 5.3 Issues of securities for cash

Listing Rule 10.1 does not apply to an issue of, or agreement to issue, securities by an entity for cash.<sup>51</sup>

Issues of securities to parties in a position of influence instead are regulated by Listing Rules 10.11 and 10.14. Guidance Note 25 *Issues of Equity Securities to Persons in a Position of Influence* has guidance on the operation of those Listing Rules.

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misleading announcement about other information in breach of section 1041H. The decision against the non-executive directors and the company secretary/general counsel was ultimately affirmed on appeal by the High Court in *ASIC v Hellicar* [2012] HCA 17 and *Shafron v ASIC* [2012] HCA 18 respectively. The decision against the CFO was affirmed on appeal by the NSW Court of Appeal in *Morley v ASIC*, [2010] NSWCA 331). The CEO did not appeal the decision at first instance.

<sup>48</sup> Listing Rules 10.3(a) and (b).

<sup>49</sup> Cf *Quancorp Pty Ltd v MacDonald* (1999) 32 ACSR 50.

<sup>50</sup> Listing Rule 10.3(c).

<sup>51</sup> Listing Rule 10.3(d).

### 5.4 Agreements to acquire or dispose of a substantial asset

Listing Rule 10.1 does not apply to an acquisition or disposal under an agreement to acquire or dispose of a substantial asset.<sup>52</sup> The exception is only available if the entity entered into the agreement:

- (a) before it was listed and it disclosed the existence and material terms of the agreement in the prospectus, PDS or information memorandum lodged with ASX under Listing Rule 1.1 condition 3;<sup>53</sup> or
- (b) after it was listed and it complied with the Listing Rules when it did so.

This is a technical exception intended to ensure that the Listing Rules deal appropriately with agreements to acquire or dispose of a substantial asset. The time at which an agreement to acquire or dispose of a substantial asset is tested to determine whether it requires approval under Listing Rule 10.1 is the time the agreement is entered into. If at that time the agreement complies with the Listing Rules, any subsequent acquisition or disposal in accordance with the agreement does not require security holder approval under Listing Rule 10.1.

In the case of (a) above, the Listing Rules effectively treat the fact that security holders have agreed to invest in the entity after it has disclosed the existence and material terms of the agreement in its listing prospectus, PDS or information memorandum as an implicit approval by security holders to the agreement. However, this does not mean that the entity has carte blanche to enter into an agreement with 10.1 parties to acquire or dispose of a substantial asset pre-listing. ASX may refuse to admit the entity to the official list and to quote its securities if ASX considers that the agreement will result in the entity not having an appropriate structure for a listed entity,<sup>54</sup> or it is otherwise appropriate for ASX to exercise its absolute discretion to refuse the entity's application for admission.<sup>55</sup>

To meet the requirement in (a) above that the entity disclose the existence and material terms of the agreement in its listing prospectus, PDS or information memorandum, the entity should include in that document:<sup>56</sup>

- the name of the person from whom the entity is acquiring the substantial asset or to whom the entity is disposing of the substantial asset;
- which category in Listing Rules 10.1.1 – 10.1.5 the person falls within and why;
- details of the asset being acquired or disposed of;
- the consideration for the acquisition or disposal;
- in the case of an acquisition, the intended source of funds (if any) to pay for the acquisition;
- in the case of a disposal, the intended use of funds (if any) received for the disposal;
- the timetable for completing the acquisition or disposal; and
- a summary of any other material terms of the agreement.

To meet the requirement in (b) above that the entity must have complied with the Listing Rules when it entered into the agreement, the agreement must have fallen outside of Listing Rule 10.1 when it was made or else have been approved by security holders under that rule.

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<sup>52</sup> Listing Rule 10.3(e).

<sup>53</sup> For these purposes, the Listing Rules effectively treat the fact that security holders have agreed to invest in the entity after it has disclosed the existence and terms of the agreement in its listing prospectus, PDS or information memorandum as de facto approval by security holders of the agreement.

<sup>54</sup> Listing Rule 1.1 condition 1. See section 3.1 of Guidance Note 1 *Applying for Admission – ASX Listings* for examples of when ASX may determine that an entity does not have a structure or operations appropriate for a listed entity.

<sup>55</sup> Listing Rule 1.19. See section 2.9 of Guidance Note 1 *Applying for Admission – ASX Listings* for examples of when ASX may exercise this discretion.

<sup>56</sup> By analogy with the information required to be disclosed under Listing Rule 10.5 in a notice of meeting seeking security holder approval under Listing Rule 10.1.

### 5.5 Transactions subject to approval under Listing Rule 10.1

Listing Rule 10.1 does not apply to 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 Listing Rule 10.1 before the agreement is given effect to.<sup>57</sup> If an entity relies on this exception it must not give effect to the agreement without such approval.

This too is a technical exception to address the point that Listing Rule 10.1 applies to an agreement to acquire or dispose of a substantial asset to a 10.1 party and requires security holders to approve the agreement before it is entered into. This exception allows an entity to enter into an agreement to acquire or dispose of a substantial asset to 10.1 party on condition that the acquisition or disposal is approved by the holders of its ordinary securities before the acquisition or disposal is given effect to.

### 5.6 Future related parties

Listing Rule 10.1 does not apply to 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.<sup>58</sup>

This also is a technical exception to prevent Listing Rule 10.1 being triggered prematurely. The definition of "related party" extends to a person who believes, or has reasonable grounds to believe, that they are likely to become a related party in the future.<sup>59</sup> Hence, if a person is negotiating an agreement or transaction with an entity that will lead to them becoming a related party of the entity, as soon as they believe, or have reasonable grounds to believe, that the agreement or transaction is going ahead, they become a related party of the entity.

In practice, the situation where this most commonly arises is where the transaction terms provide that the counterparty is to be appointed to the board of the entity once the agreement is concluded or the transaction has been completed.

This exception is based on the premise that because the person is not yet a related party of the entity, they have no influence over the board (or, in the case of a listed trust, the RE) of the entity and the board (or RE), acting in accordance with its statutory and common law duties,<sup>60</sup> can be presumed to have exercised an independent judgement on the appropriateness of entering into the agreement or transaction with the person. However, there may be circumstances where this premise does not hold true and where ASX will consider applying Listing Rule 10.1.5 to the person. These include where:

- a close relative of the person or someone with whom the person has close business or personal ties is a director of the entity (or, in the case of a trust, a director of the RE); or
- the terms of the transaction are so uncommercial as to call into question whether the board (or, in the case of a trust, the RE) has properly exercised an independent judgement.

ASX interprets this exception as only applying to related parties caught by Listing Rule 10.1.1. Accordingly, if ASX does apply Listing Rule 10.1.5 to a person in these circumstances, this exception will no longer be available to them.

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<sup>57</sup> Listing Rule 10.3(f).

<sup>58</sup> Listing Rule 10.3(g.)

<sup>59</sup> See paragraph (viii) of the definition of "related party" in relation to a body corporate, paragraph (viii) of the definition of "related party" in relation to an internally managed trust and paragraph (x) of the definition of "related party" in relation to an externally managed trust set out in '4.1 Listing Rule 10.1.1 – related parties' on page 7 and following'.

<sup>60</sup> See note 43 above.

## 6. The application of Listing Rule 10.1 to particular cases

### 6.1 Externally managed listed trusts

Listing Rule 10.1 potentially has a wider application to externally managed listed trusts than listed companies or internally managed listed trusts by dint of the fact that the related parties of an externally managed trust include its RE, any entities that control its RE (“controllers”), any entities controlled by its controllers (other than those controlled by the RE in its capacity as the RE of the listed trust), and any entities that its RE controls other than in its capacity as the RE of the listed trust.

For the avoidance of doubt, where the counterparty to an acquisition or disposal of a substantial asset by an externally managed listed trust is:

- the RE in its personal capacity;
- a related body corporate of the RE;
- another trust<sup>61</sup> with the same RE; or
- another trust that has a related body corporate of the RE as its RE,

the transaction is plainly caught by Listing Rule 10.1.1 and will require security holder approval unless an exception in Listing Rule 10.3 applies or ASX grants a waiver. ASX is highly unlikely to grant a waiver of Listing Rule 10.1 in the first two instances above, given the clear conflict between the interests of the listed trust and the interests of the RE group. However, ASX may be prepared to grant a waiver in the last two instances above, provided it is clear to ASX that the harm Listing Rule 10.1 seeks to protect against is not present. Factors that will be relevant in this regard include (but are not limited to):

- whether the transaction is of a type that the listed trust indicated in its listing PDS it was likely to undertake;
- the make-up of the boards of the REs of the two trusts, including the extent to which they have any common directors or independent directors;
- the decision making processes the boards of the REs of the two trusts have employed to manage potential conflicts of interest and to ensure that the transaction is in the interests of both trusts;
- whether the REs of the two trusts are being advised by independent external investment managers or investment advisers;
- whether the RE group has a material unitholding in either of the two trusts, thereby possibly creating an incentive for the RE group to favour one trust over the other;
- whether the RE group’s fees for managing the two trusts are different, again possibly creating an incentive for the RE group to favour one trust over the other;
- whether the price for the acquisition/disposal has been validated as an arm’s length price (eg because it was recently acquired by the disposing trust through a competitive auction or tender and it is being disposed of at the same price) or is supported by an independent valuation report); and
- whether the transaction has been opined on by an independent expert as being fair and reasonable and in the interests of the listed trust.

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<sup>61</sup> References to an acquisition of a substantial asset from, or a disposal of a substantial asset to, a trust include an acquisition or disposal where the counterparty is the RE of the trust in that capacity or a trustee, custodian or sub-custodian who holds or will hold the asset on trust for the beneficiaries of the trust.

### 6.2 Options

Options potentially involve a double application of Listing Rule 10.1 arising from the fact that the terms “acquisition” and “disposal” are defined to include granting or being granted an option and also exercising an option.

Listing Rule 10.4 addresses acquisitions and disposals of a substantial asset effected via an option. It provides:

- the consideration for the acquisition or disposal is the total of the issue price of the option and its exercise price;
- whether an asset is a substantial asset is to be assessed when the option is granted and also when the option is exercised; and
- if at the time an option is granted, an asset is not a substantial asset but at the time the option is to be exercised the asset has become a substantial asset, the exercise of the option must be approved under Listing Rule 10.1. This can be done at any time before the option is exercised (including before the asset became a substantial asset).

Hence, if an asset is a substantial asset at the time an option is given to or taken from a 10.1 party, the giving or taking of the option must be approved under Listing Rule 10.1. Once that approval has been obtained, no further approval is required under Listing Rule 10.1 for the exercise of the option.

If an asset is not a substantial asset at the time an option is given to or taken from a 10.1 party, the giving or taking of the option does not require approval under Listing Rule 10.1. However, if the asset becomes a substantial asset<sup>62</sup> before the option is exercised, approval must be obtained under Listing Rule 10.1 to the acquisition or disposal of the asset before the option is exercised. The entity is free to do this at any time, including before the asset becomes a substantial asset. This gives the entity the opportunity to remove any uncertainty about the exercisability of the option by seeking and obtaining approval under Listing Rule 10.1 at the time the option is given or taken rather than when it is exercised.

### 6.3 Takeovers and mergers

Listing Rule 10.1 can apply to an acquisition of securities by an entity under a takeover bid or merger by scheme of arrangement.<sup>63</sup> This will occur if someone who is a 10.1 party of the entity is also a security holder in the takeover or merger target and the size of their holding is large enough to be a substantial asset (ie the value of their holding, or the value of the consideration to be paid for their holding, in the target exceeds 5% of the equity interests in the entity, as set out in the latest accounts given to ASX under the Listing Rules). In such a case, absent a waiver from ASX, the acquisition by the entity of the 10.1 party’s holding under the bid or scheme will require security holder approval under Listing Rule 10.1 even though the issue of securities to them as consideration for the acquisition may well be excepted from the requirement for security holder approval in Listing Rule 10.11 by Listing Rule 10.12 exception 5.

In these circumstances, ASX has typically received a request from the entity in question for a waiver of Listing Rule 10.1. On some occasions this waiver has been granted, while on others it has been refused.

Generally ASX has agreed to grant a waiver from Listing Rule 10.1 where the 10.1 party has a materially larger security holding in the entity than it does in the takeover or merger target – the rationale being that the relative holdings of the 10.1 party in the entity and the target means that it is unlikely that the 10.1 party will exercise its power of influence over the entity to cause it to overpay to acquire the target since that would not materially advance its economic interests. Conversely, ASX has refused to grant a waiver from Listing Rule 10.1 where the 10.1 party has a materially smaller security holding in the entity than it does in the target – the rationale being that the relative

<sup>62</sup> An asset can become a substantial asset because it increases in value, and/or because the equity interests of the entity decrease in value, after the option has been given or taken.

<sup>63</sup> Listing Rule 10.3(d) excludes from Listing Rule 10.1 an issue of securities by an entity for cash. That exclusion plainly does not apply to an issue of securities in exchange for securities in the target of a takeover bid or in an entity being acquired or merged with under a scheme of arrangement.

holdings of the 10.1 party in the entity and the target may well give it an incentive to exercise its power of influence to cause the entity to overpay to acquire the target.

ASX would stress that all such waiver applications are determined by ASX on a case-by-case basis with more factors considered than just relative percentage security holdings. Those factors include:

- whether the entity can demonstrate that there is no economic rationale for it to overpay in order to benefit the 10.1 party or another closely connected party, with the onus being firmly on the entity to demonstrate that there is no reasonable possibility of the target being acquired at an over-value – relative percentage security holdings are relevant in this regard, but so too are the relative sizes of the entity and the target;
- whether or not the 10.1 party has representation on the entity's or the target's board;
- whether or not the 10.1 party has other economic interests that could be affected if the transaction proceeds or does not proceed; and
- ASX otherwise being satisfied that the 10.1 party does not have, or is unlikely to exercise, the capacity to exert influence over the terms of the proposed transaction.

#### **6.4 Leases**

The granting of a lease by a 10.1 party as landlord to an entity as tenant is an acquisition of a leasehold interest in land by the entity from the 10.1 party for the purposes of Listing Rule 10.1.

Likewise, the granting of a lease by an entity as landlord to a 10.1 party as tenant is a disposal of a leasehold interest in land by the entity to the 10.1 party for the purposes of Listing Rule 10.1.

To determine the value of that leasehold interest, ASX will typically look at the total rent payable under the lease over its term (including any option to renew) to determine whether or not it equals or exceeds 5% of the equity interests of the entity, as set out in the latest accounts given to ASX under the Listing Rules. If it does, ASX will regard the lease as a substantial asset and the transaction will require security holder approval under Listing Rule 10.1.

#### **6.5 Term contracts**

An agreement by an entity to buy goods from a 10.1 party over an extended term is an acquisition of those goods by the entity from the 10.1 party for the purposes of Listing Rule 10.1.

Likewise, an agreement by an entity to sell goods to a 10.1 party over an extended term is a disposal of those goods by the entity to the 10.1 party for the purposes of Listing Rule 10.1.

To determine the value of those goods, ASX will typically look at the total purchase price payable for the goods under the agreement over its term (including any option to renew) to determine whether or not it equals or exceeds 5% of the equity interests of the entity, as set out in the latest accounts given to ASX under the Listing Rules. If it does, ASX will regard the goods as a substantial asset and the transaction will require security holder approval under Listing Rule 10.1.

#### **6.6 Mining and petroleum offtake agreements**

An offtake agreement entered into by an entity as buyer to buy a certain amount or percentage of a 10.1 party's future mineral or petroleum production is an acquisition of the minerals or petroleum by the entity from the 10.1 party for the purposes of Listing Rule 10.1.

Likewise, an offtake agreement entered into by an entity as seller to sell a certain amount or percentage of its future mineral or petroleum production to a 10.1 party as buyer is a disposal of the minerals or petroleum by the entity to the 10.1 party for the purposes of Listing Rule 10.1.

Again, to determine the value of the minerals or petroleum, ASX will typically look at the total purchase price payable under the agreement over its term (including any option to renew) to determine whether or not it equals or exceeds

5% of the equity interests of the entity, as set out in the latest accounts given to ASX under the Listing Rules. If it does, ASX will regard the minerals or petroleum as a substantial asset and the transaction will require security holder approval under Listing Rule 10.1.

### 6.7 Security interests

The definition of “dispose” includes using an asset as collateral. Accordingly, the granting of security by an entity over any of its assets to secure a debt or obligation owing to a 10.1 party is regarded as a disposal of those assets by the entity to the 10.1 party for the purposes of Listing Rule 10.1. If at the time the security is granted the value of the assets equals or exceeds 5% of the equity interests of the entity, as set out in the latest accounts given to ASX under the Listing Rules, the granting of the security will require security holder approval under Listing Rule 10.1.

ASX may be prepared to grant a waiver to allow the security to be granted to a 10.1 party without security holder approval provided certain conditions are satisfied (see section 8.4 below).

By contrast, the definition of “acquire” includes enforcing collateral and taking an asset. Accordingly, the granting of security by a 10.1 party over any of its assets to secure a debt or obligation owing to an entity is not regarded by ASX as an acquisition of those assets by the entity from the 10.1 party for the purposes of Listing Rule 10.1 unless and until the entity enforces its security and takes the assets. If at that time the value of the assets equals or exceeds 5% of the equity interests of the entity, as set out in the latest accounts given to ASX under the Listing Rules, the taking of the assets will require security holder approval under Listing Rule 10.1.

ASX has sometimes had to address situations where a listed entity has granted a security interest to secure a debt owing to a financier and then a 10.1 party has taken an assignment of the debt and security interest from the financier. ASX takes the view that where:

- the financier was clearly an arm’s length bona fide provider of financial accommodation to the listed entity;
- there is no evidence of any association between the financier and the 10.1 party in relation to the provision of the financial accommodation;
- there is a reasonable gap in time between the original provision of the financial accommodation and the subsequent assignment of the debt and security interest by the financier to the 10.1 party;<sup>64</sup> and
- there are no material changes to the terms of the debt or the security interest as part of, or in connection with, the assignment,<sup>65</sup>

the assignment is not a disposal of an asset by the listed entity to the 10.1 party<sup>66</sup> and therefore falls outside of Listing Rule 10.1.<sup>67</sup> It should be noted, however, that if the 10.1 party subsequently advances further funds to the entity that are covered by the security interest,<sup>68</sup> ASX will treat that as a separate transaction for the purposes of Listing Rule 10.1. Accordingly, if at the time of the subsequent advance, the value of the assets the subject of the security equals or exceeds 5% of the equity interests of the entity, as set out in the latest accounts given to ASX

<sup>64</sup> See note 18 above and the accompanying text.

<sup>65</sup> If the entity does agree to any material changes to the terms of the debt or the security interest as part of, or in connection with, the assignment, ASX is likely to regard that as the practical equivalent of the entity granting a new security interest to the 10.1 party.

<sup>66</sup> Rather it was a disposal of the security interest by the entity to the financier when the security interest was originally granted and then a disposal of the security interest by the financier to the 10.1 party at the time of the assignment.

<sup>67</sup> This conclusion does not change even if the assignment of the debt and security interest requires the consent of the listed entity. However, it should be noted that the giving of such consent could constitute the “giving of a financial benefit” (within the meaning of section 229 of the Corporations Act) by the entity to the 10.1 party potentially requiring, if the 10.1 party is a “related party” of the entity (within the meaning of that Act), security holder approval under Chapter 2E if the entity is a company or under Part 5C.7 if the entity is a trust. Further, in agreeing to the assignment, the directors of the entity (or, in the case of a trust, the RE) would have to be satisfied that they are complying with their statutory and common law duties to act with due care and diligence, in good faith, in the best interests of the entity and for a proper purpose (see note 43 above).

<sup>68</sup> For example, because it is an “all-moneys” security.

under the Listing Rules, the making of the subsequent advance under the security will require security holder approval under Listing Rule 10.1.

### 6.8 Disposals by a receiver, administrator or liquidator

ASX does not regard Listing Rule 10.1 as applying to a disposal of a substantial asset by a receiver acting on behalf of a secured creditor or creditors under a mortgage, charge or other security, or by an administrator or liquidator acting under their statutory powers, even though technically they may be acting as agent for and on behalf of the company in undertaking the disposal. This is on the general principle that once a listed entity is approaching insolvency, the interests of its creditors take precedence over the interests of its security holders and it would be inappropriate for an entity's security holders to be able to exercise a right of veto over the disposal of a substantial asset in these circumstances. In any event, a receiver, administrator or liquidator has a statutory power to dispose of the company's assets<sup>69</sup> that would override any requirement in the Listing Rules for the transaction to be approved by security holders.

Hence a receiver, administrator or liquidator acting in accordance with their statutory powers is free to dispose of a substantial asset to a 10.1 party without security holder approval under Listing Rule 10.1.

However, Listing Rule 10.1 does apply to the giving of collateral under a mortgage, charge or other security to a 10.1 party.<sup>70</sup> This applies even where the security is granted to secure financial accommodation from the 10.1 party that is needed by the entity to avoid insolvency or to avoid or cure a default under its other financing agreements and hence to avoid the appointment of a receiver, administrator or liquidator.

### 6.9 Additional requirements for acquisitions of classified assets

If the substantial asset being acquired from a 10.1 party is a "classified asset", the consideration for the acquisition must be restricted securities<sup>71</sup> unless, and to the extent that, the consideration is reimbursement of expenditure incurred by the 10.1 party in developing the classified asset. The restricted securities must be subject to escrow for 12 months from the date of their issue.<sup>72</sup>

This effectively prohibits cash payments as part of the consideration for the acquisition of a classified asset, with a carve-out for reimbursement of cash expenditure incurred by the 10.1 party in developing the classified asset. If an entity seeks to rely on this carve-out, ASX may require evidence of the amounts actually incurred by the 10.1 party in developing the asset in question.

A "classified asset" means:

- (a) an interest in a mining tenement or petroleum tenement that is substantially explorative or unproven;
- (b) an interest in intangible property that is substantially speculative or unproven, or has not been profitably exploited for at least three years, and which entitles the entity to develop, manufacture, market or distribute the property;
- (c) an interest in an asset which, in ASX's opinion, cannot readily be valued; or
- (d) an interest in an entity the substantial proportion of whose assets (held directly, or through a controlled entity) is property of the type referred to in paragraphs (a), (b) and (c) above.<sup>73</sup>

<sup>69</sup> See section 420(2)(g) (receivers), 437A(1)(c) (administrators) and 477(2)(c) and 506(1)(b) (liquidators) of the Corporations Act. A similar analysis applies to a disposal by someone winding up a managed investment scheme under Part 5C.9 of the Corporations Act.

Also, in the case of an administrator disposing of a listed company's assets under a deed of company arrangement, such an arrangement, when approved by the creditors of the company in the manner required under the Corporations Act, is binding on the company and its members, without the need for any separate approval by members (see section 444G of the Corporations Act).

<sup>70</sup> See '6.7 Security interests' on page 20 and '8.4 The granting of security to a 10.1 party' on page 26.

<sup>71</sup> Listing Rule 10.7.

<sup>72</sup> Listing Rules 9.1(b) and (c) and row 5 of Appendix 9B.

<sup>73</sup> Listing Rule 19.12.

Guidance Note 11 *Restricted Securities and Voluntary Escrow* has further guidance on the requirements an entity must satisfy to issue restricted securities.

## 7. Requirements for notices of meeting

### 7.1 The type and terms of resolution required

The resolution required to approve an acquisition or disposal of a substantial asset under Listing Rule 10.1 is an ordinary resolution.<sup>74</sup>

Listing Rule 10.1 does not dictate the specific terms of the resolution required under that rule. A resolution to the following effect will suffice:

“That the [*description of transaction*] is approved under and for the purposes of Listing Rule 10.1.”

### 7.2 Specific disclosure requirements for resolutions under Listing Rule 10.1

A notice of meeting proposing a resolution to approve an acquisition or disposal of a substantial asset under Listing Rule 10.1 must include a summary of Listing Rule 10.1 and what will happen if security holders give, or do not give, the approval sought under that rule.<sup>75</sup>

A summary along the following lines will suffice for these purposes:

“[*Name of entity*] is proposing to [*insert a description of the proposed acquisition or disposal, defining it as the “Transaction” (or something similar)*].

Listing Rule 10.1 provides that a listed [*company/trust*] must not acquire or agree to acquire a substantial asset from, or dispose of or agree to dispose of a substantial asset to:

- 10.1.1 a related party;
- 10.1.2 a child 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 [*company/trust*];
- 10.1.4 an associate of a person referred to in Listing Rules 10.1.1 to 10.1.3; or
- 10.1.5 a person whose relationship with the [*company/trust*] or a person referred to in Listing Rules 10.1.1 to 10.1.4 is such that, in ASX’s opinion, the issue or agreement should be approved by [*shareholders/unitholders*],

unless it obtains the approval of its [*shareholders/unitholders*].

The Transaction falls within Listing Rule [*insert which of rules 10.1.1 to 10.1.5 applies*] and involves the [*acquisition/disposal*] of a substantial asset. It therefore requires the approval of [*name of entity*]’s [*shareholders/unitholders*] under Listing Rule 10.1.

Resolution [*nº*] seeks the required [*shareholder/unitholder*] approval to the Transaction under and for the purposes of Listing Rule 10.1.

If resolution [*nº*] is passed, [*name of entity*] will be able to proceed with the Transaction and [*outline the consequences that will follow*].

If resolution [*nº*] is not passed, [*name of entity*] will not be able to proceed with the Transaction and [*outline the consequences that will follow*].”

<sup>74</sup> Listing Rule 14.9.

<sup>75</sup> Listing Rule 14.1A.

A notice of meeting proposing a resolution to approve an acquisition or disposal of a substantial asset under Listing Rule 10.1 must also include:<sup>76</sup>

- the name of the person from whom the entity is acquiring the substantial asset or to whom the entity is disposing of the substantial asset;<sup>77</sup>
- which category in Listing Rules 10.1.1 – 10.1.5 the person falls within and why;<sup>78</sup>
- details of the asset being acquired or disposed of;<sup>79</sup>
- the consideration for the acquisition or disposal;<sup>80</sup>
- in the case of an acquisition, the intended source of funds (if any) to pay for the acquisition;<sup>81</sup>
- in the case of a disposal, the intended use of funds (if any) received for the disposal;<sup>82</sup>
- the timetable for completing the acquisition or disposal;<sup>83</sup>
- if the acquisition or disposal is occurring under an agreement, a summary of any other material terms of the agreement;<sup>84</sup>
- a voting exclusion statement;<sup>85</sup> and
- a report on the transaction from an independent expert.<sup>86</sup>

This information may be given in the notice itself or in an accompanying explanatory memorandum to security holders.<sup>87</sup>

### 7.3 The requirement for an independent expert's report

If Listing Rule 10.1 applies to an acquisition or disposal of a substantial asset, the notice of meeting seeking security holder approval must include an independent expert report stating the expert's opinion as to whether the transaction is fair and reasonable to holders of the entity's ordinary securities whose votes are not to be disregarded.<sup>88</sup>

The expert's opinion as to whether the transaction is fair and reasonable should be displayed prominently in the notice of meeting and on the covering page of any accompanying explanatory memorandum.

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<sup>76</sup> An approval of security holders is not effective under the Listing Rules unless the notice of meeting includes everything that the Listing Rules require it to include: Listing Rule 14.6.

<sup>77</sup> Listing Rule 10.5.1.

<sup>78</sup> Listing Rule 10.5.2.

<sup>79</sup> Listing Rule 10.5.3.

<sup>80</sup> Listing Rule 10.5.4.

<sup>81</sup> Listing Rule 10.5.5.

<sup>82</sup> Listing Rule 10.5.6.

<sup>83</sup> Listing Rule 10.5.7.

<sup>84</sup> Listing Rule 10.5.8.

<sup>85</sup> Listing Rule 10.5.9. See also '7.5 Voting exclusions' on page 24.

<sup>86</sup> Listing Rule 10.5.10. See also '7.3 The requirement for an independent expert's report' on page 23.

<sup>87</sup> Listing Rule 14.1.

<sup>88</sup> Listing Rule 10.5.10. See section 7.5 below for a description of the parties whose votes are to be disregarded.

The independent expert report must comply with ASIC Regulatory Guides 111 *Contents of expert reports*<sup>89</sup> and 112 *Independence of experts*,<sup>90</sup> regardless of where the entity is incorporated.<sup>91</sup>

ASX will not waive the requirement for an independent expert's report. The requirement exists so that security holders are given an independent and objective assessment of whether the transaction is fair and reasonable and can factor that into their decision on whether or not to approve the transaction. For ASX to grant such a waiver would effectively involve ASX substituting its opinion on whether the transaction is fair and reasonable to security holders for that of an independent expert. That is not an appropriate role for ASX to perform.

### 7.4 General disclosure requirements for a notice of meeting

As a matter of general law, a notice of meeting proposing a resolution under Listing Rule 10.1 must include such material as will fully and fairly inform security holders of the matters to be considered at the meeting and enable them to make a properly informed judgement on those matters.<sup>92</sup> In some cases, this may require the entity to disclose additional information over and above that specifically required under the Listing Rules summarised in sections 7.2 and 7.3 above.

If the transaction also requires approval as a related party benefit under section 208 or 601LA of the Corporations Act, the notice must include or attach an explanatory statement that complies with section 219 of that Act.<sup>93</sup>

### 7.5 Voting exclusions

A notice of meeting proposing a resolution to approve an acquisition or disposal of a substantial asset under Listing Rule 10.1 must include a voting exclusion statement.<sup>94</sup>

A voting exclusion statement is a statement to the effect that the entity will disregard any votes cast in favour of the resolution by or on behalf of an excluded person or an associate of an excluded person, save where it is cast by:

- a person as proxy or attorney for another person who is entitled to vote on the resolution, in accordance with directions given to the proxy or attorney to vote in that way;
- the chair of the meeting as proxy or attorney for a person who is entitled to vote on the resolution, in accordance with a direction given to the chair to vote on the resolution as the chair decides; or
- a holder acting solely in a nominee, trustee, custodial or other fiduciary capacity on behalf of a beneficiary provided the following conditions are met:
  - the beneficiary provides written confirmation to the holder that they are not excluded from voting, and are not an associate of a person excluded from voting, on the resolution; and
  - the holder votes on the resolution in accordance with directions given by the beneficiary to the holder to vote in that way.<sup>95</sup>

In the case of a resolution approving a transaction under Listing Rule 10.1, the excluded persons are the person disposing of the substantial asset to, or acquiring the substantial asset from, the entity and any other person who will obtain a material benefit as a result of the transaction (except a benefit solely by reason of being the holder of ordinary securities in the entity).

<sup>89</sup> Referred to in this Guidance Note as "RG 111". RG 111 is available online at: <http://download.asic.gov.au/media/1240152/rq111-30032011.pdf>.

<sup>90</sup> RG 112 is available online at: <http://download.asic.gov.au/media/3336169/rq112-published-25-august-2015.pdf>.

<sup>91</sup> See RG 111.4 and 111.52.

<sup>92</sup> See *Bulfin v Bebarfalds Ltd* (1938) 38 SR (NSW) 423 and *Chequepoint Securities Ltd v Claremont Petroleum NL* (1986) 11 ACLR 94.

<sup>93</sup> See ASIC Regulatory Guide 76 *Related party transactions*.

<sup>94</sup> Listing Rule 10.5.9 and the table in Listing Rule 14.11.1.

<sup>95</sup> Listing Rule 14.11.

For these purposes, ASX considers a “material benefit” to be one that is likely to induce the recipient of the benefit to vote in favour of the transaction regardless on its impact on ordinary security holders. Examples include:

- a professional adviser or other person who will be paid a success (or similar) fee if the transaction proceeds;<sup>96</sup>
- if the entity is proposing to undertake an issue of securities to fund the transaction:
  - an underwriter or sub-underwriter who will be paid an underwriting or sub-underwriting fee in relation to the issue; and
  - a lead manager of, or broker to, the issue who will be paid a fee or commission on the proceeds of the issue.<sup>97</sup>

ASX also has a general discretion to designate any other person whose votes, in ASX’s opinion, should be disregarded. This discretion may be exercised both before and after the notice of meeting has been sent to security holders.

Where ASX exercises its discretion under Listing Rule 10.1.5 to apply Listing Rule 10.1 to a person who is closely connected to the entity or to a person referred to in Listing Rule 10.1.1 – 10.1.4, it will usually consider whether there are any other parties that should be excluded from voting on the resolution under Listing Rule 10.1. For example, if ASX exercises its discretion to apply Listing Rule 10.1 to a person because they have a close connection with a director of the entity, ASX will usually make a determination that the director and his or her associates<sup>98</sup> are excluded from voting on the resolution.

Guidance Note 35 *Security Holder Resolutions* has further guidance on voting exclusions and the procedures that should be followed at a meeting of security holders where a resolution under Listing Rule 10.1 is being considered.

## 8. Waivers

### 8.1 ASX’s general approach to granting waivers of Listing Rule 10.1

ASX regards Listing Rule 10.1 as one of the fundamental protections afforded to investors under the Listing Rules. While ASX may consider procedural and other minor waivers of the rule, ASX will only waive the central requirement for security holders to approve an acquisition or disposal of a significant asset involving a 10.1 party, where it is clear to ASX that the harm Listing Rule 10.1 seeks to protect against is not present. The onus is firmly on the entity seeking the waiver to establish this to ASX’s satisfaction.

Hence, to receive such a waiver, an entity must establish to ASX’s satisfaction that there is no reasonable prospect of the counterparty influencing the terms of the transaction to favour themselves at the expense of the entity.

The mere fact that a director excuses himself or herself from participating in the discussion and decision at a board meeting concerning a proposed sale or purchase of a substantial asset in which they or someone connected to them is involved will not be sufficient to establish an absence of influence.

### 8.2 Transactions involving non-wholly owned child entities

As mentioned in section 4.2 above, Listing Rule 10.1.2 applies where the counterparty to an acquisition or disposal of a substantial asset is a child entity. This is subject to the exceptions in Listing Rules 10.3(a) and (b) excluding

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<sup>96</sup> This is not intended to capture normal fixed or time-based fees paid to a professional adviser advising on the transaction. It is only intended to capture fees that are directly related to the success of the transaction.

<sup>97</sup> This is not intended to capture normal handling fees payable to individual brokers who lodge acceptances or renunciations on behalf of security holders. It is only intended to capture fees and commissions payable to a lead manager of, or broker to, the issue that are directly related to the success of the transaction.

<sup>98</sup> If the voting exclusion is applied by ASX to a director under the final entry in the table in Listing Rule 14.11.1, it will automatically extend to the director’s associates under Listing Rule 14.11. If the voting exclusion is applied by ASX under Listing Rule 14.11.2, ASX will generally stipulate that the director’s associates are also excluded from voting in favour of the transaction.

from Listing Rule 10.1 transactions between the entity and a wholly owned child entity or between wholly owned child entities of the entity.

Listing Rule 10.1.2 is intended to close a potential loophole in Listing Rule 10.1 that could arise if a 10.1 party has a material interest in a non-wholly owned child entity of a listed entity. In that scenario the 10.1 party could benefit from an acquisition by the listed entity (or another child entity) of a substantial asset from, or the disposal by the listed entity (or another child entity) of a substantial asset to, the non-wholly owned child entity in question. Given this purpose, ASX will generally grant a waiver from the application of Listing Rule 10.1.2 to a transaction upon being satisfied that none of the parties referred to in Listing Rules 10.1.1 or 10.1.3 – 10.1.5 have a material interest in the child entity in question.

### 8.3 Standard supply agreements

Some entities (such as agricultural companies) will often buy goods from, or sell goods to, their customers under standard supply agreements. If a customer is a director or substantial (10%+) holder of the entity (and therefore a 10.1 party) and the total consideration payable over the term of the supply agreement exceeds the value threshold in Listing Rule 10.2, this may trigger a requirement for security holder approval under Listing Rule 10.1.

ASX may be prepared to grant a waiver from Listing Rule 10.1 to an entity to allow it to enter into a standard supply agreement with a 10.1 party on condition that the terms applicable to the 10.1 party are the same as those that apply to all other customers.

### 8.4 The granting of security to a 10.1 party

The granting of security by an entity over any of its assets to secure a debt or obligation owing to a 10.1 party is regarded as a disposal of those assets by the entity to the 10.1 party for the purposes of Listing Rule 10.1. If at the time the security is granted the value of the assets equals or exceeds 5% of the equity interests of the entity, as set out in the latest accounts given to ASX under the Listing Rules, the granting of the security will require security holder approval under Listing Rule 10.1.

ASX may be prepared to grant a waiver from Listing Rule 10.1 to permit an entity to grant security over a substantial asset to a 10.1 party to support financial accommodation provided by the 10.1 party to the entity without security holder approval under Listing Rule 10.1 on condition that:

- the material terms of the transaction and of the waiver are announced to the market;
- the announcement includes a description of the reasons why the entity has chosen to obtain the financial accommodation from the 10.1 party rather than a lender that is not a 10.1 party and the steps the board of the entity (or, in the case of a listed trust, the RE of the trust) has taken to satisfy itself that the transaction is being entered into on arm's length terms and is fair and reasonable from the perspective of the holders of the entity's ordinary securities;
- the security documents expressly provide that:
  - the security is limited to the funds due under the financial accommodation;<sup>99</sup>
  - the security will be discharged when the funds due under the financial accommodation have been repaid in full;
  - in the event the security is enforced, the assets can only be disposed of to the 10.1 party or an associate of the 10.1 party if the disposal is first approved by the entity's security holders under Listing Rule 10.1; and
  - otherwise, if the holder of the security exercises, or appoints a receiver, receiver and manager or analogous person to exercise, any power of sale under the security, the assets must be sold to an

<sup>99</sup> In other words, the security cannot be an "all moneys" security.

unrelated third party on arm's length commercial terms and the net proceeds of sale distributed to the 10.1 party in accordance with their legal entitlements;

- any variation to the terms of the financial accommodation or the security which:
  - advantages the 10.1 party in a material respect;
  - disadvantages the entity in a material respect; or
  - is inconsistent with the terms of the waiver,must be subject to security holder approval under Listing Rule 10.1; and
- for each year while they remain on foot, a summary of the material terms of the financial accommodation and the security is included in the related party disclosures in the entity's audited annual accounts.

## 9. ASX's enforcement powers

ASX has a range of enforcement powers it can exercise if an entity acquires or disposes of a substantial asset in breach of Listing Rule 10.1 or proposes to do so.

ASX may:

- suspend the quotation of the entity's securities until the matter has been dealt with to ASX's satisfaction;<sup>100</sup>
- if the transaction has not yet taken place, direct the entity not to proceed with the transaction;<sup>101</sup>
- if the transaction has already taken place, direct the entity to cancel or reverse the transaction;<sup>102</sup> and/or
- direct the entity to convene a meeting of security holders to approve the transaction under Listing Rule 10.1.<sup>103</sup>

More generally, where an entity acquires or disposes of a substantial asset in breach of Listing Rule 10.1 and ASX considers the breach to be an egregious one, ASX may:

- censure the entity for breaching the Listing Rules;<sup>104</sup> and/or
- terminate the entity's admission to the official list.<sup>105</sup>

The type of action ASX will take will depend on the nature and severity of the breach.

Whenever ASX takes enforcement action against an entity for breaching Listing Rule 10.1, ASX will usually require the entity to make an announcement to the market explaining that action and why it was taken.

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<sup>100</sup> Listing Rule 17.3.1.

<sup>101</sup> Listing Rule 18.8(c).

<sup>102</sup> Listing Rule 18.8(d).

<sup>103</sup> Listing Rule 18.8(e). Where ASX imposes such a requirement and security holders do not approve the transaction, ASX may impose such further requirements as it considers appropriate under Listing Rule 18.8.

<sup>104</sup> Listing Rule 18.8A.

<sup>105</sup> Listing Rule 17.12.