



Australian Government

Takeovers Panel

**Reasons for Decision
Nex Metals Explorations Ltd
[2021] ATP 12**

Catchwords:

Frustrating action – prescribed occurrence – defeating condition – rights issue – shareholder approval – need for funds – failure to disclose – efficient, competitive and informed market – reasonable and equal opportunity – joint venture – shareholder intention statements – declaration – orders

Corporations Act 2001 (Cth), sections 602, 606, 652C, 657A, 657D

Guidance Note 4: Remedies General, Guidance Note 12: Frustrating Action, Guidance Note 17: Rights Issues, Guidance Note 23: Shareholder intention statements

Brisbane Markets Limited [2016] ATP 3, Gondwana Resources Limited 02 [2014] ATP 15, Northern Iron Limited [2014] ATP 11, World Oil Resources Limited [2013] ATP 1, Rey Resources Ltd [2009] ATP 14, MYOB Limited [2008] ATP 27, Pinnacle VRB Ltd 08 [2001] ATP 17

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
NO	YES	YES	YES	YES	NO

INTRODUCTION

1. The Panel, Marina Kelman, Michael Lishman and Karen Phin (sitting President) made a declaration of unacceptable circumstances in relation to the affairs of Nex Metals Explorations Ltd. Nex Metals is the subject of a conditional off-market scrip bid by Metalicity Ltd. The Panel considered that the proposed Rights Issue by Nex Metals was a frustrating action in respect of Metalicity’s Bid and that Nex Metals shareholders had not been given sufficient information to enable them to consider the merits of the Rights Issue and the Bid. It made orders that if Nex Metals proceeds with the Rights Issue, or announces another rights issue, such issue must be subject to shareholder approval.

2. In these reasons, the following definitions apply.

- Bid** Has the meaning given in paragraph 8
- Bid condition** The no prescribed occurrence condition of Metalicity’s Bid referred to in paragraph 9
- Bidder’s Statement** Has the meaning given in paragraph 9
- Joint Venturer** Each of Nex Metals and KMPL (but does not include KMPL in its capacity as the Manager)
- JV** The unincorporated joint venture established under the JV Agreement
- JV Agreement** Has the meaning given in paragraph 5

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KMPL	Kym Mining Pty Ltd, a wholly-owned subsidiary of Metalicity
Manager	KMPL in its capacity as Manager of the JV
Metalicity	Metalicity Ltd
Nex Metals	Nex Metals Explorations Ltd
Rights Issue	Has the meaning given in paragraph 10
Rights Issue Announcement	Nex Metals' announcement of the Rights Issue dated 29 September 2021

FACTS

3. Nex Metals is an ASX listed mining exploration company (ASX code: NME) which owns certain tenements located in Kookynie and Yundamindra, Western Australia.
4. Metalicity is also an ASX listed mining exploration company (ASX code: MCT). KMPL is one of its wholly-owned subsidiaries, with an approximate 1.5% shareholding in Nex Metals.¹
5. On or about 4 May 2019, Nex Metals entered into a farm-in and joint venture agreement (**JV Agreement**) with KMPL and Metalicity (as guarantor) for the Kookynie and Yundamindra projects in Western Australia.
6. Pursuant to the JV Agreement, KMPL is required to spend no less than \$5 million on the Kookynie and Yundamindra projects to earn a 51% interest in the projects. Once the farm-in spend is achieved, the JV is established such that:
 - (a) KMPL is appointed as the Manager of the JV and
 - (b) KMPL has rights to 51% of the JV and Nex Metals retains a minority 49% interest.
7. On 20 May 2021, Metalicity announced that it had notified Nex Metals that the farm-in component of the JV Agreement had been achieved and that Metalicity had a 51% controlling interest in the Kookynie and Yundamindra projects. Nex Metals also made an announcement that same day confirming that it had received such notification from Metalicity.²
8. On 14 September 2021, Metalicity announced its intention to make a conditional off-market scrip bid for all of the ordinary shares in Nex Metals, offering 4.81 Metalicity shares for every 1 Nex Metals share (**Bid**).
9. On 24 September 2021, Metalicity issued and served its bidder's statement in relation to the Bid (**Bidder's Statement**). Offers made under the Bidder's Statement are

¹ As at the date of the application

² On 15 November 2021, Nex Metals announced that it had lodged (as the plaintiff) in the Supreme Court of Western Australia, a writ of summons with an indorsement of claim against KMPL (as the defendant), seeking, among other things, declarations in respect of the JV Agreement that KMPL has not provided notice to Nex Metals verifying the amount of the Stage 1 Project Expenditure that KMPL has incurred and that KMPL has not acquired the right to a 51% interest in the Kookynie and Yundamindra projects

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subject to a number of defeating conditions, including that no “Prescribed Occurrence” occurs in relation to Nex Metals or any of its subsidiaries (Condition 11.8(j)). Prescribed Occurrence was defined to include an event where “[Nex Metals] or a Subsidiary issues shares, or grants an option over its shares, or agrees to make such an issue or grant such an option...”

10. On 29 September 2021, Nex Metals announced that it was undertaking a 1 for 3 non-renounceable rights issue to raise up to \$3.115 million (before costs) priced at \$0.035 per share (**Rights Issue**). The announcement stated that the proceeds of the Rights Issue would be used by Nex Metals to (among other things) contribute to its JV commitments, meet costs of the “*proposed takeover (defence or otherwise)*”, for working capital and to identify new project opportunities.

APPLICATION

11. By application dated 30 September 2021, Metalicity sought a declaration of unacceptable circumstances. Metalicity submitted that the Rights Issue was “*plainly designed*” to frustrate the Bid which could be seen from the following matters (among others):
 - (a) the Rights Issue, if it were to proceed, would trigger a defeating condition of the Bid or “*fundamentally change the commerciality of the Bid from that which was anticipated when the bid was lodged*”
 - (b) the timing of the Rights Issue Announcement, being less than a week after the lodgment of the Bidder’s Statement
 - (c) the timing of the close of the Rights Issue, being the business day before the offer under the Bidder’s Statement is due to close
 - (d) that the Rights Issue Announcement did not clearly explain to shareholders what the effect of the Rights Issue would be on the Bid and
 - (e) the announced purposes of the raising did not suggest any justification for the amount or timing of the Rights Issue.
12. Metalicity also submitted that it is “*apparent from the rights issue announcement that the approval of NME shareholders to the rights issue will not be sought*”.

Interim orders sought

13. Metalicity sought an interim order prohibiting Nex Metals from making any offer pursuant to the Rights Issue pending determination of the application.
14. The proposed timetable for the Rights Issue (as set out in the Rights Issue Announcement) indicated that the proposed date for dispatch of the Rights Issue offer document was 15 October 2021.
15. Nex Metals offered an undertaking not to dispatch the Rights Issue offer document prior to that date, which gave us sufficient time to consider whether to conduct proceedings on the application. We accepted the undertaking and accordingly, considered that no interim order was required at that time.

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16. Following the decision to conduct proceedings (see paragraph 20 below), we revisited the question of interim orders but did not consider it necessary to restrain Nex Metals from proceeding with the Rights Issue. The indicative date for the issue of shares under the Rights Issue was 12 November 2021 (at which time the issue of shares would impact the Bid). We considered that we were likely to resolve the matter before this time.

Final orders sought

17. Metalicity sought final orders prohibiting Nex Metals from proceeding with the Rights Issue or such suitable alternative or further orders as the Panel sees fit.

DISCUSSION

18. We have considered all the material, but address specifically only that part of the material we consider necessary to explain our reasoning.

Decision to conduct proceedings

19. We received a preliminary submission from Nex Metals. It submitted that the Panel should not conduct proceedings on the following bases (among others):
- (a) Nex Metals had commenced considering options for funding more than 12 weeks ago but the raising of capital and funding had been placed on hold “*due to the untimely hospitalisation*” of one of Nex Metals’ directors.
 - (b) Nex Metals “*is in urgent need of the funds it is seeking to raise through the rights issue*” and “*did not consider it had time nor was [it] necessary to seek shareholder approval prior to proceeding with the rights issue notwithstanding that it may trigger a defeating condition of the takeover*”.
 - (c) If Nex Metals is not able to proceed with the Rights Issue, it would be placed in a financial position “*where it cannot contribute to exploration expenditure*” under the JV and this would “*provide Metalicity with a clear commercial advantage in that it will be able to dilute the Company’s interest in the joint venture tenements*”.
 - (d) In any event, Metalicity’s Bid is highly conditional and subject to a 90% minimum acceptance condition which “*will not be satisfied*”.
20. In our view, on its face, the Rights Issue appeared to have been made by Nex Metals to frustrate Metalicity’s Bid. In particular, we were concerned about the timing of, and justification for, the Rights Issue and that the Rights Issue had not been made subject to shareholder approval. Accordingly, we decided to conduct proceedings.

Rights Issue and frustrating action

21. The Panel’s Guidance Note 12: Frustrating Action defines “*frustrating action*” as an action by a target, whether taken or proposed, by reason of which a bid may be withdrawn or lapse or a potential bid is not proceeded with.³ The “*significant issuing*”

³ Guidance Note 12: Frustrating Action at [3]

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or repurchasing of shares..." is an example of a potential frustrating action (assuming it breaches a bid condition or allows a bid to be withdrawn under section 652C).⁴

22. In this case, the issue of shares under the Rights Issue will trigger the Bid condition set out in paragraph 9 above, which will result in Metalicity being entitled to not proceed with its Bid. Accordingly, we consider that the Rights Issue is a frustrating action within the meaning of GN 12.
23. When considering whether a frustrating action gives rise to unacceptable circumstances, the Panel typically considers a number of balancing factors, including the length of time the bid has been open and its likelihood of success, whether the triggered condition is commercially critical to the bid, whether the frustrating action was undertaken in the ordinary course of the target's business and how advanced the frustrating action was when the bid was made or communicated.⁵
24. The factors relevant to our assessment in this matter are discussed below.

How advanced was the Rights Issue when the Bid was announced?

25. Having submitted in its preliminary submissions that consideration of funding options (including a rights issue) had commenced more than 12 weeks ago, we asked Nex Metals to provide copies of all documents in relation to that consideration, including copies of board papers and minutes. We also asked Nex Metals whether it had received any external advice on its funding options and to provide a copy of any such written advice.
26. Nex Metals submitted that it had received advice from three different lawyers prior to the hospitalisation of one of its directors, and that the general advice *"was in relation to various types of mechanism that can be used to raise capital, including (1) placement (2) 15% capacity rule (3) rights issue (4) debt (5) seek shareholder approval for special 50,000,000 share placement"*. It submitted that at that time, the advice *"was to use debt as it was non dilutionary to shareholders..."*. However, following announcement of the Bid, the general advice was that *"none of the above options were available because those options will be considered as frustrating to the takeover and most likely considered unacceptable behaviours from Nex Metals, except for the rights issue."*
27. We note that Nex Metals' submissions were not accompanied by copies of any written external advice or copies of any board papers and minutes. There was otherwise very minimal documentation produced in response to our request for *"all documents"* relevant to Nex Metals' consideration of funding options, which included incomplete material (such as cover emails with attachments omitted).
28. On the basis of the above, we consider that there is limited material to establish that Nex Metals' directors had been considering undertaking the Rights Issue (or to otherwise raise funds through the issue of shares) prior to the announcement of Metalicity's Bid.

⁴ Guidance Note 12: Frustrating Action at [3], example 1

⁵ Guidance Note 12: Frustrating Action at [12]

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Commercial imperative for the Rights Issue?

29. Metalicity submitted in its application that based on Nex Metals' quarterly cash flow reports lodged between 30 September 2020 and 30 June 2021, there was nothing to suggest that there had been any marked change in Nex Metals' cashflow position *"such as to justify the timing, or amount of, the rights issue"*.
30. When considering a company's need for funds, the Panel looks at the company's financial situation, the amount sought to be raised and the suitability of raising capital by the relevant entitlement offer. The Panel is likely to accept the directors' decision on these issues if the decision appears to be reasonable and supported by rational reasons unless the applicant can point to something that suggests deeper inquiry may be warranted.⁶
31. In this matter, Metalicity's application noted that the Rights Issue Announcement stated that the *"proceeds from the rights issue will be used predominantly to advance the Company's Joint Venture with Metalicity..."*. However, in Metalicity's submission, there was *"no outstanding cash call with respect to either KMPL or NME..."* under the JV.
32. In addition, Nex Metals' quarterly cash flow report for the quarter ended 30 June 2021 (released on 2 August 2021) estimated that it had 2.73 quarters of funding available. Nex Metals' unaudited financial report for the year ended 30 June 2021 (released on 30 September 2021) also disclosed that *"Allen's Business Group Pty Ltd, an entity controlled by the Director, Ken Allen, has agreed to cover any short term funding needs up to \$750,000"*.
33. Accordingly, we considered it appropriate to conduct a deeper inquiry into Nex Metals' need for funds.
34. Nex Metals submitted that it had an urgent need for funds. In support of this, Nex Metals submitted (among other things) that:
 - (a) *"[T]he decision to proceed with the Rights Issue was an extension of matters already under consideration and required to maintain Nex Metals' solvency"*.
 - (b) Following advice from its legal advisers (see paragraph 26 above), it was concluded that Nex Metals *"only needed to raise funds which would be required for its immediate needs"* which included fulfilling its JV obligations (of which *"the obligation of Nex Metals is 49%"*) and for short-term working capital.
 - (c) In respect of its JV obligations, Metalicity had *"unilaterally continued to spend funds under the Joint Venture project without Nex Metals's consent"*, making Nex Metals' *"requirement to raise capital urgent"*.
35. Metalicity rejected any notion of *"unilateral expenditure"* and submitted that Nex Metals' reasons for needing funds was *"inconsistent with the size of the raising proposed"* and *"far more than Nex Metals requires for its "immediate needs"."*
36. In understanding Nex Metals' need for funds, it was necessary to consider Nex Metals' payment obligations in respect of the JV. Under the terms of the JV

⁶ Guidance Note 17: Rights Issues at [12] (noting this guidance is provided in a different context)

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Agreement, the Joint Venturers (being Nex Metals and KMPL, Metalicity's wholly-owned subsidiary) are obliged to contribute to cash calls in accordance with their respective participating interests or have their interests diluted if they elect not to contribute cash.

37. Based on the submissions of Metalicity and Nex Metals and our understanding of the JV Agreement, broadly the cash call process is as follows:
- (a) KMPL, as Manager, must provide the Joint Venturers with a proposed programme and budget detailing the proposed JV activities for the following year along with an itemised budget of estimated expenditure (**Proposed Budget**). Nex Metals and Metalicity submitted that this was done on 16 July 2021.
 - (b) The Management Committee (comprising the Joint Venturers and the Manager) must then meet to discuss and approve the Proposed Budget (**Approved Budget**). The Manager is responsible for convening the Management Committee meeting, of which at least 14 days' prior notice is required. Both Nex Metals and Metalicity submitted that there was currently no Approved Budget on foot and that the Proposed Budget (being the budget that was circulated on 16 July 2021) had yet to be approved.
 - (c) Once the Management Committee meeting has been held and the Proposed Budget is approved, the Approved Budget would be sent to the Joint Venturers, following which the Joint Venturers would have 14 days to advise whether it wished to contribute in whole or in part to the Approved Budget in cash, or instead have its participating interest in the JV diluted accordingly.
 - (d) Billing statements would then be sent out to the Joint Venturers (which are required to specify the cash calls to be paid by a Joint Venturer) and the Joint Venturers would have a further 7 days to pay.
38. We made enquiries around the timing and expected amount of any cash calls proposed to be made by the Manager (via billing statements) once the Proposed Budget had been approved.
39. Metalicity submitted that it was currently updating the Proposed Budget (following feedback from Nex Metals) and that a meeting to consider the Proposed Budget would "*be called after the Bid closes...*". It further submitted that once the Proposed Budget was approved and the steps summarised in paragraph 37(c) above had been completed, the cash call for Nex Metals is "*expected to be around \$775,000*".
40. Nex Metals submitted that based on the Proposed Budget, the expected cash call for Nex Metals was \$936,023, noting that its cash position as at 30 September 2021 was \$221,303.
41. In rebuttals, Metalicity submitted that Nex Metals had "*not mentioned a \$400,000 financing facility that it has in place*" which was disclosed in its quarterly cash flow report for the quarter ended 30 June 2021 (released on 2 August 2021). Along with the 2.73 quarters of available funding and the \$750,000 short-term funding loan

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available from Mr Ken Allen, it submitted that the amount sought to be raised by the Rights Issue *"is totally disproportionate to Nex Metals' requirements"*.

42. On the material before us, we do not consider that Nex Metals had an urgent need for funds that would justify the timing of, and the amount sought to be raised by, the Rights Issue. We reach our conclusion based on the following:
- (a) While there is some discrepancy in the amount of the expected cash call for Nex Metals under the Proposed Budget, Nex Metals has known about the approximate amount that it would need to contribute to the JV since 16 July 2021 (when the Proposed Budget was first circulated), but has not undertaken any substantive steps to raise capital until after the announcement of the Bid.
 - (b) There are no outstanding cash calls to be paid by Nex Metals under the JV as there is currently no Approved Budget on foot pursuant to which a billing statement could be issued by the Manager specifying a cash call.
 - (c) Given Metalicity's submission that a meeting to discuss the Proposed Budget (of which at least 14 days' prior notice is required) is not expected to be called until after the close of the Bid, any cash call to be made of Nex Metals would occur well outside the timeframe for the Bid,⁷ given the steps and timing requirements that need to be undertaken under the JV Agreement before a cash call can be made.
 - (d) While Nex Metals does not have a substantive amount of cash available, it did have available to it other sources of short-term funding.
 - (e) Given the above, and the lack of information to support a conclusion that Nex Metals' directors had been considering the Rights Issue prior to announcement of Metalicity's Bid (see paragraphs 25 to 28 above), we do not accept Nex Metals' submission that *"the decision to proceed with the Rights Issue was an extension of matters already under consideration and required to maintain Nex Metals' solvency"*.

Disclosure issues

43. Metalicity submitted that the Rights Issue Announcement *"did not disclose that the issue of shares under the rights issue would trigger a defeating condition of the bid"*. It pointed out that the only mention of its Bid in the Rights Issue Announcement was in the context of Nex Metals describing how the proceeds from the Rights Issue would be used which included (among other things) meeting *"the costs of the proposed takeover (defence or otherwise)"*.
44. ASIC also submitted that the Rights Issue Announcement *"does not refer to the conditions of MCT's bid or the potential impact and relative merits of the Rights Issue"*.
45. When asked to explain why the Rights Issue Announcement did not disclose the potential impact of the Rights Issue on the Bid, Nex Metals submitted that *"[t]he offer document would disclose all necessary requirements in further details"*.

⁷ At the time of our decision, the Bid was to close on 15 November 2021

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46. The Rights Issue Announcement barely mentions the Bid and fails to disclose information material to Nex Metals shareholders about the Rights Issue, including that the issue of shares under the Rights Issue would trigger a condition of Metalicity's Bid or the relative merits of the Rights Issue and the Bid.⁸
47. It was not sufficient for Nex Metals to assume that shareholders were aware of the implications of the Rights Issue.⁹
48. Accordingly, Nex Metals shareholders have not been given enough information to enable them to assess the merits of the competing proposals.

Lack of shareholder approval

49. In general, it will not give rise to unacceptable circumstances under GN 12 if, among other things, a target offers shareholders a choice (for example, seeking prior shareholder approval or making the frustrating action conditional on shareholder approval).¹⁰
50. The Rights Issue is not subject to shareholder approval.
51. Nex Metals submitted that it did not consider it necessary to seek prior shareholder approval and that it was "*not required under the ASX Listing Rule 7.2 Exception 1*".
52. Metalicity submitted that the Rights Issue should be subject to shareholder approval as it "*falls squarely within the ambit of frustrating action as discussed in Guidance Note 12; and shareholders should be offered the choice between the Rights Issue and the bid*".
53. ASIC submitted that:
 - (a) "*the Panel has consistently preferred for frustrating actions like the Rights Issue to be subject to shareholder approval, because it ensures that shareholders are provided an equal opportunity to participate in the bid satisfying the principles of s602(c)*" and
 - (b) "*[i]f NME does not intend to seek shareholder approval for the Rights Issue, NME would otherwise need to demonstrate, as contemplated by Pinnacle 8 at [11], that there are 'exceptional circumstances where the Panel may be satisfied that approval of members need not be sought despite an action triggering a bid condition.'*"
54. We agree with the submissions made by Metalicity and ASIC.
55. We consider that shareholders were not given a choice between the competing proposals, a choice which should be exercised by shareholders as a group.¹¹
56. We consider that there was opportunity to seek shareholder approval before undertaking the Rights Issue, and there was insufficient material to show that this would necessarily have had a deleterious effect on Nex Metals' financial circumstances.¹² We are not satisfied that Nex Metals has demonstrated that there

⁸ See *World Oil Resources Limited* [2013] ATP 1 at [29]

⁹ See *World Oil Resources Limited* [2013] ATP 1 at [29]

¹⁰ Guidance Note 12: Frustrating Action at [14]

¹¹ See *Gondwana Resources Limited 02* [2014] ATP 15 at [35]

¹² See *World Oil Resources Limited* [2013] ATP 1 at [37]

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are exceptional circumstances which would justify shareholder approval not being sought.

57. By not making the frustrating action subject to shareholder approval, Nex Metals has failed to give its shareholders a reasonable and equal opportunity to participate in the benefits of Metalicity's Bid.

Genuine opportunity and likelihood of success

58. In considering frustrating action, the Panel considers that a bid will not give shareholders a genuine opportunity to dispose of their shares if (among other things) there are reasonable grounds to conclude that it will not be successful.¹³

59. In relation to the Bid's 90% minimum acceptance condition, Nex Metals' preliminary submissions submitted that:

- (a) *"On the shares controlled by the directors of the Company and others that they have spoken to, that condition will not be satisfied"* and
- (b) *"The offer in its current Bid is unlikely to be accepted by all shareholders in any event less than 90% of which the applicant is fully aware"*.

60. In our Initial Brief, we asked Nex Metals for all documents and correspondence which substantiated its submissions. In response, Nex Metals provided a spreadsheet titled *"Nex Metals' shareholders not accepting Metalicity's bid offer"* which listed 21 shareholders holding 41,401,365 shares (approximately 15.51%) in Nex Metals.
61. Noting that the Panel requires very strong probative material to reach a conclusion that a bid will not be successful,¹⁴ we asked Nex Metals in our Supplementary Brief the basis upon which it established that the Nex Metals shareholders listed in the spreadsheet would not accept the Bid. In response, Nex Metals provided a bundle of signed statements from shareholders holding 77,481,419 shares (approximately 29.02%) in Nex Metals giving notice that they would not accept the Bid in its present form.
62. In rebuttals on the Supplementary Brief, Metalicity submitted that *"[a]ll of these [shareholder] statements are dated 26 and 27 October 2021. None of them existed on 15 October 2021 when Nex Metals made its initial response [to the Panel's initial brief]. None of them existed on 25 October 2021 when the Panel issued its supplementary brief."* It also submitted that *"it is obvious (because of the (largely) standard form of the responses) that Nex Metals or one or more of its directors has caused these statements to be solicited and provided."*
63. We agree with the submissions made by Metalicity. The shareholder statements appear to have been solicited and produced in response to the Panel's questions in its

¹³ Guidance Note 12: Frustrating Action at [20(b)]

¹⁴ Guidance Note 12: Frustrating Action at [20(b)]

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Initial and Supplementary Briefs, noting (as Metalicity submitted) that they did not exist until after such enquiries were made by the Panel. Moreover, they are addressed *“to the Takeovers Panel”* and do not comply with the Panel’s Guidance Note 23: Shareholder Intention Statements.

64. We have serious concerns about the appropriateness, timing and the content of these ‘shareholder intention statements’ obtained by Nex Metals, including because the statements are in substantively the same template form, which suggests that Nex Metals has prepared and directed what the statements should say. We also note that such statements were provided before Nex Metals shareholders had access to a target’s statement in respect of the Bid, making it unlikely that shareholders were fully informed when providing the signed statements.
65. While we did not consider the question of association, we note that there is a significant risk that such a process of securing shareholder statements can result in the formation of a relevant agreement, giving the soliciting entity a relevant interest in the shareholder’s shares (which may also result in a contravention of section 606).¹⁵
66. For the reasons above, we do not consider that the shareholder statements produced to us by Nex Metals are sufficient to reach a conclusion that the Bid will not be successful.
67. We also note that, in the context of Metalicity expressing concerns that Nex Metals’ directors (including Mr Ken Allen) would take up their full rights under the Rights Issue, and thereby *“allowing Ken Allen to increase his blocking stake in Nex Metals and further frustrate Metalicity’s takeover offer”*, Metalicity submitted that *“Ken Allen’s stake in Nex Metals is currently 35,815,238 shares, being 13.4%, held by Allen & Co.”*
68. Nex Metals did not rebut Metalicity’s submission that Mr Ken Allen held a 13.4% shareholding and, pointing to Metalicity’s submission, submitted that *“the Bid is self-defeating”* and *“Metalicity cannot achieve a 90% take up of the Bid and therefore using [Metalicity’s] words a possible “blocking stake” already exists”*.
69. Given Mr Allen has not lodged a substantial shareholder notice, we asked Nex Metals to provide details of its substantial holders and of the interests held by each of Nex Metals’ directors and their associates.
70. In response, Nex Metals submitted that *“Kenneth Allen does not hold 13.4% of the shares in Nex Metals either directly or indirectly ...”*.
71. Metalicity accepted that its reference to Mr Allen holding a 13.4% shareholding was an error and noted that the most recent Appendix 3Y lodged by Mr Allen¹⁶ disclosed *“approximately a 2.9% interest”*. However, it submitted that the shares held by Mr Allen and that of Mr Allen’s family would together total approximately 9.57%.

¹⁵ See *MYOB Limited* [2008] ATP 27 at [33]; Guidance Note 23: Shareholder intention statements also alludes to this possibility – see [10(b)]

¹⁶ On 17 November 2020

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72. Nex Metals also submitted that “if you were to conflate” Mr Allen’s holding with that of his direct family, that holding “is only 9.57%”. However, it submitted (in effect) that these family members were not associates of Mr Allen and that his interest in Nex Metals “represent 2.87% (including him as trustee for the Allen Super Fund).”¹⁷
73. In light of the submissions, we had some concerns around the relevant interests in Nex Metals disclosed by Mr Allen and the potential increase to Mr Allen’s interest through the Rights Issue (for example, through any underwriting or participation in shortfall). Our concerns were ultimately dealt with in our final orders. We did not otherwise consider the question of association.

Bid condition – commercially critical?

74. Metalicity submitted that if the Rights Issue was fully subscribed, this would result in the issued capital of Nex Metals increasing by 33.3%. This would result in Metalicity having to issue an additional 428,113,678 Metalicity shares to Nex Metals shareholders under its Bid (representing an additional ~\$4.3 million in value above its current offer) and “would result in Nex Metals shareholders holding an interest of 44.4% of the combined entity” (as opposed to 37.5% if the Rights Issue did not proceed). It submitted that “[t]his is a very different outcome than that contemplated by MCT when it announced the bid and lodged the bidder’s statement”.
75. In *Rey Resources Ltd*, the Panel said (emphasis added):¹⁸

Whether the rights issue is a frustrating action giving rise to unacceptable circumstances depends on whether the commercial objectives of the Gujarat bid would be frustrated by it. There are two ways in which this could occur:

- 1. the rights issue could frustrate the bid if it significantly expands the issued capital of Rey, requiring Gujarat to offer significantly more consideration to complete the acquisition. We did not need to finalise our view because the basis for the complaint was addressed by the undertaking or*
- 2. the effect of the rights issue could be that BBY's potential acquisition of a 12% interest frustrates Gujarat gaining control of Rey. The undertaking ensures that BBY cannot acquire more than 5% voting power in Rey.*

76. The expansion in the issued capital of Nex Metals through the Rights Issue is significant and would result in Metalicity being required to offer significantly more consideration to complete its acquisition of Nex Metals. We accept that the Bid condition is “commercially critical”.

Conclusion on frustrating action

77. For the reasons above, in our view, the Rights Issue is an unacceptable frustrating action in relation to Metalicity’s Bid.

¹⁷ Nex Metals made submissions in some instances that Mr Allen’s interest in Nex Metals was 2.67%. Based on the latest Appendix 3Y lodged by Mr Allen (on 17 November 2020) which records a direct holding of 7,128,303 shares and an indirect holding of 530,000 shares, Mr Allen’s disclosed interest in Nex Metals is approximately 2.87% (calculated on Nex Metals’ current issued capital of 267,014,768 shares)

¹⁸ See *Rey Resources Ltd* [2009] ATP 14 at [23]

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78. The Rights Issue should have been made subject to shareholder approval.
79. Nex Metals shareholders should have the opportunity to accept the Metalicity Bid or subscribe to the Rights Issue. They will (if Metalicity's Bid does not proceed) have been denied a reasonable and equal opportunity to participate in benefits that would accrue through Metalicity's Bid.
80. Further, Nex Metals shareholders have not been given sufficient information to enable them to consider the merits of the Rights Issue and Metalicity's Bid, such that the market for control of Nex Metals shares is not taking place in an efficient, competitive and informed market.

DECISION

Declaration

81. It appears to us that the circumstances are unacceptable:
 - (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of Nex Metals or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Nex Metals or
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602.
82. Accordingly, we made the declaration set out in Annexure A and consider that it is not against the public interest to do so. We had regard to the matters in section 657A(3). In particular, we had regard to section 602(c) and the actions of the directors of Nex Metals.

Orders

83. Following the declaration, we made the final orders set out in Annexure B. Under section 657D, the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'¹⁹ if 4 tests are met:
 - (a) it has made a declaration under section 657A. This was done on 3 November 2021.
 - (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. We are satisfied that our orders do not unfairly prejudice any person.
 - (c) it gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done on 25 October 2021 (in relation to the Supplementary Brief on declaration and orders). The

¹⁹ Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

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parties and ASIC made submissions. Rebuttals were also made by the parties (but not ASIC).

- (d) it considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons, or ensure that a takeover or proposed takeover proceeds as it would have if the circumstances had not occurred. The orders do this (in effect) by requiring that:
- (i) Nex Metals obtains shareholder approval for the Rights Issue (or another announced rights issue), thereby giving Nex Metals shareholders a choice between the rights issue and the Bid
 - (ii) in relation to obtaining any such shareholder approval, Nex Metals provides in its notice of meeting (in a form approved by the Panel) the following information:
 - (A) a comparison of the financial position of Nex Metals if the rights issue is approved and if it is not approved by Nex Metals shareholders
 - (B) a description of Metalicity's Bid
 - (C) the relative merits of the rights issue and Metalicity's Bid
 - (D) a statement that approval of the rights issue by Nex Metals shareholders will result in Metalicity being entitled to rely on the Bid condition and to not proceed with its Bid and
 - (E) details of how Nex Metals will use the proceeds from the rights issue,

thereby ensuring that Nex Metals shareholders have enough information to enable them to assess the merits of the competing proposals.

84. On 25 October 2021, we provided proposed orders to the parties and ASIC and sought submissions. The proposed orders were in substantively the same form as the final orders, except that the proposed orders:
- (a) did not specify that Nex Metals' directors and their associates must not underwrite the rights issue or participate in any shortfall and
 - (b) did not require Nex Metals to disclose in its notice of meeting the use of funds to be raised under the rights issue (see paragraph 83(d)(ii)(E) above).
85. Nex Metals did not provide any submissions on the proposed orders. However, it offered an undertaking to obtain shareholder approval for the Rights Issue (or another rights issue announced before the end of the offer period for Metalicity's Bid) and to include in its notice of meeting the information set out in the proposed orders (being the information in paragraphs 83(d)(ii)(A) to (D) above).
86. Metalicity submitted that *"the notice of meeting should set out the intentions of the directors and their associates as to the participation in the Rights Issue, the intention of Nex*

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Metals as to the allocation of any shortfall and the intention of the directors and their associates to take up the shortfall under the Rights Issue if available for subscription...".

87. In rebuttals, Nex Metals submitted that “[d]irectors and their associates are not entitled to take up any shortfall under the rights issue without shareholder approval. As this will not be sought, there will be no issue of shortfall to directors of their associates.”
88. Following the submissions, and in light of our concerns expressed in paragraph 73 above, we considered it appropriate to amend the proposed orders to specify that Nex Metals’ directors and their associates must not underwrite the rights issue or participate in any shortfall.
89. We also considered the use of funds under the rights issue to be information material to the decision of shareholders and amended the proposed orders to require Nex Metals to provide such disclosure in its notice of meeting.
90. We considered that there was utility in making orders, notwithstanding the proffering of undertakings²⁰ as Nex Metals only proffered the undertakings very late in the proceedings.²¹ Further, the undertakings were selective and did not address all aspects of our proposed orders (for example, that Nex Metals must not issue shares to subscribers under the rights issue until its shareholders had approved any such rights issue).
91. We made the final orders, which give the parties and ASIC the liberty to apply for further orders.

Karen Phin
President of the sitting Panel
Decision dated 3 November 2021
Reasons given to parties 9 December 2021
Reasons published 15 December 2021

²⁰ See *Brisbane Markets Limited* [2016] ATP 3 at [108]-[111] and *Northern Iron Limited* [2014] ATP 11

²¹ See Guidance Note 4: Remedies General at [39]

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Advisers

Party	Advisers
Nex Metals Explorations Ltd	George Papamihail Barristers and Solicitors
Metalicity Ltd	Tottle Partners



Australian Government

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Annexure A

CORPORATIONS ACT

SECTION 657A

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

NEX METALS EXPLORATIONS LTD

CIRCUMSTANCES

1. On 14 September 2021, Metalicity Ltd (**Metalicity**) announced its intention to make a conditional off-market bid for all of the ordinary shares in Nex Metals Explorations Ltd (**Nex Metals**), offering 4.81 Metalicity shares for every 1 Nex Metals share (**Bid**).
2. On 24 September 2021, Metalicity issued and served its bidder's statement in relation to its Bid (**Bidder's Statement**). Offers made under the Bidder's Statement are subject to a number of defeating conditions, including:

Condition 11.8(j) (No Prescribed Occurrences): *Between the period beginning on the date Bidder gives its Bidder's Statement to [Nex Metals] and ending three Business Days after the end of the Offer Period, no Prescribed Occurrence occurs in relation to [Nex Metals] or any of its Subsidiaries.*

"Prescribed Occurrence" is defined to include an event where:

(d) [Nex Metals] or a Subsidiary issues shares, or grants an option over its shares, or agrees to make such an issue or grant such an option;

3. On 29 September 2021, Nex Metals announced that it was undertaking a 1 for 3 non-renounceable rights issue to raise up to \$3.115 million (before costs) priced at \$0.035 per share (**Rights Issue**).
4. The issue of shares under the Rights Issue will trigger the condition of Metalicity's Bid set out in paragraph 2 and is a frustrating action.
5. The Rights Issue is not subject to shareholder approval.
6. The announcement of the Rights Issue did not disclose information material to Nex Metals shareholders, including:
 - (a) that the issue of shares under the Rights Issue would trigger a condition of Metalicity's Bid or
 - (b) the relative merits of the Rights Issue and Metalicity's Bid.
7. Further, limited material was provided by Nex Metals to establish that:

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- (a) Nex Metals' directors had been considering undertaking the Rights Issue (or to otherwise raise funds through the issue of shares) prior to the announcement of Metalicity's Bid and
- (b) Nex Metals had an urgent need for funds that would justify the timing of, and amount sought to be raised by, the Rights Issue.

EFFECT

- 8. Nex Metals shareholders have not been given sufficient information to enable them to consider the merits of the Rights Issue and Metalicity's Bid, such that the market for control of Nex Metals shares is not taking place in an efficient, competitive and informed market.
- 9. The issue of shares under the Rights Issue, which will result in Metalicity being entitled to not proceed with its Bid, would deny Nex Metals shareholders a reasonable and equal opportunity to participate in any benefits accruing under Metalicity's Bid.

CONCLUSION

- 10. It appears to the Panel that the circumstances are unacceptable circumstances:
 - (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of Nex Metals or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Nex Metals or
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602 of the *Corporations Act 2001* (Cth) (**Act**).
- 11. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3) of the Act. In particular, it had regard to section 602(c) of the Act and the actions of the directors of Nex Metals.

DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Nex Metals.

Tania Mattei
General Counsel
with authority of Karen Phin
President of the sitting Panel
Dated 3 November 2021



Australian Government

Takeovers Panel

Annexure B
CORPORATIONS ACT
SECTION 657D
ORDERS

NEX METALS EXPLORATIONS LTD

The Panel made a declaration of unacceptable circumstances on 3 November 2021.

THE PANEL ORDERS

1. Nex Metals must not:
 - (a) proceed with the rights issue announced on 29 September 2021 without the rights issue being subject to approval of Nex Metals shareholders at a general meeting or
 - (b) make or announce another rights issue prior to the end of the offer period for Metalicity's Bid unless the rights issue is subject to approval of Nex Metals shareholders at a general meeting.
2. If Nex Metals proceeds with the rights issue announced on 29 September 2021, or announces another rights issue subject to shareholder approval, the following requirements apply:
 - (a) Nex Metals must call and arrange to hold a general meeting at which shareholders consider, as an ordinary resolution, approval of the rights issue
 - (b) Nex Metals must include in the notice of meeting, in a form approved by the Panel, the following information:
 - (i) a comparison of the financial position of Nex Metals if the rights issue is approved and if it is not approved by Nex Metals shareholders
 - (ii) a description of Metalicity's Bid
 - (iii) the relative merits of the rights issue and Metalicity's Bid
 - (iv) a statement that approval of the rights issue by Nex Metals shareholders will result in Metalicity being entitled to rely on the Relevant Condition and to not proceed with its Bid and
 - (v) details of how Nex Metals will use the proceeds from the rights issue

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- (c) no Nex Metals director or any of their associates is permitted to (in full or in part) underwrite or sub-underwrite the rights issue and
 - (d) no Nex Metals director or any of their associates is permitted to participate in any shortfall facility in relation to the rights issue.
3. Until Nex Metals shareholders at a general meeting have passed a resolution approving such rights issue:
- (a) Nex Metals must not issue shares to subscribers under the rights issue and
 - (b) any money received by Nex Metals as subscriptions for new shares under the rights issue must be held:
 - (i) separately from all other Nex Metals funds and
 - (ii) on trust for the subscribers.
4. If such rights issue is not approved by Nex Metals shareholders at a general meeting, any subscription money received by Nex Metals must be returned to the subscribers promptly.
5. Until Nex Metals shareholders at a general meeting have passed a resolution approving either the rights issue announced on 29 September 2021 or any other rights issue, in relation to triggering the Relevant Condition:
- (a) Metalicity is not entitled to rely on the Relevant Condition to not proceed with its Bid in respect of such rights issue and
 - (b) takeover contracts and acceptances under Metalicity's Bid will not be considered void under section 650G of the *Corporations Act 2001* (Cth) as a result of non-fulfillment of the Relevant Condition in respect of such rights issue,
- provided that the general meeting is held before the end of the offer period for Metalicity's Bid.
6. The parties to these proceedings and ASIC have the liberty to apply for further orders in relation to these orders.
7. In these orders, the following definitions apply:

Bid	Metalicity's off-market all scrip bid for all of the ordinary shares in Nex Metals, offering 4.81 Metalicity shares for every 1 Nex Metals share, the terms of which are set out in its bidder's statement dated 24 September 2021
Metalicity	Metalicity Ltd
Nex Metals	Nex Metals Explorations Ltd

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[2021] ATP 12

**Relevant
Condition**

The condition of Metalicity's Bid that Nex Metals or a subsidiary of Nex Metals not issue any shares or grant an option over its shares, or agree to make such an issue or grant such an option (as set out in Condition 11.8(j) (No Prescribed Occurrence) and paragraph (d) of the definition of "Prescribed Occurrence" in Metalicity's bidder's statement in respect of the Bid)

Tania Mattei
General Counsel
with authority of Karen Phin
President of the sitting Panel
Dated 3 November 2021