



**Australian Government**

**Takeovers Panel**

# MEDIA RELEASE

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**No: TP21/42**

**30 November 2021**

## **Nex Metals Explorations Ltd 02 – Declaration of Unacceptable Circumstances and Orders**

The Panel has made a declaration of unacceptable circumstances (Annexure A) and final orders (Annexure B) in relation to an application dated 2 November 2021 by Metalicity Ltd in relation to the affairs of Nex Metals Explorations Ltd (see [TP21/35](#)).

### **Background**

On 14 September 2021, Metalicity announced its intention to make an off-market scrip takeover bid for Nex Metals on the basis of 4.81 Metalicity shares for each Nex Metals share. On 24 September 2021, Metalicity issued and served its bidder's statement in relation to the bid.

On 29 October 2021, Nex Metals issued and served its target's statement in relation to the bid. The target's statement included the Nex Metals' directors' unanimous recommendation that Nex Metals shareholders reject the bid "*due to the lack of information*".

On 1 November 2021, Nex Metals released its target's statement on ASX along with a covering announcement (dated 29 October 2021). The covering announcement stated that "[Nex Metals] will issue a supplementary Target Statement in the next seven days".

Also on 1 November 2021, Nex Metals was suspended from quotation on ASX for not lodging its relevant period reports by the due date.

On 2 November 2021, Nex Metals informed Metalicity that "*the preparation of a supplementary target statement has commenced which will be sent to shareholders in addition to the original target statement*".

On 8 November 2021, Nex Metals announced that a supplementary target's statement would be released on 12 November 2021.

As at the date of the Panel's decision, a supplementary target's statement has not yet been lodged by Nex Metals.

## Declaration

The Panel considered that the circumstances were unacceptable because (among other things):

- There are material deficiencies in Nex Metals' target's statement, in contravention of the standard of disclosure required by section 638,<sup>1</sup> including because it does not disclose:
  - soundly-based and sufficiently defensible reasons upon which Nex Metals' directors recommend that shareholders reject the bid, which included "*due to the lack of information*"
  - information in respect of the rights issue announced by Nex Metals on 29 September 2021
  - financial information in respect of Nex Metals
  - the risks to Nex Metals shareholders of, on the one hand, accepting the bid and, on the other, not accepting the bid and
  - that Nex Metals would be suspended from quotation on ASX on 1 November 2021.<sup>2</sup>
- The target's statement also contravenes section 670A, including because it does not contain all material required under section 638.
- Nex Metals did not produce material to establish that Nex Metals' directors had passed a resolution approving its target's statement for lodgement with ASIC, in contravention of section 639(1).
- Nex Metals did not dispatch its target's statement to shareholders by 29 October 2021, in contravention of item 12 of section 633.

The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in section 657A(3).

## Orders

The Panel has made orders that (in effect):

- Nex Metals must immediately advise the market that (among other things) its target's statement is misleading and contains material information deficiencies, and that it will lodge a replacement target's statement

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<sup>1</sup> References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

<sup>2</sup> Following lodgement of its financial report for the year ended 30 June 2021, the suspension of trading in the securities of Nex Metals was lifted from the commencement of trading on 30 November 2021

- Nex Metals must prepare a replacement target's statement, in a form that ASIC does not object to, that complies with section 638 and is accompanied by a report prepared by an independent expert (of ASIC's nomination) opining on whether the bid is fair and reasonable
- Nex Metals must bear the costs of the independent expert's report and
- Metalicity must send a letter to Nex Metals shareholders, in a form approved by the Panel, which includes a copy of this media release regarding the Panel's declaration and orders and, if Metalicity so chooses, a statement that Nex Metals shareholders have an opportunity to accept into the bid.

The Panel continues to have significant concerns about Nex Metals shareholders receiving a compliant target's statement and is currently considering whether to make any additional orders.

The sitting Panel was Marina Kelman, Michael Lishman and Karen Phin (sitting President).

The Panel will publish its reasons for the decision in due course on its website [www.takeovers.gov.au](http://www.takeovers.gov.au).

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**ANNEXURE A  
CORPORATIONS ACT  
SECTION 657A**

**DECLARATION OF UNACCEPTABLE CIRCUMSTANCES**

**NEX METALS EXPLORATIONS LTD 02**

**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**).
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. On 14 October 2021, Nex Metals was informed by Metalicity that it had completed dispatch of its Bidder's Statement and that offers had been sent to Nex Metals shareholders on 14 October 2021 (as required by items 6 and 7 of section 633<sup>1</sup>).
5. On 29 October 2021 at approximately 3.13pm (WST), Mr Ken Allen (Nex Metals' managing director) sent an email to, among others, Mr Thomas Percy QC (Nex Metals' chairman) and Mr Hock Hoo Chua (Nex Metals' other director), stating: "*...We have a deadline of lodging the Target Statement this afternoon. ASIC have recommended we lodge the rough and ready one and lodge a supplementary next week. With your approval I will complete best we can with [our lawyer] then lodge.*"
6. At approximately 3.22pm (WST) that same day, Mr Percy QC responded to Mr Allen's email stating: "*Ok by me.*"
7. ASIC has confirmed that it did not provide the recommendation to Nex Metals outlined in Mr Allen's email of 29 October 2021 set out in paragraph 5 above.

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<sup>1</sup> References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

8. Also on 29 October 2021, Nex Metals issued and served its target's statement in relation to the Bid (**Target's Statement**). The Target's Statement included the Nex Metals' directors' unanimous recommendation that Nex Metals shareholders reject the Bid "*due to the lack of information*".
9. On 1 November 2021, Nex Metals released its Target's Statement on ASX along with a covering announcement (dated 29 October 2021). The covering announcement stated that "[Nex Metals] will issue a supplementary Target Statement in the next seven days".
10. Also on 1 November 2021, Nex Metals was suspended from quotation on ASX for not lodging its relevant period reports by the due date.
11. On 2 November 2021, Nex Metals informed Metalicity that "*the preparation of a supplementary target statement has commenced which will be sent to shareholders in addition to the original target statement*".
12. On 8 November 2021, Nex Metals announced that a supplementary target's statement would be released on 12 November 2021.
13. As at the date of this declaration, a supplementary target's statement has not yet been lodged by Nex Metals.
14. The Target's Statement contains material deficiencies, in contravention of the standard of disclosure required by section 638, including because it does not disclose:
  - (a) soundly-based and sufficiently defensible reasons upon which Nex Metals' directors recommend that shareholders reject the Bid, which included "*due to the lack of information*"
  - (b) financial information in respect of Nex Metals
  - (c) information in respect of the Rights Issue
  - (d) the risks to Nex Metals shareholders of, on the one hand, accepting the Bid and, on the other, not accepting the Bid and
  - (e) that Nex Metals would be suspended from quotation on ASX from 1 November 2021.<sup>2</sup>
15. The Target's Statement also contravenes section 670A, including because it does not contain all material required under section 638.

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<sup>2</sup> Following lodgement of its financial report for the year ended 30 June 2021, the suspension of trading in the securities of Nex Metals was lifted from the commencement of trading on 30 November 2021

16. Further, Nex Metals did not produce material to establish that Nex Metals' directors had passed a resolution approving the Target's Statement for lodgement with ASIC, in contravention of section 639(1).
17. By failing to dispatch its Target's Statement to shareholders by 29 October 2021 (being 15 days after it received notice that Metalicity had completed dispatch of the Bidder's Statement), Nex Metals has also breached item 12 of section 633.

#### **EFFECT**

18. Nex Metals shareholders:
  - (a) have not been given sufficient information to enable them to consider the merits of the Bid and
  - (b) are required to make decisions whether to hold their shares or accept the Bid on the basis of inadequate information,

such that the market for control of Nex Metals shares is not taking place in an efficient, competitive and informed market.

#### **CONCLUSION**

19. 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 and
  - (b) having regard to the purposes of Chapter 6 set out in section 602 and
  - (c) because they constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6.
20. 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).

## **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 30 November 2021**



**Australian Government**

**Takeovers Panel**

**ANNEXURE B  
CORPORATIONS ACT  
SECTION 657D  
ORDERS**

**NEX METALS EXPLORATIONS LTD 02**

The Panel made a declaration of unacceptable circumstances on 30 November 2021.

**THE PANEL ORDERS**

1. Nex Metals must immediately advise the market that:
  - (a) its target's statement lodged with ASIC on 29 October 2021 (**Original Target' Statement**) is misleading and contains material information deficiencies
  - (b) the supplementary target's statement referred to in its ASX announcements dated 29 October 2021 and 8 November 2021 will not be lodged or issued by Nex Metals and
  - (c) it will lodge, and send each Nex Metals shareholder, a replacement target's statement, in a form that ASIC does not object to.
2. As expeditiously as possible, Nex Metals must prepare a replacement target's statement (**Replacement Target's Statement**), in a form that ASIC does not object to, that:
  - (a) addresses the information deficiencies and complies with section 638 of the *Corporations Act 2001* (Cth)
  - (b) includes a general statement at the beginning of the document that the replacement target's statement was required by the Panel and
  - (c) is accompanied by an independent expert's report providing an opinion for shareholders on whether the Bid is fair and reasonable.
3. In relation to Order 2(c) of these orders:
  - (a) ASIC must nominate three appropriate experts to produce the independent expert's report and



- (b) Nex Metals must choose and engage one of the three experts nominated by ASIC to produce the independent expert's report.
4. Nex Metals must use its best endeavours to assist the independent expert with its inquiries.
  5. The costs of the independent expert's report are to be borne by Nex Metals.
  6. Nex Metals must not, before lodgement of the Replacement Target's Statement, dispatch (that is, physically send) any information to its shareholders in relation to the Bid, including but not limited to the Original Target's Statement or any supplementary target's statement.
  7. As soon as practicable, Metalicity must send a letter to Nex Metals shareholders, in a form approved by the Panel, which includes the following:
    - (a) as an enclosure, a copy of the Panel's media release regarding the Declaration and orders made in respect of these proceedings and
    - (b) if Metalicity so chooses, a statement that Nex Metals shareholders have an opportunity to accept into the Bid.
  8. In relation to Order 2(b) of the Panel's final orders in *Nex Metals Explorations Ltd* dated 3 November 2021, ASIC must confirm that it does not object to the form of the notice of meeting prior to the Panel providing its approval.
  9. The parties to these proceedings and ASIC have the liberty to apply for further orders in relation to these orders, noting that the Panel is still considering whether to make further orders (if any).
  10. 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

**Declaration** The declaration of unacceptable circumstances made by the Panel in relation to the affairs of Nex Metals on 30 November 2021

**Metalicity** Metalicity Ltd

<b>Nex Metals</b>	Nex Metals Explorations Ltd
<b>Original Target's Statement</b>	Has the meaning given in Order 1(a)
<b>Replacement Target's Statement</b>	Has the meaning given in Order 2

**Tania Mattei**  
**General Counsel**  
**with authority of Karen Phin**  
**President of the sitting Panel**  
**Dated 30 November 2021**