



Australian Government

Takeovers Panel

**Reasons for Decision
Nex Metals Explorations Ltd 04R
[2021] ATP 18**

Catchwords:

Decline to conduct proceedings – collateral benefits – equal opportunity – evidence

Corporations Act 2001 (Cth), sections 619(1), 623, 657EA

Eastern Field Developments Limited v Takeovers Panel [2019] FCA 311

Guidance Note 2 – Reviewing Decisions

Nex Metals Explorations Ltd 03 [2021] ATP 14, Nex Metals Explorations Ltd [2021] ATP 12, Webcentral Group Limited 04R [2021] ATP 6, Cardinal Resources Limited 06R [2020] ATP 28, Donaco International Limited 03R [2019] ATP 24

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

INTRODUCTION

1. The review Panel, Amy Alston, Alex Cartel (sitting President) and John Sheahan QC, declined to conduct proceedings on an application by Nex Metals to review the decision of the initial Panel to decline to conduct proceedings in *Nex Metals Explorations Ltd 03*.¹

2. In these reasons, the following definitions apply.

Accountant	has the meaning given in paragraph 10(a)
Advisor	the firm of the Alleged Agent
Alleged Agent	has the meaning given in paragraph 10(a)
Bid	has the meaning given in paragraph 5
Metalicity	Metalicity Limited
Nex Metals	Nex Metals Explorations Ltd
<i>Nex Metals 01</i>	<i>Nex Metals Explorations Ltd [2021] ATP 12</i>
<i>Nex Metals 02</i>	the application to the Panel from Metalicity in relation to the affairs of Nex Metals dated 2 November 2021
<i>Nex Metals 03</i>	<i>Nex Metals Explorations Ltd 03 [2021] ATP 14</i>
Shareholder	has the meaning given in paragraph 10(a)
Witness Statements	has the meaning given in paragraph 14(a)

¹ [2021] ATP 14

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FACTS

3. Nex Metals is an ASX listed mining exploration company (ASX code: NME) [REDACTED]
4. Metalicity is also an ASX listed mining exploration company (ASX code: MCT).
5. 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**).
6. On 24 September 2021, Metalicity issued and served its bidder's statement in relation to the Bid.
7. On 30 September 2021, Metalicity made an application to the Panel in *Nex Metals 01* in relation to a rights issue proposed by Nex Metals following the announcement of the Bid. The Panel made a declaration of unacceptable circumstances and orders in *Nex Metals 01* finding, among other things, that the proposed rights issue was a frustrating action in relation to the Bid.²
8. On 29 October 2021, Nex Metals lodged its target's statement in relation to the Bid.
9. On 2 November 2021, Metalicity made an application to the Panel in *Nex Metals 02* in relation to disclosure in Nex Metals' target's statement. The Panel made a declaration of unacceptable circumstances in *Nex Metals 02* on 30 November 2021 finding, among other things, that there were material deficiencies in Nex Metals' target's statement.³
10. On 17 November 2021, Nex Metals made an application to the Panel in relation to its own affairs submitting (in effect) that following the commencement of the Bid, an agent of Metalicity had engaged in conduct that constituted a breach of sections 619(1) and 623.⁴ Nex Metals submitted that:
 - (a) a person whom was alleged to be an agent of Metalicity (the **Alleged Agent**) had a telephone call with an accountant (referred to by Nex Metals as "Shareholder 1" - **Accountant**) on or about 11 November 2021 to pass on an offer from Metalicity to acquire shares from a client of the Accountant who was a 6.37% shareholder in Nex Metals (**Shareholder**)⁵
 - (b) the offer made by the Alleged Agent was "to purchase the [Shareholder] shareholding for the sum of \$900,000 in cash" and
 - (c) the offer from the Alleged Agent constituted a contravention of section 623, meant that all offers to acquire Nex Metals shares were not the same (contrary to section 619) and that, if accepted, would have meant Shareholder received a

² See *Nex Metals Explorations Ltd* [2021] ATP 12

³ See [TP21/42](#)

⁴ Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth) and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

⁵ In the reasons for decision of the initial Panel, Accountant and Shareholder were respectively referred to as 'Shareholder 1' and 'Shareholder 2'. See *Nex Metals Explorations Ltd 03* [2021] ATP 14

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benefit which had not been offered to any other Nex Metals shareholder which is contrary to the principle in section 602(c).

11. Nex Metals sought interim orders that Metalicity “*be caused to suspend the bid immediately*” pending determination of its application and (in effect) that Metalicity make an announcement that its bid has been suspended and final orders to the effect that Metalicity “*be prohibited from proceeding with the bid*”.
12. On 19 November 2021, the initial Panel in *Nex Metals 03* declined to conduct proceedings. The initial Panel considered that Nex Metals “*provided insufficient material that fell far short of what is required to support a decision to conduct proceedings*” and noted that the Panel expects “*applicants to put forward probative material and not simply mere assertions when making allegations of serious contraventions of Chapter 6*”.⁶

APPLICATION

13. On 22 November 2021, Nex Metals requested the President’s consent for leave to review the initial Panel’s decision to decline to conduct proceedings in *Nex Metals 03* pursuant to section 657EA.
14. In its request for consent, Nex Metals submitted (among other things) that:
 - (a) it had obtained signed witness statements from Accountant and a director of Shareholder (the **Witness Statements**) and
 - (b) the Witness Statements were new evidence for the purpose of paragraph 29(c) of *Guidance Note 2 – Reviewing Decisions*.
15. The President considered that granting consent to the review was warranted on the basis that new evidence had been provided by Nex Metals in connection with its request for consent.
16. On 23 November 2021, Nex Metals made its review application, submitting that the Witness Statements should be considered by a review Panel conducting a de novo review.

DISCUSSION

17. We have considered all the material, including the material before the initial Panel in *Nex Metals 03*, but address specifically only that part of the material we consider necessary to explain our reasoning.
18. The powers of a review Panel are set out in section 657EA. Our role is to conduct a de novo review.⁷ One of the powers a review Panel has is to decline to conduct proceedings and allow the initial Panel’s decision to stand.⁸
19. We received preliminary submissions from the Advisor and Metalicity. We also received the initial Panel’s reasons for decision.

⁶ *Nex Metals Explorations Ltd 03* [2021] ATP 14 at [18]

⁷ *Eastern Field Developments Limited v Takeovers Panel* [2019] FCA 311 at [181]

⁸ *Webcentral Group Limited 04R* [2021] ATP 6 at [24]; *Cardinal Resources Limited 06R* [2020] ATP 28 at [6] and *Donaco International Limited 03R* [2019] ATP 24 at [6]

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20. The Witness Statement of Accountant describes communications between the period from 3 November to 12 November 2021 from the Alleged Agent to Accountant whereby the Alleged Agent is seeking to contact Shareholder about accepting the Bid. The Witness Statement of Accountant states (in part):
27. *On 12 November 2021 I received another text from [Alleged Agent] as follows; "Hi [Accountant] apologies to pester, just wanted a chance to talk through the situation with [director of Shareholder]. NEX is still suspended from trading, it is looking grim. We are up to 20% in acceptances. We feel it is a very compelling rational for NEX shareholders to accept (and get some comfort that their investment can be saved!) I just wanted the opportunity to talk through the reasons and then let [director of Shareholder] make a decision. I really appreciate your assistance. Regards, [Alleged Agent]."*
28. *I do recall picking up another call from [Alleged Agent] ("**Third Telephone Conversation**").*
29. *In this Third Telephone Conversation, he mentioned that Nex is still in suspension from trading, some negative comments about Ken Allen (**Ken**) and why [director of Shareholder] would not take the opportunity to receive \$900,000 "in his hand" for his shares. I don't otherwise recall the exact words that were used.*
21. The Witness Statement of the director of Shareholder provides details of:
- (a) a conversation with Accountant concerning the alleged cash offer:
21. *[Accountant] told me about the call from [Alleged Agent] and that he was calling on behalf of MCT or something about MCT offering about \$900,000 in cash for all of [Shareholder's] shares in Nex."*
- (b) subsequent text messages received from and sent to the Alleged Agent and
- (c) phone calls received, but not accepted, from the Alleged Agent.
22. In its preliminary submission, the Advisor denied that any offer of a collateral benefit was made or could be implied or inferred and submitted that the Panel should decline to conduct proceedings as the materials provided by the applicant "*do not in any way sufficiently evidence the claims made in the Original Application*" or in the review application.
23. Metalicity also submitted that the Panel should decline to conduct proceedings, submitting that there was no basis to suggest, let alone conclude, that any form of offer was made by the Alleged Agent in his conversation with Accountant on 12 November 2021 or at any other time.
24. We consider that the material provided by the applicant, including the Witness Statements, does not provide a sufficient evidentiary basis for concluding that the Alleged Agent made an offer to acquire Shareholder's Nex Metals shares for cash consideration, particularly given the seriousness of the allegation. This is because:

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- (a) paragraph 29 of the Witness Statement of Accountant does not expressly make a cash offer
- (b) the reference to a sum “*in his hand*” is at best ambiguous – in circumstances where the securities of Nex Metals were suspended from trading on ASX at the time and the consideration securities were capable of being traded on market, the language is readily understood as referring to the proceeds of realising the consideration securities
- (c) Accountant acknowledged in his Witness Statement that he did not otherwise recall the exact words used in the relevant conversation with the Alleged Agent, with the result that there was no evidence that the Alleged Agent specifically referred to cash consideration at all and
- (d) given that the Alleged Agent’s text messages with the director of Shareholder after the conversation described in paragraph 29 of the Witness Statement of Accountant focus on the relative merits of the Bid and do not refer or (as submitted by Metalicity) hint at the existence of any cash offer, we consider that, properly construed, any reference to Shareholder receiving \$900,000 “*in his hand*,” (or, “*about \$900,000*” as recounted to the director of Shareholder) refers to the implied value of the Bid to Shareholder.⁹

DECISION

25. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth). Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any interim or final orders.

Alex Cartel

President of the sitting Panel

Decision dated 13 December 2021

Reasons given to parties 20 December 2021

Reasons published 22 December 2021

⁹ The Advisor submitted in its preliminary submissions in *Nex Metals 03* that the implied value of the Bid to Shareholder, based on the Metalicity share price on the date of the application (\$0.011 per share), was \$899,470

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Advisers

Party	Advisers
Advisor	CBW Partners
Metalicity	Tottle Partners
Nex Metals	George Papamihail Barristers and Solicitors