



Australian Government

Takeovers Panel

**Reasons for Decision
Nex Metals Explorations Ltd 02
[2021] ATP 16**

Catchwords:

Target’s statement – supplementary target’s statement – replacement target’s statement – disclosure standard – disclosure deficiencies – efficient, competitive and informed market – directors’ recommendation – sufficient basis for recommendation – joint venture – dispatch of documents – independent expert’s report – interim orders – declaration – orders

Corporations Act 2001 (Cth), sections 602, 633 (item 6, 7 and 12), 638, 639(1), 640, 657A, 657D, 670A

Guidance Note 4: Remedies General, Guidance Note 18: Takeover documents

Takeovers Panel Procedural Rules 2020 (Cth), rules 18, 19

ASIC Regulatory Guide 10: Compulsory acquisitions and buyouts

ASIC v Yandal Gold (1999) 32 ACSR 317

Nex Metals Explorations Ltd [2021] ATP 12, Alto Metals Limited [2020] ATP 17, Gulf Alumina Limited [2016] ATP 4, Tully Sugar Limited 01R [2010] ATP 1, Tully Sugar Limited [2009] ATP 26, Programmed Maintenance Services Limited 02 [2008] ATP 9, AMP Shopping Centre Trust 02 [2003] ATP 24

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
YES	NO	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 (among other things) that Nex Metals’ target’s statement in respect of Metalicity’s bid contained material information deficiencies, in breach of sections 638 and 670A.¹ It made final orders, including requiring Nex Metals to prepare a replacement target’s statement (in a form that ASIC does not object to) accompanied by an independent expert’s report. It also made additional orders, including to allow Metalicity to dispatch an independent expert’s report (with the costs of the report to be borne by Nex Metals directors jointly and severally up to \$50,000) if Nex Metals did not prepare a compliant replacement target’s statement within a certain period.

2. In these reasons, the following definitions apply.

- Bid** Has the meaning given in paragraph 7
- Bidder’s Statement** Has the meaning given in paragraph 8

¹ 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)

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JV	The unincorporated joint venture established under the JV Agreement
JV Agreement	Has the meaning given in paragraph 5
KMPL	Kym Mining Pty Ltd, a wholly-owned subsidiary of Metalicity
Metalicity	Metalicity Ltd
Metalicity IER	Has the meaning given in paragraph 95(a)
Nex Metals	Nex Metals Explorations Ltd
Nex Metals IER	Has the meaning given in paragraph 82(b)
Replacement Target's Statement	Has the meaning given in paragraph 82(b)
Rights Issue	Has the meaning given in paragraph 9
Target's Statement	Has the meaning given in paragraph 11

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.²
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. 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.³
7. 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**).
8. On 24 September 2021, Metalicity issued and served its bidder's statement in relation

² As at the date of the application

³ 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. Postscript – On 24 January 2022, Justice Hill made orders that the case against Metalicity be dismissed

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to the Bid (**Bidder's Statement**).

9. 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**).
10. 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).
11. 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*". The Target's Statement was not accompanied by an independent expert's report (noting that one is not statutorily required⁴).
12. 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*".
13. Also on 1 November 2021, Nex Metals was suspended from quotation on ASX for not lodging its relevant period reports by the due date.
14. 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*".
15. On 8 November 2021, Nex Metals announced that a supplementary target's statement would be released on 12 November 2021.
16. As at the date of the Panel's decision on declaration and orders, a supplementary target's statement had not yet been lodged by Nex Metals.

APPLICATION

17. By application dated 2 November 2021, Metalicity sought a declaration of unacceptable circumstances. Metalicity submitted that Nex Metals' Target's Statement:
 - (a) "*is misleading and deceptive in a number of respects*", in contravention of section 670A and
 - (b) "*does not contain all the information that holders of bid securities and their professional advisers would reasonably require to make an informed assessment regarding whether to accept the offer under the bid*", in contravention of section 638(1).
18. Accordingly, Metalicity submitted that the Target's Statement would "*result in the market for control of NME being ill-informed, inefficient and uncompetitive contrary to the s 602 principles.*"

⁴ See section 640

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Interim orders sought

19. Metalicity sought interim orders restraining dispatch of Nex Metals' Target's Statement and removal of the Target's Statement from the ASX announcements platform and Nex Metals' website.
20. To help inform our decision on any interim orders, the Panel executive asked Nex Metals some initial questions to better understand why Nex Metals considered it necessary to announce that it "*will issue a supplementary Target's Statement*" and Nex Metals' intended plans for dispatch of its Target's Statement and a supplementary target's statement.
21. In response, Nex Metals submitted (among other things) that:
 - (a) Nex Metals had made two applications to ASIC for an extension to issue the Target's Statement, including on the basis that "*Metalicity had not provided information required under the joint venture agreement*". However, ASIC "*determined that Nex Metals would not be issued an extension of time due to ASIC's policy. Consequently, it was decided that Nex Metals should withdraw the application for an extension of time and lodge the target's statement with a supplementary target's statement lodged in the next 7 days.*"
 - (b) "*The primary purpose of stating in the covering letter dated 29 October 2021 that Nex Metals quote: 'will issue a supplementary Target's Statement' was to provide transparency to market and to all stakeholders.*"
 - (c) Nex Metals intended to issue a supplementary target's statement "*on a revised date, Monday 8 November 2021. The reason for the revised date is taking into consideration the matters raised by Metalicity in their filed [Panel] application...*". We note that Nex Metals had previously disclosed that a supplementary target's statement would be issued by 5 November 2021 (being seven days after it lodged its Target's Statement).⁵
22. Guidance Note 4: Remedies General states at [13] that "*[i]n general, the Panel will not hold up a transaction by interim orders unless mischief will occur that cannot, or cannot conveniently, be reversed by final orders. Example: Unless the information deficiencies are significant, it will usually be preferable to allow a bidder's statement to be dispatched pending a final decision on the alleged deficiencies*" (footnotes omitted).
23. In this case, our initial view was that the information deficiencies in the Target's Statement were significant (see also paragraph 34 below). We considered that the Target's Statement in its current form would not assist Nex Metals shareholders with their assessment of the Bid.
24. We also did not have any real clarity from Nex Metals on its plans for dispatching its Target's Statement or a supplementary target's statement. Our preference was for Nex Metals shareholders to be sent one comprehensive target's statement rather than piecemeal information through (potentially) multiple supplementary statements.

⁵ Nex Metals' ASX announcement titled 'Target Statement' released on 1 November 2021

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25. Accordingly, on 10 November 2021, we advised the parties and ASIC that we were minded to make interim orders that Nex Metals must not dispatch any information to its shareholders in relation to the Bid, including but not limited to a target's statement or supplementary target's statement, in order to maintain the status quo pending determination of the Panel application.
26. In response, Metalicity requested (among other things) that the wording of the interim orders be amended to make clear that the orders also applied to the making of ASX announcements in respect of the Bid.
27. Nex Metals objected to the draft interim orders and submitted (among other things) that the proposed orders "*will be unfair and inequitable to the shareholders of NME in failing to keep them fully informed. Moreover by default, Metalicity ("MCT") is provided an unfair material advantage in its pursuit of the takeover.*" It also submitted that if such orders were to be made, then an exception should apply to allow Nex Metals to dispatch information to its shareholders in respect of the Rights Issue.
28. We did not consider it necessary to broaden the interim orders to restrain Nex Metals from making any announcements in respect of the Bid – to do so in the circumstances of this matter would unreasonably restrict Nex Metals' ability to keep its shareholders informed. However, we maintained the view that it was unhelpful for shareholders to be sent a copy of the Target's Statement which, on a preliminary assessment, appeared materially defective.
29. Accordingly, we amended the draft interim orders to clarify that Nex Metals be restrained from physically sending any information to shareholders in respect of the Bid. We agreed with Nex Metals that a carve-out should be included to allow Nex Metals to dispatch information in respect of the Rights Issue to comply with our final orders made in *Nex Metals Explorations 01*.
30. Our interim orders made on 15 November 2021 reflect the above position (see **Annexure A**).

Final orders sought

31. Metalicity sought final orders, including an order that Nex Metals issue a replacement target's statement in a form approved by the Panel.

DISCUSSION

32. 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

33. While Nex Metals responded to the Panel executive's preliminary questions (see paragraphs 20 to 21 above), we did not receive a preliminary submission from Nex Metals.
34. In our view, Metalicity's application submitted what appeared to be a clear contravention of the standard of disclosure required by section 638.
35. Accordingly, we decided to conduct proceedings.

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Target's Statement disclosure

36. Section 638(1) requires a target's statement to include all the information that shareholders and their professional advisers would reasonably require to make an informed assessment whether to accept the offer.
37. A target's statement is also required to contain a statement by each target director recommending that a bid be accepted or not accepted and giving reasons for that recommendation, or giving reasons why a recommendation is not made (section 638(3)).
38. The Panel has considered a number of matters concerning the standard of disclosure for a target's statement and what is required by section 638.
39. For example, the initial Panel in *Tully Sugar Limited*⁶ considered a target's statement from Tully to contain material non-disclosures that were "*most unsatisfactory*", including because it did not include financial information that might assist shareholders to ascertain the value of their shares, only included one reference to the value of the target and that disclosure around the director's review of Tully's company structure was only provided once the Panel raised the issue.⁷
40. Also, in *Gulf Alumina Limited*, the Panel considered that a target's statement contained insufficient information regarding the comparative value of Gulf (the target) as a standalone entity and the Metro takeover offer, and the bases on which the directors recommended that shareholders reject the Metro offer.⁸ The Panel agreed with ASIC that "*an assessment of the value of bid consideration and the value of target shares is information that all investors and their advisers reasonably expect will be provided to them by the Target*" under section 638.⁹
41. In this matter, Metalicity submitted that the Target's Statement was "*grossly deficient*". It submitted that the Target's Statement "*goes nowhere near meeting the standard of disclosure required*" and "*manifestly does not comply*" with section 638(1), including because (among other things):
 - (a) "*There is no financial information given in the target's statement at all, other than the share price of MCT and NME.*"
 - (b) There was no information as to the Rights Issue recently announced by Nex Metals.
 - (c) There was no disclosure that Nex Metals would be suspended from quotation on ASX from 1 November 2021 for failure to lodge its periodic reports by the

⁶ [2009] ATP 26

⁷ The initial Panel ultimately declined to make a declaration of unacceptable circumstances after Tully offered to provide additional information for inclusion in a supplementary target's statement. The review Panel in *Tully Sugar Limited 01R* [2010] ATP 1 declined to conduct proceedings having considered Tully's disclosure in the supplementary target's statement to be sufficient

⁸ [2016] ATP 4 at [20]

⁹ [2016] ATP 4 at [22]

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requisite deadline¹⁰ and that Nex Metals' directors "*must have known, or ought to have known, that this suspension would occur when the target's statement was served on 29 October 2021*".

- (d) "*There is no identification of the risks to a NME shareholder of, on the one hand, accepting the bid or, on the other hand, not accepting the bid.*"
42. We asked Nex Metals to explain the basis upon which it determined that the information above in paragraph 41 was not required to be disclosed in the Target's Statement. Nex Metals did not respond to our question.
43. As to whether the Target's Statement meets the standard of disclosure required under section 638, Nex Metals submitted that "*Nex Metals was of the view that the target's statement it lodged would be insufficient and that [is] why it made the announcement on the same date of lodgement of the target's statement [that] it will lodge a supplementary target's statement...*".
44. ASIC submitted that it "*has reviewed the Target's Statement on the basis that NME intends to release a supplementary Target's Statement, which ASIC will review to ensure compliance with the takeover provisions and the purposes underlying Chapter 6...*".
45. ASIC also submitted that the reasons given by Nex Metals' directors for recommending rejection of the Bid (see paragraph 51 below for further detail) "*are fundamentally unsound because they are not premised on the value of the Offer, and therefore do not comply with s638(1)...*".
46. In this case, Nex Metals shareholders require information to be able to assess whether they wish to remain as shareholders in Nex Metals as a stand-alone entity or become shareholders in the post-acquisition Metalicity. We consider that Nex Metals did not provide adequate information. The Target's Statement largely comprises boilerplate language that could be reproduced in any target's statement. It does not include any financial information on Nex Metals or the value of its shares relative to the Metalicity offer. There is no comparison of the benefits shareholders may receive by accepting the Metalicity offer as opposed to remaining as shareholders in Nex Metals as a standalone entity. The Target's Statement is materially deficient, including because it does not disclose the information set out in paragraphs 41(a) to (d) above.
47. We also consider that the Target's Statement fails to 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*" (see discussion at paragraphs 51 to 62 below).
48. Accordingly, the Target's Statement falls well short of the standard of disclosure required by section 638, and Nex Metals shareholders are left without sufficient information to make an informed assessment of the Bid.

¹⁰ 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

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49. We also note that section 670A(1) provides that a person must not (among other things) give a target's statement if there is a misleading or deceptive statement in the document, or there is an omission from the target's statement of material required by section 638.
50. For the reasons discussed above, we consider that the Target's Statement does not include all material required under section 638. Accordingly, the Target's Statement also contravenes section 670A(1).

Directors' recommendation

51. Metalicity's application also concerned the following three reasons given by Nex Metals' directors for recommending rejection of the Bid as set out in the Target's Statement:
- (a) The first reason: *"Lack of information including but not limited to long outstanding mineral resource estimates, which would provide a better valuation of both Metalicity and Nex"*.
 - (b) The second reason: *"Nex under the joint venture agreement maintains in its own right the first right to all processing from joint venture tenements"*.
 - (c) The third reason: *"Nex maintains in its own right, under the joint venture all the rights to the tailings project at Kookynie which would provide significant incomes to Nex alone"*.
52. Metalicity submitted that the Target's Statement is misleading and deceptive, in contravention of section 670A(1), on the basis of the above-mentioned reasons given by Nex Metals' directors for its recommendation. In particular, it submitted (dealing with each reason in turn) that:
- (a) *"There is no obligation on MCT to have prepared any mineral resource estimate and it has not done so... for the reasons set out in MCT's announcement of 6 October 2021, ie that the mineral resource estimate is "dependent on core density measurements, which will be available after the completion of the core drilling"."* It also submitted that *"there is no relevant information that exists and to which MCT has not provided NME with access"*. Specifically, Metalicity submitted that it had provided a representative of Nex Metals with access to certain information on 6 October 2021 following a request from Nex Metals' solicitors on 28 September 2021, and had subsequently made available a copy of the requested information that (at the time of its application) *"is still awaiting collection at MCT's office"*.
 - (b) The reason given that Nex Metals maintains the first right to all processing under the JV tenements *"is simply incorrect. There is no such provision in the JVA..."*.
 - (c) The reason given that Nex Metals maintains all rights to the tailings project at Kookynie is *"also incorrect. There is no mention of tailings in the JVA at all."*
53. We asked Nex Metals to respond to Metalicity's submissions. It submitted (dealing with each reason in turn):
- (a) In respect of the 'lack of information' reason, that Nex Metals *"only got hold of*

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bundle of documents (in a harddrive amounting to 31.4 Gigs) on the 4 November 2021” and that Nex Metals was not contacted by Metalicity to advise that such information was ready for collection prior to 1 or 2 November 2021. Further, it submitted that “[b]y the time a proper review and inspection of those bundle of documents, the due date, 29 October 2021, to lodge that target’s statement has already passed and [that is] why Nex Metals’ directors recommendation for rejecting the bid is stated as lack of information”.

- (b) In respect of its first right to all processing under the JV tenements, that under the JV Agreement “MCT under its subsidiary Kym Mining Pty Ltd (KMPL), is only entitled to 51% interest in the Kookynie & Yundamindra Gold projects provided that subject to KMPL giving notice to NME verifying that the amount of Stage 1 Project Expenditure that KMPL has incurred...”. We note that whether such a notice has been given by KMPL to Nex Metals is currently being disputed by Nex Metals in the Supreme Court of Western Australia.¹¹
- (c) In respect of its right to the tailings project at Kookynie, that “under a verbal discussion between Mr Allen from Nex Metals and Mr Longworth, former director of MCT and Mr Livingston, current director of MCT, [they] agreed and confirmed that Nex Metals does have rights to everything above ground.”

54. As noted above, ASIC provided a submission more generally that the reasons provided by Nex Metals’ directors “are fundamentally unsound because they are not premised on the value of the Offer” and therefore breached section 638(1).

55. In *Alto Metals Limited*, in considering the Alto directors’ recommendation to reject the Habrok bid on the basis of an undervalue statement, the Panel commented generally on the importance of the directors’ recommendation:

... Given the importance of the directors’ recommendation and its ability to influence the outcome of the bid, one would assume that such a recommendation is made by the directors on an informed and sufficiently defensible basis.¹²

56. The Panel’s Guidance Note 18: Takeover documents also stipulates at [39] that, in respect of directors’ recommendations, “[t]he basis for a recommendation must be disclosed, must not be misleading and must give offeree shareholders enough information for them to make an informed assessment about whether to accept the offer.”

57. As we conclude further below, in this matter, there is a complete absence of material to suggest that Nex Metals’ directors had undertaken any substantive assessment or deliberation of the Target’s Statement. In particular, Nex Metals produced no board papers or minutes to show that its directors had properly turned their minds to the contents of the Target’s Statement or the basis upon which the directors’ recommendation is made (see paragraphs 69 to 71 below). Nex Metals also did not receive any external advice in preparing the Target’s Statement (see paragraph 74 below).

¹¹ See footnote 3 for further details. See also paragraphs 126 to 130 of these reasons

¹² [2020] ATP 17 at [45]

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58. In respect of the first reason given for Nex Metals' directors recommendation – “*due to the lack of information*” – we asked Nex Metals what information it considered that Metalicity has that has not been disclosed and whether Nex Metals had considered making such disclosure in the Target's Statement (and if not, why not). Nex Metals submitted “*[i]nformation like books, records and accounts for the Joint Venture Expenditure and Audit Information maintained by the Manager [of the JV]...*”. It did not otherwise identify specifically what information had not been disclosed to its shareholders.
59. We found this first reason given by Nex Metals' directors to be unsatisfactory in light of the material disclosure issues we identified in the Target's Statement. Target directors are required under section 638 to inform their shareholders in relation to the bid. Accordingly, to state as a reason for rejecting the Bid to be “*lack of information*”, without more considered explanation, is not a proper reason as required by section 638. We note the comments of the initial Panel in *Tully Sugar Limited* which recognise the obligation of target directors to provide their shareholders with sufficient information of the comparative value of the target vis-à-vis a takeover offer (emphasis added):

*... Directors of a company are subject to various duties in the context of a takeover offer. They will have information that shareholders do not. Once a bid has been made for the company, shareholders must consider whether to retain their investment in the company or accept the offer. This is a significant decision they must make. **They naturally look to, and expect, the directors to provide relevant information about their company. The law recognises this. The directors have a statutory obligation to make certain information available to shareholders.***¹³

60. Directors are required under section 638(3) to give reasons for their recommendations. These reasons, in the Panel's view, must be well considered and documented.
61. We also asked Nex Metals to provide copies of any written advice (or descriptions of any verbal advice) it received to support its assertion that Nex Metals has the first right to all processing from the JV tenements and all rights to the tailings project at Kookynie (being the second and third reasons respectively). No such advice was provided.
62. Having considered the submissions, we are not satisfied that Nex Metals' directors have provided soundly-based and sufficiently defensible reasons upon which they have recommended that shareholders reject the Bid. The recommendation does not reflect properly reasoned views, which we consider has the potential to mislead Nex Metals shareholders and does not promote an efficient and competitive market.

Preparation of the Target's Statement

63. We are also deeply concerned with the process that was undertaken by Nex Metals and its directors in preparing the Target's Statement.
64. The standard required of a target company in communications with its shareholders

¹³ *Tully Sugar Limited* [2009] ATP 26 at [60]

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was described by the Panel in *Programmed Maintenance Services Limited 02*¹⁴ (emphasis added):

[17] *The making of a takeover bid for a company is a critical time for its shareholders. Probably more than at any other time in the company's history, shareholders will look to their directors to provide advice. Accordingly, the directors must ensure that their advice is reasonably based, clear, concise, objective and not misleading. All information presented must be prepared with the highest degree of care, as it would be if the directors were issuing a prospectus. The directors should consider carefully each statement and be satisfied that it meets this test.*

[18] *Accurate, reliable information and properly reasoned views will best assist the shareholders and promote an efficient, competitive and informed market.*

65. We asked Nex Metals to provide all papers and minutes of the Nex Metals' board relating to the consideration and approval of the Target's Statement.
66. In response, Nex Metals provided a copy of an email sent on 29 October 2021 (being the same date the Target's Statement was lodged) at approximately 3.13pm (WST) by Mr Ken Allen (Nex Metals' managing director) to, among others, Mr Thomas Percy QC (Nex Metals' chairman) and Professor 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."
67. The email correspondence then showed that less than ten minutes later at approximately 3.22pm (WST), Mr Percy QC responded to Mr Allen's email stating: "Ok by me."
68. In respect of this email correspondence, Metalicity submitted (among other things) that:
 - (a) "[T]here was no response at all by Professor Chua... The target's statement falsely states (at section 3.1) that "Your directors unanimously recommend that you reject the Offer."
 - (b) "The target's statement was not seen even in draft by Mr Percy or Professor Chua (a consequence being that s 638(5) was breached)."
 - (c) "The directors of Nex Metals (with the possible exception of Mr Allen) did not consider the target's statement".
 - (d) "The directors of Nex Metals did not, in breach of s 639(1)(a), resolve to approve the target's statement" and accordingly, "the statement in the Target's Statement that "This Target's statement has been approved by a resolution passed by your directors" is false".
69. On the material before us, it is clear that the Target's Statement does not meet the standard required under section 638. The content has not been prepared with "the highest degree of care", and nor have Nex Metals' directors carefully considered each

¹⁴ [2008] ATP 9

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statement in the Target's Statement to ensure that it meets such a standard.

70. There appears to have been very little, if any, consideration by Nex Metals' directors of the information in the Target's Statement, noting that Nex Metals was not able to produce any board papers and minutes relating to the consideration and approval of the Target's Statement. We found this most concerning.
71. We agree with the issues raised by Metalicity regarding the email correspondence produced by Nex Metals. The emails, by which Nex Metals purports to show that its directors had approved the Target's Statement, clearly do not satisfy the requirement of section 639(1) which requires a copy of the target's statement lodged with ASIC to be approved by a resolution passed by the target directors. It is evident that at the time of Mr Allen's email to Mr Percy QC and Professor Chua, the Target's Statement had yet to be substantively completed – there is no draft target's statement attached to any of the email correspondence for the directors' consideration, the document itself is described as "*rough and ready*" and Mr Allen appears to be seeking approval from his fellow directors to "*complete*" the Target's Statement (rather than approve the Target's Statement) for lodgement. Notably also, we were provided with no material to establish that one of the directors had even replied to Mr Allen's email.
72. We also wish to address Nex Metals' submissions, made on a number of occasions throughout the proceedings, that it had consulted with, and acted on guidance or a recommendation by, ASIC to proceed with lodging a "*rough and ready*" target's statement by the statutory deadline with a supplementary statement to follow. In one instance, these submissions were made in response to our question on whether Nex Metals received any external advice in preparing the Target's Statement.
73. We are troubled that Nex Metals has attempted to justify its decision to lodge its deficient Target's Statement as following a recommendation provided by ASIC. ASIC confirmed that it "*did not make any recommendations to NME and had no exposure to the Target's Statement before it was lodged. ASIC does not provide legal advice to parties seeking relief.*"
74. Nex Metals did not otherwise provide submissions in respect of receiving external advice from any professional advisors. Accordingly, we consider that Nex Metals' directors did not receive any external advice with respect to the Target's Statement and had, on their own volition, determined to follow the course of lodging the deficient Target's Statement, with a supplementary target's statement to follow at some subsequent time.
75. Metalicity submitted that "*[s]ection 638 does not contemplate, countenance or permit the lodgement of a "rough and ready" target's statement on the basis that a (compliant) target's statement will be lodged at some subsequent time*". We agree that such a practice is not appropriate and does not comply with the content and timing requirements of sections 638 and 633.
76. We also note that 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). While

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Nex Metals lodged its Target's Statement on 29 October 2021, it had not completed dispatch of the Target's Statement to Nex Metals shareholders by that same date (being 15 days after it received notice that Metalicity had completed dispatch of the Bidder's Statement). Accordingly, Nex Metals has also contravened item 12 of section 633.

DECISION

Declaration

77. 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 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.
78. Accordingly, we made the declaration set out in **Annexure B** and consider that it is not against the public interest to do so. We had regard to the matters in section 657A(3).
79. We note that it was open to Nex Metals to lodge supplementary disclosure to address our disclosure concerns at any time prior to our decision to make the declaration set out in **Annexure B**. No such disclosure was proffered before our declaration (and final orders) were issued on 30 November 2021.¹⁵

Orders

80. Following the declaration, we made the final orders set out in **Annexure C**. Subsequent to that, we made the additional orders set out in **Annexure D**.
81. Under section 657D, the Panel is empowered to make 'any order'¹⁶ if 4 tests are met:
- (a) it has made a declaration under section 657A. This was done on 30 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 final orders and additional orders do not unfairly prejudice any person.
 - (c) it gives any person to whom the proposed order would be directed, the parties

¹⁵ Nex Metals submitted on several occasions that the Panel's interim orders had prevented Nex Metals from providing a supplementary statement. We address these submissions in paragraphs 116 to 119 of these reasons

¹⁶ 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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and ASIC an opportunity to make submissions. This was done on 22 November 2021 in relation to the final orders and on 2 December 2021 in relation to the additional orders. Each party made one or more submissions and rebuttals on both sets of our proposed orders.

- (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. We consider that the final orders and additional orders do this for the reasons discussed below.

Final orders

82. On 22 November 2021, we provided draft final orders (together with the draft declaration) to the parties and ASIC and sought submissions. The draft final orders required Nex Metals to:
 - (a) immediately advise the market that (among other things) its Target's Statement contains material information deficiencies, and that it will lodge a replacement target's statement
 - (b) as soon as practicable, prepare and lodge a replacement target's statement (**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 IER**) and
 - (c) bear the costs of the Nex Metals IER.
83. While ordering that the target procure an independent expert's report in circumstances where it is not statutorily required¹⁷ is unusual, we considered that an independent expert's report was necessary in this case because of the significant disclosure deficiencies in the Target's Statement, in particular in respect of the reasons given for the directors' recommendation and given our concerns discussed above regarding the process undertaken to date by Nex Metals and its directors to prepare the Target's Statement.
84. We also considered an independent expert's report would assist in ensuring that Nex Metals shareholders would receive, as expeditiously as possible, sufficient and adequate information to enable them to assess the merits of, and make decisions in respect of, the Bid.
85. We considered that an independent expert nominated by ASIC was appropriate in the circumstances and in the interests of shareholders, given an adequate target's statement was long overdue and that we were most unsatisfied with the processes undertaken so far by Nex Metals and its directors in respect of its Target's Statement.
86. Additionally, given that we contemplated that the Replacement Target's Statement

¹⁷ See section 640

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would be in a form that ASIC does not object to, and that the notice of meeting in respect of Nex Metals' Rights Issue (as required by our final orders in *Nex Metals Explorations Ltd*) will refer to information in the Replacement Target's Statement, we considered it appropriate for the draft final orders to include an order that ASIC confirm the notice of meeting in respect of the Rights Issue is in a form that it does not object to prior to the Panel providing its approval.

87. Nex Metals' only submission on the draft final orders as drafted was that they were *"prejudicial against Nex Metals as Metalicity has not submitted an independent experts report as a comparison"*.
88. Metalicity submitted that the draft final orders raised concerns around timing, noting that the *"best part of another month has now passed"* since Nex Metals lodged its deficient Target's Statement. Further, it submitted that *"there is no indication that Nex Metals is now able to lodge a compliant target's statement"* and that the process contemplated by the Panel to nominate and engage an expert to prepare the Nex Metals IER would *"significantly further extend"* and delay lodgement of a compliant target's statement. It suggested that the draft orders be amended to contemplate a tighter timeframe with specific milestone deadlines.
89. In response to Metalicity's submissions, Nex Metals submitted (among other things) that *"the Panel has requested an independent experts report so a draft Target Statement will now be dependent on that recommendation"*.
90. ASIC submitted that it is *"prepared to review the Replacement Target's Statement and notice of meeting and confirm whether it has no objection in accordance with the Proposed Orders. However, in doing so, ASIC does not assume any responsibility for, or guarantee the accuracy of, the content of the Replacement Target's Statement or notice of meeting. That approach is consistent with ASIC's policy in respect of disclosure."*
91. ASIC also submitted (in rebuttals) that, in respect of the experts it will recommend, *"ASIC will adopt a process similar to that set out in ASIC Regulatory Guide 10 Compulsory acquisitions and buyouts... ASIC's process is to ask the next three experts on the appropriate register, in rotational order, if they have a conflict or do not want to be nominated on the particular matter. We expect a response from each expert within two business days of the request... The first three experts who confirm their willingness to take the assignment will generally be nominated."*
92. We agreed with the timing concerns raised by Metalicity. However, we did not think it was workable to hardwire into the final orders defined dates by which the processes in respect of the Nex Metals IER and Replacement Target's Statement had to be completed.
93. We continued to have significant concerns about Nex Metals shareholders receiving a compliant target's statement in a timely manner and were keen to ensure that Nex Metals shareholders were aware of our concerns and their options in respect of the Bid. Accordingly, we amended the draft final orders to (among other things):
 - (a) require Nex Metals to prepare the Replacement Target's Statement (accompanied by the Nex Metals IER and in a form that ASIC does not object

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to) *“as expeditiously as possible”* (rather than *“as soon as practicable”*)

- (b) require Metalicity to send a letter to Nex Metals shareholders, in a form approved by the Panel, which includes a copy of the Panel’s 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 and
- (c) make provision for the Panel to make further orders.

94. The final orders made reflect our views expressed above, which also give the parties and ASIC the liberty to apply for further orders.

Additional orders

95. As expressed above, we continued to have significant concerns about Nex Metals shareholders receiving a compliant target’s statement. Accordingly, we proposed additional orders, including that:

- (a) if Nex Metals does not prepare and lodge its Replacement Target’s Statement by 15 January 2022, Metalicity may engage an expert to produce an independent expert’s report opining on whether the Bid is fair and reasonable (**Metalicity IER**) and dispatch the Metalicity IER to Nex Metals shareholders and
- (b) the external costs of the Metalicity IER (including the fees and expenses of the independent expert and dispatch costs) be borne by Nex Metals’ directors jointly and severally up to an amount of \$50,000 and with the balance to be borne by Metalicity.

96. Nex Metals submitted (among other things) that:

- (a) it did not agree with the proposed additional orders *“as it is under the presumption that Nex Metals will not be able to comply with the Panel’s final orders...”*
- (b) *“it is unfair and unconscionable”* for Mr Allen, Mr Percy QC and Professor Chua to bear the external costs of the Metalicity IER, that to do so would be *“extraordinary”* and such costs *“should be borne by Nex Metals instead”*
- (c) the timeline to provide the Nex Metals IER (which is required for the Replacement Target’s Statement) is *“outside the control of Nex Metals”* and the proposed additional orders *“will create more delay on the Takeover bid and will continue to frustrate the issue and dispatchment of the Replacement Target’s Statement”* and
- (d) *“... if it were not for the interim orders to stop the issue of a supplementary target statement... the supplementary target statement would have been issued some weeks ago which would have had the further effect of providing shareholders further information in any event. The delays only make the process unconscionable for Nex Metals Shareholders.”*

97. No separate submissions were received from Nex Metals’ directors who were also given an opportunity to make submissions on the draft additional orders (discussed

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further below at paragraphs 120 to 125).

98. Metalicity submitted (among other things) that:
- (a) the 15 January 2022 deadline proposed for the Replacement Target's Statement is "*far too late*" given Nex Metals had already had some five or so weeks since it lodged its deficient Target's Statement to prepare a compliant document
 - (b) Nex Metals should be required "*to identify, with precision, what steps it has already taken to prepare a replacement target's statement*" and
 - (c) any costs in respect of the Metalicity IER over \$50,000 should be borne by Nex Metals (rather than Metalicity) because "*[t]hose costs will only arise in a circumstance where Nex Metals fails to comply with the Panel's orders, and in that circumstance Metalicity will effectively be doing Nex Metals' work for it*".
99. ASIC submitted (among other things) that:
- (a) It considers "*the Replacement Target's Statement, together with the bidder's statement, is important to provide target holders with sufficient information to make an informed decision about the bid. Noting the time that has passed since the bid commenced, and since the target's statement was due to be dispatched, ASIC considers it important that NME shareholders receive the Replacement Target's Statement annexing an Independent Expert's Report (IER) as soon as possible.*"
 - (b) The proposed additional order in relation to the Metalicity IER costs "*places no limitation on [Nex Metals' directors] becoming indemnified or reimbursed by NME. ASIC notes that where a deadline is imposed on NME to provide a Replacement Target's Statement including an IER, it is possible that NME (if the Directors' expenses are reimbursed or indemnified by NME) may be responsible for costs (or the specified portion thereof) in relation to both IERs...*".
100. In response to a submission from Nex Metals that the Panel should amend its final orders to authorise Nex Metals or ASIC to approach the Panel in respect of the proposed date of 15 January 2022, ASIC submitted that the proposed order as drafted "*does not impose any obligations on ASIC to manage timeframes. Accordingly, ASIC does not presently request any amendment of the order to expressly permit ASIC to seek an extension of that date in writing.*"
101. Following the submissions, we considered it appropriate to amend the draft additional orders:
- (a) to require Nex Metals to provide weekly updates on the status and progress of its Replacement Target's Statement and the accompanying Nex Metals IER
 - (b) to provide that the Metalicity IER could be prepared and dispatched if a compliant Replacement Target's Statement (including the Nex Metals IER) was not lodged and dispatched by 14 January 2022 (noting that the original 15 January 2022 date is a Saturday), unless extended with the Panel's consent and
 - (c) that Nex Metals' directors cannot be indemnified or reimbursed by Nex Metals for their costs borne in respect of the Metalicity IER.

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102. We were also aware that Nex Metals' announcement from 30 November 2021 titled 'Takeovers Panel - Finding of Unacceptable Circumstances' did not fully comply with Order 1 of our final orders. It failed to advise that the supplementary target's statement referred to in Nex Metals' previous ASX announcements would not be lodged or issued, and that a replacement target's statement, in a form that ASIC does not object to, would be lodged and sent to each Nex Metals shareholder.
103. Metalicity also submitted that Nex Metals' announcement from 7 December 2021 titled 'Update - Various matters and MCT takeover bid - Shareholders recommended to take no further action', which advises shareholders to "*take no further action*" in respect of the Bid on nine separate occasions, was unacceptable, including because:
- (a) "*the announcement effectively gives the advice of a target's statement without being a target's statement...*" and
 - (b) "*Nex Metals' directors advise shareholders to take "no further action" until a number of things have happened, one of them being the issuing of a (further) target's statement*", in circumstances where a compliant target's statement was required by 29 October 2021 and a replacement target's statement "*is most unlikely to be lodged before the end of the month.*"
104. We were concerned about the communications being made by Nex Metals to its shareholders and disappointed that Nex Metals did not properly comply with Order 1 of our final orders (which is a straightforward order). Accordingly, we amended the draft additional orders to require:
- (a) Nex Metals to immediately advise the market of the same information that was the subject of Order 1 of our final orders and
 - (b) that until Nex Metals has lodged the Replacement Target's Statement or the Metalicity IER is dispatched to Nex Metals shareholders (whichever is earlier), Nex Metals not be permitted to publish any further statements with respect to the Bid, except:
 - (i) as required by our additional orders
 - (ii) statements which indicate when its Replacement Target's Statement and accompanying Nex Metals IER will be available to its shareholders and
 - (iii) pending the availability of its Replacement Target's Statement and accompanying Nex Metals IER, Nex Metals shareholders may be advised to take no action with respect to the Bid.
105. We considered it necessary to put in place measures to expedite the process in providing information to Nex Metals' shareholders given the substantial delay by Nex Metals to date in providing disclosure and to ensure, as much as possible, that Nex Metals shareholders receive the information they need to make a decision in relation to the Bid.
106. We agreed with ASIC's submission that it was important for Nex Metals shareholders to receive the Replacement Target's Statement with an independent

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expert's report as soon as possible.

107. We considered 14 January 2022 a reasonable time by which Nex Metals should be able to produce the Replacement Target's Statement (inclusive of the Nex Metals IER). The weekly status reports from Nex Metals keep us informed on Nex Metals' efforts in this regard.
108. In the event that Nex Metals does not prepare the Replacement Target's Statement (inclusive of the Nex Metals IER) by 14 January 2022, Metalicity may procure and dispatch the Metalicity IER. We considered that this order was necessary to bridge the information deficiencies that will continue to exist for Nex Metals shareholders if an adequate Replacement Target's Statement is not produced.
109. The costs of the Metalicity IER are to be borne by Nex Metals' directors up to an amount of \$50,000. With no indemnity or reimbursement available from the company, the Metalicity IER should serve to incentivise Nex Metals' directors to ensure a compliant Replacement Target's Statement is prepared as soon as possible.
110. In considering whether orders unfairly prejudice a person, it is appropriate to consider "*the degree of culpability of the persons whose interests are affected by the orders*".¹⁸ We did not think such an order was unfairly prejudicial to Nex Metals' directors given their decision to lodge what they knew was a deficient Target's Statement. Their course of action was not inadvertent. Considering Nex Metals' delay in lodging a target's statement which complied with section 638 and the culpability of Nex Metals and its directors in that regard, we have fashioned orders with the aim of minimising any further delay in getting appropriate information into the hands of Nex Metals shareholders.
111. We also did not consider it fair to impose the cost of the Metalicity IER on Nex Metals shareholders, given the culpability of their directors. Accordingly, we consider that it is not unfairly prejudicial for Nex Metals' directors to cover the costs of the Metalicity IER, if one is required, noting that the order in question is not operative unless Nex Metals is unable to provide a compliant Replacement Target's Statement within the six week period to 14 January 2022.
112. We also note that ASIC noted in its submissions that the Metalicity IER may require Nex Metals "*to disclose confidential or commercially-sensitive information to the independent expert engaged by Metalicity. ASIC assumes that any such information would be kept in confidence by the expert and would not be disclosed to Metalicity despite its role as the commissioning party*".
113. ASIC's submission aligns with our expectations on how the Metalicity IER order should operate. We note that Metalicity did not respond to ASIC's point in its rebuttal submissions and Nex Metals' rebuttals submitted more broadly that it "*concurs with ASIC[s] submission*".
114. We put the additional orders (as amended) to the parties and ASIC. No substantive

¹⁸ AMP Shopping Centre Trust 02 [2003] ATP 24, quoting *ASIC v Yandal Gold* (1999) 32 ACSR 317, at [120] to [121]

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comments were received.

115. Accordingly, we made the additional orders, which give the parties and ASIC the liberty to apply for further orders.
116. We also wish to address Nex Metals' submission above that the interim orders prevented Nex Metals from issuing a supplementary target's statement and that in essence, the Panel had delayed further disclosure to Nex Metals shareholders in respect of the Bid (see paragraph 96(d) above). Submissions to this effect were repeated by Nex Metals throughout the course of proceedings. We do not agree with these submissions.
117. The interim orders state that "*Nex Metals **must not dispatch (that is, physically send) any information to its shareholders in relation to [the Bid]... including but not limited to a target's statement or supplementary target's statement***" (emphasis added).
118. The interim orders did not prevent Nex Metals from making further announcements in respect of the Bid, including issuing a supplementary document.
119. The submissions from Nex Metals did not build a sufficiently strong case, in our view, particularly when the parties and ASIC were specifically informed that "*For clarity, the interim orders do not prohibit Nex Metals from making announcements on the ASX Market Announcements Platform regarding Metalicity's bid. The interim orders only restrain the physical sending of information to shareholders.*"

Other matters

Potential conflicts

120. Given that the additional orders included orders which were directed at Nex Metals' directors, Mr Allen, Mr Percy QC and Professor Chua (as non-parties) were provided an opportunity to make submissions on the draft orders.¹⁹
121. As outlined above, Nex Metals provided submissions on the draft additional orders which also appeared to have been made on behalf of Nex Metals' directors and no separate submissions were received from Nex Metals' directors.
122. Metalicity's rebuttal submissions on the draft additional orders submitted that "*[i]t is unacceptable that the solicitors for Nex Metals make submissions on behalf of the directors of Nex Metals and the Panel should record its disapproval of this practice. If the directors wished to make submissions, as they were invited and entitled to do, then those submissions ought to have been made by the directors themselves or by separate solicitors engaged by the directors.*"
123. The Panel executive made enquiries of Nex Metals to understand whether Nex Metals' legal advisers, George Papamihail Barristers and Solicitors (**George Papamihail**), were also advising Nex Metals' directors, noting to Nex Metals that "*[i]n granting leave for legal representation, the Panel considers how it might be assisted by the legal advisers seeking to represent a party. If a legal adviser is advising more than one party, the Panel needs to consider, for example, whether the potential for conflict might compromise the information that is made available to the Panel and whether an actual or*

¹⁹ See section 657D(3)(a)

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potential conflict of interest requiring the appointment of different solicitors could delay proceedings."

124. In response to the Panel executive's enquiries, Nex Metals confirmed that George Papamihail was representing Nex Metals and its directors "*in relation to the Takeover Panel matters and all the directors have waived conflict and privilege*". It also advised that "*[t]he directors have instructed [George Papamihail] to make their submission to the Panel on their behalf together with Nex Metals... Any director is welcomed (sic) to raise a conflict and seek his own independent legal advice and representative but none have sought to do so... The directors are happy to have [George Papamihail] to continue acting on their behalf, until otherwise instructed...*"
125. We considered the responses by Nex Metals and agree with the concerns raised in Metalicity's rebuttal submissions. In this matter, there was a potential for conflict to arise between the interest of Nex Metals' shareholders and its directors – for example, in relation to who should bear the costs of the Metalicity IER. This was evident from Nex Metals' submissions (see paragraph 96(b) above). However, in this instance, we decided not to take the matter further given that the directors (including one of whom is a barrister) were aware of our concerns and any change to the legal representation of Nex Metals or its directors at this late stage of the proceedings was only likely to cause further delay which we do not consider to be in the interests of Nex Metals' shareholders as a whole.

Submissions made by Nex Metals

126. Metalicity's rebuttal submissions in response to our Initial Brief noted that Nex Metals had submitted that its directors propose to state the following in its supplementary target's statement:

Metalicity is Nex's Joint Venture partner in the Kookynie Gold Project ("Kookynie"), holding a 51% interest (Nex holds a 49% interest). A key near-term value driver includes the impending declaration of a maiden JORC resource at Kookynie on the back of gold exploration target of ~1.0Moz (as announced by Metalicity). Metalicity, as project manager, has the best understanding of the inherent value of Kookynie and the lucrative upside available.... Furthermore, Nex Shareholders currently have an interest of 49% in Kookynie.

127. Metalicity submitted that Nex Metals' submission appeared to be inconsistent with the copy of the writ filed by Nex Metals against KMPL in the Supreme Court of Western Australia on 15 November 2021²⁰ and requested that Nex Metals' submission be recorded, as a direct quotation, in the Panel's reasons.
128. In its later submissions in response to both the Supplementary Brief on declaration and orders and the Supplementary Brief on additional orders, Metalicity repeated its request.
129. We make no comment on whether Nex Metals' submission is inconsistent with the writ it has filed against KMPL. However, Nex Metals did not object or provide any

²⁰ See footnote 3 for further details

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submissions in response to Metalicity's requests to include Nex Metals' submission as a direct quote in our reasons on any occasion.

130. Accordingly, we record in our reasons that Nex Metals made the submission set out in paragraph 126 above to us in the course of these proceedings.

Media canvassing

131. On 8 November 2021, Nex Metals issued an ASX announcement titled 'Supplementary Target's Statement - Update'. The announcement contained statements that directly related to the issues that were before us in these proceedings.
132. While we did not take this matter further, we were concerned that the contents of this announcement breached the confidentiality obligation and media canvassing restriction in the Panel's Procedural Rules 18 and 19. Parties are reminded that they undertake to comply with these Rules in their Notice to Become a Party and that the Panel takes such obligations seriously.

Postscript

133. On 12 January 2022, Nex Metals applied for a variation of the orders made in *Nex Metals Explorations Ltd 02*. It requested, pursuant to Order 3 of the additional orders,²¹ that the Panel give an extension of time to lodge the Replacement Target's Statement with the Nex Metals IER, or "*[i]n the alternative if the requirement for the [Nex Metals] independent expert's report is no longer a condition, we will be able to forward to the Panel a draft version of the replacement target's statement no later than next week, Friday 21 January 2022*".
134. Nex Metals submitted, in effect, that its corporate adviser had contacted all three independent experts nominated by ASIC (which ASIC had communicated to Nex Metals on 8 December 2021) but that, despite their efforts to engage with the nominated experts, the experts were either unresponsive or did not have availability to complete the Nex Metals IER within the timeframe contemplated by Order 3 of the additional orders (that is, by 14 January 2022).
135. Nex Metals further submitted that even if one of the experts could be engaged before 14 January 2022, "*it will take at least 4 to 6 weeks for the expert's report to be completed*" which would make it impossible for Nex Metals to meet the deadline.
136. On the materials submitted by Nex Metals to support its request, it did appear that Nex Metals had made some attempt to liaise with the three nominated experts but had faced difficulties engaging one to produce the Nex Metals IER within the required timeframe, possibly because of the Christmas/New Year's period disruption.
137. Accordingly, we decided to consent to a one week extension to give Nex Metals until 21 January 2022 to lodge its Replacement Target's Statement along with the Nex

²¹ Which provides that the Metalicity IER could be prepared and dispatched if a compliant Replacement Target's Statement (including the Nex Metals IER) was not lodged and dispatched by 14 January 2022, unless extended with the Panel's consent

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Metals IER while we considered whether to make any variation to the orders.

138. We sought submissions from the parties and ASIC on a number of questions to better understand the process that had been undertaken by Nex Metals to engage a nominated expert.
139. We also sought submissions on whether the orders should be varied to allow Nex Metals to engage an independent expert of its own choosing (rather than one nominated by ASIC) or lodge the Replacement Target's Statement (inclusive of an independent expert's report) by 11 February 2022, being 3 weeks after our week long extension granted to Nex Metals.
140. Nex Metals submitted (among other things) that it had contacted its preferred nominated expert on 9 December 2021. It subsequently contacted the two other nominated experts on 15 December 2021 after being advised that its preferred expert could not start the Nex Metals IER *"until sometime in February 2022"*.
141. We note that, despite being aware of the pending problems in engaging an expert to produce the Nex Metals IER within the requisite timeframe, Nex Metals submitted that it did not otherwise contact ASIC for any additional potential experts.
142. Nex Metals further submitted that its corporate adviser *"has contacted an expert who is ready to commence work"*. However, it was *"not in a position to confirm a specific timeframe as to when an independent expert's report can be produced"* and that its corporate adviser *"estimates a timeframe of up to 6 weeks"* once an expert had been retained.
143. Metalicity objected to the potential variations to the orders set out in paragraph 139 above, submitting that *"the Panel process is intended to operate swiftly. However, some 2 ½ months after this matter was commenced no substantive progress has been made by Nex Metals"*. It further submitted that Metalicity *"should now be entitled to proceed with the preparation and dispatch of [the Metalicity IER]"* and *"[i]n this regard, Metalicity has formally engaged an independent expert... [and] an independent technical expert... Those experts have estimated a (combined) report will be completed by the end of the first week in February, subject to all relevant information being made available"*.
144. ASIC submitted (among other things) that it had no objection to Nex Metals engaging an independent expert of its own choosing, noting that in the usual circumstances, a target company is free to appoint an expert of their choice provided the expert is appropriately qualified and experienced.
145. Having considered the submissions, we were conscious that Nex Metals shareholders were no closer to receiving the information they needed to make an informed decision in relation to the Bid. We were not persuaded that Nex Metals would be able to procure the Nex Metals IER within a timely manner, noting that its submissions suggested an independent expert's report was still some six weeks away.
146. Accordingly, we decided to allow Order 3 of the additional orders to operate as intended. That is, to allow Metalicity to proceed with the preparation and dispatch of the Metalicity IER (with the external costs of the Metalicity IER to be borne by Nex

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Metals' directors jointly and severally up to an amount of \$50,000) if Nex Metals did not lodge its Replacement Target's Statement with the Nex Metals IER by 21 January 2022.

147. We considered this to be the most expeditious path to ensuring Nex Metals shareholders were provided with sufficient information in respect of the Bid given Metalicity had already engaged an independent expert, had an estimated timeframe of early February for the Metalicity IER and had advised us that it intended to provide the report to Nex Metals shareholders (subject to compliance with Order 4 of the additional orders²²).
148. However, we decided to vary the additional orders to allow Nex Metals to lodge the Replacement Target's Statement without the Nex Metals IER in the event it is unable to lodge both documents together by 21 January 2022. We considered that, at this juncture, it was desirable to decouple the Nex Metals IER from the Replacement Target's Statement as it would save the need for two independent expert's reports to be prepared in respect of the Bid and therefore save the costs of the Nex Metals IER since the Metalicity IER would be prepared.
149. Further, the decoupling would allow Nex Metals to provide its draft Replacement Target's Statement to ASIC sooner for its review,²³ and subsequently, out to shareholders. We note Nex Metals' submission that it would be in a position to do this by no later than 21 January 2022 if the Nex Metals IER was no longer a condition to the Replacement Target's Statement (see paragraph 133 above).
150. We put the draft variation of orders to the parties and ASIC. No substantive comments were received.
151. Accordingly, we made the variation of orders as set out in **Annexure E**. We note the variation of orders made reflects the alternative variation put to us by Nex Metals in its variation application (see paragraph 133 above).

Karen Phin

President of the sitting Panel

Decision dated 30 November 2021 (declaration and final orders), 17 December 2021 (additional orders) and 21 January 2022 (variation of orders)

Reasons given to parties 8 February 2022

Reasons published 11 February 2022

²² Which requires Nex Metals to use its best endeavours to assist the expert engaged to produce the Metalicity IER with its inquiries

²³ As required by Order 2 of the final orders

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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 657E INTERIM ORDERS

NEX METALS EXPLORATIONS LTD 02

Metalicity Ltd (**Metalicity**) made an application to the Panel dated 2 November 2021 in relation to the affairs of Nex Metals Explorations Ltd (**Nex Metals**).

The Panel ORDERS:

1. Nex Metals must not dispatch (that is, physically send) any information to its shareholders in relation to Metalicity's off-market scrip bid for Nex Metals made pursuant to Metalicity's bidder's statement dated 24 September 2021, including but not limited to a target's statement or supplementary target's statement.
2. Order 1 does not apply to information required to be provided by Nex Metals to shareholders in order to satisfy the Panel's final orders made in *Nex Metals Explorations Ltd* dated 3 November 2021.
3. These interim orders have effect until the earliest of:
 - (i) further order of the Panel
 - (ii) the determination of the proceedings and
 - (iii) 2 months from the date of these interim orders.

Tania Mattei
General Counsel
with authority of Karen Phin
President of the sitting Panel
Dated 15 November 2021



Australian Government

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Annexure B

**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 633²⁴).
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.
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

²⁴ References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

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 2021.²⁵
15. The Target's Statement also contravenes section 670A, including because it does not contain all material required under section 638.
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.

²⁵ 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

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 C

**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's 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
Nex Metals	Nex Metals Explorations Ltd
Original Target's Statement	Has the meaning given in Order 1(a)
Replacement Target's Statement	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



Australian Government

Takeovers Panel

Annexure D

**CORPORATIONS ACT
SECTION 657D
ORDERS**

NEX METALS EXPLORATIONS LTD 02

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

THE PANEL ORDERS

1. Nex Metals must provide the Panel, ASIC and Metalicity with a weekly update on the status and progress of its Replacement Target's Statement by 5pm (Melbourne time) each Friday.
2. Nex Metals must provide the Panel, ASIC and Metalicity with a weekly update on the status and progress of the Nex Metals IER from each of:
 - (a) Nex Metals and
 - (b) the expert engaged by Nex Metals to produce the Nex Metals IERby 5pm (Melbourne time) each Friday.
3. If Nex Metals does not prepare and lodge with ASIC and ASX a Replacement Target's Statement which complies with the Panel's final orders in *Nex Metals Explorations Ltd 02* dated 30 November 2021 by 14 January 2022 (unless extended with the Panel's consent), Metalicity may:
 - (a) engage an expert to produce an independent expert's report providing an opinion for Nex Metals shareholders on whether the Bid is fair and reasonable (**Metalicity IER**) and
 - (b) dispatch the Metalicity IER to Nex Metals shareholders.
4. Nex Metals must use its best endeavours to assist the independent expert engaged to produce the Metalicity IER with its inquiries, including:
 - (a) by making available to the independent expert all information reasonably requested by the independent expert and
 - (b) by making (on behalf of the independent expert) reasonable enquiries of Mr Ken Allen, Mr Thomas Percy QC and Mr Hock Hoo Chua regarding whether there may be any other information that should be made available to the

independent expert and providing any such information to the independent expert.

5. Mr Ken Allen, Mr Thomas Percy QC and Mr Hock Hoo Chua must provide full and accurate answers to all questions directed to them by or on behalf of the independent expert engaged to produce the Metalicity IER.
6. The external costs of the Metalicity IER (including the fees and expenses of the independent expert and dispatch costs) are to be borne by Mr Ken Allen, Mr Thomas Percy QC and Mr Hock Hoo Chua jointly and severally up to an amount of \$50,000 and with the balance to be borne by Metalicity.
7. Mr Ken Allen, Mr Thomas Percy QC and Mr Hock Hoo Chua cannot be indemnified or reimbursed by Nex Metals for their costs borne under Order 6 of these orders.
8. Nex Metals must immediately advise the market of all of the following:
 - (a) that its target's statement lodged with ASIC on 29 October 2021 is misleading and contains material information deficiencies
 - (b) that 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) that it will lodge, and send each Nex Metals shareholder, a Replacement Target's Statement, in a form that ASIC does not object to, which is accompanied by an independent expert's report opining on whether the Bid is fair and reasonable.
9. Until Nex Metals has lodged with ASIC and ASX a Replacement Target's Statement or the Metalicity IER is dispatched to Nex Metals shareholders (whichever is earlier), Nex Metals is not permitted to publish any further statements with respect to the Bid except for:
 - (a) the statements required to be made pursuant to Order 8 of these orders
 - (b) statements which indicate when the Replacement Target's Statement and accompanying independent expert's report will be available to Nex Metals shareholders and
 - (c) pending the availability of the Replacement Target's Statement and accompanying independent expert's report, Nex Metals shareholders may be advised to take no action with respect to the Bid.
10. The parties to these proceedings and ASIC have the liberty to apply for further orders in relation to these orders.

11. 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
Metalicity IER	Has the meaning given in Order 3(a)
Nex Metals	Nex Metals Explorations Ltd
Nex Metals IER	The independent expert's report to be commissioned by Nex Metals to accompany the Replacement Target's Statement as required by the Panel's final orders in <i>Nex Metals Explorations Ltd 02</i> dated 30 November 2021
Replacement Target's Statement	Has the meaning given in Order 2 of the Panel's final orders in <i>Nex Metals Explorations Ltd 02</i> dated 30 November 2021

Tania Mattei
General Counsel
with authority of Karen Phin
President of the sitting Panel
Dated 17 December 2021



Australian Government

Takeovers Panel

Annexure E

**CORPORATIONS ACT
SECTION 657D
VARIATION OF ORDERS**

NEX METALS EXPLORATIONS LTD 02

Pursuant to section 657D(3) of the *Corporations Act 2001* (Cth)

THE PANEL ORDERS

The orders made on 17 December 2021 are varied by:

1. Replacing “14 January 2022” with “21 January 2022” and deleting “(unless extended with the Panel’s consent)” in Order 3.

2. Including new Order 3A as follows:

“If Nex Metals does not prepare and lodge with ASIC and ASX a Replacement Target’s Statement which complies with the Panel’s final orders in *Nex Metals Explorations Ltd 02* dated 30 November 2021 by 21 January 2022:

- (a) Nex Metals’ Replacement Target’s Statement is no longer required to be accompanied by the Nex Metals IER (as required by Order 2(c) of the Panel’s final orders in *Nex Metals Explorations Ltd 02* dated 30 November 2021) and
- (b) Nex Metals is no longer required to provide weekly updates on the status and progress of the Nex Metals IER under Order 2 of these orders.”

**Allan Bulman
Chief Executive
with authority of Karen Phin
President of the sitting Panel
Dated 21 January 2022**