



Australian Government

Takeovers Panel

**Reasons for Decision
Nex Metals Explorations Ltd 05
[2022] ATP 12**

Catchwords:

Target’s statement – supplementary target’s statement – replacement target’s statement – disclosure standard – information deficiencies – efficient, competitive and informed market – directors’ recommendation – sufficient basis for recommendation – joint venture – undervalue statements – no objection – declaration – orders – costs

Corporations Act 2001 (Cth), sections 602, 638, 657A, 657C, 657D, 657G, 670A

Guidance Note 4: Remedies General, Guidance Note 22: Undervalue Statements

Takeovers Panel Procedural Guidelines, Guideline 3.1

ASIC Regulatory Guide 9: Takeover bids

Lincoln Minerals Limited [2022] ATP 6, Nex Metals Explorations Ltd 02 [2021] ATP 16, Nex Metals Explorations Ltd [2021] ATP 12, Molopo Energy Limited 12R [2018] ATP 19, BreakFree Limited 04(R) [2003] ATP 42

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

INTRODUCTION

- The Panel, Elizabeth Hallett (sitting President), Christian Johnston and Robert McKenzie, made a declaration of unacceptable circumstances in relation to the affairs of Nex Metals Explorations Ltd. Nex Metals is the subject of an off-market scrip bid by Metalicity Ltd. The Panel considered (among other things) that Nex Metals’ replacement target’s statement in respect of Metalicity’s bid contained information deficiencies and did not disclose a sufficient basis upon which Nex Metals’ directors recommend that shareholders reject the bid. It made final orders, including requiring Nex Metals to prepare and dispatch a supplementary or replacement target’s statement (in a form that ASIC does not object to) that addresses the information deficiencies. It also awarded costs in favour of Metalicity.

- 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
Directors	The directors of Nex Metals
JV	The unincorporated joint venture established under the JV Agreement
JV Agreement	Has the meaning given in paragraph 6
KMPL	Kym Mining Pty Ltd, a wholly-owned subsidiary of Metalicity

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Metality	Metality Ltd
Metality IER	An independent expert's report commissioned by Metality in respect of the Bid pursuant to the Panel's additional orders in <i>Nex Metals 02</i> dated 17 December 2021, as referred to in paragraph 13(a)
Nex Metals 01	<i>Nex Metals Explorations Ltd</i> [2021] ATP 12
Nex Metals 02	<i>Nex Metals Explorations Ltd 02</i> [2021] ATP 16
Nex Metals IER	An independent expert's report commissioned by Nex Metals in respect of the Bid pursuant to the Panel's orders in <i>Nex Metals 02</i> dated 30 November 2021, as referred to in paragraph 12
Order 2	Has the meaning given in paragraph 120(b)
Replacement Target's Statement	Has the meaning given in paragraph 15
Rights Issue	Has the meaning given in paragraph 9
Target's Statement	Has the meaning given in paragraph 10

FACTS

3. This matter follows the Panel's decision in *Nex Metals 02*.
4. Nex Metals is an ASX listed mining exploration company (ASX code: NME).
5. Metality is also an ASX listed mining exploration company (ASX code: MCT). KMPL is one of its wholly-owned subsidiaries, with an approximate 1.5% shareholding in Nex Metals.¹
6. Nex Metals, KMPL and Metality (as guarantor) are parties to a farm-in and joint venture agreement (**JV Agreement**) for the Kookynie and Yundamindra projects in Western Australia.
7. On 14 September 2021, Metality announced its intention to make a conditional off-market scrip bid for all of the ordinary shares in Nex Metals, offering 4.81 Metality shares for every 1 Nex Metals share (**Bid**).
8. On 24 September 2021, Metality issued and served its bidder's statement in relation 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 29 October 2021, Nex Metals issued and served its target's statement in relation to

¹ As at the date of these reasons, Metality and KMPL together hold approximately 34.2% of the shares in Nex Metals

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the Bid (**Target's Statement**), which was released on ASX on 1 November 2021.

11. On 3 November 2021, the Panel in *Nex Metals 01* made a declaration of unacceptable circumstances in relation to the affairs of Nex Metals, finding that (among other things) the Rights Issue was a frustrating action in respect of the Bid. The Panel made orders that if Nex Metals proceeds with the Rights Issue, or announces another rights issue, such issue must be subject to shareholder approval.
12. On 30 November 2021, the Panel in *Nex Metals 02* made a declaration of unacceptable circumstances and orders in relation to the affairs of Nex Metals. The Panel considered (among other things) that there were material deficiencies in the Target's Statement, in contravention of sections 638² and 670A. The Panel's orders included that Nex Metals must prepare a replacement target's statement, in a form that ASIC does not object to, that complies with section 638 and is accompanied by a report prepared by an independent expert (of ASIC's nomination³) opining on whether the Bid is fair and reasonable (**Nex Metals IER**).
13. The Panel in *Nex Metals 02* subsequently made additional orders (which were varied on two occasions).⁴ In summary, those orders provided that if Nex Metals does not prepare and lodge a replacement target's statement in respect of the Bid in a form that ASIC does not object to and is accompanied by the Nex Metals IER by 21 January 2022:
 - (a) Metalicity may engage an expert to produce an independent expert's report (**Metalicity IER**) in respect of the Bid and dispatch the Metalicity IER to Nex Metals shareholders
 - (b) Nex Metals' replacement target's statement is no longer required to be accompanied by the Nex Metals IER and
 - (c) Nex Metals may engage, at its own cost, an expert of its own choosing to produce an independent expert's report in respect of the Bid and dispatch that report to Nex Metals shareholders.⁵
14. Nex Metals did not lodge a replacement target's statement with the Nex Metals IER by 21 January 2022. Accordingly, Metalicity was able to proceed with preparing the Metalicity IER and Nex Metals' replacement target's statement was no longer required to be accompanied by the Nex Metals IER (although it could still produce

² 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)

³ Nex Metals was able to choose which of the three experts nominated by ASIC would be engaged to prepare the Nex Metals IER

⁴ The additional orders were made on 17 December 2021 (see [TP21/48](#)) and the orders were subsequently varied on 21 January 2022 (see [TP22/08](#)) and on 10 February 2022 (see [TP22/14](#))

⁵ This order was made following a variation request from Nex Metals (see [TP22/14](#)). The Panel noted that it did not consider the variation requested by Nex Metals necessary because the final and additional orders (as varied) did not prohibit Nex Metals from obtaining an expert's report. However, the Panel considered that the requested variation was not objectionable and accordingly, made the variation sought by Nex Metals

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one if it chose to do so).

15. On 17 March 2022, Nex Metals issued and served its replacement target's statement in relation to the Bid (**Replacement Target's Statement**). The Replacement Target's Statement stated that it had been "*ordered by the Takeover[s] Panel to replace the Original Target's Statement*" and included the Directors' unanimous recommendation that Nex Metals shareholders reject the Bid in the absence of a higher offer. ASIC issued a confirmation that it did not object to the form of the Replacement Target's Statement.⁶ The Replacement Target's Statement was not accompanied by an independent expert's report.
16. On 18 March 2022, Metalicity lodged an application with the Panel. At this time, Metalicity held a relevant interest in 32.76% of Nex Metals shares (31.24% were Bid acceptances).⁷

APPLICATION

Declaration sought

17. Metalicity's application sought a declaration of unacceptable circumstances on the bases that the Replacement Target's Statement:
 - (a) contains statements that are misleading and deceptive, in breach 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 whether to accept the offer under the bid*", in breach of section 638(1).
18. Metalicity further submitted that each of the reasons given by the Directors for recommending rejection of the Bid "*is unsound and not defensible*".

Interim orders sought

19. Metalicity sought interim orders restraining dispatch of the Replacement Target's Statement and removal of the Replacement Target's Statement from the ASX announcements platform and Nex Metals' website.
20. The President of the Panel considered, on an urgent basis, Metalicity's request for an interim order restraining dispatch of the Replacement Target's Statement.
21. In circumstances where the Replacement Target's Statement was in a form that ASIC did not object to (as required by the Panel's orders in *Nex Metals 02*) and that Nex Metals' covering announcement to its Replacement Target's Statement stipulated that the Replacement Target's Statement "*is in the process of being dispatched to Nex Shareholders*", the President declined to make the interim order.

⁶ ASIC submitted that it does not assume any responsibility for, or guarantee the accuracy of, the content of the Replacement Target's Statement. That approach is consistent with ASIC's policy in respect of disclosure documents

⁷ Metalicity's Form 604: Notice of change of interests of substantial holder dated 2 March 2022

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22. The President noted that the sitting Panel, once appointed, would be able to consider the other interim order requested.

Final orders sought

23. Metalicity sought final orders, including that:
- (a) Nex Metals be prohibited from distributing the Replacement Target's Statement
 - (b) Nex Metals immediately advise the market that the Replacement Target's Statement is misleading and deceptive and that no person rely on it
 - (c) Nex Metals must issue a further replacement target's statement, in a form approved by the Panel, that addresses the disclosure deficiencies and
 - (d) the Directors pay Metalicity's and Nex Metals' costs of the Panel application, such costs to be fixed, with no indemnification or reimbursement from Nex Metals.

DISCUSSION

24. 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

25. We received a preliminary submission from Nex Metals.
26. Nex Metals submitted that the Panel should decline to conduct proceedings given that the Replacement Target's Statement was prepared pursuant to the Panel's orders in *Nex Metals 02*. As required by those orders, the Replacement Target's Statement "had to be in a format that ASIC does not object to" and "[a]fter the draft [Replacement Target's Statement] went through various queries, amendment and reviews, ASIC did not object to the [Replacement Target's Statement] and NME lodged it on the ASX and ASIC portal with a copy emailed to MCT and the Panel on the 17 March 2022."
27. Nex Metals also submitted that "[m]ost of the comments by MCT on NME's [Replacement Target's Statement] is unsubstantiated and obvious nit-picking".
28. The application sought a declaration of unacceptable circumstances in relation to 32 statements in the Replacement Target's Statement (noting that many of the disclosure issues in those statements overlapped).
29. We had initial concerns in relation to the majority of these statements.⁸ Many statements were poorly explained, confusing or did not appear to disclose the complete information required to allow Nex Metals shareholders to make a properly informed decision in respect of the Bid.
30. Further, we were concerned that the Replacement Target's Statement repeated a number of the same statements which the Panel in *Nex Metals 02* considered to be

⁸ References to statements are to statements in the Replacement Target's Statement, unless otherwise specified

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unsupported,⁹ noting that the Replacement Target's Statement offers no further explanation as to how those statements are substantiated.

31. We acknowledge that the Replacement Target's Statement was lodged by Nex Metals after it had received confirmation from ASIC that it did not object to the form of the Replacement Target's Statement.¹⁰ Therefore, Nex Metals acted pursuant to the Panel's orders in *Nex Metals 02* which (among other things) required it to prepare a compliant replacement target's statement in a form that ASIC does not object to.
32. However, ASIC's 'no objection' to the Replacement Target's Statement does not necessarily mean that it has endorsed the content of the disclosure. We note ASIC's submission on its approach to disclosure and verification of content: "*ASIC does not assume any responsibility for, or guarantee the accuracy of, the content of the Replacement Target's Statement. That approach is consistent with ASIC's policy in respect of disclosure documents*".
33. Therefore, we do not consider that ASIC's no objection confirmation precludes us from further examining statements in the Replacement Target's Statement to the extent we consider that issues in relation to disclosure still persist, noting that the Panel's orders in *Nex Metals 02* were broader than just requiring Nex Metals to obtain a no objection confirmation from ASIC.
34. Accordingly, in light of our preliminary views on disclosure expressed above and our concerns in respect of Nex Metals shareholders receiving sufficient information to make an informed decision on the Bid, and despite ASIC's no objection confirmation, we decided to conduct proceedings.
35. We initially decided to examine and seek submissions on 18 of the 32 statements raised in the application, being those statements which we considered were likely to be material to the consideration of Nex Metals shareholders in deciding whether or not to accept the Bid. Following submissions from the parties, we decided to examine 3 additional statements.
36. We also decided to conduct proceedings on the issue of whether the reasons for the Directors' recommendation are soundly-based and sufficiently defensible given that many of the statements in issue are used to support the Directors' reasons.

⁹ See further at paragraph 52 below

¹⁰ Following our decision to conduct proceedings, we received from Nex Metals a copy of the email correspondence from 16 March 2022 which shows that ASIC had emailed Nex Metals regarding the Replacement Target's Statement and stated that "*ASIC does not object to NME providing this latest amended version of the RTS to the Panel as required by the Panel's order 2 of its orders dated 30 November 2021*". We note that those orders (made in *Nex Metals 02*) do not require the Replacement Target's Statement to be provided to the Panel. Although there appears to be some confusion with the no objection language that was used in ASIC's email, we think that it was reasonable for Nex Metals to form the view that ASIC had provided its no objection confirmation and could proceed to lodge the Replacement Target's Statement in accordance with the Panel's orders. ASIC also submitted in these proceedings that it "*provided a no objection confirmation*" that was "*given consistently with the caveat that ASIC does not assume any responsibility for, or guarantee the accuracy of, the content of any disclosure.*"

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37. On the question of interim orders, we did not consider it necessary to require the Replacement Target's Statement to be removed from the ASX announcements platform and Nex Metals' website given that it had already been dispatched to Nex Metals shareholders.

Overview of the disclosure issues

38. The 21 statements that we decided to examine can broadly be categorised into three buckets:
- (a) statements about the JV and issues related to the JV (including the JV tenements, and the right to processing and ownership of the Kookynie tailings)
 - (b) statements about the Bid, including statements comparing the Bid and the Rights Issue and the tax consequences of accepting the Bid and
 - (c) statements about the financial position of Nex Metals.
39. Based on the disclosure in the Replacement Target's Statement and having considered the submissions from the parties, we ultimately consider that there are information deficiencies in respect of the 21 statements.
40. We discuss our reasoning below in further detail.

Statements about the JV and related issues

The JV tenements

41. Nex Metals discloses (on page 26¹¹) that *"Nex Metals holds a suite of highly prospective tenements in the greater Kookynie and Yundamindra area"*.
42. It also discloses (on page 32), as one of the factors upon which the Directors believe there to be reasonable grounds that Nex Metals will continue as a going concern, *"[t]he possible sale of mining tenements, recognised as exploration and evaluation assets in the statement of financial position as at 30 June 2021."*
43. Metalicity submitted that these statements were misleading *"as it suggests that NME solely owns those tenements. The tenements are jointly held by NME (as to 49%) and [KMPL] (as to 51%)."* Accordingly, it submitted that Nex Metals could not sell the tenements given the interest of KMPL.
44. Nex Metals submitted that it *"can in fact sell its 49% stake in the tenements, there is no preemptive right for MCT to buy the 49%"*.
45. As an initial observation, we note the statements in contention are broad and refer to *"tenements in the greater Kookynie and Yundamindra area"* and even more vaguely, *"mining tenements"*. It is unclear to us whether the tenements referred to are the same Kookynie and Yundamindra tenements which are the subject of the JV, or some other tenements outside of the JV. We consider that this needs to be clarified.
46. Assuming that the tenements referred to are the JV tenements, we consider that the statements are misleading as they imply that they are solely held by Nex Metals.

¹¹ References to pages numbers are to page numbers in the Replacement Target's Statement

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They are also confusing because they conflict with other statements in the Replacement Target's Statement. For example, that "*Nex Metals and Metalicity each have approximately an equal interest in The Kookynie Gold Project... (Nex Metals 49% vs. Metalicity 51%)*".

47. We note that during the course of the *Nex Metals 02* proceedings, Nex Metals lodged a claim against KMPL in the Supreme Court of Western Australia disputing the formation of the JV. It sought (among other things) a declaration that KMPL had not acquired the right to a 51% interest in the Kookynie and Yundamindra projects. However, on 24 January 2022, by consent of the parties, Justice Hill made orders that the proceedings against KPML be dismissed. It is Metalicity's view that "[t]he question of ownership has therefore been resolved".
48. Accordingly, we consider that where Nex Metals makes statements that imply that it holds the JV tenements in its own right, further disclosure is required to clarify that Metalicity considers that it (through KMPL) has acquired a 51% interest in those same tenements. Nex Metals appears to agree with this position in some parts of the Replacement Target's Statement (for example, the statement that it and Metalicity have "*approximately an equal interest*" in the Kookynie project). However, if Nex Metals considers (irrespective of the dismissal of the Court proceedings) that the question of ownership remains unresolved, it must explain why it considers this to be the case.
49. Further, we consider that Nex Metals should explain how it is able to sell the JV tenements given the processes and requirements outlined in the JV Agreement. As currently drafted, Nex Metals shareholders may be left with the impression that Nex Metals has the ability to deal with the JV tenements as it sees fit, including a "*possible sale*" if required to continue as a going concern. This appears contrary to the terms of the JV Agreement in which the transfer provisions include consent requirements and a permitted right of pre-emption (although Nex Metals would disagree with us here¹²).

The right to processing and ownership of the Kookynie tailings

50. The Replacement Target's Statement discloses (on page 8) that "*Nex under the joint venture agreement maintains in its own right the first right to all processing (Using Nex Technologies) from the joint venture tenements and all the rights to the tailings project at Kookynie which would provide significant incomes to Nex Metals alone.*"
51. Various other statements asserting Nex Metals' 100% ownership of the Kookynie tailings appear throughout the Replacement Target's Statement (including on pages 2, 5 and 33).
52. Metalicity submitted that such statements were untrue and that "[s]imilar statements were found by the Panel in [an] earlier application to be unsupported." Here, Metalicity refers to the *Nex Metals 02* proceedings where the Panel considered whether the reasons supporting the Directors' recommendation to reject the Bid in the Target's

¹² See Nex Metals' submission at paragraph 44 above

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Statement were soundly-based and sufficiently defensible. Those reasons included Nex Metals' ownership of the Kookynie tailings and first right to processing from the JV tenements (in essence, the statement set out in paragraph 50 above). The Panel considered that Nex Metals did not produce any advice to support those assertions and that accordingly, the recommendation did not reflect properly reasoned views.¹³

53. Nex Metals submitted that these issues related to contractual matters *"which can only be resolved by a Court"* and, in effect, that a verbal discussion had taken place between Mr Ken Allen (Nex Metals' managing director) and Mr Mathew Longworth (a former Metalicity director) where they agreed that Nex Metals has rights to everything above ground (i.e. the tailings). In particular, Nex Metals submitted that:
- (a) The JV Agreement provides that *"[t]he Parties agree that any Development Works undertaken by NME whether prior to or following the Effective Date is not subject to this agreement"* and that the Kookynie tailings are captured as 'Development Works'.
 - (b) It was *"integral to discussions between NME and MCT [that] prior to entering any agreement... as a matter of commercial reality that NME would not sit waiting for MCT to undertake 5 years of exploration (under the JVA) only potentially to walk (sic) away. The tailings was prior and during the JVA both a research project and potential source of revenue for NME."*
54. In rebuttals, Metalicity submitted that *"... it is unlikely that Nex Metals' shareholders have available a copy of the JVA, nor have the capacity to interpret it, nor were they privy to any precontractual discussions between Messrs Allen and Longworth..."*. Further, it submitted that *"[a]t a minimum, Nex Metals should be required to state that it considers that it has those rights, outline the basis for that belief (including referring to any relevant documents or legal advice that support that view, or noting that there are none if that is the case) and then explain to shareholders that it is contested by Metalicity..."*.
55. We agree with Metalicity's submissions. The statements in question are deficient in their current, unqualified form.
56. We consider that it is important for Nex Metals shareholders to understand the bases upon which Nex Metals asserts that it owns the Kookynie tailings and maintains the first right to all processing from the JV tenements. If those rights or ownership are disputed by Metalicity, those details should be provided. Such disclosure is material to the decision of shareholders given that those interests (the Kookynie tailings and right to processing) are relied upon by the Directors to support their recommendation to reject the Bid.¹⁴
57. The ownership of the Kookynie tailings is also used by Nex Metals to justify its assertion (on page 3) that it has a *"superior asset holding"* to Metalicity: *"Nex Metals has an (sic) 49% interest in Kookynie and a 100% interest in Kookynie Tailings, whereas Metalicity's only asset of value is considered to be its 51% interest in Kookynie"*. We

¹³ Nex Metals Explorations Ltd 02 [2021] ATP 16 at [61]-[62]

¹⁴ See also paragraph 106(a) below

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consider that the bases for this statement requires further clarification and qualification in light of Metalicity's opposing view on the tailings.

58. Finally on this issue, we note that Nex Metals refers to the Kookynie tailings "*as "low-hanging fruit" and able to be monetised in the near term"* (on page 5). There is no elaboration of what is meant by "*low-hanging fruit"* and it is not apparent to us what it means. We consider that an accompanying explanation is required.

JV expenditure

59. Metalicity took issue with a statement in a table (on page 8) outlining how the proceeds from the Rights Issue are proposed to be used. Item 1 one of the table is for the amount of \$1.1 million and states that this is for "*50% JVA expenditure as per budget provided by Metalicity but not yet approved by the Joint Venture or called"*.
60. Metalicity submitted that the statement was misleading given that the JV budget had been validly approved by the JV management committee and that the expenditure amount had been called.
61. Nex Metals submitted that the JV management committee meeting took place without a Nex Metals representative and therefore there was no quorum. Accordingly, the approved budget "*is invalid and contrary to the Joint Venture Agreement..."*.
62. In our view, it is misleading for the Replacement Target's Statement to assert that the JV expenditure amount has not been approved or called without acknowledging that the position is contested by Metalicity. Nex Metals is aware of Metalicity's view on the matter (noting that it has also been the subject of ASX announcements from both Metalicity and Nex Metals¹⁵) and should have qualified its statement appropriately.

Statements about the Bid

Comparisons with the Rights Issue

63. Nex Metals' disclosure about the Rights Issue in the Replacement Target's Statement included the following:
- (a) "*Nex Metals is currently raising funding..."* (on page 6)
 - (b) "*Outlined below is a table detailing how the proceeds obtained through the Rights Issue are proposed to be used..."* (on page 8) and
 - (c) "*Nex Metals expects for the rights issue to be fully underwritten..."* (on page 9).
64. Metalicity submitted that these various statements were misleading and deceptive. In particular, it submitted (in effect) that:
- (a) It was misleading to say that Nex Metals was "*currently raising*" funds or that the Rights Issue is "*not subject to any condition*" given the Panel's orders in *Nex Metals 01* (which, in summary, require a rights issue announced by Nex Metals

¹⁵ See, for example, Metalicity's announcement from 29 March 2022 titled "Nex Metals issued with non-payment notices" and Nex Metals response to that announcement of the same date titled "Metalicity Ltd: - Announcement to Market"

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to be subject to shareholder approval and a notice of meeting in respect of the rights issue to be dispatched to shareholders in a form that ASIC and the Panel does not object to) and that Nex Metals' notice for its upcoming annual general meeting¹⁶ did not include any resolutions regarding a rights issue.

- (b) Nex Metals implies that the proceeds of the Rights Issue have already been received which is untrue, and shareholders *"should have accurate information regarding the likelihood of the Rights Issue being effected and the use of the proceeds"* given that the Rights Issue appears *"essential to Nex Metals' survival as a going concern"*.
- (c) There was *"no proposed basis given for [the] alleged expectation"* that the Rights Issue would be fully underwritten.

65. Nex Metals submitted that it was intending to undertake a rights issue and was *"currently clearing some queries by ASIC, as recently as 24 March 2022"* in respect of a notice of meeting for a rights issue. It also submitted that *"[s]hareholders have already been made aware that the rights issue is subject to shareholder approval"* and that *"[t]he rights issue itself is not subject to any conditions once approved by shareholders"*. It further submitted that it *"continues to have discussions with potential underwriters"* and that while it *"cannot state that an underwriting exists"*, it has *"a reasonable basis to form the assumption"*.
66. In rebuttals, Metalicity pointed out that the last correspondence between ASIC and Nex Metals on the notice of meeting for a rights issue was ASIC's requisitions to Nex Metals on 10 December 2021 and that *"there was then no correspondence from 10 December until 21 March (ie after the Replacement Target's Statement was lodged)."* Accordingly, *"[i]n those circumstances, to say in the Replacement Target's Statement that Nex Metals is 'currently raising funding' without mentioning that ASIC had raised requisitions that Nex Metals had not addressed for over 3 months, is plainly misleading."*
67. We agree with the submissions made by Metalicity.
68. It is difficult to see how Nex Metals can still be said to be *"currently raising funds"* in respect of the Rights Issue that was first announced on 29 September 2021 and where progress on the notice of meeting was left idle for months. Shareholders must be wondering whether or not it is still intended for the Rights Issue (or any rights issue) to be undertaken and if so, what stage it is at and when it will take place.
69. We consider that it is important for shareholders to be informed of the status and timing of the Rights Issue, including clarification that the Rights Issue is subject to certain conditions (i.e. shareholder approval and that the notice of meeting to be dispatched to shareholders is subject to ASIC and the Panel providing a no objection confirmation).
70. We also consider that the statement that *"Nex Metals expects for the rights issue to be fully underwritten"* is deficient because it fails to explain the bases upon which Nex Metals holds that belief, noting that it also appears contrary to the lead in to that

¹⁶ to be held on 31 March 2022

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same statement which reads “[t]he current predicament in which Nex Metals finds itself has made procuring a commercial underwriting proposal difficult...”.

71. Additionally, we wish to comment on the various statements which compare the Rights Issue and the Bid throughout the Replacement Target’s Statement. For example:
- (a) The section that follows under the heading “*Risks of Accepting the Takeover Bid versus proceeding with the Rights Issue*” (on pages 6-7).
 - (b) “*While Metalicity’s Bidder’s Statement offers Nex Metals shareholders 4.81 Metalicity shares for every 1 Nex Metals share, no cash is offered to Nex Metals shareholder[s]. The Rights Issue offers better value to Nex Metals shareholders...*” (on page 7).
 - (c) “*There is no certainty that Nex Metals (sic)¹⁷ will gain a relevant interest in more than 50% of the issued share capital of the Company. The Rights Issue in contrast is not subject to any conditions and would allow Nex Metals shareholders being able to receive the new shares in a shorter time frame*” (on page 8).
72. Firstly, we do not consider that Nex Metals has properly explained the bases upon which it asserts that the Rights Issue “*offers better value to Nex Metals shareholders*”.
73. Secondly, and more generally, it would seem to us that, given that the Bid was declared unconditional on 3 December 2021, the various statements comparing the Rights Issue and the Bid are less relevant to the decision of Nex Metals shareholders.
74. While the Bid was conditional, Nex Metals shareholders were, in effect, being asked to choose between two competing proposals as the issue of shares under the Rights Issue would trigger a Bid condition which would entitle Metalicity to not proceed with its Bid. Accordingly, it was at that point important for shareholders to be informed of the relative merits of the Rights Issue and the Bid.
75. However, the Bid is no longer conditional. Therefore, it is unclear to us why statements comparing the Rights Issue and the Bid are given such prominence in the Replacement Target’s Statement. To the extent such comparisons are less or no longer relevant, those statements and sections of the Replacement Target’s Statement should be de-emphasised or deleted (as appropriate) as their inclusion may confuse shareholders.
76. Lastly, we note that there are a number of statements about the Rights Issue which are inaccurate and require correction because, for example, they erroneously refer to Nex Metals instead of Metalicity, or because the drafting confuses the Bid and the Rights Issue.

Tax consequences of accepting the Bid

77. The Replacement Target’s Statement discloses, on the one hand, that “*Nex Metals Shareholders would currently realise a loss by accepting the Metalicity Offer*” (on page 4)

¹⁷ The reference to “Nex Metals” should be a reference to “Metalicity” – see further at paragraph 76 above

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and, on the other, that “[t]he Offer may create a capital gains tax liability for Nex Metals Shareholders” (on page 12).

78. Metalicity submitted that the two statements were misleading and contradictory. It submitted that “*whether or not particular shareholders would realise a loss [by accepting the Bid] depends entirely on what price those shareholders paid for their [Nex Metals] shares*”. It also submitted that “*[s]elling shares may always create a capital gains tax liability for the seller, whether that is done on market or during a takeover bid. This is not a sound reason for the directors to recommend that shareholders reject the Offer.*”
79. Nex Metals submitted that the “loss” referred to was clear:
- “The value of the MCT Offer is materially less than the last traded price of NME shares. The “loss” referred to in the RTS obviously refers to the loss compared to the current (and recent) share prices of NME. It is clear that NME shareholders would lose value by accepting the MCT Offer compared to selling their NME shares at the market price. In relation to a theoretical shareholder’s loss (or CGT liability), individual shareholder circumstances are not considered, as is made clear in the RTS.”*
80. We agree with Metalicity that the statements on pages 4 and 12 are contradictory. We also consider that the statements lack proper explanation and are confusing in their current form.
81. We consider that the statement on page 4 requires clarification because, as Metalicity contends, whether a Nex Metals shareholder would realise a gain or loss on accepting the Bid would depend on the price on which they acquired their Nex Metals shares (which Nex Metals acknowledged is the capital gains tax position).
82. If Nex Metals is asserting instead that Nex Metals shareholders would be better off selling on-market compared to accepting the Bid (which appears to be the substance of its submission), Nex Metals should clarify this and provide a reasonable basis for the statement. If it does not do so, the statement should be retracted.
83. We also consider that, in respect of the statement on page 12, an explanation as to how accepting the Bid could create a capital gains tax liability for Nex Metals shareholders should be disclosed, noting that the Replacement Target’s Statement, in various spots, refers shareholders to Section 6 (Information Regarding Nex Metals) and Section 7 (Risk Factors) of the Replacement Target’s Statement for details of the tax consequences of the Bid. However, these sections do not include any information about the tax implications of accepting the Bid.

Independent Expert’s Reports

84. At the time of these proceedings, following a number of Panel orders and variations of orders that attempted to ensure shareholders were provided with sufficient information on the Bid as soon as possible,¹⁸ Nex Metals shareholders could expect to receive up to two independent expert’s reports in respect of the Bid – the Metalicity

¹⁸ See paragraphs 12 to 14 above

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IER¹⁹ and possibly, if Nex Metals chose to do so, an independent expert's report commissioned by Nex Metals.²⁰

85. The Replacement Target's Statement discloses (on pages 16 and 19) that:
- "The Directors encourage you to... read the independent expert's reports (as per orders by the Takeover Panel, see media release dated 17 December 2021 and 11 February 2022) **which is prepared** and will be published on the ASX platform once completed"* (emphasis added).
86. Metalicity submitted that "[t]he references to the independent expert report suggests that it is completed, and yet it has not been released... Releasing the Replacement Target's Statement in the absence of the expert reports is apt to confuse shareholders and does not provide them with all relevant information to assist in their decision making. That is particularly the case when, as matters currently stand, the Offer is due to expire in one week (and there is no indication whether the independent expert reports will be released by then)".
87. We asked Nex Metals whether either of the independent expert's reports had in fact been 'prepared' (that is, completed and ready for dispatch to Nex Metals shareholders) and if so, to clarify which of the two reports had been prepared. Nex Metals responded that "Nex Metals has engaged their own independent expert and are waiting for their report".
88. While the response was not entirely clear, it was obvious, contrary to what was implied by the disclosure, that there was currently no independent expert's report available to shareholders for their consideration.
89. It is disappointing that shareholders do not, after a long passage of time, have either of the independent expert's reports commissioned by Metalicity²¹ and Nex Metals. The delay in shareholders receiving an expert's report is particularly problematic given that we also had no clarity from Nex Metals on what would happen to the Directors' recommendation if one of those expert's reports concluded favourably in respect of the Bid terms.
90. In circumstances where the provision of an independent expert's report is considered necessary to bridge the information deficiencies to Nex Metals shareholders in respect of the Bid²² (noting that a compliant target's statement from Nex Metals has been outstanding since 29 October 2021), it is imperative that there is accurate disclosure regarding its availability so that shareholders know whether or not they have received all the information necessary to make an informed decision in respect of the Bid.

¹⁹ See paragraphs 13(a) and 14 above

²⁰ See paragraphs 13(c) and 14 above

²¹ Postscript – on 10 May 2022, Metalicity released an independent expert's report prepared by BDO Corporate Finance

²² Nex Metals Explorations Ltd 02 [2021] ATP 16 at [108]

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91. In view of the above, we consider that Nex Metals' disclosure in respect of the independent expert's reports is deficient and inaccurate, and that further disclosure is required to clarify that:
- (a) the independent expert's reports referred to are the Metalicity IER and Nex Metals' voluntarily commissioned independent expert's report and
 - (b) those independent expert's reports are still being completed and once completed will, in addition to being published on the ASX platform, be dispatched to Nex Metals shareholders (as required by the Panel's orders).

Financial information

Nex Metals' financial accounts

92. Metalicity submitted that the financial information provided and relied upon in the Replacement Target's Statement was not the most recently available accounts from Nex Metals. It pointed out that the financial information in the Replacement Target's Statement was for the year ended 30 June 2021 but Nex Metals had released more recent financial information for the year ended 31 December 2021.²³ It submitted that *"[t]he difference between the financial position at those two times is substantial and it is misleading to use the (more favourable) 30 June 2021 position in the Replacement Target's Statement."*
93. When asked to explain why Nex Metals' most recent financial accounts were not included in the Replacement Target's Statement, Nex Metals submitted that *"[t]he financial information provided by Nex Metals are the audited June 2021. The December 2021 has only been reviewed."*
94. In rebuttals, Metalicity submitted that Nex Metals' 31 December 2021 half-yearly accounts *"contain an independent auditor's review report from HLB Mann Judd that indicates that they have been reviewed by the auditor. There is therefore no reason not to have used the more up-to-date, and auditor-reviewed, financial statements in the Replacement Target's Statement."*
95. We agree with Metalicity that it was misleading for Nex Metals to disclose outdated financial information that painted it in a more positive light. The Replacement Target's Statement should have disclosed Nex Metals' most up-to-date financial information; that is clearly information that shareholders (and their professional advisers) would reasonably require to make an informed assessment of the Bid.²⁴

Current liabilities / payables

96. The Replacement Target's Statement discloses (on page 32) that the Directors *"believe that there are reasonable grounds to believe [Nex Metals] would be able to continue as a going concern after consideration of the following factors"* (among others):

²³ Nex Metals released its quarterly report for the period ended 31 December 2021 on 31 January 2022, and its half year report for the period ending 31 December 2021 on 16 March 2022

²⁴ Section 638(1)

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- (a) *“\$328,000 of share application monies received from a Director, shown as a current liability in the statement of financial position as at 30 June 2021, will be transferred to equity when the shares are issued”*
- (b) *“Included in current payables is an amount of \$1,950,976 payable to the Directors of the consolidated entity. The Directors have agreed to not seek cash payments for their unpaid balances until the consolidated entity is in a financial position to pay.”*
- (c) *“Included in current payables is an amount of \$306,788 payable to Allens Business Group Pty Ltd, an entity controlled by the Director, Ken Allen. Allens Business Group Pty Ltd have agreed to not seek cash payments for this unpaid balance until the consolidated entity is in a financial position to pay.”*

97. Metalicity submitted that these statements were misleading.
98. In respect of the share application monies (see paragraph 96(a) above), Metalicity submitted that *“[the \$328,000] share application amount has been sitting in NME’s current liabilities, on the same basis and without any change since the year ended 30 June 2014... The statement is misleading as it suggests a present intention to (sic) capacity to issues shares and thus eliminate the liability.”*
99. In response, Nex Metals submitted that *“[e]very year, the director reviews the current liability and agrees to postpone the payment”*.
100. In respect of the amounts included as current payables to the Directors (see paragraphs 96(b) and 96(c) above), Metalicity submitted that any conditions or limitations that may attach to the forbearances should be disclosed as the arrangements *“are highly material to Nex Metals’ current and future financial viability and therefore to shareholders’ decisions as to whether to accept the takeover bid or not.”*
101. In response, Nex Metals submitted that *“[a]s the directors have stated in the audit (sic) financial statements, they have no intention to call the amount due until NME is in a financial position to do so. It is the directors’ own discretion to decide when they want to call the amount due.”*
102. We agree with the submissions made by Metalicity.
103. In respect of the \$328,000 share application amount, it was not clear, following Nex Metals’ submissions, whether Nex Metals intended to discharge the liability through the issue of shares (as is currently disclosed) or through repayment (as per its submission) to the relevant Director. If it is intended that Nex Metals will extinguish the liability by issuing shares, Nex Metals should disclose when the share issue is intended to occur. If it is intended that Nex Metals will extinguish the liability by payment and that the Director has agreed to *“postpone the payment”*, this needs to be disclosed along with any terms and conditions or limitations that may attach to the repayment.
104. In a similar vein, we consider that disclosure of the terms and conditions or limitations that may attach to the forbearances in respect of the current payables to the Directors is required. These forbearance terms appear highly material to ensuring Nex Metals’ financial viability and therefore, important to the decision of Nex Metals shareholders in considering whether or not to accept the Bid.

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Directors' recommendation

105. The Replacement Target's Statement discloses six reasons for the Directors' recommendation that shareholders reject the Bid.
106. We note that many of the statements that we consider to be deficient from a disclosure perspective (as discussed above) have been relied upon by the Directors to support the reasons for their recommendation. For example:
- (a) The first reason is that "*[t]he Offer by Metalicity materially undervalues your shares in Nex Metals*". To justify this reason, the Directors rely on statements that Nex Metals owns the Kookynie tailings and that it has a "*superior asset holding*" to Metalicity. We consider these statements to be deficient (see paragraphs 50 to 58 above).
 - (b) The second reason is that "*[t]he price offered to Nex Metals Shareholders and implied acquisition premium are highly unattractive, opportunistic and significantly less than market standard acquisition premiums for comparable transactions*". In support of this reason, the Directors assert that "*Nex Metals Shareholders would currently realise a loss by accepting the Metalicity Offer*". We consider this statement to be deficient and also contradictory to the sixth reason given for rejecting the Bid which is "*[t]he Offer may create a capital gains tax for Nex Metals Shareholders*" (see paragraphs 77 to 83 above).
 - (c) The third reason is that "*Nex Metals has a number of highly attractive near-term opportunities, including the ongoing work on Kookynie and Kookynie Tailings, that are anticipated to create material valuation upside for Nex Metals Shareholders*". The bases for this reason includes statements relating to the ownership of the Kookynie tailings and the Rights Issue which we consider to be deficient (see paragraphs 50 to 58 and 63 to 76 above).
107. In light of the above, we are not satisfied that the Directors' recommendation reflects properly reasoned views.²⁵
108. We also asked Nex Metals whether its undervalue statements in respect of the Bid were made on the basis of internal analysis and/or external advice (noting the Panel's guidance on recommendations and undervalue statements in Guidance Note 22²⁶) and to provide any documents which supported its response (noting that the Panel has previously said that the reasons for the directors' recommendation must be well considered and documented²⁷).
109. In response, Nex Metals submitted that "*[t]he reasons for the Directors' Recommendation are based on internal analysis, and external analyses performed by NME's corporate advisor*". However, no documents were provided to support its submission.
110. We followed up Nex Metals for copies of the analysis referred to in its submission. Nex Metals then provided a copy of its engagement letter with its corporate advisor

²⁵ Nex Metals Explorations Ltd 02 [2021] ATP 16 at [62]

²⁶ At [13] to [15]

²⁷ Nex Metals Explorations Ltd 02 [2021] ATP 16 at [60]

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and copies of two email chains between it and its corporate advisor. None of this material disclosed any advice given by Nex Metals' corporate advisor to Nex Metals. There were also no documents provided to support Nex Metals' contention that it had undertaken internal analysis.

111. Given the above, we do not consider that the Replacement Target's Statement discloses soundly-based and sufficiently defensible reasons upon which the Directors recommend that shareholders reject the Bid, including because the Directors' reasons are supported by statements that we consider to be deficient. In addition, the materials provided by Nex Metals do not establish that the Directors had considered any internal analysis or external advice which would support the undervalue statements made in respect of the Bid.

Conclusion on the Replacement Target's Statement

112. For the reasons above, we consider that the Replacement Target's Statement includes information deficiencies including omissions of material information, the inclusion of statements that are misleading or confusing in material respects and statements that are incorrect. Accordingly, we consider that the Replacement Target's Statement constitutes, or is likely to constitute, a contravention of sections 638(1) and/or 670A(1).
113. We do note that ASIC submitted that in its view "*nothing precludes MCT from seeking to address any perceived disclosure deficiencies through its own supplementary bidder's statement*". Nex Metals agreed. However, given the nature of the statements at issue, in our view, the deficiencies are more appropriately addressed by Nex Metals or cannot be addressed by Metalicity through supplementary disclosure (for example, because it would require disclosure of the bases upon which Nex Metals makes certain statements).
114. In addition, the Directors' recommendation is not supported by soundly-based and sufficiently defensible reasons, which we consider has the potential to mislead Nex Metals shareholders.
115. Given the above, Nex Metals shareholders continue to be left without sufficient information to make an informed assessment of the Bid and the market for control of Nex Metals shares is not taking place in an efficient, competitive and informed market.

DECISION

Declaration

116. 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

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

117. Accordingly, we made the declaration set out in **Annexure A** and consider that it is not against the public interest to do so. We had regard to the matters in section 657A(3).

Orders

118. Following the declaration, we made the final orders set out in **Annexure B**. Subsequent to that, we made the costs order set out in **Annexure C**.

119. Under section 657D the Panel is empowered to make 'any order'²⁸ if 4 tests are met:

- (a) it has made a declaration under section 657A. This was done on 28 April 2022.
- (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. We are satisfied that our orders do not unfairly prejudice any person.
- (c) it gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. In respect of the final orders, this was done on 13 April 2022. All parties made submissions and Nex Metals and Metalicity made rebuttals. In respect of the costs order, this was done on 2 May 2022. Nex Metals made submissions and Metalicity made submissions and rebuttals.
- (d) it considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons, or ensure that a takeover or proposed takeover proceeds as it would have if the circumstances had not occurred. The final orders do this by requiring Nex Metals to make appropriate disclosure to address the information deficiencies,²⁹ which we consider would remedy the effects of the unacceptable circumstances and ensure that the Bid proceeded as if the information deficiencies had not occurred.

Final orders

120. On 13 April 2022, we provided draft final orders (together with the draft declaration) to the parties and sought submissions. The draft final orders were to the effect that:

²⁸ Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

²⁹ The nature of the information deficiencies in respect of the 21 statements is set out in the annexure to our final orders in **Annexure B**

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- (a) Nex Metals must as soon as practicable and by no later than the end of trading on the day after the date of the Panel's orders make a market announcement that:
 - (i) the Replacement Target's Statement contains information deficiencies and does not disclose a sufficient basis upon which the Directors recommend that shareholders reject the Bid
 - (ii) refers to the information deficiencies identified by the Panel, as set out in the annexure to the Panel's orders (a copy of which must also be enclosed with the market announcement) and
 - (iii) the Panel has ordered that Nex Metals must prepare and send each Nex Metals shareholder a supplementary or replacement target's statement, in a form that ASIC does not object to, that addresses the information deficiencies.
- (b) Nex Metals must prepare, as expeditiously as possible, a supplementary or replacement target's statement (as, in its opinion, is most convenient for shareholders of Nex Metals) that, among other things, addresses the information deficiencies (including those identified in the annexure to the Panel's orders) and complies with section 638 (**Order 2**).
- (c) Nex Metals must not lodge and dispatch the supplementary or replacement target's statement (as applicable) until ASIC has provided written confirmation that it does not object to the form of the supplementary or replacement target's statement (as applicable).

121. Nex Metals opposed the proposed orders, submitting (among other things) that *"[m]uch of the information contained in the Replacement Target's Statement (RTS) which the Panel consider as deficient based on Metalicity's application are in dispute. Until adjudicated on by a court of competent jurisdiction the panels orders must be stayed as they raise questions of contaminating evidence in proceedings of a higher court. The Panel does not have jurisdiction as the matters are commercial and contractual not related to the current proceedings before the Panel."*

122. Metalicity submitted (among other things) that the proposed orders should be amended to include *"a set date for the supplementary or replacement target's statement to be provided to ASIC for written confirmation"*. It also submitted that the Panel *"may wish to consider whether it should also review the replacement or supplementary target's statement to ensure that it meets the requirements set out in the Proposed Orders."*

123. ASIC had no comments on the proposed orders, other than to reiterate that its approach to reviewing any draft disclosure would be in accordance with its policy in ASIC Regulatory Guide 9: Takeovers bids, that it *"does not have the statutory power to make findings of fact in relation to any claims made in any new supplementary or replacement target's statement"* and that in undertaking its review, ASIC *"will have regard to s670A(2) and may consider that a statement should be removed if there are not reasonable grounds for making the statement"*.

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[2022] ATP 12

124. We were concerned that a compliant target's statement has been outstanding for more than five months and that Nex Metals may not promptly provide adequate supplementary disclosure.
125. Accordingly, we considered it appropriate to include an additional order to require Nex Metals to provide ASIC a draft supplementary or replacement target's statement (as applicable) that substantively complies with Order 2 within two weeks of the orders being made. We considered that it would then be open to ASIC to take whatever action it considered appropriate (including approaching the Court under section 657G) if it did not receive a draft supplementary or replacement target's statement (as applicable) that substantively complies with Order 2 by that time.
126. We did not consider it necessary to amend the proposed orders to make the supplementary or replacement target's statement subject to the Panel's no objection confirmation. That function best sits within ASIC's domain and as the corporate regulator, it is better placed and better equipped to scrutinise the disclosure.³⁰ However, we note ASIC's submission that in determining whether to give a no objection confirmation, "*ASIC does not assume any responsibility for, or guarantee the accuracy of, the content of the [supplementary or replacement target's statement]. That approach is consistent with ASIC's policy in respect of disclosure documents.*"
127. We do not agree with Nex Metals' submissions, including its contention that the "*Draft Orders are wrong at law*" and exceed our jurisdiction.
128. As we state above, if the Panel makes a declaration of unacceptable circumstances, it may make orders to protect the rights and interests of persons affected by the unacceptable circumstances or ensure (as far as possible) that a bid proceeds as if the unacceptable circumstances have not occurred. Here, the orders do this by requiring Nex Metals to provide proper disclosure to its shareholders to assist them in their decision-making in respect of the Bid. In some instances, this requires disclosure about the existence of a particular dispute. We do not consider that by requiring such disclosure, that we are adjudicating the veracity of the statements in issue, or seeking to resolve a dispute if there is one. The existence of a dispute does not detract from the obligation to provide disclosure in relation to it.
129. Accordingly, we are comfortable that we have jurisdiction to make the orders we proposed.
130. We made the final orders in **Annexure B** which reflect our views expressed above, which also give the parties and ASIC the liberty to apply for further orders. We also communicated to parties that we proposed to seek further submissions on the question of costs.

Costs order

131. We sought submissions from the parties as to whether a costs order should be made in these proceedings.

³⁰ See *Lincoln Minerals Limited* [2022] ATP 6 at [68]

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132. Metalicity submitted that:
- (a) *“The Panel ought to order that the directors of Nex Metals pay Metalicity’s costs of this application, fixed in the sum of \$15,000, and not be entitled to reimbursement from Nex Metals.”*
 - (b) *“The Panel also ought to order that the directors of Nex Metals pay Nex Metals’ costs of defending the application, and not be entitled to reimbursement by Nex Metals.”*
133. Metalicity submitted that costs orders were warranted because, among other things, it *“has had to incur substantial costs in bringing three successful applications to the Panel, as well as defending an unsuccessful application and review application brought by Nex Metals”* and that *“it was predictable that a declaration of unacceptable circumstances would be made when the Replacement Target’s Statement repeated at least two of the claims that the Panel had found were unsupported in previous proceedings...”*.
134. Further, it submitted that the Directors should be personally liable for costs because *“Nex Metals has already spent significant amounts of its limited shareholder funds on the defence of the takeover bid (including defending and bringing applications to the Panel, each of which it has been unsuccessful on), and on other disputes with Metalicity. Ultimately, the directors are required to prepare the target’s statement for the benefit of shareholders. Shareholders should not bear the costs when the directors fail to discharge that duty.”*
135. Nex Metals opposed the making of a costs order against it or its Directors. It submitted that, in accordance with the Panel’s orders in *Nex Metals 02*, *“Nex Metals went through various reviews with ASIC and only lodged its RTS when ASIC confirmed that it does not object to the final draft of the RTS.”* It also submitted that to make costs orders against the Directors personally without indemnification or reimbursement from Nex Metals *“would be extraordinary”*.
136. Having regard to the guidance on the award of costs in paragraph 29 of Guidance Note 4: Remedies General, we consider that Nex Metals’ conduct in these proceedings justify the making of a costs order in favour of Metalicity. Among other things:
- (a) A number of the disclosure issues in respect of the Replacement Target’s Statement were the same issues that were raised, and formed part of the unacceptable circumstances, in the *Nex Metals 02* proceedings.
 - (b) Nex Metals has still not lodged a compliant target’s statement, noting that:
 - (i) it was statutorily required to do so by 29 October 2021 and
 - (ii) the Panel in *Nex Metals 02* made final orders on 30 November 2021 (which were subsequently varied) requiring Nex Metals to lodge a compliant replacement target’s statement that addresses the information deficiencies in the Target’s Statement.
 - (c) Because of Nex Metals’ continued failure to lodge a compliant target’s statement, Metalicity has been required to bring this further Panel application which has resulted in additional costs, time and resources being expended by Metalicity, ASIC and the Panel.

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137. We consider that the amount sought by Metalicity (\$15,000) represented fair and reasonable costs incurred by it in connection with the proceedings.
138. We turned our minds to the question of whether Metalicity's costs should be borne by Nex Metals' directors (rather than Nex Metals).
139. We note that the Panel does not often make orders against directors personally given the high bar that must be met, although it has done so in rare cases. For example, in *Molopo Energy Limited 12R*, the review Panel made orders against certain former directors of Molopo as it considered that the former directors had, among other things, blatantly disregarded Molopo's disclosure obligations on numerous occasions (at times over extended periods) and that the matters that should have been disclosed were in relation to transactions of great significance to Molopo. It considered that such orders were appropriate to protect the rights or interests of Molopo shareholders who have been affected by seriously deficient disclosure.³¹
140. Such orders against directors personally are unusual, but given the facts of this case, it warranted careful consideration.
141. These proceedings concerned a number of disclosure issues which the Directors and their legal advisers should have been aware of in preparing a competent replacement target's statement which complies with the law and with the earlier Panel orders in *Nex Metals 02*. The deficiencies should have been addressed and although we considered them serious, the conduct was not held to be of the same gravity as that before the review Panel in *Molopo Energy Limited 12R*.
142. On balance, we do not consider that costs against the Directors are appropriate in the circumstances.
143. We also considered the even more unusual order sought by Metalicity for Nex Metals' costs in these proceedings to be borne by the Directors, but considered that very compelling circumstances would be required for such an order to be made. We did not consider that the high bar was met in the circumstances.
144. The costs order we made in **Annexure C** reflect our views expressed above.

Other matters

145. We do wish to address a submission by Nex Metals that the Panel "*only addressed issues raised by Metalicity*" in the proceedings and that "*[t]his is a partial and partisan approach by the Panel which goes to the issue of impartiality and procedural fairness*". It is hardly surprising that we have concentrated on considering the issues raised by Metalicity given we conducted proceedings in relation to Metalicity's application.
146. Our initial Brief was clear that we were only conducting on the matters set out in paragraphs 34 to 36 above (in essence, the disclosure deficiencies in respect of the Replacement Target's Statement and the Directors' recommendation). We invited all parties to make submissions in respect of those matters and considered all submissions and rebuttals received in response. Among its submissions, Nex Metals

³¹ *Molopo Energy Limited 12R* [2018] ATP 19 at [33]-[37]

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submitted that “[d]ue to the continuous and persistent drop in the Metalicity share price on the market for the past 6 months, Metalicity needs to issue a replacement bidder’s statement in respect to the fall in its minimum bid price”.

147. Our supplementary Brief sought submissions from all parties on our proposed declaration and final orders. Again, we considered all submissions and rebuttals received in response. In its submissions, Nex Metals made claims of insider trading against Metalicity.
148. Nex Metals further submitted later in proceedings that “the Panel continues not to request MCT to file an updated bidder’s statement”.
149. In our view, it is clear that the alleged disclosure deficiencies in Metalicity’s Bidder’s Statement and claims of insider trading are not issues logically connected to Metalicity’s application.³² The Panel does not make declarations or orders of its own volition.³³ We consider these are new circumstances which would require Nex Metals to bring a fresh application.
150. Accordingly, we wholly disagree with Nex Metals’ submissions that we have taken a “partial and partisan approach” in these proceedings.

Elizabeth Hallett

President of the sitting Panel

Decision dated 28 April 2022 (declaration and final orders), 30 May 2022 (costs order)

Reasons given to parties 24 June 2022

Reasons published 1 July 2022

³² *BreakFree Limited 04(R)* [2003] ATP 42 at [47]

³³ Section 657C and Guideline 3.1 of the Takeovers Panel Procedural Guidelines

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Advisers

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



Australian Government

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Annexure A

**CORPORATIONS ACT
SECTION 657A**

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

NEX METALS EXPLORATIONS LTD 05

BACKGROUND

1. On 14 September 2021, Metalicity Ltd (**Metalicity**) announced its intention to make a conditional off-market bid for all 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 the Bid.
3. On 29 October 2021, Nex Metals issued and served its target's statement in relation to the Bid (**Target's Statement**), which was released on ASX on 1 November 2021.
4. On 30 November 2021, the Panel made a declaration of unacceptable circumstances and orders in relation to the affairs of Nex Metals.¹ In those proceedings, the Panel considered (among other things) that there were unacceptable circumstances because it considered that there were material deficiencies in the Target's Statement and contraventions of sections 638(1) and 670A(1).² The Panel made orders, including that Nex Metals must prepare a replacement target's statement, in a form that ASIC does not object to, that complies with section 638.³

CIRCUMSTANCES

5. On 17 March 2022, Nex Metals issued and served its replacement target's statement in relation to the Bid (**Replacement Target's Statement**). The Replacement Target's Statement stated that it had been "*ordered by the Takeover[s] Panel to replace the Original Target's Statement*" and included the Nex Metals' directors' unanimous recommendation that Nex Metals shareholders reject the Bid in the absence of a higher offer. ASIC issued a confirmation that it did not object to the form of the Replacement Target's Statement.⁴

¹ *Nex Metals Explorations Ltd 02* (see [TP21/42](#))

² References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

³ Additional orders were made on 17 December 2021 (see [TP21/48](#)) and the orders were subsequently varied on 21 January 2022 (see [TP22/08](#)) and on 10 February 2022 (see [TP22/14](#))

⁴ ASIC submitted that it does not assume any responsibility for, or guarantee the accuracy of, the content of the Replacement Target's Statement. That approach is consistent with ASIC's policy in respect of disclosure documents

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6. The Panel considers that the Replacement Target's Statement contains information deficiencies, and constitutes or is likely to constitute a contravention of section 638(1) or section 670A(1) or both, in that:
 - (a) it omits material information
 - (b) it includes statements that are misleading or confusing in material respects and
 - (c) it includes statements that are incorrect.
7. The Panel considers that the Replacement Target's Statement does not disclose, including because of the information deficiencies in paragraph 6, a sufficient basis upon which Nex Metals' directors recommend that shareholders reject the Bid.

EFFECT

8. Nex Metals shareholders have not been given sufficient information to enable them to consider the merits of the Bid.
9. The market for control of Nex Metals shares is not taking place in an efficient, competitive and informed market.

CONCLUSION

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

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[2022] ATP 12**

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 Elizabeth Hallett
President of the sitting Panel
Dated 28 April 2022**



Australian Government

Takeovers Panel

Annexure B

**CORPORATIONS ACT
SECTION 657D
ORDERS**

NEX METALS EXPLORATIONS LTD 05

The Panel made a declaration of unacceptable circumstances on 28 April 2022.

THE PANEL ORDERS

1. Nex Metals must as soon as practicable and by no later than the end of trading on the day after the date of these orders make a market announcement which includes the following:
 - (a) a statement that Nex Metals' replacement target's statement dated 17 March 2022 (**First Replacement Target's Statement**) contains information deficiencies and does not disclose a sufficient basis upon which Nex Metals' directors recommend that shareholders reject the Bid
 - (b) refers to the information deficiencies identified by the Panel, as set out in the Annexure (a copy of which must also be enclosed with the market announcement) and
 - (c) a statement that the Panel has ordered that Nex Metals must prepare and send each Nex Metals shareholder a supplementary or replacement target's statement, in a form that ASIC does not object to, that addresses the information deficiencies.

2. As expeditiously as possible, Nex Metals must prepare a supplementary or replacement target's statement (as, in its opinion, is most convenient for shareholders of Nex Metals) that:
 - (a) addresses the information deficiencies (including those identified in the Annexure) and
 - (b) complies with section 638 of the *Corporations Act 2001* (Cth) and
 - (c) if a replacement target's statement is prepared, explains what changes have been made from the First Replacement Target's Statement and
 - (d) includes a general statement at the beginning of the document that the supplementary or replacement target's statement (as applicable) was required by the Panel.

Takeovers Panel

Reasons – Nex Metals Explorations Ltd 05 [2022] ATP 12

3. Nex Metals must not lodge and dispatch the supplementary or replacement target's statement (as applicable) prepared under Order 2 until ASIC has provided written confirmation that it does not object to the form of the supplementary or replacement target's statement (as applicable).¹
4. Nex Metals must provide to ASIC a draft supplementary or replacement target's statement (as applicable) that substantively complies with Order 2 by 13 May 2022.
5. The parties and ASIC have liberty to apply.
6. In these orders, the following definitions apply:

Annexure	The annexure to these orders which sets out the information deficiencies identified by the Panel in respect of the First Replacement Target's Statement
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
First Replacement Target's Statement	The meaning in Order 1(a)
Metalicity	Metalicity Ltd
Nex Metals	Nex Metals Explorations Ltd

Tania Mattei
General Counsel
with authority of Elizabeth Hallett
President of the sitting Panel
Dated 28 April 2022

¹ ASIC will not assume any responsibility for, or guarantee the accuracy of, the content of the supplementary or replacement target's statement (as applicable), which is consistent with ASIC's policy in respect of disclosure documents

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ANNEXURE: INFORMATION DEFICIENCIES

Page #	Statement	Nature of information deficiencies
2	“Nex Metals also owns 100% of the prospective Kookynie Tailings Research Project”	Requires disclosure of the bases upon which Nex Metals considers that it owns 100% of the Kookynie tailings.
3	“Given Nex Metals’ superior asset holding...”	Requires disclosure of the bases upon which Nex Metals considers that it has a superior asset holding to Metalicity.
4	“Nex Metals Shareholders would currently realise a loss by accepting the Metalicity Offer”.	This statement is contradictory to the statement on page 12 which states: “The Offer may create a capital gains tax liability for Nex Metals Shareholders”. Requires an explanation of how Nex Metals shareholders would realise a loss if they accept the Bid and clarification of what is meant by “loss”.
5	“Nex Metals regards Kookynie Tailings as “low-hanging fruit” and able to be monetised in the near term”	Requires disclosure of the bases upon which Nex Metals considers that it owns 100% of the Kookynie tailings and an explanation of what is meant by “low-hanging fruit”.
8	“50% JVA expenditure as per budget provided by Metalicity but not yet approved by the Joint Venture or called”	Requires disclosure that the statement is disputed by Metalicity.
6	“Nex Metals is currently raising funding...”	The paragraph needs to: <ul style="list-style-type: none"> • disclose the status and timing of the Rights Issue and • clarify that the notice of meeting to be issued in respect of the shareholder meeting at which approval for the Rights Issue will be sought is subject to ASIC

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Page #	Statement	Nature of information deficiencies
		<p>and the Panel providing confirmation that it has no objection to the form of the notice of meeting.²</p> <p>The section that follows under the heading “Risks of Accepting the Takeover Bid versus proceeding with the Rights Issue” needs to explain the relevance of comparing the merits of the Bid and the Rights Issue, noting that the First Replacement Target’s Statement, in various spots (including on pages 6-7), compares the Rights Issue and the Bid but that this comparison would not appear relevant given that the Bid is unconditional. If the comparison is no longer relevant, it should be deleted.</p>
7	<p>“While Metalicity’s Bidder’s Statement offers Nex Metals shareholders 4.81 Metalicity shares for every 1 Nex Metals share, no cash is offered to Nex Metals shareholder. The Rights Issue offers better value to Nex Metals shareholders...”</p>	<p>Requires disclosure of the bases upon which Nex Metals asserts that the Rights Issue offers better value to Nex Metals shareholders, noting that the First Replacement Target’s Statement, in various spots (including on page 7), compares the Rights Issue and the Bid but that this comparison would not appear relevant given that the Bid is unconditional.</p>
8	<p>“There is no certainty that Nex Metals will gain a relevant interest in more than 50% of the issued share capital of the Company. The Rights Issue in contrast is not subject to any conditions and would allow Nex Metals shareholders being able to</p>	<p>The first reference to “Nex Metals” should be replaced with “Metalicity”.</p> <p>Either remove or explain the relevance of that part of the sentence which reads: “The Rights Issue in contrast is not subject to any conditions and would allow Nex Metals shareholders being able to</p>

² In accordance with the orders made by the Panel in the *Nex Metals Explorations Ltd 01* and *Nex Metals Explorations Ltd 02* proceedings.

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Page #	Statement	Nature of information deficiencies
	receive the new shares in a shorter time frame”.	receive the new shares in a shorter time frame”, noting that the First Replacement Target’s Statement, in various spots (including on page 8), compares the Rights Issue and the Bid but that this comparison would not appear relevant given that the Bid is unconditional.
8	“Nex under the joint venture agreement maintains in its own right the first right to all processing (Using Nex Technologies) from the joint venture tenements and all the rights to the tailings project at Kookynie which would provide significant incomes to Nex Metals alone”	Requires disclosure of the bases upon which Nex Metals considers that it maintains the first right to all processing and owns the Kookynie tailings.
8	“Outlined below is a table detailing how the proceeds obtained through the Rights Issue are proposed to be used...”	The paragraph needs to disclose: <ul style="list-style-type: none"> • the status and timing of the Rights Issue and • that the Rights Issue is subject to shareholder approval.
9	“Nex Metals expects for the rights issue to be fully underwritten...”	Requires disclosure of the bases upon which Nex Metals considers that it expects the Rights Issue to be fully underwritten (noting that this appears contrary to the lead in to the statement which reads: “The current predicament in which Nex Metals finds itself has made procuring a commercial underwriting proposal difficult...”).
10	“The potential effect of the Offer on control of the Company is as follows: (a) If all eligible shareholders take up their Entitlement, then the Offer will practically have no effect on control of the Company”	Requires clarification that the reference to “the Offer” is to the “Rights Issue”.

Takeovers Panel

Reasons – Nex Metals Explorations Ltd 05
[2022] ATP 12

Page #	Statement	Nature of information deficiencies
10	“In the more likely event there is a Shortfall...” and subparagraphs (a) and (b)	Requires clarification that the references to “the Offer” are to the “Rights Issue”.
12	“The Offer may create a capital gains tax liability for Nex Metals Shareholders”	<p>The statement is contradictory to the statement on page 4 that states: “Nex Metals shareholders would currently realise a loss by accepting the Metalicity Offer.”</p> <p>Requires an explanation of how accepting the Bid could create a CGT tax liability for Nex Metals shareholders (noting that the First Replacement Target’s Statement, in various spots, refers shareholders to Sections 6 and 7 of the First Replacement Target’s Statement for details of the tax consequences of the Bid, but that these sections do not contain any information about the tax implications of accepting the Bid).</p>
16, 19	“The Directors encourage you to ... read the independent expert’s reports (as per orders by the Takeover Panel, see media release dated 17 December 2021 and 11 February 2022) which is prepared and will be published on the ASX platform once completed”	<p>Requires clarification that the independent expert’s reports:</p> <ul style="list-style-type: none"> • referred to are an independent expert’s report commissioned by Nex Metals and an independent expert’s report separately commissioned by Metalicity • are still being completed (i.e. they are not yet “prepared”) and • once completed, will (in addition to being published on the ASX platform) be dispatched to Nex Metals shareholders. <p>Requires disclosure of when it is intended that the independent expert’s report commissioned by Nex Metals is likely to be dispatched to Nex Metals shareholders, and that the</p>

Takeovers Panel

Reasons – Nex Metals Explorations Ltd 05
[2022] ATP 12

Page #	Statement	Nature of information deficiencies
		directors' recommendations may change upon receipt of the independent expert's report.
26	"Nex Metals holds a suite of highly prospective tenements in the greater Kookynie and Yundamindra area".	<p>Requires clarification as to whether the tenements referred to are the same tenements the subject of the Joint Venture, or other tenements in the Kookynie and Yundamindra area which are not subject of the Joint Venture.</p> <p>Requires clarification that Metalicity considers that it (through Kym Mining Pty Ltd) has acquired the right to 51% interest in the Joint Venture tenements and, if Nex Metals considers (irrespective of the dismissal of the Court proceedings) that the question of ownership remains unresolved it must explain why.</p>
30 - 31	Tables of financial information	Requires inclusion of Nex Metals' most recent financial accounts (from December 2021).
32	"\$328,000 of share application monies received from a Director, shown as a current liability in the statement of financial position as at 30 June 2021, will be transferred to equity when the shares are issued"	<p>If it is intended that Nex Metals will extinguish the liability by issuing shares (as is currently disclosed), requires disclosure of when the share issue is intended to occur (noting that the share application amount has been shown in Nex Metals' current liabilities since year ended 30 June 2014).</p> <p>If it is intended that Nex Metals will extinguish the liability by "payment" and that the Director has agreed to "postpone the payment" (as was submitted in the Panel proceedings), this needs to be disclosed along with any terms and conditions or</p>

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Page #	Statement	Nature of information deficiencies
		limitations that may attach to the repayment.
32	<p>“The possible sale of mining tenements, recognised as exploration and evaluation assets in the statement of financial position as at 30 June 2021”</p>	<p>Requires clarification as to whether the tenements referred to are the same tenements the subject of the Joint Venture, or some other tenements.</p> <p>If the tenements referred to are the same tenements the subject of the Joint Venture, requires disclosure of how Nex Metals is able to sell those tenements given the processes and requirements set out in the Joint Venture Agreement.</p>
32	<p>“Included in current payables is an amount of \$1,950,976 payable to the Directors of the consolidated entity. The Directors have agreed to not seek cash payments for their unpaid balances until the consolidated entity is in a financial position to pay.”</p> <p>and</p> <p>“Included in current payables is an amount of \$306,788 payable to Allens Business Group Pty Ltd, an entity controlled by the Director, Ken Allen. Allens Business Group Pty Ltd have agreed to not seek cash payments for this unpaid balance until the consolidated entity is in a financial position to pay;”</p>	<p>Requires disclose of the terms and conditions or limitations that may attach to the forbearances.</p>
33	<p>“Pursuant to the Joint Venture Agreement, Nex Metals maintains the rights to the Kookynie Tailings”</p>	<p>Requires disclosure of the bases upon which Nex Metals considers that it owns 100% of the Kookynie tailings.</p>



Australian Government

Takeovers Panel

Annexure C
CORPORATIONS ACT
SECTION 657D
ORDER

NEX METALS EXPLORATIONS LTD 05

The Panel made a declaration of unacceptable circumstances and final orders on 28 April 2022.

Pursuant to section 657D(2)(d) of the *Corporations Act 2001* (Cth)

THE PANEL ORDERS

1. Within 10 business days after the date of these orders, Nex Metals Explorations Ltd must pay in aggregate \$15,000 to Metalicity Ltd (**Metalicity**), representing the fair and reasonable costs incurred by Metalicity in connection with these proceedings.

Allan Bulman
Chief Executive
with authority of Elizabeth Hallett
President of the sitting Panel
Dated 30 May 2022