



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Nex Metals Explorations Ltd 06  
[2022] ATP 18**

**Catchwords:**

*Decline to conduct proceedings – bidder’s statement – supplementary bidder’s statement – disclosure standard – information deficiencies*

*Corporations Act 2001 (Cth), sections 621(3), 636, 643, 670A*

*Guidance Note 12: Frustrating Action*

*Takeovers Panel Procedural Guidelines, Guideline 4.4(e)*

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

**INTRODUCTION**

1. The Panel, Elizabeth Hallett (sitting President), Christian Johnston and Robert McKenzie, declined to conduct proceedings on an application by Nex Metals Explorations Ltd in relation to its affairs. Nex Metals is subject to a takeover bid from Metalicity Ltd. The application concerned (among other things) whether new circumstances had arisen (in particular, the fall in the respective share prices of Nex Metals and Metalicity and a rights issue conducted by Metalicity) had rendered Metalicity’s Bidder’s Statement misleading and deceptive (including by omission). The Panel decided not to conduct proceedings after Metalicity provided a supplementary bidder’s statement. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

<b>Bid</b>	Has the meaning given in paragraph 5
<b>Bidder’s Statement</b>	Has the meaning given in paragraph 6
<b>First Supplementary Bidder’s Statement</b>	Has the meaning given in paragraph 18
<b>IER</b>	Has the meaning given in paragraph 18(a)
<b>Metalicity</b>	Metalicity Ltd
<b>Nex Metals</b>	Nex Metals Explorations Ltd
<b>Rights Issue</b>	Has the meaning given in paragraph 7
<b>Second Supplementary Bidder’s Statement</b>	Has the meaning given in paragraph 25
<b>TERP</b>	Has the meaning given in paragraph 23(b)

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## FACTS

3. Nex Metals is an ASX listed mining exploration company (ASX code: NME).
4. Metalicity is also an ASX listed mining exploration company (ASX code: MCT).
5. On 14 September 2021, Metalicity announced its intention to make a conditional off-market scrip bid for all of the ordinary shares in Nex Metals, offering 4.81 Metalicity shares for every 1 Nex Metals share (**Bid**).
6. On 24 September 2021, Metalicity issued and served its bidder's statement in relation to the Bid (**Bidder's Statement**).
7. The Bid was declared unconditional on 3 December 2021.
8. On 3 May 2022, Metalicity announced a fully underwritten non-renounceable 2 for 7 rights issue (with 1 free attaching option for every new share) to raise approximately \$3.65 million (**Rights Issue**).
9. The Rights Issue offer opened on 13 May 2022 and closed at 5:00pm (Perth time) on 24 May 2022.

## APPLICATION

### Declaration sought

10. By application dated 24 May 2022, Nex Metals sought a declaration of unacceptable circumstances. Nex Metals submitted that there were "*new material circumstances*" which rendered the Bidder's Statement "*potentially misleading or deceptive, and there are [o]missions which could lead to NME shareholders being misled (sic) without MCT releasing a Supplementary Bidder's Statement*". In particular, it submitted that the "*materially outdated*" Bidder's Statement should be "*revised*" because (among other things):
  - (a) There had been a significant fall in the share prices of both Nex Metals and Metalicity since the issue of the Bidder's Statement and that "*[t]hese material changes in share price have not since been addressed and provided to the market expressly in the form of a Supplementary Bidder's Statement.*"
  - (b) The Bidder's Statement, "*in six separate instances, refers to an effective 30% premium to the closing price of NME shares of \$0.037 on 13 September 2021*" and that "*[t]his 'premium' is no longer accurate and reflective of the respective companies' share prices.*"
  - (c) Shareholders should be informed of the impact of the Rights Issue on the Bid, including the dilutionary effect on Nex Metals shareholders who intend to accept, or have accepted, the Bid.
11. Nex Metals also submitted that given the "*material decrease*" in the respective share prices of Nex Metals and Metalicity, pursuant to section 621(3)<sup>1</sup> (the minimum bid price rule) Metalicity was required to increase the number of Metalicity shares

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

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offered under its Bid consideration as “[t]he offer of 4.81 MCT shares for 1 NME share no longer reflects the offer value as set out in the Bidder’s Statement.”

12. Nex Metals submitted that the effect of the circumstances was that there were contraventions of sections 621(3), 636(1)(m), 643(1) and 670A(1).

#### Interim order sought

13. Nex Metals sought an interim order restraining Metalicity from proceeding with the Rights Issue.
14. The President considered Nex Metals’ request for an interim order on an urgent basis. He decided not to make an interim order (noting that the sitting Panel may reconsider the matter once appointed) on the basis that the application for an interim order was not timely, noting that the Rights Issue was scheduled to close on the day that Nex Metals made its application.<sup>2</sup>

#### Final orders sought

15. Nex Metals sought final orders, including that:
  - (a) Metalicity issue a supplementary bidder’s statement that addresses the disclosure deficiencies
  - (b) Metalicity “increase the Bidder’s Statement offer price in compliance with s 621(3) for consistency with [the] Bidder’s statement” and, if it fails to do so, that Metalicity be required to withdraw its Bid
  - (c) Metalicity be restrained from proceeding with its Rights Issue unless it is made subject to shareholder approval and former Nex Metals shareholders (who accepted the Bid) are given equivalent shares so as to not dilute their percentage shareholdings in Metalicity and
  - (d) Metalicity pay the costs of Nex Metals’ application.

## DISCUSSION

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

#### Preliminary submissions

17. Metalicity made a preliminary submission submitting that the Panel should decline to conduct proceedings. It submitted (among other things) that:
  - (a) Metalicity had been preparing a Supplementary Bidder’s Statement which it anticipated would be lodged in the week commencing 30 May 2022 and “[h]ad Nex made an enquiry of Metalicity before lodging its Application, Nex would have been informed accordingly”.

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<sup>2</sup> See Guideline 4.4(e) of the Takeovers Panel Procedural Guidelines

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- (b) Nex Metals waited until 4:48pm (Perth time) on 24 May 2022 to serve the application, being 12 minutes before the closure of the Rights Issue (which had been announced on 3 May 2022).

#### Supplementary disclosure from Metalicity

18. On 30 May 2022, Metalicity lodged a Supplementary Bidder's Statement (**First Supplementary Bidder's Statement**), which included disclosure in relation to (among other things):
  - (a) the independent expert's report prepared by BDO Corporate Finance (WA) Pty Ltd, as independent expert, to provide an opinion for Nex Metals shareholders on whether the Bid is fair and reasonable (**IER**).<sup>3</sup> The independent expert concluded that, in the absence of a superior offer, the Bid is fair and reasonable to Nex Metals shareholders and
  - (b) the Rights Issue, including:
    - (i) the effect of completion of the Rights Issue on Metalicity's capital structure and
    - (ii) the effect of completion of the Rights Issue on Metalicity's pro forma financial statements.
19. While we considered that the First Supplementary Bidder's Statement addressed some of the disclosure concerns raised in the application, we remained concerned that Nex Metals shareholders had not been provided with updated disclosure in respect of the implied value of the Bid following the effects of:
  - (a) the material change in the respective share prices of each of Nex Metals and Metalicity since the lodgment of the Bidder's Statement (on 24 September 2021) and
  - (b) the completion of the Rights Issue.
20. These were material matters which impacted on the value of the Bid consideration and therefore, important to the consideration of Nex Metals shareholders in deciding whether or not to accept the Bid.
21. Before deciding whether or not to conduct proceedings, we requested (among other things) the following details from Metalicity:
  - (a) whether Metalicity was prepared to lodge a second supplementary bidder's statement with ASIC that addressed our concerns outlined in paragraph 19 above and
  - (b) whether the independent expert in preparing the IER had taken into account the effect of the Rights Issue when undertaking its valuation of Metalicity and the implied value of the Bid.

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<sup>3</sup> which had been prepared by Metalicity pursuant to the Panel's orders in *Nex Metals Explorations Ltd 02* dated 17 December 2021

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22. In response, Metalicity made submissions that:
- (a) it was prepared to lodge a second supplementary bidder's statement if required
  - (b) in relation to the change in the relative share prices:
    - (i) *"it is not market practice to lodge updated bidder's statements even in circumstances where there is a material change in relative share price because market participants can readily assess the relative market value of the offer on any given day by reference to the prevailing market prices and also because such a practice would often lead to there being a large number of bidder's and target's statements, increasing both confusion and costs"*
    - (ii) the Bidder's Statement stated the implied value of the Bid would change with fluctuations in the Metalicity share price and
    - (iii) it did not accept that the changes in the Nex Metals share price are material because Nex Metals is an *"illiquid stock and those changes have been occasioned by trading of insignificant volumes"*
  - (c) in relation to the completion of the Rights Issue, that the lack of any material movement in the Metalicity share price at or around the time of completion is strong evidence that the impact of the Rights Issue on the Metalicity share price (and thus the implied value of the Bid) was neutral and
  - (d) the independent expert in preparing the IER had already taken into account the effect of the Rights Issue when undertaking its fairness assessment in respect of the Bid.
23. While the Bidder's Statement stipulated that the implied value of the Bid would change with fluctuations in Metalicity's share price, we considered that Metalicity should make further disclosure to Nex Metals shareholders in a second supplementary bidder's statement to address the impact of the Rights Issue and the changes in the share prices of Nex Metals and Metalicity because:
- (a) of the time that has elapsed since Metalicity last communicated the implied value of the Bid (which was in its Bidder's Statement from 24 September 2021) and
  - (b) Metalicity had issued a material amount of new shares under the Rights Issue with a theoretical ex-rights price (TERP) below the share price prior to the announcement of the Rights Issue and below the undisturbed price used to calculate the implied value of the offer in the 24 September 2021 Bidder's Statement.
24. We expected that such further disclosure should include details of the following:
- (a) the undisturbed value of the Bid (i.e. the value detailed in the Bidder's Statement)
  - (b) the value of the Bid using the TERP from the Rights Issue and
  - (c) the value of the Bid using the most recent share price (i.e. post-Rights Issue).

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25. On 14 June 2022 Metalicity lodged a further Supplementary Bidder's Statement (**Second Supplementary Bidder's Statement**), which provided disclosure of (among other things) the implied value of the Bid:
  - (a) compared to the independent expert's valuation of Nex Metals in the IER using the undisturbed Metalicity share price, the TERP and the rights issue price
  - (b) compared to the undisturbed share price of Nex Metals using the undisturbed Metalicity share price, the TERP and the rights issue price and
  - (c) compared to the closing price of Nex shares on 7 June 2022 using the closing price of Metalicity shares on 7 June 2022.
26. We are satisfied that our concerns outlined above have been sufficiently addressed in the Second Supplementary Bidder's Statement.
27. We note that we also considered Nex Metals' submissions that Metalicity had contravened the minimum bid price rule as it had not increased the number of Metalicity shares offered under its Bid consideration "*for consistency with [the] Bidder's statement*". We do not agree that there has been any contravention of the minimum bid price rule. We consider Nex Metals' submissions displayed a misunderstanding of the operation of section 621(3).
28. Further, Nex Metals submitted that the "*events*" outlined in its application (i.e. the Rights Issue and fluctuations in the respective share prices of Nex Metals and Metalicity) "*constitute frustrating and unacceptable circumstances.*" We fail to see how these events could be considered 'frustrating actions' within the meaning of the Panel's Guidance Note 12: Frustrating Action (if that is what was contended by Nex Metals).

## DECISION

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

**Elizabeth Hallett**

**President of the sitting Panel**

**Decision dated 10 June 2022**

**Reasons given to parties 30 June 2022**

**Reasons published 4 July 2022**

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### Advisers

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