



Australian Government

Takeovers Panel

# MEDIA RELEASE

No: TP22/34

Thursday, 28 April 2022

## Nex Metals Explorations Ltd 05 – Declaration of Unacceptable Circumstances and Orders

The Panel has made a declaration of unacceptable circumstances (Annexure A) and final orders (Annexure B) in relation to an application dated 18 March 2022 by Metalicity Ltd in relation to the affairs of Nex Metals Explorations Ltd (see [TP22/23](#)).

### Background

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

On 29 October 2021, Nex Metals issued and served its target's statement in relation to the Bid (**Target's Statement**), which was released on ASX on 1 November 2021.

On 30 November 2021, the Panel in *Nex Metals Explorations Ltd 02* made a declaration of unacceptable circumstances and orders in relation to the affairs of Nex Metals.<sup>1</sup> 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).<sup>2</sup> 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.<sup>3</sup>

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

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

<sup>2</sup> References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

<sup>3</sup> 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](#))

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higher offer. ASIC issued a confirmation that it did not object to the form of the Replacement Target's Statement.<sup>4</sup>

## Declaration

The Panel considered that the circumstances were unacceptable because, among other things, 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:
  - it omits material information
  - it includes statements that are misleading or confusing in material respects and
  - it includes statements that are incorrect and
- does not disclose, including because of the information deficiencies outlined above, a sufficient basis upon which Nex Metals' directors recommend that shareholders reject the Bid.

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

## Orders

The Panel has made orders that (in effect):

- Nex Metals must 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:
  - the 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
  - 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
  - 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.

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<sup>4</sup> 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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- Nex Metals must prepare 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.
  - 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).<sup>5</sup>
  - Nex Metals must provide to ASIC a draft supplementary or replacement target's statement (as applicable) that substantively complies with the disclosure requirements under the Panel's orders by 13 May 2022.

The Panel proposes to seek further submissions from the parties as to whether a costs order should be made.

The sitting Panel was Elizabeth Hallett (sitting President), Christian Johnston and Rob McKenzie.

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

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<sup>5</sup> Noting ASIC's role as explained in fn 4



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**Takeovers Panel**

**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.<sup>1</sup> 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).<sup>2</sup> 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.<sup>3</sup>

**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

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

<sup>2</sup> References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

<sup>3</sup> 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](#))

higher offer. ASIC issued a confirmation that it did not object to the form of the Replacement Target's Statement.<sup>4</sup>

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.

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<sup>4</sup> 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

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).

**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**

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**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.

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).<sup>1</sup>
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:

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

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

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<sup>1</sup> 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



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"> <li>disclose the status and timing of the Rights Issue and</li> <li>clarify that the notice of meeting to be issued in respect of the shareholder meeting at which approval for the Rights Issue</li> </ul>

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Page #	Statement	Nature of information deficiencies
		<p>will be sought is subject to ASIC and the Panel providing confirmation that it has no objection to the form of the notice of meeting.<sup>2</sup></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</p>

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

Page #	Statement	Nature of information deficiencies
	receive the new shares in a shorter time frame” .	conditions and would allow Nex Metals shareholders being able to 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...”	<p>The paragraph needs to disclose:</p> <ul style="list-style-type: none"> <li>• the status and timing of the Rights Issue and</li> <li>• that the Rights Issue is subject to shareholder approval.</li> </ul>
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	<p>“The potential effect of the Offer on control of the Company is as follows:</p> <p>(a) If all eligible shareholders take</p>	Requires clarification that the reference to “the Offer” is to the “Rights Issue”.

Page #	Statement	Nature of information deficiencies
	up their Entitlement, then the Offer will practically have no effect on control of the Company”	
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"> <li>• referred to are an independent expert’s report commissioned by Nex Metals and an independent expert’s report separately commissioned by Metalicity</li> <li>• are still being completed (i.e. they are not yet “prepared”) and</li> <li>• once completed, will (in addition to being published on the ASX platform) be dispatched to Nex Metals shareholders.</li> </ul>

Page #	Statement	Nature of information deficiencies
		<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 directors' recommendations may change upon receipt of the independent expert's report.</p>
26	<p>"Nex Metals holds a suite of highly prospective tenements in the greater Kookynie and Yundamindra area".</p>	<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	<p>Tables of financial information</p>	<p>Requires inclusion of Nex Metals' most recent financial accounts (from December 2021).</p>
32	<p>"\$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>	<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"</p>

Page #	Statement	Nature of information deficiencies
		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 limitations that may attach to the repayment.
32	“The possible sale of mining tenements, recognised as exploration and evaluation assets in the statement of financial position as at 30 June 2021”	<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>	Requires disclose of the terms and conditions or limitations that may attach to the forbearances.

<b>Page #</b>	<b>Statement</b>	<b>Nature of information deficiencies</b>
33	"Pursuant to the Joint Venture Agreement, Nex Metals maintains the rights to the Kookynie Tailings"	Requires disclosure of the bases upon which Nex Metals considers that it owns 100% of the Kookynie tailings.