



Australian Government

Takeovers Panel

# MEDIA RELEASE

No: TP21/34

Wednesday, 3 November 2021

## Nex Metals Explorations Ltd – 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 30 September 2021 by Metalicity Ltd in relation to the affairs of Nex Metals Explorations Ltd (see [TP21/22](#)).

### Background

On 14 September 2021, Metalicity Ltd (**Metalicity**) announced its intention to make a conditional off-market bid for all of the ordinary shares in Nex Metals Explorations Ltd (**Nex Metals**), offering 4.81 Metalicity shares for every 1 Nex Metals share (**Bid**).

Offers made under Metalicity's Bid are subject to a number of defeating conditions (as set out in Metalicity's bidder's statement dated 24 September 2021), including that:

*Between the period beginning on the date Bidder gives its Bidder's Statement to [Nex Metals] and ending three Business Days after the end of the Offer Period, no Prescribed Occurrence occurs in relation to [Nex Metals] or any of its Subsidiaries.*

"Prescribed Occurrence" is defined to include an event where:

*(d) [Nex Metals] or a Subsidiary issues shares, or grants an option over its shares, or agrees to make such an issue or grant such an option;*

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**).

### Declaration

The Panel considered that the circumstances were unacceptable because (among other things):

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- The issue of shares under the Rights Issue will trigger a condition of Metalicity's Bid and constitutes a frustrating action, but the Rights Issue is not subject to shareholder approval
- In its announcement of the Rights Issue, Nex Metals did not disclose information material to Nex Metals shareholders, including that the issue of shares under the Rights Issue would trigger a condition of Metalicity's Bid or the relative merits of the Rights Issue and the Bid and
- Limited material was provided by Nex Metals to establish that Nex Metals had an urgent need for funds that would justify the timing of, and the amount sought to be raised by, the Rights Issue.

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) of the *Corporations Act 2001* (Cth) (Act). In particular, it had regard to section 602(c) of the Act and the actions of the directors of Nex Metals.

### Orders

The Panel has made orders that if Nex Metals proceeds with the Rights Issue, or announces another rights issue, such issue must be subject to shareholder approval.

The sitting Panel was Michael Lishman, Marina Kelman and Karen Phin (sitting President).

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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**Takeovers Panel**

**ANNEXURE A  
CORPORATIONS ACT  
SECTION 657A**

**DECLARATION OF UNACCEPTABLE CIRCUMSTANCES**

**NEX METALS EXPLORATIONS LTD**

**CIRCUMSTANCES**

1. On 14 September 2021, Metalicity Ltd (**Metalicity**) announced its intention to make a conditional off-market bid for all of the ordinary shares in Nex Metals Explorations Ltd (**Nex Metals**), offering 4.81 Metalicity shares for every 1 Nex Metals share (**Bid**).
2. On 24 September 2021, Metalicity issued and served its bidder's statement in relation to its Bid (**Bidder's Statement**). Offers made under the Bidder's Statement are subject to a number of defeating conditions, including:

*Condition 11.8(j) (No Prescribed Occurrences): Between the period beginning on the date Bidder gives its Bidder's Statement to [Nex Metals] and ending three Business Days after the end of the Offer Period, no Prescribed Occurrence occurs in relation to [Nex Metals] or any of its Subsidiaries.*

"Prescribed Occurrence" is defined to include an event where:

*(d) [Nex Metals] or a Subsidiary issues shares, or grants an option over its shares, or agrees to make such an issue or grant such an option;*

3. On 29 September 2021, Nex Metals announced that it was undertaking a 1 for 3 non-renounceable rights issue to raise up to \$3.115 million (before costs) priced at \$0.035 per share (**Rights Issue**).
4. The issue of shares under the Rights Issue will trigger the condition of Metalicity's Bid set out in paragraph 2 and is a frustrating action.
5. The Rights Issue is not subject to shareholder approval.
6. The announcement of the Rights Issue did not disclose information material to Nex Metals shareholders, including:
  - (a) that the issue of shares under the Rights Issue would trigger a condition of Metalicity's Bid or

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- (b) the relative merits of the Rights Issue and Metalicity's Bid.
7. Further, limited material was provided by Nex Metals to establish that:
- (a) Nex Metals' directors had been considering undertaking the Rights Issue (or to otherwise raise funds through the issue of shares) prior to the announcement of Metalicity's Bid and
  - (b) Nex Metals had an urgent need for funds that would justify the timing of, and amount sought to be raised by, the Rights Issue.

#### **EFFECT**

8. Nex Metals shareholders have not been given sufficient information to enable them to consider the merits of the Rights Issue and Metalicity's Bid, such that the market for control of Nex Metals shares is not taking place in an efficient, competitive and informed market.
9. The issue of shares under the Rights Issue, which will result in Metalicity being entitled to not proceed with its Bid, would deny Nex Metals shareholders a reasonable and equal opportunity to participate in any benefits accruing under Metalicity's Bid.

#### **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 or
  - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602 of the *Corporations Act 2001* (Cth) (**Act**).
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) of the Act. In particular, it had regard to section 602(c) of the Act and the actions of the directors of Nex Metals.

**DECLARATION**

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Nex Metals.

**Tania Mattei**  
**General Counsel**  
**with authority of Karen Phin**  
**President of the sitting Panel**  
**Dated 3 November 2021**

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**Takeovers Panel**

**ANNEXURE B  
CORPORATIONS ACT  
SECTION 657D  
ORDERS**

**NEX METALS EXPLORATIONS LTD**

The Panel made a declaration of unacceptable circumstances on 3 November 2021.

**THE PANEL ORDERS**

1. Nex Metals must not:
  - (a) proceed with the rights issue announced on 29 September 2021 without the rights issue being subject to approval of Nex Metals shareholders at a general meeting or
  - (b) make or announce another rights issue prior to the end of the offer period for Metalicity's Bid unless the rights issue is subject to approval of Nex Metals shareholders at a general meeting.
2. If Nex Metals proceeds with the rights issue announced on 29 September 2021, or announces another rights issue subject to shareholder approval, the following requirements apply:
  - (a) Nex Metals must call and arrange to hold a general meeting at which shareholders consider, as an ordinary resolution, approval of the rights issue
  - (b) Nex Metals must include in the notice of meeting, in a form approved by the Panel, the following information:
    - (i) a comparison of the financial position of Nex Metals if the rights issue is approved and if it is not approved by Nex Metals shareholders
    - (ii) a description of Metalicity's Bid
    - (iii) the relative merits of the rights issue and Metalicity's Bid
    - (iv) a statement that approval of the rights issue by Nex Metals shareholders will result in Metalicity being entitled to rely on the Relevant Condition and to not proceed with its Bid and

- (v) details of how Nex Metals will use the proceeds from the rights issue
- (c) no Nex Metals director or any of their associates is permitted to (in full or in part) underwrite or sub-underwrite the rights issue and
- (d) no Nex Metals director or any of their associates is permitted to participate in any shortfall facility in relation to the rights issue.
3. Until Nex Metals shareholders at a general meeting have passed a resolution approving such rights issue:
- (a) Nex Metals must not issue shares to subscribers under the rights issue and
- (b) any money received by Nex Metals as subscriptions for new shares under the rights issue must be held:
- (i) separately from all other Nex Metals funds and
- (ii) on trust for the subscribers.
4. If such rights issue is not approved by Nex Metals shareholders at a general meeting, any subscription money received by Nex Metals must be returned to the subscribers promptly.
5. Until Nex Metals shareholders at a general meeting have passed a resolution approving either the rights issue announced on 29 September 2021 or any other rights issue, in relation to triggering the Relevant Condition:
- (a) Metalicity is not entitled to rely on the Relevant Condition to not proceed with its Bid in respect of such rights issue and
- (b) takeover contracts and acceptances under Metalicity's Bid will not be considered void under section 650G of the *Corporations Act 2001* (Cth) as a result of non-fulfillment of the Relevant Condition in respect of such rights issue,

provided that the general meeting is held before the end of the offer period for Metalicity's Bid.

6. The parties to these proceedings and ASIC have the liberty to apply for further orders in relation to these orders.
7. In these orders, the following definitions apply:

<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
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<b>Metality</b>	Metality Ltd
<b>Nex Metals</b>	Nex Metals Explorations Ltd
<b>Relevant Condition</b>	The condition of Metality's Bid that Nex Metals or a subsidiary of Nex Metals not issue any shares or grant an option over its shares, or agree to make such an issue or grant such an option (as set out in Condition 11.8(j) (No Prescribed Occurrence) and paragraph (d) of the definition of "Prescribed Occurrence" in Metality's bidder's statement in respect of the Bid)

**Tania Mattei**  
**General Counsel**  
**with authority of Karen Phin**  
**President of the sitting Panel**  
**Dated 3 November 2021**