



Australian Government

Takeovers Panel

**Reasons for Decision
Nex Metals Explorations Ltd 03
[2021] ATP 14**

Catchwords:

Decline to conduct proceedings - collateral benefits - equal opportunity - evidence

Corporations Act 2001 (Cth), sections 619(1), 623, 657D(2)

ASIC Regulations 2001 (Cth), Regulation 16(2)(a)

Takeovers Panel Procedural Rules 2020, Rule 22(1) and 22(2)

Takeovers Panel Procedural Guidelines 2020, guideline 5.4(b)

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

INTRODUCTION

1. The Panel, Marina Kelman, Michael Lishman, and Karen Phin (sitting President), declined to conduct proceedings on an application by Nex Metals Explorations Ltd in relation to its affairs. Nex Metals had submitted (in effect) that following the making of Metalicity's bid, an agent of Metalicity had engaged in conduct that constituted a breach of sections 619(1) and 623.¹ The Panel considered that insufficient material had been provided to support the Panel conducting proceedings. Accordingly, the Panel concluded there was no reasonable prospect that it would make a declaration of unacceptable circumstances.
2. In these reasons, the following definitions apply.

Advisor	has the meaning given in paragraph 13
Alleged Agent	has the meaning given in paragraph 9
Metalicity	Metalicity Limited
Nex Metals	Nex Metals Explorations Ltd
Shareholder 1	has the meaning given in paragraph 9
Shareholder 2	has the meaning given in paragraph 9

FACTS

3. Nex Metals and Metalicity are ASX listed companies (ASX codes: NME and MCT respectively).

¹ Unless otherwise indicated, all statutory references are to the *Corporations Act 2001 (Cth)*, and all terms used in Chapter 6 or 6C have the meaning given in the relevant chapter (as modified by ASIC)

Takeovers Panel

Reasons – Nex Metals Explorations Ltd 03 [2021] ATP 14

4. On 14 September 2021, Metalicity announced its intention to make a scrip takeover bid for Nex Metals, offering 4.81 Metalicity shares for every 1 Nex Metals share.
5. On 24 September 2021, Metalicity lodged its bidder's statement.
6. On 29 October 2021, Nex Metals lodged its target's statement.
7. On 2 November 2021, Metalicity made an application to the Panel in relation to disclosure in Nex Metals' target's statement (Nex Metals Explorations Ltd 02). We are still considering that application.
8. On 5 November 2021, Metalicity extended the offer period under its bid from 15 November 2021 to 6 December 2021.

APPLICATION

Declaration sought

9. By application dated 17 November 2021, Nex Metals sought a declaration of unacceptable circumstances. Nex Metals submitted that on or about 11 November 2021, a person whom Nex Metals submitted was an agent of Metalicity (**Alleged Agent**²) had a telephone conversation with an accountant (referred to by Nex Metals as "Shareholder 1" - **Shareholder 1**) to, in effect, pass on an offer from Metalicity to acquire shares from a client of Shareholder 1 who was a 6.37% shareholder in Nex Metals (**Shareholder 2**). Nex Metals submitted that:

"The offer that was made by [Alleged] Agent was to purchase the Shareholder 2 shareholding for the sum of \$900,000 in cash. This cash offer by [Alleged] Agent equals a price of 5.24 cents per fully paid ordinary share for NME shares held by Shareholder 2".

10. Nex Metals submitted (among other things) that the offer from the Alleged Agent constituted a contravention of s623, meant that all offers were not the same (contrary to s619(1)) and, if accepted, *"would have led to Shareholder 2 receiving a benefit which no other shareholders of NME had been offered, which invokes the objective in s 602(c)".* Nex Metals also submitted that:

"The offer means that the bid is no longer the same for each holder of the relevant class of shares. NME submits that MCT must now either make the same offer (i.e., 5.24 cents per fully paid ordinary share in NME) to all of NME's shareholders, or it must withdraw the bid entirely. The Panel ought not condone the act of MCT, through its agent, covertly offering different and more valuable consideration to a particular substantial shareholder in the target company NME."

Interim orders sought

11. Nex Metals sought interim orders that Metalicity *"be caused to suspend the bid immediately"* pending determination of its application and (in effect) that Metalicity make an announcement that its bid has been suspended.

² Given the seriousness of the allegation, we have decided not to disclose the identities of the Alleged Agent, Shareholder 1, Shareholder 2 and the Advisor

Takeovers Panel

Reasons – Nex Metals Explorations Ltd 03 [2021] ATP 14

Final orders sought

12. Nex Metals sought final orders to the effect that Metalicity *“be prohibited from proceeding with the bid”*.

DISCUSSION

13. The Alleged Agent’s firm (**Advisor**) made a preliminary submission. The Advisor submitted that the application was *“presented in a misleading manner”* or was *“intended to mislead”* the Panel, noting among other things, that the application did not provide *“a complete record of the correspondence or discussion”*.
14. The Advisor provided a chronology, providing details of text messages and telephone conversations between the Alleged Agent and either of Shareholder 1 or a director of Shareholder 2. The Advisor submitted that on 4 November 2021, the Alleged Agent had a telephone conversation with Shareholder 1 where he said (among other things):
“that Metalicity felt the Offer is compelling for the reasons set out in the Bidders Statement, including that the Offer values NME shares at 4.8 cents per share based on the recent share price of MCT being 1 cent and at the date we announced”.
15. The Advisor submitted that based on Metalicity’s closing price at the date of the application (1.1 cents), the value of the scrip consideration Shareholder 2 would receive if it accepted the offer would be \$899,470. The Advisor submitted that *“if the Application is not intended to mislead”*, the Advisor could only deduce that (in effect) the value of the consideration Shareholder 2 would receive was somehow miscommunicated in communications between Shareholders 1 and 2.
16. Metalicity made a preliminary submission. Metalicity submitted that from the *“detailed chronology”* submitted by the Advisor, *“that Nex had misrepresented the facts in the Application and in particular [had] omitted relevant texts from its account of relevant events”*. Metalicity also submitted that it appeared from the application that the assertions as to the alleged conversation between the Alleged Agent and Shareholder 1 were conveyed by Shareholder 1 to the director of Shareholder 2, then by the director of Shareholder 2 to a director of Nex Metals and then by the director of Nex Metals to Nex Metals’ solicitors – which Metalicity submits is *“hearsay upon hearsay upon hearsay”*.
17. The Panel is not bound by the rules of evidence³ and *“may act on any logically probative material”*⁴. Rule 22(2) of the Takeovers Panel’s Procedural Rules states that:
“A person who does not have personal knowledge of a matter included in a submission must make appropriate inquiries that the matter is true and not misleading.”
18. We consider that Nex Metals has provided insufficient material that fell far short of what is required to support a decision to conduct proceedings. While the Panel is not bound by the rules of evidence, we expect applicants to put forward probative

³ Regulation 16(2)(a) of the *ASIC Regulations 2001* (Cth)

⁴ Rule 22(1) of the Takeovers Panel Procedural Rules 2020

Takeovers Panel

Reasons – Nex Metals Explorations Ltd 03
[2021] ATP 14

material and not simply mere assertions when making allegations of serious contraventions of Chapter 6.

DECISION

19. 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). 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.

Karen Phin

President of the sitting Panel

Decision dated 19 November 2021

Reasons given to parties 26 November 2021

Reasons published 30 November 2021

Takeovers Panel

Reasons - Nex Metals Explorations Ltd 03
[2021] ATP 14

Advisers

Party	Advisers
Advisor	CBW Partners
Metalicity	Tottle Partners
Nex Metals	George Papamihail Barristers and Solicitors