



## Australian Government

### Takeovers Panel

## Reasons for Decision

### Emu NL 02R

### [2025] ATP 12

#### Catchwords:

*Decline to conduct proceedings – association – board spill – collective action – evidence*

*Corporations Act 2001 (Cth), sections 12, 249D, 657EA*

*Takeovers Panel Procedural Rules 2020, rules 20(1) and 20(2)*

*Guidance Note 2: Reviewing Decisions*

*ASIC Regulatory Guide 128: Collective action by investors*

*Emu NL [2025] ATP 11, Global Lithium Resources Limited 02R [2025] ATP 4, Auris Minerals Limited [2018] ATP 7, Dragon Mining Limited [2014] ATP 5, Orion Telecommunications Ltd [2006] ATP 23,*

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

## INTRODUCTION

1. The review Panel, Yasmin Allen AM (sitting President), Con Boulougouris and Marissa Freund, declined to conduct proceedings on an application by Emu NL in relation to its affairs. The application concerned an alleged association in the context of a requisitioned board spill meeting. The review Panel considered that the applicant did not provide a sufficient body of evidence to justify the review Panel making further enquiries and did not set out in a clear way what the relevant circumstances were. The review Panel was not satisfied that, on the materials provided, there was a compelling case of association and considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

|                           |                                       |
|---------------------------|---------------------------------------|
| <b>Coolibah</b>           | has the meaning given in paragraph 11 |
| <b>Emu</b>                | Emu NL                                |
| <b>Farris</b>             | has the meaning given in paragraph 7  |
| <b>Interested Persons</b> | has the meaning given in paragraph 18 |
| <b>Madini</b>             | has the meaning given in paragraph 11 |
| <b>Mayfair</b>            | Mayfair Communications Pty Ltd        |
| <b>MPS</b>                | Martin Place Securities Pty Ltd       |
| <b>Oakmount</b>           | has the meaning given in paragraph 7  |
| <b>Placement</b>          | has the meaning given in paragraph 6  |

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|                                       |                                       |
|---------------------------------------|---------------------------------------|
| <b>Potentially Associated Parties</b> | has the meaning given in paragraph 22 |
| <b>Procedural Rules</b>               | Takeovers Panel Procedural Rules 2020 |
| <b>Requisition Meeting</b>            | has the meaning given in paragraph 15 |
| <b>Requisition Notice</b>             | has the meaning given in paragraph 13 |
| <b>Requisitioning Shareholders</b>    | has the meaning given in paragraph 13 |
| <b>Wayburn</b>                        | has the meaning given in paragraph 11 |

## FACTS

- The facts are set out in detail in the initial Panel's reasons for decision in *Emu NL*.<sup>1</sup> Below is a summary of those facts and any other relevant facts at the time of Emu's review application.
- Emu is an ASX-listed copper exploration company (ASX code: EMU).
- At the time of the application, its directors were Mr Peter Thomas, Mr Tim Staermose and Mr Roland Bartsch.
- On 21 October 2024, Emu announced a placement to sophisticated and professional investors to raise up to \$1.525 million to fund exploration and for general working capital, to be effected in two tranches (**Placement**). The Placement was managed by MPS, of which Mr Barry Dawes is the sole Director and Principal.
- On 28 October 2024, Emu issued 21,000,000 new shares under the first tranche of the Placement. Relevantly, the following persons first acquired a relevant interest in Emu shares at this time:

| Shareholder   | No. of shares |
|---|---------------|
| Farris Corporation Pty Ltd as trustee for the Farris Family Trust ( <b>Farris</b> )   | 4,000,000     |
| Oakmount Nominees Pty Ltd as trustee for the Narromine Super Fund ( <b>Oakmount</b> ) | 3,000,000     |
| Mr Keith Rowe <sup>2</sup>  | 4,000,000     |
| Mr John Anderson <sup>3</sup>   | 1,600,000     |

- On 22 November 2024, Farris acquired 300,000 Emu shares.

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<sup>1</sup> *Emu NL* [2025] ATP 11

<sup>2</sup> Directly and through a controlled entity

<sup>3</sup> Through a controlled entity

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9. On 2 December 2024, Emu announced the results of its AGM, including that:
- (a) a “second strike” had occurred in relation to the adoption of the remuneration report
  - (b) the board spill motion put to shareholders as a result of the second strike did not carry and
  - (c) the resolution regarding the approval of the second tranche of the Placement carried.
10. The 2 December 2024 announcement also disclosed that Mr Gavin Rutherford (a director of Emu at the time) had requested immediately before the meeting that he did not wish to be put up for re-election and that Emu had appointed Mr Bartsch as a non-executive technical director.
11. On 16 December 2024, Emu issued the second tranche of Placement shares. Relevantly, the following persons acquired Emu shares:

| Shareholder   | No. of shares |
|---|---------------|
| Mayfair Communications Pty Ltd ( <b>Mayfair</b> )   | 2,000,000     |
| Coolibah WA Pty Ltd as trustee for the Wippl Family Superannuation Fund ( <b>Coolibah</b> ) | 2,000,000     |
| Wayburn Holdings Pty Ltd ( <b>Wayburn</b> )   | 3,600,000     |
| Madini Minerals ( <b>Madini</b> )   | 5,031,574     |

12. On 3 January 2025, Farris acquired 200,000 Emu shares.
13. On 23 January 2025, Emu announced that it had received a notice under section 249D<sup>4</sup> (**Requisition Notice**) signed by Mayfair, Coolibah, Oakmount and Farris (together, the **Requisitioning Shareholders**) to consider resolutions to remove Mr Thomas and Mr Bartsch as directors of Emu and to appoint Mr Rowe and Mr Anderson as directors.
14. The 23 January 2025 announcement included a notice of initial substantial holder on behalf of the Requisitioning Shareholders and others including Mr Rowe and Mr Anderson, disclosing a voting power of 8.89% and an association pursuant to sections 12(2)(b) and 12(2)(c) by reason of the Requisition Notice.
15. On 11 February 2025, Emu released a notice of meeting in relation to the Requisition Notice with the meeting (**Requisition Meeting**) to be held on 18 March 2025.
16. On 18 March 2025, Emu announced that on 17 March 2025 it had terminated with immediate effect its contract for the services of Mr Douglas Grewar as CEO of the company due to “*the very recent discovery*” of breaches of contract.

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<sup>4</sup> Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth) and all terms used in Chapter 6, 6A or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

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17. Also on 18 March 2025, Emu announced that it had resolved to postpone the Requisition Meeting to 16 April 2025 citing as reasons the termination of its CEO on 17 March 2025.
18. On 3 April 2025, Emu sought a declaration of unacceptable circumstances. It submitted (among other things) that 25 Emu shareholders (including the Requisitioning Shareholders), who first became members, or alternatively increased their holdings, in December 2024 (**Interested Persons**), one month before the Requisition Notice, were associates in relation to Emu. Emu submitted that the Interested Persons were acting in concert with the intention of removing the majority of the incumbent board and replacing them with those sympathetic towards the alternate business goals of the Interested Persons. Emu also submitted that the Interested Persons collectively held 31.86%<sup>5</sup> in Emu and failed to fully disclose their holdings to the market.
19. On 14 April 2025, Emu announced that it had resolved to postpone the Requisition Meeting for a further 28 days to 14 May 2025, citing as reasons the initial Panel proceedings so that “*the Resolutions to be put to the EGM can be voted upon in the context of the determination of the Takeovers Panel and any resulting remedial Orders.*”
20. On 16 April 2025, the initial Panel declined to conduct proceedings on the basis that Emu did not provide a sufficient body of material to justify the Panel making further enquiries.

## APPLICATION

21. On 22 April 2025, Emu sought the President’s consent to apply for a review of the decision by the initial Panel pursuant to section 657EA. Emu submitted (among other things) that the “*overwhelming commonality*” of the voting of certain shareholders at the AGM as well as through the proxies received for the Requisition Meeting indicated an association.
22. The review application included a list of Emu shareholders which included the Requisitioning Shareholders and some, but not all, of the Interested Persons and in relation to which Emu submitted that “*[w]ith their shareholdings all included, the number of shares held by the potentially Associated parties goes significantly beyond the 20% threshold*” (**Potentially Associated Parties**).

### President’s consent

23. The President considered, in accordance with Guidance Note 2: Reviewing Decisions (see [27]-[30]), whether there was any basis for granting consent, including whether there was any new evidence and the importance of the dispute.
24. The President considered that the review application brought new arguments to light in relation to the voting patterns of the Interested Persons (as discussed further below) but was not, on first view, convinced that the new arguments were adequately supported by evidence so as to assist a review Panel in its determination.

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<sup>5</sup> Based on 193,601,409 total shares on issue

25. However the President considered that the importance of the dispute, and the fact that the issues raised were current, justified him granting consent to the review.

## DISCUSSION

26. We have considered all the materials but address specifically only those we consider necessary to explain our reasoning. The materials included the material before the initial Panel in *Emu NL*<sup>6</sup>.
27. In its initial application, Emu submitted that the Interested Persons voted “*as a cabal and uniformly*” showing “*a clear association between the Interested Persons*”.
28. In its review application, Emu appeared to narrow down the scope of its association claim and focus on the Potentially Associated Parties. Emu submitted that the Potentially Associated Parties shared structural links and included the Requisitioning Shareholders and some, but not all, of the Interested Persons.
29. Emu also made new allegations in its review application, submitting that:
  - (a) the signatory of the substantial holder notice lodged by the Requisitioning Shareholders “*appears to have led the EGM requisition*” and that he had had meetings with a number of other relevant parties “*as evidenced by email trails that EMU has examined*”, including Mr Vernon Wills,<sup>7</sup> Mr Anderson and Mr Iain MacPherson<sup>8</sup>
  - (b) “*the overwhelming commonality of the voting result of the alleged interested persons was the consequence of the then existing collusion of the shareholders itself, who had become members of the Applicant Company, overwhelmingly through the actions and conduct of one primary individual.*”
30. The list of Potentially Associated Parties did not include Mr Grewar or Mr Dawes but the applicant submitted that Mr Grewar “*has been instrumental in the actions of the concert parties*” and that “*it is also probable that Dawes is involved*”.
31. The Panel has limited investigatory powers, and the onus is on the applicant to do more than make allegations of association and rely on a Panel to substantiate them.<sup>9</sup> Here, Emu did not persuade us by the evidence it adduced that we should conduct proceedings.
32. It was unclear, based on the materials before us, who the applicant alleged to be associated with whom, since when and on what basis. The applicant referred to different groups of people, including the Interested Persons, the Potentially Associated Parties and others. As a result, among other things we could not determine the impact on the relevant shareholders’ relevant interest, if any, for the

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<sup>6</sup> [2025] ATP 11

<sup>7</sup> Mr Wills’ controlled entity, Wayburn, is one of the Interested Persons listed by Emu. Further background is provided in the initial Panel’s reasons, see *Emu NL* [2025] ATP 11 at [23], [30] and [36].

<sup>8</sup> Two entities connected to Mr MacPherson, Madini and TrustQore (BVI) Ltd as trustee for the MacPherson Family Trust are some of the Interested Persons listed by Emu. Further background is provided in the initial Panel’s reasons, see *Emu NL* [2025] ATP 11 at [23] and [36].

<sup>9</sup> *Dragon Mining Limited* [2014] ATP 5 at [59]-[60]

purposes of section 657A(2). The applicant also referred to events and relationships among a very small group which do not appear to be relevant to the association claim (see below at paragraph 40). No evidence of a common purpose among all the Interested Persons, or all the Potentially Associated Parties, was articulated in relation to Emu’s affairs.

33. We also consider that Emu did not provide evidence which would have been readily available to substantiate its case, including:
  - (a) evidence of the proxies for the Requisition Meeting, when they were lodged and by whom
  - (b) evidence of the emails between the signatory of the Requisition Notice, Mr Wills, Mr Anderson and potentially others as referred to in the review application (see above at 29(a)) and
  - (c) who is the “one primary individual” referred to in the review application (see above at 29(b)).
34. While we acknowledge the difficulties that an applicant faces in gathering evidence in an association matter, we consider that certain tools were available to Emu to build its Panel application, including issuing tracing notices to the nominee shareholders which it alleged were among the Interested Persons.
35. Emu submitted that “*[a]ll the 11 placees who voted against the Remuneration Report and Options packages for Directors had been shareholders for less than 6 weeks when that meeting was held*” and that “*[a]s well as 11 of the initial 12 placees, of the second group of 12 placees, 9 have filed proxies voting to remove Thomas and Bartsch and appoint Rowe and Anderson at the postponed EGM.*”
36. While we consider that the voting patterns reflected at the AGM and in the proxies lodged in advance of the Requisition Meeting were relevant circumstances, we consider that:
  - (a) shareholders voting in the same manner is usually not sufficient evidence to demonstrate an association unless there is an understanding or an agreement entered into regarding the exercise of voting rights<sup>10</sup>
  - (b) a number of the shareholders alleged to be associates, including some of the Requisitioning Shareholders, were not on the register at the time of the AGM, therefore the commonality of voting did not apply to them with regards to the AGM but only, potentially, to the Requisition Meeting and
  - (c) Emu did not provide evidence of the proxies received for the Requisition Meeting (as discussed above at 33).
37. Emu submitted that “*the number of shares held by the potentially Associated parties goes significantly beyond the 20% threshold*”.

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<sup>10</sup> Orion Telecommunications Ltd [2006] ATP 23 at [111]; Global Lithium Resources Limited 02R [2025] ATP 4 at [51]

38. Based on publicly available information and information available to the initial Panel in *Emu NL*,<sup>11</sup> the Potentially Associated Parties, as we understand them to be listed in the review application, appear to hold together less than 20% in Emu. That includes the 8.89% relevant interest held by the Requisitioning Shareholders and already disclosed in their substantial holder notice.
39. We are not satisfied that, on the materials provided, there is a compelling case that goes beyond permissible collective action aiming at enhancing corporate governance.<sup>12</sup> We note relevantly (and among other things) that:
- (a) Emu shareholders voted against the remuneration report at the AGM, two years in a row
  - (b) the chair of Emu, Mr Thomas, served on the board for a substantial period (17 years)
  - (c) Emu postponed the Requisition Meeting twice
  - (d) Mr Grewar submitted *“I was unaware of any 249D activity although I was hardly surprised given increased conversations with shareholders relating to EMU performance over the past 2 years”* and
  - (e) the Requisitioning Shareholders otherwise lodged a substantial holder notice together with the two nominee directors, disclosing their voting power in Emu which appeared to comply with their legal obligations.
40. We also consider that some of the claims made by the applicant did not appear to be relevant to Emu’s association claim, including reference to the work done by Mr Grewar on the Mabuhay Project in the Philippines<sup>13</sup> not on account of Emu and for which evidence was submitted that the Emu board authorised Mr Grewar’s involvement.
41. Emu included a large number of shareholders in its allegations of association. As a practical matter, it may be more difficult for an applicant to demonstrate patterns of conduct or relevant probative material to satisfy the application hurdle.<sup>14</sup> Here, without providing any evidence or establishing any connections between these shareholders, the application fell short of the application hurdle. We also consider that applicants should be cautious about making allegations against shareholders when there is little material to support those claims.

### Other matters

42. We were informed by the Panel Executive that, after we had received preliminary submissions from other parties, the applicant over several days signalled an intention to make an out of process submission. We did not receive any out of process submission from the applicant and, to our knowledge, it was not made at the time we communicated our decision to the parties.

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<sup>11</sup> [2025] ATP 11

<sup>12</sup> ASIC Regulatory Guide 128: Collective action by investors

<sup>13</sup> Further background is provided in the initial Panel’s reasons, see *Emu NL* [2025] ATP 11 at [23] and [38].

<sup>14</sup> *Auris Minerals Limited* [2018] ATP 7 at [20]

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43. We note that the applicant had the opportunity, in its review application, to make any submissions it considered necessary to support its case. We remind parties that, in accordance with our Procedural Rules, applicants are not entitled to make preliminary submissions (rule 20(2)) and parties (including applicants) are not entitled to make rebuttal submissions to a preliminary submission, unless the Panel agrees to accept such submission (rule 20(1)).
44. The Takeovers Panel is a prompt dispute resolution body and it is incumbent on applicants to set out their case and provide appropriate supporting material, where relevant.

### DECISION

45. 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).

### Orders

46. 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.

**Yasmin Allen AM**  
**President of the sitting Panel**  
**Decision dated 5 May 2025**  
**Reasons given to parties 2 July 2025**  
**Reasons published 14 July 2025**



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### Advisers

| Party   | Advisers     |
|---|--------------|
| Emu NL  | Norton Smith |
| Mr Douglas Grewar   | -            |
| Mr Barry Dawes  | -            |
| Madini Minerals   | -            |
| TrustQore (BVI) Ltd as trustee of the Macpherson Family Trust | -            |