



Australian Government

Takeovers Panel

Reasons for Decision

Emu NL 03 [2025] ATP 18

Catchwords:

Declaration – orders – board spill – placement – directors' duties – effect on control

Corporations Act 2001 (Cth), sections 203D, 249D, 249P, 250B, 602, 657A, 657D, 671B

Eclairs Group Ltd and another v JKC Oil and Gas plc [2015] UKSC 71; [2016] 1 BCLC 1, Brierley Investments Limited v Australian Securities Commission (1997) 15 ACLC 1341, Whitehouse v Carlton Hotel Pty Ltd (1987) 162 CLR 285, Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821

Emu NL 02R [2025] ATP 12, Emu NL [2025] ATP 11, Tempus Resources Limited [2024] ATP 1, Webcentral Group Limited 03 [2021], Factor Therapeutics Limited [2019] ATP 5, Tribune Resources Limited [2018] ATP 18, Auris Minerals Limited [2018] ATP 7, MMA Offshore Limited [2017], Redflex Holdings Limited [2009] ATP 17, Riokin Financial Services 01 [2004] ATP 14, Ballarat Goldfields NL [2002] ATP 7, Pinnacle VRB Ltd No. 11 [2001] ATP 23

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

INTRODUCTION

1. The Panel, Stephanie Charles (sitting President), Alberto Colla and John McGlue, made a declaration of unacceptable circumstances in relation to the affairs of Emu NL. The application concerned an Emu extraordinary general meeting considering resolutions to replace two of Emu's three directors and a placement made on the day of the EGM. The Panel declared the circumstances unacceptable as the placement, and the manner in which the EGM was conducted, did not give a sufficient basis for confidence as to the EGM's outcome and the subsequent composition of the Emu board, and inhibited an efficient, competitive and informed market. The Panel made orders requiring Emu to convene and hold a further general meeting to consider resolutions relating to the removal and appointment of Emu directors, including the resolutions put at the EGM, in accordance with certain requirements to ensure the integrity of the meeting.

2. In these reasons, the following definitions apply.

Applicant	Wayburn Holdings Pty Ltd ACN 009 320 852
Applicant's Request	has the meaning given in paragraph 133
Bartsch	Mr Roland Bartsch, non-executive director of Emu until 17 June 2025
Dawes	Mr Barry Dawes, sole director and principal of Martin Place Group Pty Ltd, which managed a placement for

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	Emu in October 2024 discussed in <i>Emu NL 01</i> and <i>Emu NL 02R</i>
EGM	has the meaning given in paragraph 6
Emu	Emu NL ACN 127 291 927
Emu NL 01	<i>Emu NL</i> [2025] ATP 11
Emu NL 02R	<i>Emu NL 02R</i> [2025] ATP 12
Emu's Request	has the meaning given in paragraph 134
Grewar	Mr Douglas Grewar, CEO of Emu until 17 March 2025, referred to in <i>Emu NL 01</i> and <i>Emu NL 02R</i>
Metropolis	Metropolis Pty Ltd
New Meeting	has the meaning given in paragraph 121(d)
New Shares	has the meaning given in paragraph 19
Northmead	Northmead Holdings Pty Ltd <The Greenwell Family a/c>
Notice of Meeting	has the meaning given in paragraph 6
Orders	has the meaning given in paragraph 132
Placees	the subscribers of the New Shares, as set out in paragraph 20
Placement	placement announced by Emu on 14 May 2025 (described in paragraphs 19 to 20)
Record Date	has the meaning given in paragraph 6
Registry	Emu's share registry
Requisitioning Shareholders	means the Emu shareholders who signed the s249D Notice: Mayfair Communications Pty Ltd ACN 144 673 138; Coolibah WA Pty Ltd ACN 620 574 094 as trustee for the Wippl Family Superannuation Fund; Oakmount Nominees Pty Ltd ACN 076 377 387 as trustee for the Narromine Super Fund; and Farris Corporation Pty Ltd ACN 008 933 711 as trustee for the Farris Family Trust
s249D Notice	has the meaning given in paragraph 4
s249P Statement	has the meaning given in paragraph 132
Staermose	Mr Tim Staermose, non-executive director of Emu
Stern	Mr Peter Stern, director and sole employee of Metropolis
Thomas	Mr Peter Thomas, non-executive director and Chair of Emu

**Variation of
Orders**

variation of the Orders dated 1 August 2025

FACTS

3. Emu is an ASX-listed copper/gold exploration company (ASX code: EMU).
4. On 23 January 2025, Emu announced that it had received a notice under section 249D¹ (**s249D Notice**) requisitioning a meeting to consider four resolutions to:
 - (a) remove two of Emu's three directors,² Mr Peter Thomas and Mr Roland Bartsch³ and
 - (b) appoint two new nominees as Emu directors.

The s249D Notice was given by the Requisitioning Shareholders who had the previous day given a substantial holder notice disclosing an association by reason of the s249D Notice and voting power in Emu of 8.89%.

5. On 3 February 2025, Emu signed Metropolis' letter of engagement for "*corporate advisory services to Emu in relation to a notice received under section 249D...*". The letter of engagement provided (among other things) that the fee was payable in two tranches, the first tranche being payable in cash and the second tranche "*at the election of Emu, may be paid in ordinary shares in Emu*", noting that "*[i]f EMU elects to pay in shares, they shall be issued prior to the scheduled meeting the subject of the Meeting Request so that the shares can be voted at that meeting.*"
6. On 11 February 2025, the Emu board convened a general meeting (**EGM**) to be held on 18 March 2025 in response to the s249D Notice. The Emu board unanimously recommended that shareholders vote against all resolutions. The notice of meeting (**Notice of Meeting**) stated that:

Pursuant to a determination under regulation 7.11.37 of the Corporations Regulations 2001 (Cth), the persons eligible to vote at the Meeting are those registered as Shareholders at 5:00 pm AWST on Sunday, 16 March 2025. (Record Date)
7. The Notice of Meeting contained a proxy form that did not include a personalised name, address or holder number, and did not request a holder number. However, shareholders were provided with an additional proxy form⁴ that was prepopulated with voting directions marked "AGAINST" the resolutions, and which did include a personalised name, address and holder number.
8. On 12 March 2025, in an email with the subject heading "*RE: Do we have an update on the EGM votes?*" copied to Emu directors, the Company Secretary wrote:

¹ 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)

² Emu's third director is Mr Tim Staermose.

³ Emu's announcement also attached a section 203D notice from the Requisitioning Shareholders of their intention to move the resolutions to remove Mr Thomas and Mr Bartsch. The s203D and s249D notices were both attached to a Form 603 Initial Substantial Holder notice given by the Requisitioning Shareholders

⁴ For which the incremental costs of printing and distribution were paid by Mr Thomas and Mr Bartsch

...

I've attached my latest spreadsheet – too close to call!!

9. Also on 12 March 2025, Emu, after one of its directors confirmed via email to Mr Peter Stern that *“the entire fee is to be settled in equity”*, issued 1,222,222 shares to Metropolis for services rendered in relation to the s249D Notice.
10. On 18 March 2025, Emu announced that the board had unanimously resolved pursuant to clause 44.4 of Emu’s Constitution to postpone the EGM to 16 April 2025. The announcement indicated that was necessary due to the termination, the previous day, of a contract for CEO services delivered by Mr Grewar and *“ongoing investigation into circumstances which appear to the board to be unacceptable”*.
11. On 3 April 2025, Emu applied to the *Emu NL 01* Panel for a declaration of unacceptable circumstances, submitting (among other things) that 25 persons (including the Requisitioning Shareholders, the Applicant, and other shareholders) were associates. Emu also submitted, in support of its application, that based on an analysis of proxies received to date, the expected votes at the s249D Meeting was 79,209,230 proxies in favour and 58,175,802 proxies against, representing 40.9% and 30.05% respectively of all votes eligible to be cast.
12. On 14 April 2025, in an announcement titled ‘FURTHER ADJOURNMENT OF EXTRAORDINARY GENERAL MEETING’, Emu announced that, pursuant to its constitution, the board had resolved unanimously to postpone the EGM to 14 May 2025. The announcement indicated that *“the postponement of the EGM is considered by the Board to be necessary whilst it awaits the decision of the Takeovers Panel”*.
13. On 16 April 2025, the *Emu NL 01* Panel declined to conduct proceedings on Emu’s application.⁵
14. Also on 16 April 2025, Emu announced that the EGM would be held at 5:00pm (AWST) on Wednesday 14 May 2025 and stated that, pursuant to section 250B, proxy voting would be accepted up to 48 hours before that meeting, namely up to 5:00pm (AWST) on Monday 12 May 2025. The Notice of Meeting was not otherwise updated or supplemented, no new proxy forms were provided, and the announcement made no reference to the Record Date.
15. On 22 April 2025, Emu applied for a review of *Emu NL 01*.
16. On 30 April 2025, Emu released its Appendix 5B Quarterly Activity Report Ended 31 March 2025, which indicated that Emu had 1.62 estimated quarters of funding available and advised that Emu was:

“currently in discussions and having regard to its record of raising funds as and when required, these negotiations are expected to result in additional capital being raised.”

⁵ *Emu NL* [2025] ATP 11

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17. On 6 May 2025, the *Emu NL 02R* Panel declined to conduct proceedings on Emu's review application.⁶

18. On 14 May 2025, the day of the EGM, at 12:53pm (AWST), the Emu board met via telephone by consent on short notice. Draft minutes of the meeting noted:

The Board resolved that applications for shares at \$0.017 (being at least 75% the 15 day VWAP) to raise up to \$300,000 be accepted and the shares be issued forthwith subject to receipt of cleared funds.

The meeting closed at 1.04pm

19. Also on the day of the EGM, at 3:07pm (AWST),⁷ Emu announced the issue on the same date of 17,647,059⁸ ordinary fully paid Emu shares (**New Shares**) in an Appendix 2A application for quotation of the securities. At 3:12pm (AWST) on the same day, Emu indicated in an announcement 'Placement and Cleansing Notice' that:

- (a) it had agreed to place the New Shares "at \$0.017 per share to sophisticated and professional investors to raise \$300,000" and
- (b) "Funding from the placement will be applied to exploration within the Company's exploration projects and general working capital".

The announcement did not specify whether the New Shares were eligible to be voted at the EGM later that day.

20. The New Shares were issued to four placees (**Placees**) as follows:

Placee	New Shares (number)	New Shares (% post dilution fully paid shares)
Horn Nominees Pty Ltd <Horn Super Fund a/c>	2,941,176	1.39%
Robert Peter van der Laan	2,941,176	1.39%
Northmead Holdings Pty Ltd <The Greenwell Family a/c> (Northmead)	8,823,529	4.18%
Rec (WA) Pty Ltd	2,941,176	1.39%
TOTAL	17,647,057	8.35%

21. Also on the day of the EGM, at 4:54pm (AWST), the Emu board met via telephone by consent on short notice. Draft minutes of the meeting noted:

⁶ *Emu NL 02R* [2025] ATP 12

⁷ Shown as 5:07pm (AEST) on the ASX Market Announcements Platform

⁸ 17,647,057 shares were in fact issued, Emu confirmed that the release contained a typographical error

Discussion ensued in relation to the point at which shares on the register are eligible to vote at the EGM being held today.

RESOLVED that shares on the register at 5:00pm AWST be eligible to be voted.

22. At 5:00pm (AWST) on the same day, the EGM was scheduled to start. At 5:25pm (AWST), after a delay in registering members, the EGM was declared open.
23. Mr Thomas, who chaired the meeting, described the proceedings in an email to his fellow directors sent on 15 May 2025, as follows:⁹

The registry's refusal to act on my rulings re proxies ended up in a disorderly process at the meeting.

The meeting was not opened for nearly 30 minutes after due. By then I still did not have the proxy numbers. The meeting was then held in abeyance pending the proxy numbers being provided. When they were I was confused as one set of numbers only was provided (no abstains) and I thought that the votes were not identical on all proxies. After pause I was assured by [the Company Secretary] that the numbers I was given were correct and [sic] applied to each resolution (that is the same numbers for each resolution). These numbers were disclosed as required by the law.

The vote was then referred off to a poll and the meeting closed.

...

Late in the evening it was disclosed to me that the numbers that had been disclosed to the meeting were wrong in any event as they included all the votes on the shares issued yesterday – obviously those shares were not be [sic] voted by proxy.

...

It appears to me the registrar will take a considerable time to sort the mess made by the registrar because of the registrar refusing to act on my rulings.

24. Later that morning, Emu entered into a trading halt to be lifted no later than 19 May 2025. At that time, the results of the EGM, and the identity of the Placees, had not been announced by Emu.

APPLICATION

Declaration sought

25. By application dated 16 May 2025, the Applicant sought a declaration of unacceptable circumstances. The Applicant submitted that the following circumstances (among others) were unacceptable:
 - (a) The Emu board issuing the New Shares on the day of the EGM at substantial discount (0.017c) to the market price (0.024c) in circumstances where Emu's

⁹ The Registry requested that we indicate that the statements made regarding it are unverified, were made by individuals with a vested interest in their acceptance, and are not findings of fact by the Panel and do not reflect its views. See paragraph 77

latest Quarterly Activity Report suggested that Emu had sufficient cash available for the next quarter.

- (b) The issue of New Shares apparently allowing Emu directors to retain control against the wishes of the Requisitioning Shareholders and general body of shareholders.
- (c) The identity of the recipients of a placement of more than 8% of Emu's issued capital remaining undisclosed as at the date of the application.

26. The Applicant submitted that the effect of the circumstances infringed section 602 principles as:

- (a) Emu shareholders did not know the identity of persons who took the New Shares.
- (b) The Applicant was unable to ascertain whether there had been a prohibited exercise of voting rights of shares acquired after the cutoff date for eligibility to vote.

Interim orders sought

27. The Applicant sought interim orders to the effect that:

- (a) Emu produce to the Panel within 2 business days, all proxy forms received in connection with the EGM including disallowed proxies (and the basis for disallowance) and
- (b) Emu provide details of subscribers for the holders of the New Shares and any voting instructions provided by them.

Final orders sought

28. The Applicant sought final orders to the effect that:

- (a) The declaration of the poll at the EGM be set aside and the Panel declare the outcome of the poll by:
 - (i) disallowing any votes of the New Shares
 - (ii) allowing votes of any proxies unreasonably or improperly disallowed.
- (b) Placees be restrained from exercising any voting or other rights attached to the New Shares for a period of 6 months from the date of issue.
- (c) The costs of the Applicant be paid by Emu directors.

Subsequent events

29. On 19 May 2025, Emu announced the proxy votes and results of the poll at the EGM. The announcement also stated that:

... on the day of the shareholders' meeting, EMU issued new fully paid shares by way of a placement. The need for a fund raising by way of a share placement has long been budgeted and was certainly required. For the record, each of the four resolutions would still have failed even if the votes on these new shares had not been included.

30. On 20 May 2025, Emu made a preliminary submission to the Panel in which (among other things) it disclosed the identity of the Placees as well as the number and percentage of New Shares issued to each of them (see paragraph 20 above).
31. Shortly after Emu's preliminary submission, the Applicant submitted an amended application, which we decided to receive. In it, the Applicant submitted that "*the only logical and reasonable inference to be drawn is that the issue of the Placement Shares was conditional on the subscribers voting against the Resolutions*" and that the Placees were associates and requested that the following additional orders be made:
- (a) interim orders that:
 - (i) Emu be restrained from dealing with the funds received from the issue of the New Shares pending determination of these proceedings and
 - (ii) the Placees must not dispose of, transfer, grant a securities interest over (or agree to any such disposal, transfer or grant) or vote any of the New Shares pending determination of the application by the Panel and
 - (b) final orders that the Placement be declared void or, in the alternative, that the New Shares be vested in the Commonwealth on trust for each of the Placees or, in the further alternative, that in accordance with the final order already requested by the Applicant,¹⁰ Placees be restrained from exercising any voting or other rights attached to the New Shares for a period of 6 months from the date of issue.

DISCUSSION

32. We have considered all the material before us but address specifically only the material we consider necessary to explain our reasoning.

Interim orders

33. The President of the Panel considered the interim orders sought by the Applicant on an urgent basis. The President invited parties to make submissions, indicating that he was minded to make the interim order referenced in paragraph 27(a), as the placement of the New Shares on the same day as the EGM appeared unusual, and providing the relevant information should not be difficult for Emu.
34. Emu submitted that the purpose of the interim order was to preserve a copy of the proxy forms, and that a statement of the basis of disallowance was unnecessary for that purpose and irrelevant. Emu indicated that it was prepared to give an undertaking to preserve the original proxy forms and tally sheets. Emu also proposed that a scrutineer be appointed by ASX in accordance with ASX Listing Rule 14.8 to review the votes cast.

¹⁰ As set out in paragraph 28(b) above

35. On 21 May 2025, the President made the interim order referenced in paragraph 27(a)¹¹ (see Annexure A) requiring that:
- (a) the information be provided to the Panel executive by 12pm (Melbourne time) on 22 May 2025, for it to hold for the purposes of these proceedings and subject to any direction from the Panel (once appointed) and
 - (b) Emu notify parties once it had complied.
36. The President saw no reason not to obtain the disallowance information noting the uncertainty of the meeting results and that the Panel (once appointed) could determine if it needed to see that information.
37. We gave further consideration to the interim orders sought when deciding to conduct proceedings, including the Applicant's request for further interim orders to restrain Placees from dealing with New Shares.¹² We advised parties and the Placees that we were minded to make that interim order, and to continue the President's interim orders, and invited their submissions. After considering those submissions, we made interim orders to that effect (Annexure B).

Decision to conduct proceedings

38. In its preliminary submissions in response to the application Emu submitted that we should decline to conduct proceedings because, among other things:
- (a) the application proceeded upon a demonstrably false premise as to the outcome of the poll, and the subsequent announcement of the EGM results on 19 May 2025 indicated that whether the impugned shares should have been voted was moot since those votes did not affect the result.
 - (b) the Applicant provided no information attracting the jurisdiction of the Panel to make a declaration under section 657A, and the principal issue raised concerned a question of law that should be determined by a court.
39. In our view, the application raised matters potentially within our jurisdiction that warranted further enquiry. The issue of the Placement of 8.35% post dilution of fully paid Emu shares immediately before the EGM was highly unusual, in our experience. That, in the context of alleged problems with the conduct and outcome of the EGM, appeared to raise matters that may have an effect on control or potential control or be contrary to the purposes in section 602. Accordingly, we decided to conduct proceedings.
40. We issued a brief on matters that included the s249D Notice, the EGM and its adjournments/postponements, the proxy forms provided to Emu shareholders, the proxies received for the EGM, Emu's engagement of Metropolis, and the Placement, its arrangement and effect. In addition to the Applicant and Emu, Mr Grewar and Mr Dawes elected to become parties. We also sent the brief to each of the Placees,

¹¹ As set out in paragraph 30 above, Emu provided the information sought by the order requested in paragraph 27(b) in its preliminary submission dated 20 May 2025

¹² See paragraph 31(a)(ii)

inviting them to make submissions and/or seek to become a party. Subsequent supplementary briefs were also sent to the Placees and other persons affected or concerned.

Jurisdiction – general meetings and board spills

41. Emu submitted that issues going to the manner in which meetings are convened or conducted do not usually attract interest, much less action, from the Panel, but rather are questions of shareholder rights requiring curial resolution. Emu submitted further that the application was about control of Emu through control of the composition of its board and *“the Panel will not generally treat issues about the composition of a company’s board as control issues for the purposes of section 657A, unless an accumulation of voting power was involved in contravention of section 606 or without proper disclosure under Chapter 6C”*.¹³
42. We agree, but note that the statement above was made before the Panel’s jurisdiction was significantly expanded by the addition of paragraph 657A(2)(b) regarding circumstances that *“are otherwise unacceptable ... having regard to the purposes of this Chapter set out in section 602”*. This extension is reflected in the Panel’s statement in the later matter of *Resource Generation Ltd*¹⁴:

In our view, the fact that an application involves a proposal to reconstitute a board of directors does not take it outside the purview of the Panel. If, in the context of issues regarding the composition of a company's board, there is an accumulation or exercise of voting power possibly in contravention of s606, without proper disclosure under Chapter 6C or in otherwise unacceptable circumstances, those issues may be treated as control issues for the purposes of s657A.

43. The Panel put this another way recently in *Tempus Resources Limited* 02R¹⁵:

In deciding whether to conduct proceedings and, if so, make a declaration “we need to have regard to, among other things, the purposes in section 602, the provisions of Chapter 6 and, more broadly, the role Parliament intended the Panel to perform”.

The Panel’s powers to declare unacceptable circumstances are wide and not restricted to cases where there is a live takeover bid. However, it remains the case that the Panel was established as the primary forum for resolving disputes in control transactions. The Panel is not a general corporations tribunal, and so an applicant must explain why the circumstances the subject of its application are unacceptable under section 657A.

44. In that matter, the Panel and Review Panel were not persuaded that a rights issue was designed to “frustrate” resolutions to spill the board, noting that the company had resolved to undertake the rights issue before its receipt of the relevant section 203D and 249D notices.¹⁶

¹³ *Rivkin Financial Services* 01 [2004] ATP 14 at [26]

¹⁴ [2015] ATP 12 at [48]. See also *Tempus Resources Limited* [2024] ATP 1 at [26]-[28]

¹⁵ [2024] ATP 2 at [23]-[24] [footnote omitted]. See also: *Auris Minerals Limited* [2018] ATP 7 at [23], *Tribune Resources Limited* [2018] ATP 18 at [67]

¹⁶ *Tempus Resources Limited* [2024] ATP 1 at [30], *Tempus Resources Limited* 02R [2024] ATP 2 at [31]

45. Other decisions illustrate the need to establish circumstances that may be unacceptable under section 657A in order for the Panel to examine the conduct of board spill meetings.¹⁷ Nevertheless, where such circumstances have been established, the Panel has examined the conduct of meetings relevant to the circumstances or their effect or the protection of the rights and interests of persons affected. For example:
- (a) In *IFS Construction Services Limited*,¹⁸ the Panel made a declaration in relation to the rejection of proxies for 38% of issued shares and a lengthy adjournment of a requisitioned meeting that sought to remove and replace all IFS directors. Six days before the meeting, IFS announced it had received notice of intention to make a takeover bid for IFS from a company sharing two directors with IFS. The takeover bid was subject to conditions, including that the requisitioned meeting not pass the resolutions. The Panel considered that the takeover bid and its condition regarding the meeting made composition of the board an aspect of the fulfilment of the section 602 purposes.
 - (b) In *Redflex Holdings Limited*,¹⁹ the Panel declined to conduct proceedings on an application concerning a capital raising (which included a placement component) announced by Redflex Holdings Limited in the context of a proposed reconstitution of the Redflex Holdings Limited board. The Panel considered, among other things, that there was nothing to suggest that the balance of control at the general meeting would be tipped one way or the other by the placement.
 - (c) In *MMA Offshore Limited*²⁰ (*MMA*), the Panel made a declaration where it was proposed that shares issued under a placement and the institutional component of an accelerated entitlement issue would be able to vote at the company's AGM, but not shares issued under the retail component of the same entitlement issue. Resolutions to remove and replace two directors (but not a majority) were to be considered at the AGM. The institutional component conferred approximately 27.1% of all shares that could be voted at the AGM, and there was potential for one shareholder's voting power to increase from 10.4% to 13.8% and another's from 3.1% to 6.4%. The Panel agreed with the approach in *Resource Generation Limited*,²¹ but concluded that:
 - (i) the size and timing of the accelerated institutional component of the equity raising clearly raised control issues that were properly within the

¹⁷ For example, *Factor Therapeutics Limited* [2019] ATP 5, where the Panel declined to conduct proceedings on a 20% placement made shortly after the Company received a section 249D notice to remove three of its four directors. The Panel found that the Company appeared to have a genuine need for funds and the applicant had not provided sufficient material to suggest that: the placement was not already in contemplation, any placees would become substantial holders, or any placees were associates

¹⁸ [2012] ATP 15

¹⁹ [2009] ATP 17

²⁰ [2017] ATP 21

²¹ quoting from the passage set out above in paragraph 42

purview of the Panel, particularly given some institutions would obtain or increase substantial holdings as a result, and

- (ii) the timing of the equity raising had the potential to distort voting at the AGM and that was unacceptable.²²

46. In this matter, the circumstances that engage section 657A are similar to those in MMA – a placement that increases a substantial holding (but below 20%) shortly before a meeting to consider resolutions to replace directors. The placement in MMA was much larger, but made to apparently independent institutions as part of an entitlement offer that was not found to be contrary to *Guidance Note 17: Right issues*,²³ potentially reducing control effect concerns.
47. Here, we consider that the Placement raised issues that enliven our powers under section 657A, bringing this matter within the purview of the Panel. The manner in which the EGM was convened and held raises concerns, but our main focus is on their relevance to section 657A, and in particular:
- (a) to what extent there was a sufficient basis for Emu shareholders and the market to have confidence in the outcome of the EGM and
 - (b) whether that outcome could reasonably be considered to reflect the will of sufficiently informed holders of a majority of the shares who wished to vote.

The Placement

Approval of the Placement

48. On 14 May 2025, the day of the EGM, the Emu board met at 12:53pm (AWST) via telephone by consent on short notice and approved the Placement. The meeting lasted 11 minutes. It was announced to ASX 2 hours later in an Appendix 2A application stating that “[t]he placement has been negotiated at short notice”, followed by a Placement and Cleansing Notice stating that “[f]unding from the placement will be applied to exploration within the Company’s exploration projects and general working capital”. The announcements did not specify whether the New Shares could be voted at the EGM.
49. At 4:54pm (AWST), 6 minutes before the scheduled commencement of the EGM, the Emu board again met via telephone by consent on short notice and resolved “that shares on the register at 5:00pm AWST be eligible to be voted”.

Placement – need for funds and timing

50. We asked Emu why the Placement was negotiated at short notice, to what extent the need to raise \$300,000 was urgent, and why it was made before rather than immediately after the EGM. Emu provided reports of available funds as at 7, 9 and

²² MMA Offshore Limited [2017] ATP 21 at [12]-[14]

²³ The Panel noted that a shortfall facility would have been preferable, but considered the sub-underwriting arrangements were a sufficient dispersion strategy: MMA Offshore Limited [2017] ATP 21 at [20]-[22] and footnote 10

14 May 2025 which it submitted demonstrated its obvious and urgent need for cash. Emu submitted, among other things, that:

- (a) With no cash being generated while undertaking exploration, its need for fundraising was almost continuous.
- (b) Normal operational cash requirements had been increased by the demands of the EGM and what it considered to be an undeclared voting block in support.
- (c) Endeavours to raise further funds had been ongoing for several months (from at least March 2025) with significant "offers" to raise funds made to Emu in or about March 2025 to 13 May 2025.
- (d) Over time, the board became increasingly concerned about Emu's solvency and the need to preserve its Badja project (requiring expenditure of ~\$90,000 by 11 August 2025, including ~\$45,000 in July) to avoid the risk of forfeiture.
- (e) Expressions of interest to participate in any future placement had previously been made to two of the Placees. When the board resolved to seek to raise not more than \$300,000 (as the minimum necessary "survival" amount) those expressions of interest were followed up on or about 8 May 2025 and Emu's temporary general manager suggested the other two Placees.
- (f) *"The directors did not consider it likely that the resolutions would succeed. But even if they did, incoming directors would face an urgent need to raise funds to meet immediately due or imminent liabilities. Any incoming directors would necessarily be delayed in undertaking a fundraising while they appraised EMU's financial position, and assessed fundraising alternatives. There was at least a real prospect that while doing so EMU would be in a position of insolvency. Each of the directors was concerned to ensure he was not involved in the Company trading insolvently. But for the fundraising it would now be in that position."*

51. The Applicant submitted in response that:

- (a) Emu's submissions were inconsistent with its representations to the market as to its financial position, noting that Emu's Quarterly Activities Report dated 31 March 2025 showed that Emu had funding to survive for 1.6 quarters and
- (b) if Emu's financial position was so dire, why did it not follow the proper procedures – enter a trading halt, advise the market of its intention to raise capital and offer existing shareholders the opportunity to participate?

52. Mr Grewar submitted that Emu's argument that the Placement was urgently needed for solvency purposes was undermined by its admissions that it had multiple placement options over several months *"but chose one involving selected individuals with historical relationships to Emu's officers"*. Mr Grewar submitted also that the Placement was deliberately timed for the New Shares to be registered just before the EGM and voted in the incumbent board's favour.

53. We note that as far back as 19 March 2025, Mr Thomas expressed concerns about Emu's funding *"especially in light of uncertainty and extra cost (not the least of which will [be] the legal costs re actions and advice) thrust on us by the 249D"*, to which Mr

Staermose replied: *“The company cannot just stop functioning due to a 249D attack and money needs to be raised for normal functioning”*.²⁴

54. It is surprising that Emu could not find a way to address that issue without resorting to a hurried placement on the day of the EGM. We do not find Emu’s submissions on this compelling. Raising capital at this time would not seem favourable commercially. Further, if the Emu board *“did not consider it likely”* the resolutions would succeed, it is difficult to see why they should not delay the Placement for a few hours. That should have resolved any uncertainty created by the EGM and also avoided distorting voting at the EGM.

Conduct of the Placement

55. We asked Emu to provide details of how it selected the Placees to receive shares under the Placement. Emu submitted that:
- (a) Shares were placed to persons with immediately available funds who were prepared to subscribe for sufficient shares to cover short term needs, without conditions linked to additional transactions or shareholder approvals, free of fees, and with no free attaching options.
 - (b) Communications with the Placees were oral until they committed to subscribe, and conducted through Mr Thomas and Emu’s temporary general manager.
 - (c) *“Each subscriber was aware of the EGM and wished to ensure that they could vote at the EGM. That was confirmed in the email to them sent with the subscription form and by the Placees’ conduct in subscribing”*.
 - (d) Each of the Placees was known to one or both of Mr Thomas and Emu’s temporary general manager and, aside from Northmead, had been known to one of them for over 30 years. Northmead was known to Emu’s board as a substantial (and continuing shareholder) who had been introduced to Emu by a former director, and Mr Thomas had spoken to one of Northmead’s controllers *“a handful of times on the telephone”*.
56. The Applicant submitted in response that Emu *“plainly failed to engage with a proper and meaningful capital raising process. Rather the Placement was confined to selected associates...”*.
57. Given that Emu’s board considered the Requisitioning Shareholders to be opportunistically seeking control, and was openly committed to aggressively defending against that, we think it unlikely they would approach the Requisitioning Shareholders or anyone thought likely to support them. We saw no evidence that any assurances as to voting were sought from the Placees. However, since the Placees were all known to directors and wished to ensure that they could vote at the EGM, we infer that the board believed the New Shares would be voted against all resolutions at the EGM, in accordance with its recommendation.

²⁴ See paragraph 103

Record Date, postponements and voting of New Shares

58. The Notice of Meeting indicated that the Record Date for eligibility to vote at the EGM had been set under regulation 7.11.37 of the *Corporations Regulations 2001* at 5:00pm (AWST) on Sunday, 16 March 2025. Regulation 7.11.37 allows a convenor of a meeting to determine a time, which must not be more than 48 hours before the meeting, at which securities are taken, for the purposes of the meeting, to be held by the persons who held them at the specified time. The determination must be made before the notice of meeting is given.²⁵
59. Emu made no further reference to the Record Date in its announcements when it first postponed the EGM on 18 March 2025 or when it further postponed the EGM on 14 April 2025. On 16 April 2025, Emu announced that pursuant to section 250B “proxy voting” (presumably meaning proxy appointments) would be accepted up to 48 hours before the meeting, but no reference was made to the Record Date for eligibility to vote.
60. Emu submitted that the effect of this was that the Placees could vote the New Shares at the EGM (but not by proxy, due to section 250B) since:
 - (a) the Placees were registered before the EGM
 - (b) the Record Date stated in the Notice of Meeting related to the meeting “.. held ...on Tuesday, 18 March 2025 commencing at 5 PM AWST”, which was postponed under clause 44.4 of Emu’s Constitution and accordingly never held
 - (c) the determination under regulation 7.11.37 had accordingly lapsed and
 - (d) clause 53.1.2 of Emu's Constitution (which prevents voting of shares a person came to hold after a specified time, being not more than 48 hours before the meeting) had no application because there was no “specified time” applicable.Emu submitted that, had the Record Date not lapsed, the holders of over 8 million shares traded on market between 16 March 2025 and 14 May 2025 would have been disenfranchised.
61. The Applicant submitted that pursuant to regulation 7.11.37 the shareholders eligible to vote at the EGM were those registered at 5pm on 16 March 2025, and accordingly the Placees’ were ineligible to vote. The Applicant submitted that Emu’s argument was “unsupported” by its conduct and its announcements on 18 March and 14 April 2025 which had “Adjournment of Extraordinary General Meeting” in the heading.
62. Emu’s Constitution provides for “postponement” of a “proposed general meeting” in clause 44.4 and also “adjournment” of a meeting by the chairperson “with the consent of any meeting at which a quorum is present” in clause 51. If a meeting is adjourned under clause 51 for 30 days or more, clause 51.2 requires that “notice of the adjourned meeting must be given as in the case of an original meeting”.
63. Emu’s announcements on 18 March and 14 April 2025 expressly stated that the EGM had been postponed pursuant to clause 44.4 of Emu's Constitution. In each case the

²⁵ Regulation 7.11.37(4)(b) of the *Corporations Regulations 2001*

postponement was announced before the time scheduled for the proposed meeting to commence.

64. We consider that Emu's use of "postponement" and "adjournment" interchangeably was confusing for shareholders and market participants. Some may have thought that the EGM opened, but was immediately adjourned, on 18 March 2025, and was continuing with the same Record Date. Some may have expected that Emu would issue another notice of meeting to set a new record date. Some may have confused the section 250B proxy deadline with the record date for entitlement to vote. Many, we expect, would have assumed that shares issued hours before the EGM would not be able to vote.

Effect on control, potential control or the acquisition of a substantial interest

65. The Placement amounted to 8.35% post dilution of all fully paid Emu shares. Half the Placement (4.18%) was issued to Northmead, giving Northmead the largest substantial holding in Emu. In our view that represents a "substantial interest" in these circumstances for the purposes of sections 602 and 657A(2)(a)(ii), given the composition, relatively widespread, and small size, of shareholdings on Emu's register.²⁶
66. We asked parties whether the Placement had an effect on the control or potential control of Emu.
67. The Applicant submitted that the Placement did have an effect on the control or potential control of Emu as, among other things:
- (a) the EGM resolutions sought to replace two out of three of Emu's directors and, if passed would have resulted in a change of control and
 - (b) the Placement should be seen as a component of "*Emu's unacceptable conduct*" (including disallowing valid proxies and potentially allowing irregular proxies) utilised to defeat the resolutions.
68. Mr Grewar made a similar submission to the effect that the Emu board's conduct – "*including the deliberate delay of the meeting, manipulation of procedural mechanisms, and the use of company financial resources to defend their own positions*" – reflected a coordinated effort to entrench control.
69. Emu submitted in response, that the application was about control of Emu through control of the composition of its board, and noted the Panel's previous statements about the limited circumstances in which it treats such matters as control issues for the purposes of section 657A.²⁷ Emu noted that the directors' direct and indirect holdings prior to the Placement amounted collectively to less than 4%, and submitted

²⁶ See eg: *Brierley Investments Limited v Australian Securities Commission* (1997) 15 ACLC 1341 at 1349, 1351; *Ballarat Goldfields NL* [2002] ATP 7 at [27] (regarding the relevance of a widespread and small size of shareholdings); *Pinnacle VRB Ltd No. 11* [2001] ATP 23 at [18], [36]

²⁷ See paragraphs 41 to 44

that the Applicants had identified no features suggestive of control by the incumbent directors.

70. We agree with Emu that the Panel has generally not treated the concept of “control” in section 657A as encompassing removal or replacement of directors, even if it affects a majority of the board. However, paragraph 657A(2)(a) also encompasses the acquisition of potential control²⁸ and substantial interests.²⁹ Furthermore, paragraph 657A(2)(b) together with paragraph 602(a) addresses “*the acquisition of control over ...voting shares*” rather than control of a company.
71. Emu submitted also that the Placement had no effect on actual or potential control of Emu because the outcome of the meeting “*demonstrated a significant preponderance of support for the incumbent directors over the nominees of those seeking control of the board*” even without the Placement. Emu noted also that all share issues have a potential effect on control, whether by direct placement, share purchase plan or rights issue.
72. Had we been satisfied that the result of the EGM demonstrated clear majority support for the incumbent directors at an appropriately convened and conducted meeting, we may have declined to make a declaration in this matter. However, as explained below, we consider the results of the EGM, at best, uncertain and unclear due (to some extent at least) to the manner in which the EGM was convened and conducted.

Conduct of the EGM

73. All parties agreed that the manner in which the EGM proceeded was unsatisfactory and a valid concern. Among other things, it opened late, the proxy numbers were initially not available, and then the numbers were wrong when provided.
74. Where the parties differ, markedly, is in relation to the causes of, and responsibility for, the EGM’s undisputed problems.
75. Emu placed the blame for this squarely on its Registry. Emu considered that, among other things, its Registry had failed to manage proxies and the poll adequately, and failed to comply with instructions given by Mr Thomas, both at the meeting and on other occasions.
76. We provided a draft of our declaration to the Registry and invited it to respond to Emu’s allegations and to become a party to the proceeding. The Registry objected to the references to it in the draft declaration and noted that, as a neutral service provider, it was conscious of the commercial sensitivities inherent in its involvement in the proceedings and did not consider it appropriate to make submissions on matters beyond those that concerned it directly. The Registry commented also that the EGM “*was operationally complex, for reasons outlined in the Panel’s own findings, and was marked by heightened tension throughout the proxy and meeting processes*”.

²⁸ See paragraph 107

²⁹ See paragraph 65

77. The Registry chose not to become a party, but requested that we indicate that the statements in the draft declaration regarding the registry, including the statements referred to in paragraph 23 above:
- (a) are unverified and were made by individuals with a vested interest in their acceptance, and
 - (b) are not findings of fact by the Panel and do not reflect the Panel's views (which we confirm).
78. In our view, it is not necessary or appropriate for us to seek to determine the causes and who was accountable for the EGM's deficiencies although, without coming to a view as to who was at fault here, we consider that as a general principle it is the directors' responsibility to ensure the integrity of a shareholder meeting. Rather, our focus is on determining whether unacceptable circumstances have occurred, and if so, seeking to address them.
79. The parties were largely agreed that the material provided to us enabled us to declare the outcome of the EGM. Unfortunately, however, Emu and other parties were diametrically opposed as to what that outcome was. Each of the Applicant, Mr Grewar and Mr Dawes made submissions to the effect that we should declare all resolutions passed based on the proxy votes lodged by 16 March 2025. In our view, those submissions misconceive our role and powers. The circumstances alleged up to 18 March 2025 related almost entirely³⁰ to the convening and postponement of the EGM and matters that, without more, would take us beyond Parliament's intended role for the Panel. We do not, in any case, think it appropriate to assume that proxies lodged by 16 March 2025 necessarily indicated the outcome of the meeting, had it been held, such were the confusing, disorderly circumstances which Emu itself readily acknowledged.³¹

Results of the EGM

80. The problems concerning the EGM did not end when it closed. Rather:
- (a) On 19 May 2025, Emu announced the proxy votes and results of the poll at the EGM to ASX, but the information given was not correct.
 - (b) On 22 May 2025, Emu failed to comply with interim orders made by the President of the Panel³² to provide electronic copies of all proxy forms received in connection with the EGM, after advising the Panel that there were issues with the Registry providing proxies to Emu. Emu advised the Panel and parties:
 - (i) on 22 and 26 May 2025, that there were outstanding proxies still to be received from the Registry

³⁰ The exception being Emu's issue of 1,222,222 shares to Metropolis for services rendered in relation to the s249D Notice. See paragraph 112 below.

³¹ Noting that section 249Y(3) would have allowed members giving proxies to attend the meeting and vote differently to the direction in their proxies

³² and continued by our Interim Orders – see paragraphs [35] to [36]

- (ii) on 28 May 2025, at or around 12:07pm (AWST), that it had uploaded the remaining proxies and
- (iii) on the same day, at or around 12:15pm (AWST), that the Registry advised of an additional proxy that had been missed (which was then uploaded).
- (c) On 3 June 2025, Emu advised the Panel and parties of the results of an internal recount, conducted by the Chair in conjunction with Emu's solicitors, after "*a review of the proxies for the purpose of provision in these proceedings revealed further significant issues ...*". Emu submitted that the recount "*was conducted with the benefit of every proxy form, valid or invalid, every power of attorney and every corporate representative notice*". As part of the recount, Emu submitted that 68 proxies were disallowed³³ (compared to 44 proxies disallowed³⁴ in the original count), representing over 30% of all proxies provided for the EGM.
- (d) On 13 June 2025, in response to further questions in a Supplementary Brief regarding the results, Emu submitted that there were "inadvertent errors" in the numbers provided on 3 June 2025 as "*compounding issues with the Registry that delayed production of the proxies included issues with identification of which proxies went into which category (superseded or revoked/valid/invalid chair/invalid registry) lead to a mix up with the count*". Emu provided a table "*reflecting what we now consider accurate according to the recount*" with 52 proxies disallowed³⁵ (compared to 34 proxies disallowed³⁶ in the original count), representing over 23% of all proxies provided for the EGM.

81. We note Emu's efforts, but the fact that:

- (a) previous assurances proved wrong
- (b) further proxies appeared over the course of 2 weeks after the EGM and
- (c) correct categorisation of proxies took a further 2 weeks,

suggests to us that the problems with the EGM results go beyond mere counting and categorisation. Accordingly, we are not satisfied that we, or the market, can have confidence in the results in the absence of a declaration by a court³⁷ on that question.

82. We are satisfied, however, for reasons explained below,³⁸ that decisions made and steps taken by Emu's board in convening the EGM have contributed to the EGM's problems and the uncertainty of its results.

83. We otherwise make no findings as to what or who caused the problems in determining the EGM's results. In our view, the existence of such uncertainty over

³³ Including 27 superseded or revoked proxies

³⁴ Including 21 superseded or revoked proxies

³⁵ Including 12 superseded or revoked proxies

³⁶ Including 12 superseded or revoked proxies

³⁷ Emu considered seeking a court determination on its decision to accept votes attached to the New Shares but submitted that it had decided not to pursue that due to the commencement of proceedings on the application.

³⁸ See paragraphs 84 to 110

four weeks is of itself inconsistent with an efficient, competitive and informed market for Emu's voting shares. It may well be that advisers, consultants or service providers caused or contributed to that. Nevertheless, in our view, ultimate responsibility lies with the board.

Convening the EGM

84. We received submissions from parties and extensive documents from Emu concerning Emu's response to the s249D Notice and the convening and postponements of the EGM. We considered that material but will not discuss it at length.
85. To the extent that matters up to 16 April 2025 had potential to create or exacerbate subsequent unacceptable circumstances, they could have been addressed, in our view, by supplementary disclosure on 16 April 2025 (or in some cases, later). Accordingly, we consider that unacceptable circumstances first occurred no earlier than 16 April 2025.
86. Nevertheless, some earlier material is relevant, in our view, in understanding aspects of the Placement and the problems affecting the EGM and its results. We make limited findings below.

Aggressively defending

87. In our view, the material below indicates that the Emu board considered, from the outset, that the Requisitioning Shareholders were opportunistically seeking to gain control without paying a premium, and the board intended to strongly defend against that. We make no criticism of that. However, in our view, the Emu board's actions both provided the backdrop for, and later contributed to, unacceptable circumstances.³⁹
88. Minutes of an Emu board meeting held on 23 January 2025, the day the s249D Notice was announced, stated:

The intention is to aggressively defend the action taken by the dissident shareholders, absent research ... justifying otherwise.

RESOLVED to recommend that the proposals be rejected.

...

[Mr Thomas] opined that EMU is an undervalued stock – the 249D action is an attempt to gain control without paying premium – suggested we run well and hard ...

89. A week later, on 30 January 2025, in an email to his fellow directors, Mr Thomas recommended engaging Mr Stern of Metropolis as an adviser.⁴⁰

Gents

³⁹ See further paragraphs 104 to 110

⁴⁰ We note also that Metropolis' letter of engagement required that, if Emu elected to pay for its services in shares, the shares were to be issued prior to the EGM so that they could be voted at the EGM. Emu issued 1,222,222 shares to Metropolis on 12 March 2025. See paragraph 9

*You will note I have used non EMU addresses for you. **Please communicate from non EMU addresses** to avoid the emails we exchange becoming property of and thus clearly discoverable by EMU.*

I have worked with Peter Stern before. He and I did a 249D for Image years ago (his first) when we worked up effective strategies and approaches to defending opportunistic aggressors. In that case the defence was successful (by a very short nose) with a 94% voter turnout – so the notice was part only of the exercise – but a very important part. (original emphasis)

90. Also on 30 January 2025, in an email to the other Emu directors, Mr Staermose wrote:

...For whatever reason, I am not being attacked by these parties. Is it worth me reaching out in a neutral way, to see what the heck it is they want / are trying to accomplish? ...

Mr Thomas replied:

...

I am only guessing but I suspect the strategy is divide and conquer – hence attack 2 but not the whole board and you again a guess [sic] because if they succeed with getting 2 on the board you are offshore and 1 of 3 so they will just ignore you?

I reckon we should not reach out – that is just my experience. We have nothing to gain. They are not aggrieved – they just want to get control of a clean vehicle for very little cost. ...

Blank proxy form more difficult to use

91. Based on the material below we find that the Emu board was responsible for the Notice of Meeting containing a proxy form that was not personalised with a shareholder's name and address and was more difficult to use than an enclosed personalised proxy form prefilled to vote AGAINST all resolutions.

92. Minutes of an Emu board meeting held the day the s249D Notice was announced noted:

It was suggested that when shareholders are requested to vote on the resolutions at the EGM, voting directions be streamlined by the use of prefilled voting papers if legally appropriate – there cannot be any doubt within the voting process of how a shareholder wishing to support the current board should vote ...

93. On 6 February 2025, Emu's Registry provided a draft notice of meeting with (i) a non-prefilled proxy form with placeholders to include personalised shareholder's name and address and (ii) a prefilled proxy form (to vote AGAINST) that was not intended to be personalised with shareholders' details. In response, the Company Secretary directed the Registry to swap which form was personalised and delete all references to online voting:⁴¹

...

3. The prefilled proxy form will need the personalised shareholders name and address;

⁴¹ the email was copied to Emu directors

4. *The non-prefilled proxy form will NOT have personalised shareholders name and address showing (swapped from what you have already drafted);*

5. *Take out all references to online voting on both forms; ...*

Lack of electronic mailout and online voting

94. Based on the material below we find that Emu directors were aware that the lack of an electronic mailout and provision for online voting would likely cause problems.

95. Despite the lack of provision for online voting in the Notice of Meeting, Mr Thomas and Mr Stern gave brief consideration to establishing an “against” online voting portal to be funded by the directors. Mr Thomas asked in an email to Mr Stern on 27 February 2025:

Are we getting an “against” online voting portal up and running – this would be funded by the directors?

Mr Stern replied, referring to the “IT effort” required, how it would dovetail with the share registry, potential for challenge by the Requisitioning Shareholders and the need for shareholders to find the URL. He concluded: “... All in all, too hard I think.”

96. On 6 March 2025, Mr Staermose wrote in an email to the Company Secretary, copied to the other directors:

It appears to me that not only is there no online voting facility, (it would seem sensible to have, as we’d control it, not the other parties), but EGM Notices have NOT gone out via email, either?

That’s silly, in my view. I for one live thousands of miles away from [sic] wherever my mail goes.

For most shareholders with an email address provided, I am sure it would be easier to deal with an emailed notice.

Anyway, my 2 cents.

The Company Secretary replied:

Tim, this was a strategic move suggested by [REDACTED]. There was to be no electronic mailout.

97. On 3 April 2025, in an email to the Company Secretary with the subject heading “RE: Has [Registry] mailed out a notice detailing the postponement of the EGM yet?”, Mr Thomas wrote:

The mailout needs to be a lot slicker than the last one in relation to which I got the mail after the due date for the meeting.

Lack of clarification of eligibility to vote

98. We infer that Emu directors were aware of the lack of clarification of the effect of the Record Date in Emu’s announcements regarding postponement of the EGM. We find also that Mr Thomas, at least, considered that the ability to vote shares right up to the time of the poll was important.

99. On 1 April 2025, in an email to the Company Secretary copied to other Emu directors and a lawyer, Mr Thomas wrote:

... Unanswered question: can the date for determining eligibility to vote be reset? If yes, then we need to resolve upon the new date and include that information in the release.

100. On 4 April 2025, in an email to Mr Staermose copied to the Company Secretary and Mr Bartsch, Mr Thomas asked the Company Secretary to:

... just check the wording in the draught [sic] release with respect to the 48 hour cut off and its reference to appointments I don't believe we refer to appointments in the notice of meeting but whatever words were used in the notice of meeting need to be consistent because that keeps open the possibility of accepting letters of appointment right up to the time of and at the meeting including at the time of the poll

The Company Secretary replied that the Notice of Meeting made no reference to the matter, to which Mr Thomas responded:

That is my point – so why make it now? It changes what we have always ensured was the preserved position (that is letters of appointment can be lodged right up to the time of the conduct of the poll.

101. On 14 April 2025, the Emu board further postponed the EGM to 14 May 2025 and on 16 April 2025, announced that pursuant to section 250B, proxies would be accepted up to 5:00 pm (AWST) on 12 May 2025. The Notice of Meeting was not otherwise updated or supplemented, no new proxy forms were provided, and the announcements made no reference to the Record Date.
102. In summary, we found the manner in which the shareholders' meeting was convened and managed to be so disorderly that the rights and interests of Emu shareholders were materially compromised.

Need for funds

103. We find that Emu directors were conscious, at least 8 weeks before the EGM, of the effect of extra costs responding to the s249D Notice on Emu's funding.
104. On 19 March 2025, in an email to Mr Staermose, Mr Thomas wrote:

... I am concerned about funding especially in light of uncertainty and extra cost (not the least of which will the legal costs re actions and advice) thrust on us by the 249D.

Mr Staermose replied:

The company cannot just stop functioning due to a 249D attack and money needs to be raised for normal functioning.

Effect of the circumstances on control or potential control and the efficient, competitive and informed market

105. We accept that the Emu directors believed the Applicant and Requisitioning Shareholders were acting in concert with others to opportunistically gain control of Emu without paying a premium. The directors were entitled to defend against that occurring, in particular by seeking to secure shareholder support for the incumbent directors at a properly convened EGM. However, there are limits as to what is

consistent with section 602 and acceptable for the purposes of section 657A.⁴² We consider that the Emu directors exceeded those limits in the manner in which they convened the EGM⁴³ and in making the Placement.⁴⁴

106. In our view, the board's ultimate objective should have been to facilitate properly informed decisions at the EGM by the holders of a majority of votes cast. We make no criticism of the board for testing its concerns regarding association, but given they were not upheld by the Panel⁴⁵ and the matter was not taken to court, the board needed to accept that suspected associates had as much right to vote as any other shareholder. We consider that the Emu board failed to do that sufficiently in respect of the proxy forms provided,⁴⁶ the lack of an electronic mailout (and possibly, online voting)⁴⁷ and the lack of clarification of eligibility to vote.⁴⁸
107. Drawing on our experience and expertise, we infer that these things are likely to have exacerbated what the Registry described as an "*operationally complex*" EGM "*marked by heightened tension throughout the proxy and meeting processes*". The actual effect of these factors on the EGM and the uncertainty of its results, is impossible to determine. In our view, the difficulty of using the blank proxy form, and the lack of an electronic mailout and online voting, are likely to have had a significant effect on votes and, in particular, on votes in favour. We note that the last set of EGM results provided by Emu⁴⁹ indicated that, of shareholders who voted in person, there were none voting in favour, and 19 shareholders casting 12,466,641 votes against each resolution. Because those votes against were cast in person, they were not affected (as were votes in favour) by the need to correctly complete a blank proxy form or the risk of proxy disallowance for errors.
108. The uncertainty of the EGM results makes it difficult to determine the effect of the factors referred to in paragraphs 105 and 106 in combination with the Placement. We consider that it may well have affected the outcome of resolutions.

⁴² The UK Supreme Court noted the challenges directors face in observing analogous limits (under the proper purpose rule) in a decision concerning a board's suspension of voting rights before a contested director election: "[the proper purpose rule] ... is also fundamental to the constitutional distinction between the respective domains of the board and the shareholders. These considerations are particularly important when the company is in play between competing groups seeking to control or influence its affairs. The directors' task is no more difficult than it was in the many cases like *Howard Smith Ltd v Ampol Petroleum Ltd* in which other fiduciary powers, such as the power to issue shares, have been held improperly exercised because in the face of pressures arising from a battle for control the directors succumbed to the temptation to use their powers to favour their allies. ... in that situation the board would naturally wish to have the predators disenfranchised. That is precisely why it is important to confine them to the more limited purpose for which their powers exist." – *Eclairs Group Ltd and another v JKC Oil and Gas plc* [2015] UKSC 71; [2016] 1 BCLC 1 at [37] (Lord Sumption, Lord Hodge concurring). See also *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 837; *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285 at 289-290.

⁴³ See paragraphs 87 to 100

⁴⁴ See paragraphs 48 to 72

⁴⁵ See *Emu NL 01* and *Emu NL 02R*

⁴⁶ See paragraphs 91 to 93

⁴⁷ See paragraphs 94 to 97

⁴⁸ See paragraphs 98 to 100

⁴⁹ See paragraph 80(d)

109. Whether or not that is the case, we consider that the circumstances of the Placement, the disorderly EGM, the opaque disallowance of proxies, and the subsequent challenges in determining its results, have not given Emu shareholders or the market a sufficient basis for confidence as to the outcome of the EGM and the subsequent composition of the Emu board. We are satisfied that that is unacceptable having regard to its effect on an efficient, competitive and informed market for the acquisition of Emu shares.
110. The treatment of share issues ahead of a meeting considering changes to the board will usually require careful attention to the whole of the circumstances. Share issues to a board's allies could obstruct their removal and potentially, over time, entrench director control of the board's exclusive management powers, inconsistently with the constitutional division of power. Equally, however, receipt of a section 249D notice to remove directors should not restrict a company from properly raising capital where there is an operational requirement to do so.
111. Panel decisions to date demonstrate this delicate balance⁵⁰ and the unusual facts of this matter, in our view, merely add another example.

Application timing

112. Section 657C(3) provides that:

An application for a declaration under section 657A can be made only within:

- (a) 2 months after the circumstances have occurred; or
- (b) a longer period determined by the Takeovers Panel.

113. The Applicant sought an extension of time to allow it to apply for a declaration in relation to circumstances first occurring on 12 March 2025, being the date on which Emu issued 1,222,222 shares to Metropolis for services rendered in relation to the s249D Notice. The Applicant submitted the extension should be granted given that it had only become aware of the engagement and issuing of shares to Metropolis in the course of these proceedings. We accept that this is an adequate explanation for delay under the last of the discretionary considerations mentioned in *Webcentral Group Limited 03*.⁵¹ Ultimately, however, given the stake issued to Metropolis (0.6%) was clearly not a substantial interest, we considered that it would not give rise to unacceptable circumstances. Also, we do not consider that, on its own, it was sufficiently serious to justify extending time,⁵² noting that the discretion to do so is not exercised lightly⁵³.

Contravention of section 657E

114. Emu contravened section 657E by failing to provide material required by the President's interim order within the time specified.

⁵⁰ See paragraphs 41 to 46

⁵¹ [2021] ATP 4 at [86(d)]

⁵² *Webcentral Group Limited 03* [2021] ATP 4 at [86(b)]

⁵³ *Webcentral Group Limited 03* [2021] ATP 4 at [86(a)]

115. Emu submitted that the declaration should not cover this contravention as it was irrelevant to the finding of unacceptable circumstances and explicable due to extensive Registry issues. We disagree. In our view, Emu's failure to comply (or seek an extension of time) was an indication of the state of the proxy materials (and Emu's lack of appreciation of that when it announced the result) and the lack of a sufficient basis for confidence in the announced results.
116. Furthermore, section 657E is a provision of Chapter 6 to which we are required to have regard in exercising our powers under section 657A.⁵⁴

Contravention of section 671B

117. One of the Placees, Northmead, gave a notice of change of substantial interest late, on 28 May 2025. While in our view, this short delay was not likely to have had a material effect on the market, it nonetheless constitutes a breach of Chapter 6C.

DECISION

Declaration

118. Considering the whole of the material, and drawing appropriate inferences, we consider that Emu directors should reasonably have expected that:
- (a) The Placees, or some of them, were likely to vote their New Shares at the EGM
 - (b) The Placees, or some of them, were likely to support the incumbent Emu directors and
 - (c) Some shareholders and market participants (other than the Placees) could assume that the Record Date for the EGM would either be:
 - (i) 16 March 2025, as disclosed in the Notice of Meeting or
 - (ii) 48 hours before the scheduled commencement of the EGM, consistent with how the Record Date was originally set in the Notice of Meeting.
119. We consider that:
- (a) By not updating or clarifying the Record Date on 16 April 2025, when Emu announced that the EGM would be held on 14 May 2025, Emu may have deterred persons (other than the Placees) from acquiring shares, or seeking to vote shares they had acquired, after 16 March 2025.
 - (b) By not facilitating access to proxy forms that included the necessary shareholder identification information, other than proxy forms that were prepopulated with voting directions marked "AGAINST" the resolutions, Emu made it more difficult for shareholders to vote in favour than against.
 - (c) The actions of the Emu directors in issuing the New Shares to the Placees, and the timing, manner and quantum of issue, facilitated the acquisition of a

⁵⁴ Under section 657A(3)(a)(ii)

substantial interest in Emu by one or more Placees that the Emu directors could reasonably expect would be voted at the EGM and would likely be voted in support of the incumbent directors.

- (d) The timing of the Placement had the potential to distort voting at the EGM inconsistently with the respective domains of the board and shareholders.
- (e) The overall manner in which the EGM was conducted, including the two postponements, the placement on the day of the EGM and the lack of clarity and disclosure with regards to Emu's recount(s) of the proxies, did not give Emu shareholders or the market a sufficient basis for confidence as to the outcome of the EGM and the subsequent composition of the Emu board, preventing or inhibiting the acquisition of control over Emu shares taking place in an informed market.

120. It appears to us 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 Emu or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Emu or
- (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602 or
- (c) in the further alternative, because they constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6 and 6C of the *Corporations Act 2001* (Cth).

121. Accordingly, we made the declaration set out in Annexure C and consider that it is not against the public interest to do so. We had regard to the matters in s657A(3).

Orders

122. Following the declaration, we made the final orders set out in Annexure D. The Panel is empowered to make 'any order'⁵⁵ if 4 tests are met:

- (a) it has made a declaration under section 657A. This was done on 27 June 2025.
- (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. For the reasons below, we are satisfied that our orders do not unfairly prejudice any person.
- (c) it gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done on 11 June 2025,

⁵⁵ Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

20 June 2025 and 1 July 2025. Each party and some persons to whom the proposed orders would be directed made submissions.

- (d) it considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons. The orders do this by:
 - (i) requiring Emu to convene and hold a further general meeting (**New Meeting**) to consider all resolutions previously put at the EGM on 14 May 2025, except resolution 2 (removal of Mr Roland Bartsch as a director)⁵⁶ and any additional resolution for which notice under section 203D is given before the New Meeting is called
 - (ii) ensuring the integrity of the New Meeting by requiring:
 - (A) electronic voting
 - (B) a proxy form pre-filled with each shareholder's name, address, and holder identification number
 - (C) no other proxy form is issued with the notice of meeting
 - (D) no indication is provided in the proxy form as to how shareholders should vote and it is not made easier to vote either for or against a resolution
 - (E) a draft notice of meeting and proxy form is provided to the Panel for review by 18 July 2025
 - (F) the final notice and proxy form is issued, in a form acceptable to the Panel, by 25 July 2025
 - (G) an independent scrutineer is appointed from a list provided by the Panel to oversee the treatment of proxies, validity and counting of all votes cast at the New Meeting and, if there is a disagreement between the independent scrutineer and the chair of the meeting in relation to the result of the meeting:
 - Emu must disclose the number of proxies and votes that were the subject of the disagreement and
 - If the disputed votes had the potential to affect the outcome of any resolution, the independent scrutineer must provide a report to the Panel on those disputed votes
 - (H) Emu must assist the independent scrutineer and not cancel or postpone the New Meeting without the consent of any member of the Panel
 - (iii) requiring Emu to hold the New Meeting no later than 30 calendar days after the issue of the notice of meeting and

⁵⁶ Emu announced, on 17 June 2025, that Mr Bartsch had resigned as a director of Emu.

- (iv) prohibiting the New Shares and any further shares issued before the New Meeting from being voted at the New Meeting.
123. We sought submissions as to whether we should consider accepting enforceable undertakings in lieu of making our proposed orders on 11 June 2025 and again on 20 June 2025.
124. Emu offered to give an enforceable undertaking to the effect that it would abide by a decision of a competent and independent scrutineer appointed by Emu on the nomination of the Panel in relation to the admission or disqualification of votes cast at the meeting on 14 May 2025. This was offered on the basis that the scrutineer's decisions would be made having heard from the Chair as to the rulings made, but Emu advised that the Chair had instructed Emu that he would accept the advice of such scrutineer to determine the admission and voting of a proxy, power of attorney or vote cast in person. It was also subject to the Applicant accepting that such an outcome would resolve the matter, conclusively.
125. The Applicant in response was opposed to us accepting an undertaking in lieu of orders and submitted that "*the egregious nature of the conduct*" of Emu warranted a costs order.
126. In our view, Emu's proposed undertaking would not in any case have been appropriate and sufficient to protect the rights or interests of Emu shareholders affected by the circumstances identified in the declaration, for the following reasons:
- (a) it would not address any effect of the Placement in distorting voting at the EGM inconsistently with the respective domains of the Board and shareholders
 - (b) it would not sufficiently address the effect on the vote of proxy forms that made it more difficult to vote in favour than against, and confusion as to eligibility to vote and the effect of postponements described as adjournments and
 - (c) accordingly, the recount may not give Emu shareholders or the market a sufficient basis for confidence as to the outcome of the EGM and the composition of the Emu board.
127. Accordingly, despite the preference of the Panel and parties for a resolution that avoided the cost and delay of another meeting, we could not see (and were not presented with) any alternative that we would consider appropriate to protect the rights or interests of affected Emu shareholders.
128. Emu submitted that there was a "very real possibility" that the current board of directors would be unduly prejudiced by a New Meeting as Emu shareholders (save for those directly involved in the proceedings) would not have the full context of these proceedings given all submissions and rebuttals are confidential. We consider that the information provided in our media releases and the declaration of unacceptable circumstances should be sufficient to prevent any such prejudice becoming unfair. We also expect that our reasons will be available before the New Meeting and will provide more context to Emu shareholders.

129. We also consider that any prejudice to the Emu directors would not be unfair, given our findings that the directors have contributed to the circumstances.⁵⁷
130. All parties made submissions on the detail of the orders (several of which were accepted to some extent) and especially the requirements imposed to ensure the integrity of the New Meeting. Emu raised many concerns, including regarding electronic voting, proxy form requirements, timing, and further shares issued not voting at the New Meeting.
131. Among other things Emu submitted that online voting cannot now be securely adopted by Emu due to the integrity of the Holder Identification Number / Securityholder Reference Number details of many shareholders no longer being secure.⁵⁸ If the Registry or the independent scrutineer appointed under our orders advise that this cannot adequately be addressed, it is open to Emu to seek a variation of the orders.
132. We have included a broad “liberty to apply for further orders” to ensure that the above and any other potential problems or prejudice that may arise can be considered. This continues until 14 calendar days after the outcome of the New Meeting is announced on ASX, and expressly extends to orders as to who should bear:
 - (a) the costs of the parties to the proceedings and
 - (b) the costs of the New Meeting and the independent scrutineer.

POSTSCRIPT

133. On 24 July 2025, the Applicant submitted that:
 - (a) on 18 July 2025 it had issued a letter to Emu attaching a statement for despatch from the Requisitioning Shareholders pursuant to section 249P (**s249P Statement**) in relation to the New Meeting to be held under the orders we made on 10 July 2025 (**Orders**) and
 - (b) since then, Emu had not confirmed that a copy of the statement would be despatched to shareholders together with the notice of meeting for the New Meeting, which pursuant to the Orders was required to be despatched no later than the following day.
134. Accordingly, the Applicant applied for a further order (in accordance with order 9 of the Orders) requiring Emu to despatch the s249P Statement together with the notice of meeting for the New Meeting (**Applicant’s Request**).

⁵⁷ See paragraphs 82 to 83

⁵⁸ On 9 May 2025, Emu announced that it had been informed of “*unauthorised misuse of shareholder information*” including shareholder Holder Identification and Security Holder Reference Numbers. In the announcement, Emu stated that it had “*issued the 2 offending parties with cease and desist letters*” and that it “*will report the breaches to the Office of the Australian Information Commissioner at the conclusion of its investigation*”.

135. Also on 24 July 2025, Emu sought a variation of order 2(f) of the Orders to extend the deadline for issuing the notice of meeting for the New Meeting (**Emu's Request**). It submitted that order 2(f), which required Emu to issue the notice of meeting and proxy form, in a form acceptable to the Panel, as soon as practicable and by no later than 25 July 2025 should be amended to require Emu to issue the documents "*5 business days following receipt of approval from the Panel*".⁵⁹ Emu submitted that this extension was required because:
- (a) it had provided us with its draft notice of meeting and proxy form on Saturday 19 July 2025, despite the Orders requiring the drafts to be provided to us on 18 July 2025, "*due to significant illness, both within EMU's legal team and the board*"
 - (b) on Tuesday 22 July 2025, we requested that changes be made to the documents and asked Emu to provide updated drafts by Wednesday 23 July 2025, which Emu did
 - (c) "*[a]t the time of making these submissions, EMU has not received approval from the Panel to commence the process of issuing the notices*" and
 - (d) it would take "*a minimum of 5 business days to dispatch the required documents*" and therefore it was "*simply impossible for EMU to facilitate postage of the relevant documents in one business day*" and comply with the Orders.
136. We sought submissions from the parties and the Requisitioning Shareholders⁶⁰ in relation to the Applicant's Request and Emu's Request. We also asked Emu to confirm whether it had received notice under section 203D of any additional resolution to be considered at the New Meeting under order 1(b) of the Orders.
137. Emu submitted that it objected to the Applicant's Request because:
- (a) the Applicant had no standing to apply for such orders because the s249P Statement was the Requisitioning Shareholders' statement, not the Applicant's
 - (b) the Requisitioning Shareholders did not have standing in these proceedings and did not send the s249P Statement to Emu directly, but through the Applicant's lawyers and
 - (c) Emu was not obliged to circulate the s249P Statement given it did not relate to a new notice under section 249D and a statement under section 249P had already been issued by the Requisitioning Shareholders in relation the s249D Notice.
138. The Applicant submitted that it had only facilitated the provision of the s249P Statement from the Requisitioning Shareholders and that it was a valid statement under section 249P. The Applicant also submitted that, following provision of the s249P Statement, a concerns notice was issued by one of the directors of Emu to the

⁵⁹ Emu had submitted on 9 July 2025 that Order 2(f) was "*for all intents and purposes, impossible for EMU to comply with*" as it would "*take a minimum of 10 business days*" after Panel approval to dispatch (5 business days for ASX approval and 5 business days for dispatch). In our experience, ASX approval and dispatch - especially for a company with a small register - can be achieved more quickly and usually is

⁶⁰ In accordance with section 657D(3), given we considered them to be affected by the requests to vary the Orders

Requisitioning Shareholders, alleging that the s249P Statement contained defamatory language. In response to those concerns, the Requisitioning Shareholders had agreed to modify the s249P Statement and provide a revised statement no later than the following day, on 1 August 2025.

139. Mr Grewar submitted that Emu should send the s249P Statement together with the notice of meeting given the context of the meeting had materially changed.
140. We agree. In our view the Applicant has standing to apply for a further order or variation, and the order sought is one we consider appropriate to protect the interests of persons affected by the circumstances under section 657D(2). We think that given we ordered that Emu convene the New Meeting, at which the resolutions contained in the s249D notice are to be considered, the Requisitioning Shareholders should be allowed to give Emu a fresh statement in light of current circumstances, including those we found to be unacceptable. We decided to vary our orders to include a new order that Emu must send, together with the notice of meeting and proxy form, the s249P Statement⁶¹ (see Annexure E).
141. In relation to Emu's Request, the Applicant submitted that Emu had been on notice with regards to the New Meeting for a while now and had had ample time to comply.
142. We agree. We first sought submissions on draft orders which contemplated Emu convening the New Meeting as early as 11 June 2025. The Orders were made on 10 July 2025 and Emu's Request is dated 24 July 2025. In our professional experience, there would have been ample time for Emu to prepare the notice of meeting and proxy form for the New Meeting, noting that, to some extent, Emu already had the benefit of the documents already prepared for the EGM.
143. However, as a practical way forward and with the interests of Emu's broader shareholder base in mind, and given the fact that by the time we received Emu's Request and the parties' submissions, Emu would have already been in breach of our Orders, we decided to vary our Orders (see Annexure E) so that:
 - (a) Emu must provide us with a draft of the notice of meeting and the proxy form by no later than 4 August 2025 (i.e. 3 calendar days but only 1 business day after the date of our Variation of Orders) and
 - (b) Emu must issue the notice of meeting and proxy form by no later than 13 August 2025 (i.e. 12 calendar days and 8 business days after the date of our Variation of Orders, to ensure Emu's logistical concerns would be addressed).⁶²
144. In response to our question in relation to any resolutions received by Emu under a section 203D notice, Emu submitted that it did receive "*a purported s203D notice from*

⁶¹ or any variation of the members' statement received by Emu no later than 1 August 2025, to reflect the Applicant's submission that a revised statement would be issued no later than 1 August 2025, as set out above.

⁶² See Emu's submission above that a minimum of 5 business days was required to dispatch the required documents

*Wayburn. However, the notice received was from Wayburn Holdings, not the original requisitions, or any other shareholder. It is not a valid s203D notice because Wayburn Holdings **does not** hold shares carrying more than 5% of the rights to vote at the meeting: Corporations Act ss203D and 249N.” (original emphasis)*

145. In response, the Applicant submitted that “[t]he Panel did not require any Section 249N Notice to be provided for the obvious reason that the Panel has already ordered Emu to convene a meeting to consider resolutions in relation to the composition of the Board so a Section 249N Notice would be redundant”. The Applicant also submitted that, although Emu had received the notice from the Applicant on 23 June 2025, it did not seek to dispute the validity of the notice prior to 24 July 2025.
146. The intention behind our Orders was to allow for an interested Emu shareholder or shareholders (for example the Applicant or the Requisitioning Shareholders) to put forward resolutions to be considered at the New Meeting in relation to the composition of the board, including with respect to Mr Douglas, appointed to fill Mr Bartsch’s vacancy, who was the subject of the s249D Notice. We considered that appropriate to protect the interests of persons affected by the circumstances under section 657D(2). Disputing the validity of the Applicant’s notice, and Emu’s delay in communicating this to the Applicant, had the effect of undermining this objective. Accordingly, for the avoidance of doubt, we decided to vary our Orders to refer specifically to the resolutions put forward by the Applicant (see Annexure E).
147. On 29 August 2025, Emu issued a notice of meeting for the New Meeting to be held on Monday 29 September 2025.
148. On 9 September 2025, Emu announced that one of the directors nominated by the Requisitioning Shareholders had withdrawn his consent to act as a director of Emu and did not wish to stand for election as a director of Emu at the New Meeting.
149. Also on 9 September 2025, Emu requested that our Orders be varied so that Emu no longer be required to put the relevant resolution to shareholders at the New Meeting.
150. After considering submissions, we further varied our orders accordingly (see Annexure F).

Stephanie Charles

President of the sitting Panel

Decision dated 27 June 2025 (declaration), 10 July 2025 (orders), 1 August 2025 (variation of orders) and 16 September 2025 (variation of orders)

Reasons given to parties 16 September 2025

Reasons published 24 September 2025

Takeovers Panel

Reasons - Emu NL 03
[2025] ATP 18

Advisers

Party	Advisers
Applicant	Bennett Litigation and Commercial Law.
Emu NL	HFW Australia
Barry Dawes	-
Douglas Grewar – Escannor Pty Ltd	-



Australian Government

Takeovers Panel

Annexure A
CORPORATIONS ACT
SECTION 657E
INTERIM ORDERS

EMU NL 03

Wayburn Holdings Pty Ltd made an application to the Panel dated 16 May 2025 in relation to the affairs of Emu NL.

The President ORDERS:

1. That Emu NL provide to the Panel executive by 12pm (Melbourne time) on 22 May 2025 electronic copies of all proxy forms received by Emu NL in connection with Emu NL's extraordinary general meeting held on 14 May 2025, including any proxies that were disallowed and the basis for the disallowance - for the Panel executive to hold for the purposes of the Emu NL 03 proceedings and subject to any direction from the Panel (once appointed).
2. That Emu NL notify all parties in the Emu NL 03 proceedings once it has complied with the above order 1.
3. These interim orders have effect until the earliest of:
 - (i) further order of the President or the Panel
 - (ii) the determination of the proceedings and
 - (iii) 2 months from the date of these interim orders.

Tania Mattei
General Counsel
with authority of Alex Cartel
President
Dated 21 May 2025

Annexure B
CORPORATIONS ACT
SECTION 657E
INTERIM ORDERS

EMU NL 03

Wayburn Holdings Pty Ltd made an application to the Panel dated 16 May 2025 in relation to the affairs of Emu NL.

The Panel ORDERS:

1. Without the consent of a member of the sitting Panel, each of the subscribers of Emu NL shares under the placement made on 14 May 2025 (**Placement**), and each of their respective associates, must not dispose of, transfer, charge or otherwise deal with any shares in Emu NL issued under the Placement.
2. The interim orders made by the President on 21 May 2025 continue with full force and effect.
3. These interim orders have effect until the earliest of:
 - (i) further order of the Panel
 - (ii) the determination of the proceedings and
 - (iii) 2 months from the date of these interim orders.

Allan Bulman
Acting General Counsel
with authority of Stephanie Charles
President of the sitting Panel
Dated 28 May 2025

Annexure C

CORPORATIONS ACT
SECTION 657A

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

EMU NL 03

BACKGROUND

1. Emu NL (**Emu**) is an ASX-listed company (ASX code: EMU).
2. On 23 January 2025, Emu announced receipt of a section 249D⁶³ request to call a meeting (**s249D Notice**) to consider resolutions to:
 - (a) remove two of Emu's three directors, Mr Peter Thomas (Chairman) and Mr Roland Bartsch,⁶⁴ and
 - (b) appoint as Emu directors, Mr Keith Rowe and Mr John Anderson.

The s249D Notice was given by Emu shareholders (**Requisitioning Shareholders**) who had the previous day given a substantial holder notice disclosing an association by reason of the s249D Notice and voting power in Emu of 8.89%.

3. On 11 February 2025, the Emu Board convened a general meeting (**EGM**) to be held on 18 March 2025 in response to the s249D Notice. The Emu Board unanimously recommended that shareholders vote against all resolutions. The notice of meeting (**Notice of Meeting**) stated that "*Pursuant to a determination under regulation 7.11.37 of the Corporations Regulations 2001 (Cth), the persons eligible to vote at the Meeting are those registered as Shareholders at 5:00 pm AWST on Sunday, 16 March 2025*" (**Record Date**).
4. The Notice of Meeting contained a proxy form that did not include a personalised name, address or holder number, and did not request a holder number. However, shareholders were provided with an additional proxy form⁶⁵ that was prepopulated with voting directions marked "AGAINST" the resolutions, which *did* include a personalised name, address and holder number.
5. On 12 March 2025, Emu issued 1,222,222 shares to a corporate advisory firm for services rendered in relation to the s249D Notice. The letter of engagement between Emu and the corporate advisory firm provided that if Emu elected to pay in shares, the shares shall be issued prior to the EGM so that they could be voted at the EGM.

⁶³ 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)

⁶⁴ Emu's announcement also attached a notice under section 203D notice of intention to move resolutions to remove Mr Thomas and Mr Bartsch

⁶⁵ For which the incremental costs of printing and distribution was paid by Mr Thomas and Mr Bartsch

6. On 18 March 2025, the Emu Board announced it had postponed the EGM to 16 April 2025 pursuant to clause 44.4 of Emu's Constitution.
7. On 14 April 2025, the Emu Board further postponed the EGM under clause 44.4 of Emu's Constitution to 14 May 2025 at a time and location to be advised.

CIRCUMSTANCES

8. On 16 April 2025, Emu announced that the EGM would be held at 5:00 pm AWST on Wednesday 14 May 2025 and stated that, pursuant to section 250B, proxy voting would be accepted up to 48 hours before that meeting, namely up to 5:00 pm AWST on Monday 12 May 2025. The Emu Board advised that postponement of the EGM was considered necessary whilst it awaited the decision of the Takeovers Panel in *Emu NL*.⁶⁶ The Notice of Meeting was not otherwise updated or supplemented, no new proxy forms were provided, and the announcement made no reference to the Record Date.
9. At 12:53pm (AWST) on Wednesday 14 May 2025, the day of the EGM, the Emu Board met via telephone by consent on short notice. Draft minutes of the meeting noted:

The Board resolved that applications for shares at \$0.017 (being at least 75% the 15 day VWAP) to raise up to \$300,000 be accepted and the shares be issued forthwith subject to receipt of cleared funds.

The meeting closed at 1.04pm

10. At 3:07pm (AWST) on the day of the EGM, Emu announced the issue on the same date of 17,647,059⁶⁷ ordinary fully paid Emu shares (**New Shares**) in an Appendix 2A application for quotation of the securities.
11. At 3:12pm (AWST) on the same day, Emu stated in a Placement and Cleansing Notice released to ASX that:
 - (a) it had agreed to place the New Shares "at \$0.017 per share to sophisticated and professional investors to raise \$300,000" and
 - (b) "Funding from the placement will be applied to exploration within the Company's exploration projects and general working capital".

The announcement did not specify whether the New Shares were eligible to be voted at the EGM later that day.

⁶⁶ [2025] ATP 11

⁶⁷ 17,647,057 shares were issued. The release contained a typographical error

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12. The New Shares were issued to four placees (**Placees**) as follows:

Placee	New Shares (number)	New Shares (% post dilution fully paid shares)
Horn Nominees Pty Ltd <Horn Super Fund a/c>	2,941,176	1.39%
Robert Peter van der Laan	2,941,176	1.39%
Northmead Holdings Pty Ltd <The Greenwell Family a/c> (Northmead)	8,823,529	4.18%
Rec (WA) Pty Ltd	2,941,176	1.39%
TOTAL	17,647,057	8.35%

13. At 4:54pm (AWST) on the same day, the Emu Board met via telephone by consent on short notice. Draft minutes of the meeting noted:

Discussion ensued in relation to the point at which shares on the register are eligible to vote at the EGM being held today.

RESOLVED that shares on the register at 5:00pm AWST be eligible to be voted.

14. At 5:00pm (AWST) on the same day, the EGM was scheduled to start. At 5:25pm (AWST), after a delay in registering members, the EGM was declared open.
15. The Chairman described the proceedings at the meeting in an email to his fellow directors sent Thursday, 15 May 2025 at 7:21am (AWST), as “a disorderly process” and proceeded in that email to state:

The meeting was not opened for nearly 30 minutes after due. By then I still did not have the proxy numbers. The meeting was then held in abeyance pending the proxy numbers being provided. When they were I was confused as one set of numbers only was provided (no abstains) and I thought that the votes were not identical on all proxies. After pause I was assured by Rudolf that the numbers I was given were correct an [sic] applied to each resolution (that is the same numbers for each resolution). These numbers were disclosed as required by the law.

The vote was then referred off to a poll and the meeting closed.

...

Late in the evening it was disclosed to me that the numbers that had been disclosed to the meeting were wrong in any event as they included all the votes on the shares issued yesterday – obviously those shares were not be [sic] voted by proxy.

...

It appears to me the registrar will take a considerable time to sort the mess....

16. Later that morning, Emu entered into a trading halt to be lifted no later than 19 May 2025.
17. On 16 May 2025, the Emu Board met to discuss the EGM, among other things.
18. On 19 May 2025, Emu announced the proxy votes and results of the poll at the EGM. The announcement also stated that:

... on the day of the shareholders' meeting, EMU issued new fully paid shares by way of a placement. The need for a fund raising by way of a share placement has long been budgeted and was certainly required. For the record, each of the four resolutions would still have failed even if the votes on these new shares had not been included.
19. On 21 May 2025, after seeking submissions from the parties on the proposed interim orders, the President of the Panel made interim orders under which Emu was to provide to the Panel executive electronic copies of all proxy forms received in connection with the EGM, including any proxies that were disallowed and the basis for disallowance (**Proxy Information**) by 12pm on 22 May 2025 (**Interim Orders**). Under the Interim Orders, Emu was to notify all parties once it had complied with the request to provide the Proxy Information. Emu provided such confirmation on 28 May 2025.
20. Despite having already announced the voting results of the EGM on 19 May 2025, Emu determined an internal recount was necessary to respond to the Application, which was undertaken between 26 May 2025 and 31 May 2025. The Registry was still providing proxies that were previously uncounted (and then password protected) on a continuing but sporadic basis until 28 May 2025 at 12.09pm.
21. On 3 June 2025, Emu submitted to the Panel that as part of a recount, 68 proxies were disallowed⁶⁸ (compared to 44 proxies disallowed⁶⁹ in the original count), representing over 30% of all proxies provided for the EGM.
22. On 13 June 2025, Emu submitted to the Panel that as part of a further recount, 52 proxies were disallowed⁷⁰ (compared to 34 proxies disallowed⁷¹ in the original count), representing over 23% of all proxies provided for the EGM.
23. The fact of internal recounts and the details of any internal recount have not been disclosed to the market at the time of this declaration.
24. On 17 June 2025, Emu announced that Mr Bartsch had resigned as a director of Emu and was replaced by Mr Oliver Douglas.

⁶⁸ Including 27 superseded or revoked proxies

⁶⁹ Including 21 superseded or revoked proxies

⁷⁰ Including 12 superseded or revoked proxies

⁷¹ Including 12 superseded or revoked proxies

Contravention of section 671B

25. One of the Placees, Northmead, was previously a substantial holder with voting power of 5.58%. Northmead had not given an updated substantial holder notice at the date of the Application.⁷²
26. In contravention of section 671B, Northmead failed to give the information required by subsection 671B(1)(b) within 2 business days after it become aware of the information.

Contravention of section 657E

27. Emu's delay in providing the Proxy Information under the President's Interim Orders contravened section 657E.

EFFECT

28. Considering the whole of the material, and drawing appropriate inferences, the Panel considers that the Emu directors should reasonably have expected that:
 - (a) The Placees, or some of them, were likely to vote their New Shares at the EGM
 - (b) The Placees, or some of them, were likely to support the incumbent Emu directors and
 - (c) Some shareholders and market participants (other than the Placees) could assume that the Record Date for the EGM would either be:
 - (i) 16 March 2025, as disclosed in the Notice of Meeting or
 - (ii) 48 hours before the scheduled commencement of the EGM, consistent with how the Record Date was originally set in the Notice of Meeting.
29. By not updating or clarifying the Record Date on 16 April 2025, when Emu announced that the EGM would be held on 14 May 2025, Emu may have deterred persons (other than the Placees) from acquiring shares, or seeking to vote shares they had acquired, after 16 March 2025.
30. By not facilitating access to proxy forms that included the necessary shareholder identification information, other than proxy forms that were prepopulated with voting directions marked "AGAINST" the resolutions, Emu made it more difficult for shareholders to vote in favour than against.
31. The actions of the Emu directors in issuing the New Shares to the Placees, and the timing, manner and quantum of issue, facilitated the acquisition of a substantial

⁷² Northmead's notice of change of interests of substantial holder – disclosing an increased voting power of 8.43% and 17,823,531 votes – appeared on ASX on 28 May 2025

interest in Emu by one or more Placees that the Emu directors could reasonably expect would be voted at the EGM and would likely be voted in support of the incumbent directors.

32. The timing of the placement had the potential to distort voting at the EGM inconsistently with the respective domains of the Board and shareholders.
33. The overall manner in which the EGM was conducted, including the two postponements, the placement on the day of the EGM and the lack of clarity and disclosure with regards to Emu's recount(s) of the proxies, did not give Emu shareholders or the market a sufficient basis for confidence as to the outcome of the EGM and the subsequent composition of the Emu Board, preventing or inhibiting the acquisition of control over Emu shares taking place in an informed market.

CONCLUSION

34. 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 Emu or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Emu or
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602 or
 - (c) in the further alternative, because they constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6 and 6C of the *Corporations Act 2001* (Cth).
35. 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 Emu.

Allan Bulman
Chief Executive
with authority of Stephanie Charles
President of the sitting Panel
Dated 27 June 2025

Annexure D
CORPORATIONS ACT
SECTION 657D
ORDERS

EMU NL 03

The Panel made a declaration of unacceptable circumstances on 27 June 2025.

THE PANEL ORDERS

1. Emu must convene and hold a further general meeting (**New Meeting**) in accordance with Orders 2 to 8 to consider the following resolutions:
 - (a) all resolutions previously put at the EGM, other than resolution 2 'Removal of Mr Roland Bartsch as a Director' and
 - (b) any additional resolution of which notice under section 203D is given before the New Meeting is called.
2. Emu must, in relation to the New Meeting:
 - (a) permit shareholders to vote electronically
 - (b) provide a proxy form for the New Meeting that is pre-filled with each shareholder's name, address and shareholder identification number
 - (c) ensure that no other proxy form is issued with the notice of meeting or included in the same electronic communication or, in the case of physical mail, the same envelope
 - (d) not provide any indication in the proxy form as to how shareholders should vote or make it easier to vote either for or against a resolution
 - (e) provide to the Panel for review, as soon as practicable and by no later than 18 July 2025, a draft notice of meeting and proxy form
 - (f) issue the notice of meeting and proxy form, in a form acceptable to the Panel, as soon as practicable and by no later than 25 July 2025 and
 - (g) hold the New Meeting no later than 30 calendar days after the issue of the notice of meeting.
3. The 17,647,057 ordinary fully paid Emu shares issued on 14 May 2025 under the placement made by Emu on that day must not be voted at the New Meeting.
4. Any further shares issued by Emu from the date of these orders until, and including, the date of the New Meeting must not be voted at the New Meeting.

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5. No later than 7 calendar days before the New Meeting, Emu must appoint an independent scrutineer from a list of names provided by the Panel (**Independent Scrutineer**), to oversee the treatment of proxies, validity and counting of all votes cast at the New Meeting, to the satisfaction of the Independent Scrutineer.
6. If the treatment of proxies, validity, and counting of all votes cast are not all to the satisfaction of the Independent Scrutineer:
 - (a) Emu must disclose in its announcement of the result of the meeting to ASX, the numbers of proxies and votes (for, against, or abstaining) that were the subject of disagreement between the Independent Scrutineer and the chair of the meeting (**Disputed Votes**) and
 - (b) If the Disputed Votes had the potential to affect the outcome of any resolution considered at the New Meeting, the Independent Scrutineer must provide a report to the Panel on those Disputed Votes, for the Panel to consider in connection with any application for further orders.
7. Emu must provide all necessary assistance to the Independent Scrutineer in relation to Orders 5 and 6.
8. The directors of Emu must not exercise any powers under Rule 44 of the Constitution to cancel or postpone the holding of the New Meeting, without the consent of any member of the Panel.
9. The parties to these proceedings have liberty to apply for further orders, until 14 calendar days after the outcome of the New Meeting is announced on ASX, including as to who should bear:
 - (a) the costs of the parties to the proceedings and
 - (b) the costs of the New Meeting and the Independent Scrutineer.
10. Interim Order 1 made by the Panel on 28 May 2025 continues with full force and effect until 14 calendar days after the outcome of the New Meeting is announced on ASX.

Interpretation

11. In these orders the following terms apply.

Disputed Votes	As defined in Order 6(a)
EGM	Extraordinary general meeting of Emu NL held on 14 May 2025
Emu	Emu NL
Independent Scrutineer	As defined in Order 5

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New Meeting

As defined in Order 1

**Allan Bulman
Chief Executive
with authority of Stephanie Charles
President of the sitting Panel
Dated 10 July 2025**

Annexure E
CORPORATIONS ACT
SECTION 657D
VARIATION OF ORDERS

EMU NL 03

Pursuant to section 657D(3) of the *Corporations Act 2001* (Cth)

THE PANEL ORDERS

The final orders made on 10 July 2025 are varied by restating those orders with the following amendments:

1. Amending Order 1 to read:

“Emu must convene and hold a further general meeting (**New Meeting**) in accordance with Orders 2 to 8 to consider the following resolutions:

- (a) all resolutions previously put at the EGM, other than resolution 2 ‘Removal of Mr Roland Bartsch as a Director’
- (b) all resolutions set out in the notice signed by Wayburn Holdings Pty Ltd dated 24 June 2025 with the title “NOTICE OF INTENTION TO MOVE RESOLUTIONS TO REMOVE DIRECTORS UNDER SECTION 203D OF THE CORPORATIONS ACT” and
- (c) any additional resolution of which notice under section 203D is given before the New Meeting is called.”

2. Amending Order 2(e) to read:

“provide to the Panel for review, as soon as practicable and by no later than 4 August 2025, a draft notice of meeting and proxy form”.

3. Amending Order 2(f) to read:

“issue the notice of meeting and proxy form, in a form acceptable to the Panel, as soon as practicable and by no later than 13 August 2025 and”.

4. Inserting new Order 2A as follows:

“Emu must send, together with the notice of meeting, the members’ statement pursuant to section 249P given to Emu on 18 July 2025, or any variation of the members’ statement received by Emu no later than 1 August 2025.”

Allan Bulman
Chief Executive
with authority of Stephanie Charles
President of the sitting Panel
Dated 1 August 2025

Annexure F
CORPORATIONS ACT
SECTION 657D
VARIATION OF ORDERS

EMU NL 03

Pursuant to section 657D(3) of the *Corporations Act 2001* (Cth)

THE PANEL ORDERS

The final orders made on 10 July 2025 and varied on 1 August 2025 and on 25 August 2025 are further varied as follows:

1. Amending Order 1(a) to read:

“all resolutions previously put at the EGM, other than resolution 2 ‘Removal of Mr Roland Bartsch as a Director’ and resolution 3 ‘Election of Mr Keith Rowe as a Director’”

Tania Mattei
General Counsel
with authority of Stephanie Charles
President of the sitting Panel
Dated 16 September 2025