



## Australian Government

### Takeovers Panel

## Reasons for Decision

### Emu NL 03 (Costs)

### [2025] ATP 36

#### Catchwords:

*Costs orders – compliance with orders – elongating proceedings – shareholder applicant – board spill*

*Corporations Act 2001 (Cth), sections 203D, 249D, 249P, 657D, 657F*

*Guidance Note 4: Remedies General*

*DRA Global Limited [2022] ATP 16*

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

## INTRODUCTION

1. The Panel, Stephanie Charles (sitting President), Alberto Colla and John McGlue, made costs orders against Emu and its former directors on a joint and several basis on application from Wayburn Holdings Pty Ltd.

2. In these reasons, the following definitions apply.

<b>Applicant</b>	Wayburn Holdings Pty Ltd
<b>EGM</b>	the extraordinary general meeting of Emu shareholders convened on 11 February 2025 and held on 14 May 2025 <sup>1</sup> to consider the resolutions in the s249D Notice
<b>Emu</b>	Emu NL
<b>Former Directors</b>	Mr Peter Thomas, Mr Tim Staermose and Mr Oliver Douglas
<b>New Meeting</b>	has the meaning in paragraph 8
<b>Orders</b>	the final orders made by us on 10 July 2025, as varied
<b>Requisitioning Shareholders</b>	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

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<sup>1</sup> The EGM was initially scheduled to be held on 18 March 2025 and was postponed twice by Emu.

<b>Requisitioning Shareholders' Statement</b>	has the meaning given in paragraph 10(b)
<b>s203D Notice</b>	has the meaning given in paragraph 10(a)
<b>s249D Notice</b>	the notice received by Emu under section 249D <sup>2</sup> , announced on 23 January 2025, requisitioning a meeting to consider four resolutions to remove two of Emu's three directors <sup>3</sup> (Mr Thomas and Mr Roland Bartsch) and to appoint two new nominees as Emu directors

## FACTS

3. Emu is an ASX-listed copper/gold exploration company (ASX code: EMU).
4. On 16 May 2025, the Applicant sought a declaration of unacceptable circumstances submitting (among other things) that the issue of new Emu shares by way of placement on the day of the EGM apparently allowed Emu directors to retain control against the wishes of Emu shareholders.
5. On 21 May 2025, the President made interim orders<sup>4</sup> requiring that:
  - (a) Emu provide to the Panel executive by 12pm (Melbourne time) on 22 May 2025 electronic copies of all proxy forms received by Emu in connection with the EGM, 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) and
  - (b) Emu notify parties once it had complied.
6. On 28 May 2025, seven days after the deadline imposed by the President's interim orders had passed, Emu completed the provision of the proxy forms and notified parties that all the relevant documents had been provided to the Panel executive.
7. On 27 June 2025, we made a declaration of unacceptable circumstances in relation to the affairs of Emu. We considered (among other things) that:
  - (a) 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 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 and
  - (b) 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

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<sup>2</sup> Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth) and all terms used in Chapter 6, 6A or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

<sup>3</sup> Emu's third director was Mr Staermose

<sup>4</sup> See Annexure A of our reasons for decision in *Emu NL 03* [2025] ATP 18

and disclosure with regards to Emu’s several recounts 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.

8. On 10 July 2025, we made orders that Emu convene and hold a further general meeting (**New Meeting**) to consider the resolutions previously put at the EGM<sup>5</sup> and any additional resolution for which notice under section 203D was given before the New Meeting was called.
9. Order 9 of the Orders provided that:

*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. On 18 July 2025, the Applicant sent the following documents to Emu:
  - (a) a section 203D notice in relation to resolutions for the removal of each of Mr Douglas and Mr Staermose to be considered at the New Meeting (**s203D Notice**) and
  - (b) a statement, signed by the Requisitioning Shareholders, for dispatch to Emu shareholders pursuant to section 249P in relation to the New Meeting (**Requisitioning Shareholders' Statement**).
11. On 24 July 2025, the Applicant submitted that since sending Emu the Requisitioning Shareholders' Statement “*neither the Company Secretary for Emu NL nor Emu NL’s lawyers in relation to the Takeovers Panel Proceedings have confirmed that a copy of the statement will be dispatched to shareholders together with the Notice of Meeting, which pursuant to the Panel Orders is required to be dispatched no later than tomorrow*”. On that basis, the Applicant applied for a further order requiring Emu to dispatch the Requisitioning Shareholders' Statement together with the notice of meeting for the New Meeting.
12. On the same day, Emu applied for a variation of the Orders to extend the deadline for the issuance of the notice for the New Meeting from 25 July 2025 to “*5 business days following receipt of approval from the Panel*”.
13. On 1 August 2025, we decided to vary the Orders as follows:
  - (a) by amending Order 1 to add that the resolutions to be considered at the New Meeting included all resolutions set out in the s203D Notice
  - (b) by amending Order 2 to provide more time for Emu to:

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<sup>5</sup> With the exception of the resolution for the removal of Mr Roland Bartsch, given Emu announced, on 17 June 2025, that Mr Bartsch had resigned as a director of Emu

- (i) provide a draft notice of meeting for the New Meeting and proxy form for our review and
  - (ii) issue the New Notice of Meeting and proxy form and
  - (c) by inserting a new Order 2A clarifying that Emu must dispatch, together with the notice of meeting for the New Meeting, the Requisitioning Shareholders' Statement or any variation of that statement received by Emu no later than 1 August 2025.<sup>6</sup>
14. On 29 August 2025, Emu issued the notice for the New Meeting, the proxy form and a heavily redacted Requisitioning Shareholders' Statement. We did not object to these documents being issued under the Orders.
15. 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 at the New Meeting.
16. Also on 9 September 2025, Emu requested that our Orders be varied so that it no longer be required to put the relevant resolution to shareholders at the New Meeting. After considering submissions, we further varied our orders accordingly.
17. On 29 September 2025, Emu announced that Mr Thomas had tendered his resignation as a director and non-executive chairman, effective from 28 September 2025 and that the remaining board directors had appointed Mr Adrian Griffin, then General Manager of Emu, to fill in Mr Thomas' vacancy on the board.
18. On 30 September 2025, Emu announced the following results of the New Meeting:
- (a) Mr John Anderson was elected as a director of Emu and
  - (b) Mr Douglas and Mr Staermose were removed as directors of Emu.
19. The announcement also stated that the resolution to consider the removal of Mr Thomas had been withdrawn given his resignation the day prior. We were not informed of the withdrawal of the resolution.

## APPLICATION

20. By application dated 13 October 2025 and further to order 9 of the Orders, the Applicant applied for an order that Emu and each of the Former Directors be jointly and severally liable to pay the Applicant's costs of the proceedings.
21. The Applicant submitted that it was seeking that Emu be jointly liable for its costs to ensure that the Applicant was able to recover its costs rather having to undertake "*expensive enforcement proceedings against the Former Directors*".
22. The Applicant also submitted that:
- (a) shareholders had to wait from 23 January 2025 to 30 September 2025 for the outcome of the s249D Notice to be finalised and, if not for the actions of the

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<sup>6</sup> Our decision to vary the Orders was subject to a review – see *Emu NL 04R* [2025] ATP 28

Applicant in bringing these proceedings, *“the incumbent Board... would have continued to be in control of the company against the wishes of shareholders”*

- (b) Emu breached Panel orders and
- (c) a decision not to make a costs order would send *“a very dangerous precedent to incumbent Boards that they can utilise the company’s resources to entrench their own positions”* and would discourage shareholders from taking similar matters to the Panel given the significant personal cost involved.

## DISCUSSION

- 23. Section 657D(2)(d) empowers the Panel to make an order that it thinks is appropriate to determine who is to bear the costs of the parties to proceedings.
- 24. Having considered parties’ submissions on this issue as well as the Panel’s policy with regards to costs,<sup>7</sup> we consider that costs should be awarded against Emu and the Former Directors for the reasons set out below.

### Failure to comply with the President’s interim orders

- 25. Costs orders may be awarded against a party if it failed to comply with a Panel order, in which case the costs of the other parties attributable to the failure may be ordered.<sup>8</sup>
- 26. Emu failed to provide the information required under the President’s interim orders on time. As per paragraph 5 above, Emu had to provide to the Panel executive, among other things, electronic copies of all proxy forms received by Emu in connection with the EGM by 12pm (Melbourne time) on 22 May 2025.
- 27. Emu was only able to confirm to the parties that it had complied with the interim orders on 28 May 2025.
- 28. Emu submitted that *“there was a brief delay in complying with the interim order to provide all proxies – however, the order was ultimately complied with as soon as EMU had the capacity to do so.”* It also submitted that the delay was not caused by Emu but was the result of issues with its registry and that it did not cause any corresponding delay to the proceedings.
- 29. In our view this is unsatisfactory. In our professional experience, Emu should have had the relevant records in its possession so that compliance with the interim orders should not have taken so long.
- 30. Also, given it is an offence to contravene a Panel order under section 657F, we would have expected more transparent, clear communication to the Panel and the parties on any issues encountered with respect to the President’s interim orders.
- 31. For these reasons, we consider that the Applicant is entitled to the costs attributable to the failure of Emu to comply with the President’s interim orders. We consider that

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<sup>7</sup> Including Guidance Note 4: Remedies General and previous Panel decisions, including *DRA Global Limited* [2022] ATP 16 at [153]-[160]

<sup>8</sup> Guidance Note 4: Remedies General at [29]

the costs should be borne by Emu and the Former Directors<sup>9</sup> on a joint and several basis.

### Elongated proceedings

32. Costs orders may also be awarded against a party if it wasted time on a particular issue or elongated proceedings, in which case partial costs referable to the additional expenses may be appropriate.<sup>10</sup>
33. The Applicant submitted that “[t]he legalistic and adversarial way in which Emu conducted the proceedings was in [the Applicant]’s submission an extension of the actions of the incumbent Board leading up to the commencement of the proceedings which were rightly found by the Panel to give rise to unacceptable circumstances”.
34. While company directors are entitled to defend themselves against a board spill, we consider that Emu and its former directors vigorously opposing the Orders, notwithstanding a finding of unacceptable circumstances, went beyond that. At no point during the proceedings was there any offer by Emu or any of the Former Directors to resolve the matter quickly.
35. The Former Directors submitted that such a statement was factually incorrect “*having regard to... attempts by the Emu and the Former Directors to resolve this matter quickly*”. The Former Directors referred to:
  - (a) a letter from Emu to one of the parties to the proceedings, offering to discuss concerns and views on board composition and
  - (b) a submission from Emu that it would be willing to appoint a scrutineer approved by the ASX to decide the validity of the votes cast at the EGM.
36. We were not convinced that either of these were genuine attempts at resolving the matters before us quickly.
37. The letter from Emu was only sent to one of the parties to the proceedings, not the Applicant, and it was not brought to our attention until we turned our minds to potential costs orders in late November 2025. Most importantly, it was sent on 23 July 2025, almost one month after the declaration of unacceptable circumstances and two weeks after the Orders. It is difficult to see how this was done in an attempt to resolve matters quickly.
38. As for Emu’s submission that it was willing to appoint a scrutineer approved by ASX, the submission was in response to a question we had asked Emu as to whether it would be willing to do so. In our view Emu’s response was ambiguous and conditional and Emu did not reiterate its offer during the proceedings, despite having opportunities to make submissions to that effect. In any event, the appointment of a scrutineer for the already held EGM would not have resolved all the matters before us.

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<sup>9</sup> With the exception of Mr Douglas who had not been appointed as a director of Emu at that time

<sup>10</sup> Guidance Note 4: Remedies General at [29]

39. As a result of Emu and the Former Directors' vigorous opposition to the Orders, the New Meeting was held 3 months after the declaration of unacceptable circumstances was made. During that time, the Applicant was put to significant time and expense in the interests of all Emu shareholders – noting that if the unacceptable circumstances had not occurred it is likely that the board spill at the EGM would have been successful; i.e. it is likely that the board of Emu would have been reconstituted in accordance with the views of the majority of Emu shareholders just over 6 months earlier than the date of the New Meeting ordered by the Panel to remedy the unacceptable circumstances.
40. The Panel's primary role is to resolve disputes expeditiously and informally. Here, we consider that Emu and the Former Directors elongated proceedings after the declaration of unacceptable circumstances was made, noting for example that:
- (a) Emu did not engage with the Applicant in relation to its s203D Notice and did not inform the Applicant that it considered the notice invalid, until prompted by us.
  - (b) Emu was on notice of our proposed orders since 11 June 2025 and the Orders were made on 10 July 2025. On 24 July 2025, Emu sought a variation to extend the deadline for issuing the notice of meeting for the New Meeting. In our professional experience, there would have been ample time for Emu to prepare the notice of meeting and proxy form in the time prescribed.
41. We also consider that Emu issuing the notice of meeting with a heavily redacted version of the Requisitioning Shareholders' Statement was an opportunistically liberal interpretation of section 249P(9)(a) which allows a company the subject of a board spill to exclude defamatory content from such a statement. While we did not object to it, considering that it was in the best interest of Emu shareholders to receive the documents for the New Meeting (albeit with a heavily redacted Requisitioning Shareholders' Statement) without further delay, we nonetheless consider that heavy redactions of the Requisitioning Shareholders' Statement was against the spirit of the Orders.
42. Emu submitted that if we were to make a costs order against the Former Directors, *"it would require some finding of relatively egregious fault on their part... that would, effectively, be a finding of misconduct by the former directors"* and that *"such a finding should completely expiate EMU from any liability for costs."*
43. The Former Directors submitted that they had not been parties to these proceedings, save as in relation to the costs application, and had only been involved as officers of the company and not in their personal capacities. As such, the Former Directors submitted that *"it would be inappropriate and unfairly prejudicial for the Former Directors to have a costs order made against them in their personal capacities"*. They also submitted that it would be inappropriate for any costs order to be made against Mr Douglas given he was appointed 13 days prior to the declaration of unacceptable circumstances.

44. Costs orders may be made by the Panel against a non-party<sup>11</sup> and the Former Directors were given opportunities to make submissions in relation to the proposed costs orders.
45. Given the time at which Mr Douglas was appointed, we consider that he should not be liable for the costs incurred by the Applicant prior to the declaration of unacceptable circumstances. We otherwise consider that the Former Directors should be jointly and severally liable. A board does not operate as a group of individuals but as a collective body. Therefore, we are not satisfied that it is appropriate to differentiate between them, noting that no evidence has been presented or arguments made to the contrary (except in relation to Mr Douglas as per the above).
46. It was not necessary nor within our jurisdiction to decide whether the Former Directors were acting in accordance with their fiduciary duties and statutory obligations. What is relevant is that the Former Directors were directors of Emu at all relevant times during these proceedings<sup>12</sup> and that, as decision makers, they played a key role in the elongation of the proceedings which we observed and described above.
47. For these reasons, after reviewing the costs incurred by the Applicant and applying our commercial judgement, we considered that it was appropriate for a portion of the fair and reasonable costs incurred by the Applicant in connection with these proceedings from 15 May 2025 to 28 October 2025 to be borne by Emu and the Former Directors.

## DECISION

### Costs Orders

48. After determining who should bear the costs and the portion of the costs they should bear,<sup>13</sup> we made the costs orders set out in Annexure A. For the reasons above, we are satisfied that our orders do not unfairly prejudice any person. We have given any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done on 27 October 2025 and on 21 November 2025.

**Stephanie Charles**

**President of the sitting Panel**

**Decision dated 4 December 2025**

**Reasons given to parties 6 January 2026**

**Reasons published 15 January 2026**

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<sup>11</sup> Guidance Note 4: Remedies General at [26]

<sup>12</sup> Noting that Mr Douglas was not appointed as a director until 13 days before the declaration of unacceptable circumstances

<sup>13</sup> Section 657D(2)(d)



## Takeovers Panel

Reasons – Emu NL 03 (Costs)  
[2025] ATP 36

### Advisers

Party	Advisers
Applicant	Bennett Litigation and Commercial Law
Emu NL	HFW Australia
Peter Thomas, Tim Staermose, Oliver Douglas	Clyde & Co
Barry Dawes	-
Douglas Grewar – Escannor Pty Ltd	-



**Australian Government**

**Takeovers Panel**

**Annexure A**  
**CORPORATIONS ACT**  
**SECTION 657D**  
**ORDERS**

**EMU NL 03**

The Panel made a declaration of unacceptable circumstances on 27 June 2025 and final orders on 10 July 2025, as varied.<sup>1</sup>

Pursuant to section 657D(2)(d) of the *Corporations Act 2001* (Cth)

**THE PANEL ORDERS**

1. Within 30 days of the date of this order, Emu NL, Mr Tim Staermose and Mr Peter Thomas must pay to the applicant, Wayburn Holdings Pty Ltd, \$28,338 excluding GST representing a portion of the fair and reasonable costs incurred by the applicant in connection with these proceedings from 15 May 2025, being the date of the application to 27 June 2025, being the date of the declaration of unacceptable circumstances. Liability for these costs is joint and several.
2. Within 30 days of the date of this order, Emu NL, Mr Staermose, Mr Thomas and Mr Oliver Douglas must pay to the applicant, Wayburn Holdings Pty Ltd, \$13,374 excluding GST representing a portion of the fair and reasonable costs incurred by the applicant in connection with these proceedings from 28 June 2025, being the date immediately after the declaration of unacceptable circumstances to 28 October 2025. Liability for these costs is joint and several.

**Tania Mattei**  
**General Counsel**  
**with authority of Stephanie Charles**  
**President of the sitting Panel**  
**Dated 4 December 2025**

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<sup>1</sup> The Panel varied the final orders on 1 August 2025 and on 16 September 2025. The final orders were also varied by the review Panel in Emu NL 04R on 25 August 2025