



Australian Government

Takeovers Panel

Reasons for Decision

Emu NL 06

[2025] ATP 37

Catchwords:

Decline to make a declaration – association – placement – effect on control – frustrating action – board spill

Corporations Act 2001 (Cth), sections 12, 201A, 657A(3)

Guidance Note 12: Frustrating Action

Emu NL 05 [2025] ATP 34, Emu NL 04R [2025] ATP 28, Emu NL 03 [2025] ATP 18, Emu NL 02R [2025] ATP 12, Emu NL [2025] ATP 11, Accelerate Resources Limited 01 & 02 [2020] ATP 7, Factor Therapeutics Limited [2019] ATP 5, MEC Resources Limited [2017] ATP 6, Mount Gibson Iron Limited [2008] ATP 4

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

INTRODUCTION

1. The Panel, Costas Condoleon, Teresa Dyson and Karen Phin (sitting President), declined to make a declaration of unacceptable circumstances in relation to the affairs of Emu. The application concerned a placement announced 2 weeks before, and undertaken 1 week before, Emu’s AGM at which resolutions concerning the composition of the board were to be considered. The Panel was not satisfied that there was sufficient material to enable the drawing of inferences of association such that the circumstances were unacceptable.
2. In these reasons, the following definitions apply.

Applicant	Mr Oliver Douglas
Astrial	Mr Douglas Grewar / Astrial Pty Ltd
AGM	has the meaning given in paragraph 6
EGM	has the meaning given in paragraph 4
Emu	Emu NL
MPS	Martin Place Securities
Placement	has the meaning given in paragraph 8
Wonfair	Wonfair Investments Pty Ltd

FACTS

3. Emu is an ASX-listed copper/gold exploration company (ASX code: EMU).

4. The Applicant is a shareholder and former director of Emu. The Applicant was removed as a director of Emu at an extraordinary general meeting of Emu held on 29 September 2025 (**EGM**).¹
5. On 20 October 2025, Emu announced an update to its strategy and key corporate arrangements, stating that it was in a strong financial position and, in relation to the non-renounceable pro-rata entitlement offer the subject of the Panel decision in *Emu NL 05*², that there was “no need for further funding at this time [and that the company] will not allot or issue any shortfall securities in relation to its recent non-renounceable rights issue [and] there will be no additional drawdown of the Northmead Holdings Pty Ltd Loan Facility”.
6. On 30 October 2025, Emu sent its shareholders a Notice of Annual General Meeting and Explanatory Memorandum stating that it will hold an Annual General Meeting at 1.00pm (Brisbane time) on 28 November 2025 (**AGM**) to consider resolutions relating to (among other things) the re-election of all of the directors of Emu (being Mr Adrian Griffin, Mr Peter Swiridiuk, Mr Ian Davies and Mr John Anderson) and the election of Mr Paul Ingram and the Applicant as new directors.
7. On 31 October 2025, Emu released its Appendix 5B Quarterly Activity Report Ended 30 September 2025, which indicated that Emu had 2.89 estimated quarters of funding available.
8. On 14 November 2025, Emu announced its intention to undertake a placement to raise approximately \$1.4 million at \$0.036 per share (**Placement**).³
9. On 20 November 2025, Mr Griffin gave notice to Emu to terminate his consulting services agreement with the company.
10. On 21 November 2025, Emu completed the Placement and issued 39,000,000 shares (around 15% of Emu’s share capital) to the places.

APPLICATION

Declaration sought

11. By application dated 21 November 2025, the Applicant sought a declaration of unacceptable circumstances and submitted that (among other things):
 - (a) the Placement is a control transaction and was undertaken for an improper purpose given Emu’s announcement on 20 October 2025 that it was fully funded and did not require additional capital
 - (b) certain persons appear to have acted in concert for the purpose of influencing the composition of the board and control of Emu
 - (c) there are complex relationships and connections among certain shareholders, brokers and advisory firms that are not disclosed, converging around three

¹ The EGM was ordered by the Panel in *Emu NL 03* [2025] ATP 18

² [2025] ATP 34

³ Placement conducted utilising the Company’s available placement capacity under ASX Listing Rules 7.1 and 7.1A

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parties: Mr Vernon Wills, Mr Barry Dawes (the Executive Chairman of MPS, the lead manager of the Placement) and Mr Thomas McCoy and

- (d) there has been a concerted effort by shareholders to conceal their relevant interest to avoid complying with the tracing notice requirements and substantial holder disclosure provisions.

Interim orders sought

12. The Applicant sought interim orders including to:
 - (a) prevent Emu from issuing any shares prior to the AGM and cancel shares issued by Emu between 30 September 2025 and the AGM
 - (b) prevent shares issued after the EGM from being voted at the AGM or any subsequent meeting until the Panel has made a final determination on the application
 - (c) prevent any shares in which Mr McCoy holds a relevant interest from being voted at the AGM or any subsequent meeting
 - (d) require certain shareholders to disclose the ultimate beneficial owner of Emu shares
 - (e) require Emu to provide the current members register and beneficial holders register to the Panel and the Applicant and
 - (f) require Emu to appoint a Panel-approved scrutineer to report on the conduct and outcome of the AGM.
13. The substantive President of the Panel considered the interim orders request on an urgent basis given the proximity of the AGM and the Applicant's concerns that unresolved association issues could materially affect voting outcomes. The President decided not to make any orders after Emu provided written confirmation on 27 November 2025 that it would not destroy any voting records or proxy voting forms relating to the AGM before the determination of the Panel proceedings.

Final orders sought

14. The Applicant sought final orders including to:
 - (a) restrain Mr McCoy from exercising any rights associated with his Emu shares and
 - (b) require Emu to declare the EGM results invalid and, after excluding all votes attached to shares held by Mr McCoy, re-tally the vote and announce the revised results to the ASX.

DISCUSSION

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

Results of the AGM

16. We considered whether to conduct proceedings after the following had taken place:
- (a) On 28 November 2025, less than an hour before the AGM, Emu announced that it received notice from Mr Davies that he no longer intended to stand for re-election as a director of EMU. In the announcement, Emu stated that *“Mr Davies agreed to join the Board of the Company for a limited duration to assist it to navigate its way through its short-term challenges... Mr Davies has advised the Board that as these challenges have now been successfully addressed, that [on] reflection, he considers that it makes little sense for him to continue to seek re-election if he does not intend to remain a Director for a reasonable duration beyond the AGM”*. Consequently, the resolution concerning Mr Davies’ re-election was withdrawn.
 - (b) Later on 28 November 2025, Emu released the results of the AGM, with Messrs Swiridiuk and Anderson re-elected as directors and the resolutions to re-elect Mr Griffin and elect Mr Ingram and the Applicant not carried. Emu then appointed Mr Corey Nolan as a non-executive director to meet the minimum director requirements under section 201A.⁴
 - (c) On 1 December 2025, Mr Nolan resigned as a non-executive director and Emu announced the appointment of Mr James Knowles as a new non-executive director.
 - (d) Also on 1 December 2025, Emu announced revised voting results from the AGM which arose from an error mixing up the registration of the relevant HIN numbers being recorded in respect of a properly registered corporate representative. The poll results remained unchanged.

Preliminary submissions and decision to conduct proceedings

17. We received preliminary submissions from Emu, Astrial⁵ and Wonfair.⁶
18. Emu submitted that the Panel should decline to conduct proceedings because (among other things):
- (a) the application was made *“tactically to allow the Applicant to promote his election at the AGM”*
 - (b) Emu took into account the impending closure (over the holiday period) of the equity capital markets in Australia and consequently *“the timing of the Placement prior to the AGM [was] coincidental and not by design”*
 - (c) *“The Applicant is treating the upcoming AGM as if it were a shareholders’ requisitioned meeting at which the Panel may be required to act in order to ensure that Shareholders are able to clearly express their view and hold directors to account through their statutory rights. Here, it is merely as a result of the operation of the Company’s*

⁴ 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)

⁵ Astrial previously stated in *Emu NL 05* (see [2025] ATP 34 at [30]) that it is a *“creditor and interested stakeholder”* in Emu

⁶ Wonfair submitted that it is a *“long-standing shareholder in Emu”*

Constitution that sees the entire board up for "re-election", and not as a result of a shareholder (or group of shareholders) exercising activist rights" and

(d) *"the application is excessively long, contains large amounts of irrelevant information and appears to recycle the issues previously considered by the Panel" in Emu NL⁷ and Emu NL 02R.⁸*

19. Astrial similarly submitted that the Panel should decline to conduct proceedings because (among other things) the application is *"lengthy, speculative and unreliable, built on conjecture, mischaracterization and unsubstantiated personal accusations"* and attempts to re-argue issues previously ventilated in historical Emu Panel matters.
20. Wonfair submitted that the Panel should conduct proceedings given the *"small margins by which most resolutions at the AGM were passed or defeated"*, which meant that the issue of the placement shares *"ahead of the AGM appears to clearly have had the potential to affect control of the company"*.
21. While we had some sympathy with Emu and Astrial's submissions in relation to the quality of the application, we considered it was appropriate to make further enquiries relating to the timing and effect of the Placement, in particular whether it was undertaken for a control related purpose. The Placement was announced shortly before the AGM at a time when all directors were due to stand for election or re-election. This occurred notwithstanding a recent announcement by Emu that there was no need for further funding at this time.
22. Furthermore, the Placement occurred against a backdrop of changes to the composition of the board in the period between the EGM and the AGM. During that period, a number of directors were appointed⁹ and endorsed for re-election. Other directors subsequently terminated their services agreements with the company (see paragraph 9) or withdrew their candidacy shortly before the AGM (see paragraph 16(a) in relation to the Managing Director). The fact that certain directors approved the Placement and then ceased to serve as directors shortly thereafter raised questions as to the circumstances in which the Placement was approved and the considerations taken into account by the board at that time.
23. In our view, the sequencing of these events, when considered together with the timing of the Placement and the matters to be decided at the AGM, gave rise to questions as to whether the Placement was undertaken, at least in part, to influence voting outcomes or the composition of the board.
24. The voting results indicated that a number of resolutions were decided by relatively narrow margins and that overall shareholder participation was limited. Given those circumstances, we considered that votes attached to the placement shares had the potential to influence the outcome of one or more resolutions, but we could not be definitive without obtaining and analysing the voting records.

⁷ [2025] ATP 11

⁸ [2025] ATP 12

⁹ Mr Anderson was appointed as Chair and Mr Griffin was appointed as Managing Director and CEO on 24 October 2025. Mr Swiridiuk was appointed as non-executive director on 27 October 2025

25. Accordingly, we considered it appropriate to make further enquiries and decided to conduct proceedings.

Placement

Purpose and timing

26. We asked questions on the background and purpose of the Placement and in response, Emu submitted that the Placement:
- (a) arose from funding considerations and prevailing market conditions, and was not for the purpose of affecting the voting at the AGM
 - (b) was not initiated by the company but was instead solicited by Mr Barry Dawes through MPS and
 - (c) was undertaken after the company had obtained legal advice on it.
27. Having regard to the size and nature of Emu, we accepted Emu's submission that the Placement was undertaken at an opportune time to raise funds ahead of an anticipated quiet period in equity markets. We also note that Emu was able to optimise the placement terms, having successfully negotiated a reduction in the fee payable to MPS as lead manager from 6% to 5% and negotiated an increase in the share price of the placement shares from 3.5 cents to 3.6 cents. We are cognisant that small cap companies require flexibility in accessing capital. Therefore, given the circumstances behind the capital raising, we were satisfied as to the commercial purpose of the Placement.
28. The Applicant raised concerns about the timing of the Placement, having occurred only "10 days before a contested AGM". We briefly considered whether this could give rise to a frustrating action.
29. The Panel's approach to frustrating action is set out in Guidance Note 12.¹⁰ As a starting point, Guidance Note 12 relates to actions that could frustrate a bid or potential bid and there are no references to board control situations. However, the Panel has, in limited circumstances, considered whether a placement was designed to frustrate a contested shareholders' meeting.
30. For instance, in *Accelerate Resources Limited*,¹¹ the Panel observed that a placement undertaken prior to a shareholder meeting does not necessarily, without more, give rise to unacceptable circumstances and that it would be necessary to have regard to the factual matters of the case.
31. This approach is consistent with the Panel's earlier decision in *Factor Therapeutics Limited*,¹² where the Panel emphasised that the relevant consideration is whether the placement had an effect on control and impact on voting at the meeting in an unacceptable way.

¹⁰ Guidance Note 12: Frustrating Action

¹¹ [2020] ATP 7 at [40]

¹² [2019] ATP 5 at [12]

32. We did not consider that the Placement had a control effect (see paragraphs 34 to 43) and we had no reason to depart from established Panel precedent which recognises that findings of frustrating action in relation to placements are rare where there is no takeover bid on foot. For those reasons, we did not consider that the Placement was a frustrating action.

Dilution and control effect of Placement

33. The Applicant submitted that the Placement “*diluted non-aligned shareholders*”, which immediately gave rise to a material control effect.
34. In assessing the control effect, we first considered the quantum and dispersion of the Placement and whether it resulted in the acquisition of a substantial interest or otherwise altered the balance of voting power that could be characterised as affecting control.
35. The Applicant submitted that the Placement had the effect of strengthening an alleged coordinated voting bloc. Emu rejected that contention and submitted that more than 40 placees participated in the Placement and that it “*did not have line-of-sight on the underlying participants*”.
36. In *Emu NL 03*,¹³ the Panel considered a placement that amounted to 8.35% post dilution of all fully paid Emu shares with half of the placement (4.18%) issued to one shareholder. The Panel considered that represented “*a “substantial interest...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*”.¹⁴ The Panel concluded among other things that:¹⁵
- (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.*”
 - (b) “*The timing of the Placement had the potential to distort voting at the EGM inconsistently with the respective domains of the board and shareholders.*”
37. The facts differ here. The material before us indicated that the Placement was widely dispersed. Not only were there over 40 placees but no placee received more than 9,000,000 shares out of the 39,000,000 shares issued under the Placement. In that context, the allocation to any individual placee represented a relatively small proportion of the total Placement, which was made within Emu’s placement capacity.¹⁶

¹³ [2025] ATP 18

¹⁴ Ibid at [65]

¹⁵ Ibid at [119(c) and (d)]

¹⁶ Also, in this case, the Placement was announced 2 weeks before and undertaken 1 week before Emu’s AGM. In *Emu NL 03*, the placement was made on the day of an extraordinary general meeting with the Emu board resolving on that day that the shares issued under the placement were eligible to be voted at that meeting, see *Emu NL 03* [2025] ATP 18 at [19] to [21]

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38. While the Applicant alleged that certain placees were connected to one another, the materials did not establish that the Placement was targeted to a coherent control-seeking group or was structured in a manner that would support an inference that it strengthened a coordinated exercise of voting power.
39. On the voting of the placement shares, Emu noted that:
- (a) *“in respect of the 39,000,000 Placement Shares, only 20,168,887 Placement Shares were voted at the AGM”*
 - (b) *“there appear to be some minor variations in how the Placement Shares were voted but broadly speaking as it relates to the election or re-election of directors, the Placement Shares appear to have been voted in favour of Resolutions 3 and 5 (being the re-election of Mr Swiridiuk and Mr Anderson) and against Resolutions 2, 6 and 7 (being the re-election of Mr Griffin and the elections of Mr Ingram and Mr Douglas)”*
 - (c) *“if the 20,168,887 Placement Shares were excluded from the totals it appears that:*
 - (i) *Resolutions 3 and 5 would still have been carried*
 - (ii) *Resolution 2 would have been passed such that Mr Griffin would have remained on the Board as a Non-Executive Director*
 - (iii) *Resolution 6 would have passed such that Mr Ingram would have joined the Board as a Non-Executive Director and*
 - (iv) *Resolution 7 would have been lost, such that Mr Douglas would not have joined the Board”.*
40. We accept that the relevant resolutions were decided by narrow margins and that if the placement shares voted at the AGM were excluded, the outcomes of resolutions 2 and 6 would have been different. However, the possibility that a different outcome may have resulted in that counterfactual scenario does not, of itself, establish a control effect and we needed to consider whether the Placement materially altered control in a manner that gave rise to unacceptable circumstances.
41. We note that only a portion of the placement shares were voted at the AGM and that the voting of those shares was not identical across all resolutions. In our view, the mere fact that some of those votes aligned with particular outcomes is not sufficient to support an inference of a coordinated use of voting power.
42. The materials before us did not demonstrate any arrangement, understanding or commitment that the placees would vote in a particular manner at the AGM. Nor did it show that participation in the Placement was conditional on support for or in opposition to any resolution. Evidence of coordinated voting requires more than a shared voting outcome.
43. While we consider that it is not good practice for a company to undertake a placement shortly before a meeting at which the board composition is contested, we were not satisfied that this Placement had a control effect. While the close margins on certain resolutions warranted close scrutiny, the materials did not demonstrate that the Placement materially altered control or the exercise of control through the AGM voting process. In addition, we consider it relevant that, unlike the facts in

Emu NL 03,¹⁷ the resolutions regarding the appointment of directors were considered at an AGM rather than a requisitioned meeting.

Association

44. The Applicant submitted there is sufficient material to support an inference of an association between shareholders, relying on a broad range of factors including historical relationships, use of common intermediaries and similarities in voting outcomes at shareholder meetings. In particular, the application characterised the alleged undisclosed association as converging around “*three cornerstone parties*”: Mr Wills, Mr Dawes and Mr McCoy.
45. Emu, in its preliminary submission, rejected these allegations and submitted that the Applicant sought to “*cast its net of association as widely as possible [and appears] to seek to capture as an associate anyone that has ever had a business or other dealing with another person*”.
46. Astrial also submitted that there is no evidence of association and the Applicant’s “*theory of a coordinated group is built on social proximity, industry overlap, placement participation and intermediary nominee structures*”.
47. In our view, the materials did not demonstrate that the overlapping connections among the alleged associates were linked by any common plan in relation to voting at the AGM or control of Emu generally.
48. The Applicant also relied on similarities in voting behaviour, including allegations that certain shareholders were historically instructed on how to vote. The materials before us did not demonstrate that any shareholders were subject to voting instructions ahead of the AGM. Without evidence of coordinated conduct, similarities in voting outcomes did not support an inference of acting in concert.
49. A number of orders sought were directed specifically to Mr McCoy, including orders restraining the exercise of his voting rights and requiring further disclosure. While issues were raised regarding the timing and manner of disclosure of Mr McCoy’s interest, the materials did not establish that he had entered into an agreement or understanding with other shareholders to act in concert in relation to the affairs of Emu.
50. As discussed above at paragraph 22, we had some initial concerns about Mr Griffin terminating his consulting services agreement with Emu just over a week before the AGM and the resignation of Mr Davies shortly after the Placement received board approval. We sought material from Emu in relation to these matters.
51. Emu provided board minutes dated 12 November that approved Mr Anderson negotiating with MPS over MPS’s proposal to arrange the Placement. The minutes record that there was a discussion by the directors of the advantages and disadvantages with accepting MPS’s proposal. Mr Griffin abstained from this decision and raised some concerns about considering MPS’s offer. However, he acknowledged in effect that November was a better time to raise funds compared to

¹⁷ [2025] ATP 18

January or February. There was no evidence of any disagreement among the board members of the need for capital or the proposed timing of the capital raising.

52. Emu submitted that on 19 November 2025, Mr Anderson proposed for the Emu board to discuss terminating Mr Griffin’s consulting services agreement. Shortly after this, Mr Griffin gave notice terminating this agreement.

53. In relation to Mr Davies, Emu submitted that:

“Two days before the AGM, Mr Davies advised Mr Anderson that he was considering not standing for re-election at the AGM. Mr Davies advised that he felt he had played a short-term role to help set a fresh direction for the Company and that it was now well funded to extend a good portion of its future drilling program. He also advised that perhaps this was a suitable time to step off and not seek re-election. The following day (the day before the AGM) Mr Davies said he had substantially firmed up this view and that the Board should expect him to formally advise of his decision not to seek re-election on the morning of the AGM.”

54. We do not consider the material in relation to Mr Griffin and Mr Davies provided any support for an inference of association.

55. Therefore, based on the materials available, we were not satisfied that there was sufficient evidence for us to draw inferences of an association.

DECISION

Declaration

56. For the reasons above, we declined to make a declaration of unacceptable circumstances. We consider that it is not against the public interest to decline to make a declaration and we had regard to the matters in section 657A(3).

Orders

57. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

Karen Phin

President of the sitting Panel

Decision dated 12 December 2025

Reasons given to parties 10 March 2026

Reasons published 17 March 2026

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Advisers

Party	Advisers
Oliver Douglas	-
Emu NL	HopgoodGanim Lawyers
Douglas Grewar - Astrial Pty Ltd	-
Wonfair Investments Pty Ltd	-
Barry Dawes - Martin Place Group Pty Ltd	-