

IN THE SUPREME COURT OF WESTERN AUSTRALIA

CIV of 2020

**IN THE MATTER OF SECTIONS 89 AND 92 OF THE *TRUSTEES ACT 1962*  
(WA)**

**IN THE MATTER OF THE GENERAL GUMALA FOUNDATION\_TRUST  
(ABN 50 336 714 927)**

EX PARTE:

**GUMALA INVESTMENTS PTY LTD (ACN 077 593 581)** Plaintiff  
**AS TRUSTEE FOR THE GENERAL GUMALA  
FOUNDATION\_TRUST (ABN 50 336 714 927)**

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**OUTLINE OF SUBMISSIONS**

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<b>Date of document:</b>	25 November 2020	
<b>Date of filing:</b>	25 November 2020	
<b>Filed on behalf of:</b>	The Plaintiff	
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**Introduction**

1. The Plaintiff seeks an order that:
  - (a) Pursuant to the inherent jurisdiction of the Court, Clause 16.1 of the Consolidated Trust Deed be varied to read as follows (variation emphasised):

An annual general meeting of the Beneficiaries shall be held between 1<sup>st</sup> August and 31<sup>st</sup> December in each Accounting Period. *In the case of an emergency, natural disaster, health epidemic, or other potential risk to the health and safety of persons who may attend an annual*

**FILED**

**25 NOV 2020**

*Via eLodgment*  
**CENTRAL OFFICE  
SUPREME COURT**

*general meeting, the Trustee may, acting reasonably, in good faith and in the best interests of the Beneficiaries, hold the annual general meeting after 31<sup>st</sup> December. All general meetings other than the annual general meeting shall be called extraordinary general meetings.*

- (b) alternatively, pursuant to s. 89 of the *Trustees Act 1962* (WA), the necessary power be conferred on the Plaintiff to hold the Trust's 2020/21 Annual General Meeting (**AGM**) on a date later than that provided for in the Consolidated Trust Deed, to be by no later than 1 March 2021; or
  - (c) alternatively, directions that the Plaintiff is justified in holding the AGM of the Trust outside of the period prescribed by the Consolidated Trust Deed.
2. The Plaintiff relies on the affidavit of Mr John Robert Raftis sworn 25 November 2020 (**Raftis Affidavit**) in support of its Originating Motion.

### **Background**

- 3. The Plaintiff is a corporation incorporated in Western Australia under the *Corporations Act 2001* (Cth) and is the trustee of the General Gumala Foundation\_Trust (**Trust**), which is a charitable discretionary trust, registered on the Australian Charities and Not-for-Profits Commission (**ACNC**) register.<sup>1</sup>
- 4. The Trust was created in 1997 as an outcome of the Yandi Land Use Agreement between Hamersley Iron Pty Ltd and the Banyjima, Innawonga and Nyiyaparli peoples (**Beneficiaries**), the traditional owners of the country at the centre of Hamersley Iron's Yandi iron ore mining operation in the Pilbara.<sup>2</sup>

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<sup>1</sup> Raftis Affidavit [5]-[6].

<sup>2</sup> Raftis Affidavit [7].

5. The Plaintiff's sole shareholder is Gumala Aboriginal Corporation (ICN 2744) (**GAC**), a *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**) body and is also Manager of the Trust.<sup>3</sup>
6. The Beneficiaries are the members of GAC.<sup>4</sup>
7. The Annual General Meeting of GAC (**GAC AGM**) has been extended by the Office of the Registrar of Indigenous Corporations (**ORIC**) and is to be held prior to 1 March 2021.<sup>5</sup>
8. The Trust AGM and the GAC AGM are usually held conjunctionally.<sup>6</sup>
9. Clause 16.1 of the Consolidated Trust Deed requires that the AGM "shall be held between 1<sup>st</sup> August and 31<sup>st</sup> December in each Accounting Period".<sup>7</sup> The "Accounting Period" is the 12 months ending on the 30<sup>th</sup> day of each year (cl. 1).<sup>8</sup>
10. The Plaintiff urgently seeks a deferral of the Trust's AGM due to the following reasons:
  - (a) logistical difficulties of convening a COVID-19 compliant Trust AGM within the current timeframe;
  - (b) health risks to Beneficiaries of travelling to and from the Trust AGM, and the increased health risks of attending two separate meetings for the Trust AGM and GAC AGM;

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<sup>3</sup> Raftis Affidavit [14].

<sup>4</sup> Raftis Affidavit [17].

<sup>5</sup> Raftis Affidavit [26]

<sup>6</sup> Raftis Affidavit [30]

<sup>7</sup> Raftis Affidavit, p. 107.

<sup>8</sup> Raftis Affidavit, p. 91.

- (c) concerns raised in ensuring that each Beneficiary can validly vote and be enfranchised at the Trust AGM, following concerns communicated to GAC about the ability of private electoral services and the WA Electoral Commission to conduct voting;
- (d) costs to Beneficiaries, the Trust and GAC of conducting two separate AGMs; and
- (e) capacity limitations at the Wanangkura Stadium in Port Hedland and function rooms and the need for the Trust and GAC to comply with the Stadium's COVID Safety Plan.

11. The matter is urgent because under the Consolidated Trust Deed:

- (a) a Trust AGM requires 14 days' notice (cl. 16.4);<sup>9</sup>
- (b) 21 days' notice is required for any General Meeting (which includes a Trust AGM) at which a Special Resolution for amendment of the trust deed (cl. 26 and 30);<sup>10</sup> and
- (c) under the Consolidated Trust Deed the Plaintiff shall convene the Trust AGM by 31 December 2020.<sup>11</sup>

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<sup>9</sup> Raftis Affidavit, p. 108.

<sup>10</sup> Raftis Affidavit, pp. 116 and 119.

<sup>11</sup> Raftis Affidavit, p. 107.

## Relevant legal principles

### Intervention by the Court in the Administration of Trusts

12. A trustee who deviates from the strict terms of a trust can be held liable for breach of trust and a trustee may not unilaterally vary the terms of a trust.<sup>12</sup> Generally, a trustee will be liable unless:
- (a) the trustee obtains the authority of the court prior to acting;
  - (b) a court order warrants departure from the terms of the trust; or
  - (c) the trust directions are incapable of being observed.<sup>13</sup>
13. Thus, the Court can intervene in the administration of trusts, either via additional powers, variation of the trust, or via directions.<sup>14</sup>
14. The Plaintiff relies on three alternative jurisdictional bases in relation to this application:
- (a) the court's inherent jurisdiction to amend the Consolidated Trust Deed; or
  - (b) additional powers which may be conferred on the trustee via s. 89 of the Act in relation to "expenditure or other transaction", if it is expedient or in the best interests of the beneficiaries; or
  - (c) directions pursuant to section 92 of the Act.

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<sup>12</sup> *Hodge v De Pasquale* [2014] VSC 413 at [70] per McMillan J.

<sup>13</sup> Halsbury's Laws of Australia [430-5110].

<sup>14</sup> Halsbury's Laws of Australia [430-5055]-[430-5155].

15. The three alternatives above provide different routes to the same outcome. That is, deferral of the Trust's AGM until 1 March 2021. The alternatives represent varying degrees of court intervention. While the Plaintiff considers that the current state of emergency is an exceptional circumstance that warrants the Court's full intervention, should this Honourable Court desire to take a less interventionist approach, the Plaintiff has fashioned the relief sought to include alternative orders.

#### Inherent Jurisdiction to Vary a Trust

16. A court has an inherent jurisdiction to vary a trust deed. This jurisdiction is, however, utilised exceptionally and where, in the management of a trust, a peculiar state of circumstances arises, which was not provided for in the trust instrument.<sup>15</sup> It must be essential for the benefit of the trust and beneficiaries.<sup>16</sup>
17. The statutory power to vary trusts is broad and the inherent jurisdiction has been used in the United Kingdom, for instance, to direct by way of emergency some transactions which were unauthorised by the trust instrument.<sup>17</sup>

#### Section 89 of the Trustees Act – Additional Powers

18. Section 89(4) of Act permits a trustee to apply to the Court for the conferral of additional powers on the trustee. Additional powers can be conferred on the trustee by the Court where:

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<sup>15</sup> *Chapman v Chapman* [1954] AC 429 at [451] per Lord Morton, HL; *Re New* [1901] 2 Ch 534 at [544]-[545]; *Paloto Pty Ltd v Herro* [2015] NSWSC 445 at [10]-[12].

<sup>16</sup> *Re New* [1901] 2 Ch 534 at [544]-[545].

<sup>17</sup> *Re Tollemache* [1903] 1 Ch 955.

- (a) “any ... *expenditure or other transaction* is expedient in the management or administration of any property vested in a trustee...”; or
- (b) “would be in the best interests of the persons, or the majority of the persons, beneficially interested under the trust...”; and
- (c) it is “inexpedient or difficult or impracticable to effect the ... transaction without the assistance of the Court, or it **or** they cannot be affected by reason of the absence of any power for that purpose vested in the trustee by the trust instrument...” (s. 89(1)).
19. An order to this effect can be made notwithstanding anything to the contrary in the trust instrument (s. 89(3)). This statutory “remedial jurisdiction” should be construed liberally.<sup>18</sup> It is intended to provide trustees with the power to administer the trust in the most satisfactory and effective way, where the trust instrument is inadequate.<sup>19</sup>
20. There are three considerations in relation to the statutory jurisdiction of s. 89. First, to what degree the term “transaction” is to be construed *eiusdem generis* with other so-called “dealings” listed in s. 89, that is: “any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, retention, expenditure or other transaction ...”.<sup>20</sup>

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<sup>18</sup> *Royal Melbourne Hospital v Equity Trustees Ltd (trustee of Estate of Langford (dec'd))* [2007] VSCA 162 at [12], [29] per Ashley and Redlich JJA, at [148] per Bell AJA.

<sup>19</sup> *Re Shipwrecked Fishermen and Mariners' Royal Benevolent Society* [1959] Ch 220 at [228].

<sup>20</sup> *Cisera v Cisera Holdings Pty Ltd* [2017] NSWSC 960 at [54]-[68] per Parker J; *Re Application of Country Road Services Pty Ltd (Browne Family Trust)* [2019] NSWSC 779 at [65], [68]-[70] per Parker J; *University of New South Wales v Attorney General for State of New South Wales* [2018] NSWSC 550 at [30]-[33] per Sackar J; *Re Arthur Brady Family Trust* [2014] QSC 244 at [23]-[42] per Philip McMurdo J; *Re Bowmill Nominees Pty Ltd (as trustee of the Williamson Superannuation Fund)* [2004] NSWSC 161 at [16] per Hamilton J.

21. The High Court in *Riddle* held that:

*“Section 81 [the NSW equivalent provision] is a provision conferring very large and important powers upon the Court which depend upon the Court’s opinion of what is expedient, a criterion of the widest and most flexible kind ... I do not think that the powers given by s 81 were intended to be restricted by any implications.”*<sup>21</sup>

22. In *Cisera*, Justice Parker found that a “transaction” involves an exchange between the trustee and someone else and was “something bilateral”<sup>22</sup> (at [56]). In *Re Dion Investments Pty Ltd* [2014] NSWCA 367, the NSW Court of Appeal also considered this issue, noted the breadth of the phrase (at [87]) and stated:

*“Transaction”, of itself, does not imply an outlay of money. Nor should any such limitation be taken to be indicated by the fact that the reference to “transaction” comes immediately after references to “purchase”, “investment”, “acquisition” and “expenditure”. A “transaction” that in fact involves an outlay of money is certainly in contemplation. But so too, in my view, is one that does not.”* (at [91])

23. Turning to the requirement that the transaction is inexpedient or difficult or impracticable to effect without the assistance of the Court. Expediency has been judicially considered to mean “desirable”, “advantageous” and “suitable to the circumstances of the case.”<sup>23</sup> It has been interpreted flexibly and widely.<sup>24</sup> Justice

<sup>21</sup> *Riddle v Riddle* (1952) 85 CLR 202 at [214]-[216] per Dixon J.

<sup>22</sup> *Cisera v Cisera Holdings Pty Ltd* [2017] NSWSC 960 at [56] per Parker J.

<sup>23</sup> *Riddle v Riddle* (1952) 85 CLR 202 at [214] per Dixon J.

<sup>24</sup> *Arakella Pty Ltd v Paton* [2004] NSWSC 13 at [76]-[82] per Austin J; *James N Kirby Foundation Ltd v A-G (NSW)* [2004] NSWSC 1153 at [13] per White J; *Royal Melbourne Hospital v Equity Trustees Ltd (trustee of Estate of Langford (dec’d))* [2007] VSCA 162 at [154] per Bell AJA.

Parker in *Cisera* remarked that there must be a question, “in the sense of a problem of some immediacy” before the conferral of power can be expedient. Further, it must be said to be expedient for the trust as a whole.<sup>25</sup>

24. The expediency jurisdiction cannot be used to alter the object of the trust and applies to charitable trusts.<sup>26</sup> Further, “management or administration ...” in section 89(1) refers to the “manner in which trust property is managed, administered, handled, directed or controlled and the actual carrying out of those functions”.<sup>27</sup> The expediency jurisdiction in Western Australia (and Queensland) is arguably broader than other corresponding state Trustee Acts.<sup>28</sup>
25. Third, the additional power would be in the best interests of the persons or majority of persons beneficially interested under the trust (s. 89(1)). In Western Australia, this is an alternative basis to the expediency requirement.<sup>29</sup>

#### Section 92 of Trustees Act – Directions

26. Section 92(1) of the Act provides that a trustee may apply to the Court for directions (but not an opinion or advice in Western Australia)<sup>30</sup> concerning “management or administration of that [trust] property” or “respecting the exercise of any power or discretion vested in the trustee”.

<sup>25</sup> *Arakella Pty Ltd v Paton* [2004] NSWSC 13 at [140] per Austin J.

<sup>26</sup> *James N Kirby Foundation Ltd v A-G (NSW)* [2004] NSWSC 1153 at [11] per White J; *Freeman v Attorney-General* [1973] 1 NSWLR 729.

<sup>27</sup> *Arakella Pty Ltd v Paton* [2004] NSWSC 13 at [88] per Austin J.

<sup>28</sup> The addition of the phrase “or it is inexpedient or difficult or impracticable to effect without the assistance of the court” in Western Australian, Queensland and New Zealand legislation (*Trustee Act 1956 NZ* s64) may mean that there is no need to establish an absence of power. See Halsburys [430-5120]. For example, see *Hancock v Reinehart* [2015] NSWSC 646 at [182].

<sup>29</sup> *Re Arthur Brady Family Trust* [2014] QSC 244 at [25], [43] per Philip McMurdo J.

<sup>30</sup> *Re Nilant* [2004] WASC 7 at [52] per Barker J. See also *Trusts Act 1973 (QLD)* s96(1). There are no equivalent provisions in other jurisdictions.

27. Whilst it is for the trustee to actively and honestly consider and apply its “forensic judgement” to whether to take a particular action or not in the execution of the trust,<sup>31</sup> a direction from the Court may provide the trustee with guidance and protection in relation to the trustee’s duties, in relation to a particular proposed course of action (ss. 95(1) and 100 of the Act).<sup>32</sup> The order is ordinarily permissive, directing that the trustee “would be justified” in acting a particular way.<sup>33</sup>
28. Orders relating to the settling of minor administration problems,<sup>34</sup> furnishing of accounts<sup>35</sup> and the scope of the trustee’s powers under the trust instrument have been considered pursuant to this jurisdiction.<sup>36</sup> The Court’s approach in giving directions is conservative<sup>37</sup> and substantive issues are not determined via this procedure.<sup>38</sup> There may be less judicial restraint in matters which involve charitable trusts.<sup>39</sup>

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<sup>31</sup> *Re Application of NSW Trustee and Guardian* [2014] NSWSC 423 at [25] per Kunc J; *Re Estate Late Chow Cho-Poon* [2013] NSWSC 844 at [200] per Lindsay J.

<sup>32</sup> *Klatt v Coore* [2013] QSC 196 at [6]-[7] per Atkinson J.

<sup>33</sup> *Ireland v Retallack* [2012] NSWSC 1179 at [57] per Hallen AsJ; *Re Application of NSW Trustee and Guardian* [2014] NSWSC 423 at [24] per Kunc J.

<sup>34</sup> *Re Campbell* (1883) 9 VLR (E) 138; *Re Nicholas Trust* (1986) 85 FLR 188.

<sup>35</sup> *Re Ready’s Estate* [1920] St R Qd 87 SC (QLD), Full Court.

<sup>36</sup> *MTM Funds Management Ltd v Cavalane Holdings Pty Ltd* [2000] NSWSC 922 per Austin J.

<sup>37</sup> *Nevin v Beneficiaries of the Bremer Bay Estate Trust* [2002] WASC 24 at [14] per Pullin J; *Re Nilant* [2004] WASC 7 at [44] per Barker J; *Perpetual Trustees WA Ltd v Riverwest Pty Ltd* [2004] WASC 81 at [132] per Barker J.

<sup>38</sup> *Re Trusts of the Will of Gilchrist* (1867) 6 SCR (NSW) Eq 74.

<sup>39</sup> *Macedonian Orthodox Community Church St Petka Inc. v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42 at [67]-[68], [114] per Gummow ACJ, Kirby, Hayne and Heydon JJ.

## **Application of Principles to Facts**

### Inherent jurisdiction

29. On 15 March 2020, the Honourable Francis Michael Logan, Minister for Emergency Services, declared a state of emergency in respect of the pandemic caused by COVID-19. The state of emergency applied to the entire State of Western Australia and restricted movement within the State and substantially effected the ability of the Plaintiff to plan the 2020/21 Trust AGM.<sup>40</sup>
30. The COVID-19 pandemic has created an unprecedented and unexpected, or “peculiar” set of circumstances which could not have been foreseen when the Trust was established. It is for that reason that the Consolidated Trust Deed does not expressly make provision for deferral of meetings in the event of emergencies or pandemics. In many ways it is desirable, and to some degree even essential, that this deferral occur, which in ordinary circumstances the Plaintiff would not have the power to do.<sup>41</sup>
31. As set out in the Raftis Affidavit, it is the usual practice for the Trust and GAC to hold their AGM’s together. This is because the members of GAC and the Beneficiaries are the same. By holding the AGM’s together:
- (a) the costs of attendance are reduced;
  - (b) the attendance at both AGMs is maximised; and
  - (c) the health risks associated with:

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<sup>40</sup> Raftis Affidavit [35]-[38].

<sup>41</sup> *Re New* [1901] 2 Ch 534 at [544]-[555].

- (i) the Beneficiaries travelling in and out of their communities; and
  - (ii) the Beneficiaries socialising in a large group,
- are reduced.

32. On 3 November 2020, GAC obtained an exemption from the Office of the Registrar of Indigenous Corporations (**ORIC**) for deferral of its AGM.<sup>42</sup> However, variation of the Consolidated Trust Deed requires a special resolution passed at a General Meeting (cls. 26 and 30).<sup>43</sup> Without the assistance of the Court, the Plaintiff finds itself in the circuitous situation of needing to call a meeting to defer the calling of the AGM.
33. Deferring the AGM will be for the benefit of the Trust and in the interests of all of the Beneficiaries because it will:
- (a) reduce the health risk of repeated travel to two separate AGMs;
  - (b) allow the Trust time to ensure the venue has adequate space to comply with COVID-19 requirements; and
  - (c) reduce the travel, accommodation, catering and administration costs of the Trust and Beneficiaries.

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<sup>42</sup> Raftis Affidavit, [26].

<sup>43</sup> Raftis Affidavit, pp. 116 and 119.

34. The simplest way to defer the AGM is for this Honourable Court, if it considers it appropriate, to exercise its inherent jurisdiction to amend a trust deed in circumstances where a peculiar state of circumstances arises, which was not provided for in the trust instrument. The COVID -19 pandemic presents such a peculiar state of circumstances which warrants the full intervention of the Court.
35. Amendment of the Consolidated Trust Deed by Court order is the primary relief sought due to the peculiar set of circumstances. That is, no one can foresee what may occur next in this pandemic. Although the Plaintiff has sought less interventionist remedies (i.e. the limited power to defer the 2020/21 AGM or directions), the Plaintiff considers it appropriate for the Court to vary the Consolidated Trust Deed so that the Plaintiff has the power to defer the AGM until such time as the public health risk is manageable. If this Honourable Court takes a less interventionist approach and orders one of the other remedies sought by the Plaintiff, should the pandemic ignite again within this State, the Plaintiff will be required to return to Court seeking a further deferral of the AGM. The Plaintiff appreciates that the power of this Honourable Court to amend a trust deed is only exercised in exceptional circumstances. The Plaintiff considers that this is an exceptional circumstance.

Deferral pursuant to s. 89 of the Act

36. Should this Honourable Court consider it appropriate to take a less interventionist approach, the Plaintiff respectfully considers that, under s. 89 of the Act, this Honourable Court has the jurisdiction to grant the power to the Plaintiff to defer the 2020/21 AGM to no later than 1 March 2021.

37. Section 89 of the Act requires, relevantly, an “expenditure or other transaction” to enliven the Court’s jurisdiction. Although there is case law in other States that has construed the phrase “transaction” ejusdem generis with other dealings listed in s. 89(1),<sup>44</sup> the Western Australian Courts have given the phrase a broader definition. The Plaintiff considers that s. 89 applies to this matter for the following reasons:
- (a) convening of the AGM involves the Trust expending monies;
  - (b) the AGM is a “transaction” in the sense that the deferral of the AGM is bilateral, affecting relations and decision making between the Trust and Beneficiaries; and
  - (c) the AGM involves consideration and approval of the Trust’s audited accounts and thus falls within the notion of a financial exchange between parties.
38. The “transaction” in this context is not the variation of the Trust Deed as such,<sup>45</sup> but the election by the Plaintiff not to convene the AGM. That is, the “expenditure or other transaction” relates to the deferral of the AGM.
39. The orders sought by the Plaintiff are appropriate because they are for a new, necessary power of deferral that is limited in its ambit.<sup>46</sup> Further, the additional power relates to a specific dealing and is not a wide discretionary power to alter

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<sup>44</sup> A more recent series of New South Wales cases has limited the definition of “transaction” in this context. Note that the New South Wales provisions do not provide for what is in the best interests of the Beneficiaries and are narrower **in some respects** than the corresponding s89 in Western Australian legislation. *Re Dion Investments Pty Ltd* [2014] NSWCA 367 at [87]-[100]; *Hancock v Reinehart* [2015] NSWSC 646 at [180]-[192]. See further Halsbury [430-5120], fn 5. *Trustee Act 1925* (NSW) s81(1).

<sup>45</sup> *Re Dion Investments Pty Ltd* [2014] NSWCA 367 at [87]-[100]; *Hancock v Reinehart* [2015] NSWSC 646 at [187].

<sup>46</sup> *Re Dion Investments Pty Ltd* [2014] NSWCA 367 at [95]-[98].

the terms of the Consolidated Trust Deed. In that sense, it is a less interventionist order.<sup>47</sup>

40. Finally, the granting of this additional power will not alter the substantive rights of the Beneficiaries or structure of the Trust (e.g. by altering a vesting day, distribution of trust property or removal of the trustee).<sup>48</sup> The AGM would still be convened, just later and concurrently with the GAC AGM.
41. The Trust is a charitable trust, rather than a private trust and the court's jurisdiction in relation to charitable trusts has been construed more liberally in this context.

#### Expediency

42. There is an immediate problem. That is, the health risks to vulnerable Beneficiaries due to COVID-19 and the cost to both the Trust and Beneficiaries means it is inexpedient, impractical and difficult to hold the Trust's AGM prior to 31 December 2020. It would be a breach of the Consolidated Trust Deed to defer the Trust's AGM without an appropriate order from this Honourable Court as the Consolidated Trust Deed does not provide the Plaintiff with the flexibility to unilaterally alter the AGM date.
43. The impact of COVID-19 on in-person AGMs has been considered by a number of regulators including ASIC, the ACNC and ORIC. Various pieces of delegated legislation and guidance notes have been granted to corporations,<sup>49</sup> charities and

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<sup>47</sup> *Re Dion Investments Pty Ltd* [2014] NSWCA 367 at [98]; *Hancock v Reinehart* [2015] NSWSC 646 at [184].

<sup>48</sup> *Hancock v Reinehart* [2015] NSWSC 646 at [180]-[192].

<sup>49</sup> *Corporations Act 2001* (Cth); Corporations (Coronavirus Economic Response) Determination (No. 3) 2020.

CATSI bodies to defer or alter AGM arrangements. Trusts, however, do not have a regulatory body (other than the Court) and so have not had a similar focus.

44. COVID-19 is a health emergency and has created a peculiar state of circumstances in this context. There are several logistical challenges in convening the Trust's AGM by 31 December 2020, including:
- (a) the health risks of Aboriginal people travelling for both the Trust and GAC AGMs;<sup>50</sup>
  - (b) as at 16 November 2020, the Remote Aboriginal Communities Direction (No. 3) applied to the Innawonga people, one of the three groups of Beneficiaries provided for in the Consolidated Trust Deed,<sup>51</sup> with associated issues with these Aboriginal families travelling in and out of this geographical area;<sup>52</sup>
  - (c) finding venues in Port Hedland which can accommodate approximately 550 people (and their children) and complying with the COVID-19 "2-square metre rule"; and
  - (d) the financial costs to both the trust and Beneficiaries of attending two separate meetings.<sup>53</sup>
45. ORIC has granted an extension of time for GAC to convene its AGM (until 1 March 2021).<sup>54</sup> Efforts were made by GAC to consider online voting for the

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<sup>50</sup> Raftis Affidavit, [35]-[38].

<sup>51</sup> Raftis Affidavit, [36].

<sup>52</sup> Raftis Affidavit, pp. 186-200.

<sup>53</sup> Raftis Affidavit [45] and [46].

<sup>54</sup> Raftis Affidavit, p. 184.

GAC AGM, which may have also then been applied to the Trust's AGM.<sup>55</sup>

However, both a private provider and the WAEC were not in a position to conduct elections within the required timeframes.<sup>56</sup>

### Best interests of Beneficiaries

46. Deferring the trust's AGM is in the best interests of the Beneficiaries. It is in their best interests as deferral will:

- (a) minimise, to the extent possible, the health risks associated with COVID-19;<sup>57</sup>
- (b) reduce the Beneficiaries' costs;<sup>58</sup> and
- (c) ensure that all Beneficiaries are fully enfranchised and can vote at the AGM.<sup>59</sup>

### Directions

47. In the event that the court determines the deferral of the AGM does not fall within the scope of s. 89(1), the Plaintiff seeks directions that the Plaintiff will not be in breach of its obligations under the Consolidated Trust Deed to defer the Trust's AGM until 1 March 2021.

48. The direction sought in relation to the deferral is a minor administrative matter, relates to the production of accounts and does not substantively affect the

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<sup>55</sup> Raftis Affidavit [42]-[44].

<sup>56</sup> Raftis Affidavit [42].

<sup>57</sup> Raftis Affidavit [38].

<sup>58</sup> Raftis Affidavit [45]-[46].

<sup>59</sup> Raftis Affidavit [31].

Beneficiaries' rights in relation to the distribution of trust property. It is necessary due to the logistical challenges of COVID-19, the health risks and associated costs.<sup>60</sup>

49. Rather than unilaterally defer the AGM, the Plaintiff seeks the protection of the Court in making orders that the Plaintiff is justified in deferring the Trust's AGM to be held by no later than 1 March 2021. This is the least interventionist approach as it does not require the Court to amend the trust deed or confer a power on the Plaintiff. It merely provides the Plaintiff with the necessary protection.

### **Costs**

50. Section 97 of the Act provides that the Court may order the costs and expenses of and incidental to any application for an order be borne and paid in such manner and by such persons as the Court thinks fit.<sup>61</sup>
51. The Plaintiff seeks an order that the costs of this application are borne by the Trust.

### **Service**

52. The Plaintiff will serve the Originating Motion, supporting affidavit, certificate of urgency and these submissions on the Beneficiaries in the same manner as a notice of the AGM is issued. Should this Honourable Court make one of the orders sought, the Plaintiff will serve that order in the same manner. This will

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<sup>60</sup> Raftis Affidavit [35]-[38].

<sup>61</sup> *Application by Perpetual Trustee Co Ltd* [2003] NSWSC 1185 at [19] per Young CJ in Eq. See also *Trustee Act 1925* (NSW), s93(3), *Trusts Act 1973* (QLD), s100 and *Trustee Act 1898* (TAS) s44. There are no equivalent provisions in other jurisdictions.

ensure that the Beneficiaries are aware of the Plaintiff's application and the resultant order.

J. R. SHEPHERD  
Counsel for the Plaintiff

## List of Authorities

### Legislation

1. *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth)
2. *Corporations Act 2001* (Cth)
3. Corporations (Coronavirus Economic Response) Determination (No. 3) 2020
4. *Emergency Management Act 2005 (WA)* ss 67, 72A
5. Remote Aboriginal Communities Direction (No. 3)
6. *Trustee Act 1898* (TAS) s44
7. *Trustee Act 1925* (NSW) ss 81(1), 93(3)
8. *Trustee Act 1956* (NZ) s64
9. *Trustees Act 1962* (WA) ss 89, 92, 95, 97, 100 \*
10. *Trusts Act 1973* (QLD) ss 96(1), 100

### Case law

11. *Application by Perpetual Trustee Co Ltd* [2003] NSWSC 1185 at [19]
12. *Arakella Pty Ltd v Paton* [2004] NSWSC 13 at [76]-[82], [88] [140]\*
13. *Chapman v Chapman* [1954] AC 429 at [451]\*
14. *Cisera v Cisera Holdings Pty Ltd* [2017] NSWSC 960 at [54]-[68]\*
15. *Freeman v Attorney-General* [1973] 1 NSWLR 729

16. *Hancock v Rhinehart* [2015] NSWSC 646 at [180]-[192]
17. *Hodge v De Pasquale* [2014] VSC 413 at [70]
18. *Ireland v Retallack* [2012] NSWSC 1179 at [57]
19. *James N Kirby Foundation Ltd v A-G (NSW)* [2004] NSWSC 1153 at [11], [13]
20. *Klatt v Coore* [2013] QSC 196 at [6]-[7]
21. *Macedonian Orthodox Community Church St Petka Inc. v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42 at [67]-[68], [114]\*
22. *MTM Funds Management Ltd v Cavalane Holdings Pty Ltd* [2000] NSWSC 922
23. *Nevin v Beneficiaries of the Bremer Bay Estate Trust* [2002] WASC 24 at [14]
24. *Paloto Pty Ltd v Herro* [2015] NSWSC 445 at [10]-[12]
25. *Perpetual Trustees WA Ltd v Riverwest Pty Ltd* [2004] WASC 81 at [132]
26. *Re Application of Country Road Services Pty Ltd (Browne Family Trust)* [2019] NSWSC 779 at [65], [68]-[70]
27. *Re Application of NSW Trustee and Guardian* [2014] NSWSC 423 at [24], [25]
28. *Re Arthur Brady Family Trust* [2014] QSC 244 at [23]-[43]
29. *Re Bowmill Nominees Pty Ltd (as trustee of the Williamson Superannuation Fund)* [2004] NSWSC 161 at [16]
30. *Re Campbell* (1883) 9 VLR (E) 138

31. *Re Estate Late Chow Cho-Poon* [2013] NSWSC 844 at [200]
32. *Re New* [1901] 2 Ch 534 at [544]-[555]
33. *Re Nicholas Trust* (1986) 85 FLR 188
34. *Re Nilant* [2004] WASC 7 at [44], [52]
35. *Re Ready's Estate* [1920] St R Qd 87 SC (QLD), Full Court
36. *Re Shipwrecked Fishermen and Mariners' Royal Benevolent Society* [1959] Ch 220 at [228]
37. *Re Tollemache* [1903] 1 Ch 955
38. *Re Trusts of the Will of Gilchrist* (1867) 6 SCR (NSW) Eq 74
39. *Riddle v Riddle* (1952) 85 CLR 202 at [214]-[216]\*
40. *Royal Melbourne Hospital v Equity Trustees Ltd (trustee of Estate of Langford (dec'd))* [2007] VSCA 162 at [12], [29], [148], [154]
41. *University of New South Wales v Attorney General for State of New South Wales* [2018] NSWSC 550 at [30]-[33]

**Other**

42. Halsbury's Laws of Australia [430-5055]-[430-5155]