

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)

AFFIDAVIT OF JOHN ROBERT RAFTIS
sworn 25 November 2020 in support of the **Originating Motion**
dated 25 November 2020
with Attachments “JRR1” to “JRR16”

Date of document:	25 November 2020	
Date of filing:	25 November 2020	
Filed on behalf of:	The Plaintiff	
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I, John Robert Raftis, of c/- Level 2, 165 Adelaide Tce, East Perth, in the State of Western Australia, Executive Officer and Company Secretary, make oath and say as follows:

Introduction

1. I am employed as an Executive Officer and Company Secretary of the Plaintiff.
2. I make this affidavit in support of the Plaintiff's Originating Motion in these proceedings seeking orders to defer the Annual General Meeting (**AGM**) of the General Gumala Foundation_Trust (ABN 50 336 714 927) (the **Trust**), of which the Plaintiff is the Trustee, until 1 March 2021.
3. I am authorised by the Plaintiff to swear this affidavit on its behalf.
4. I swear this affidavit from my own knowledge and belief, save where I depose to the contrary, in which case I state the source of my information and belief.




5. The Plaintiff is incorporated under the Corporations Act and registered with the Australian Securities and Investments Commission (**ASIC**). Attached hereto and marked "**JRR1**" is a true copy of an ASIC search of the Plaintiff, dated 12 November 2020.

The Trust

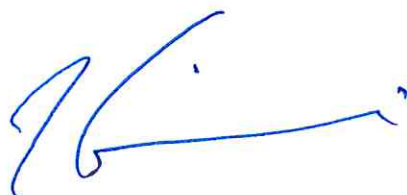
6. The Trust is a charity registered on the Australian Charities and Not-for-Profits Commission (**ACNC**) register. Attached hereto and marked "**JRR2**" is a true copy of the ACNC search for the Trust, dated 12 November 2020.
7. The Trust was created in 1997 as an outcome of the Yandi Land Use Agreement 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. Attached hereto and marked "**JRR3**" is a true copy of the original signed Trust Deed, dated 27 February 1997 (**Trust Deed**).
8. The Trust was created for the relief of poverty, sickness, suffering, distress, misfortune or destitution of the traditional owners, particularly those traditional owners residing in the Pilbara region.
9. The Plaintiff was appointed trustee of the Trust pursuant to the Trust Deed.
10. The Trust Deed was varied on or around 26 May 2009 and 8 November 2011. Attached hereto and marked respectively "**JRR4**" and "**JRR5**" are true copies of the letters regarding the amendments.
11. On 14 February 2012, the Trust Deed and its amendments were incorporated into a single document known as the General Gumala Foundation Consolidated Trust



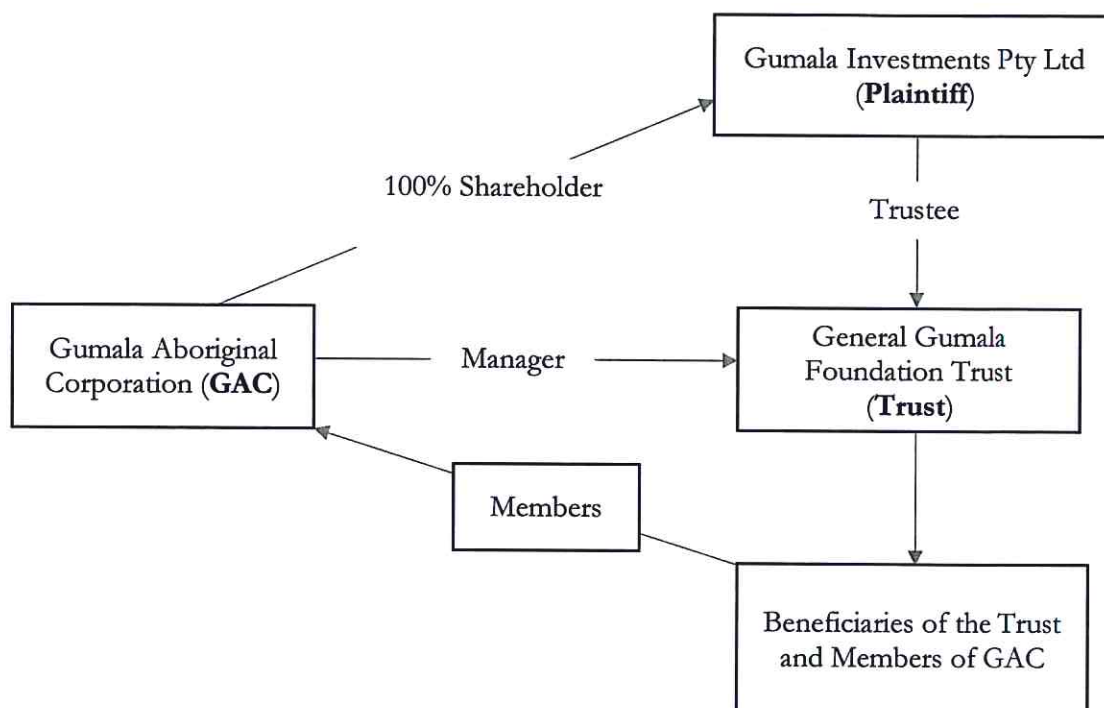
Deed (**Consolidated Trust Deed**). Attached hereto and marked “**JRR6**” is a true copy of the Consolidated Trust Deed, dated 14 February 2012.

Gumala Aboriginal Corporation – Shareholder and Manager of the Trust

12. The Gumala Aboriginal Corporation (ICN 2744) (**GAC**) is registered with the Office of the Registrar of Indigenous Corporations (**ORIC**). Attached hereto and marked “**JRR7**” is a true copy of the ORIC search of GAC, dated 11 November 2020.
13. GAC is also registered on the ACNC register. Attached hereto and marked “**JRR8**” is a true copy of the ACNC search for GAC, dated 12 November 2020.
14. GAC is the sole shareholder of the Plaintiff and the Manager of the Trust.
15. As Manager of the Trust, GAC’s role is, on a day-to-day basis, to consult with traditional owners, prepare proposals for investments and projects, and implement proposals approved by the Trustee.
16. The Plaintiff’s role, as Trustee, is one of supervision and governance to ensure that the Manager acts in accordance with the Trust Deed, to determine whether investment and project proposals are in accordance with the Trust Deed, and, if appropriate, approve them and to ensure the Manager appropriately implements those approved proposals.



17. To assist with an understanding of the structure referred to above, a pictorial representation of the structure of the Plaintiff, GAC and the Trust is set out below:



AGM

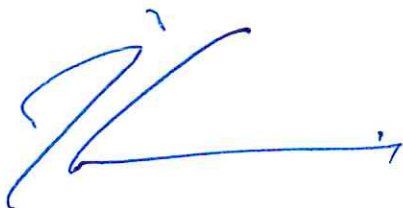
18. Under clause 16 of the Consolidated Trust Deed, the Trust is required to hold an AGM every financial year between August and December. The last AGM of the Trust was held on 29 September 2019. Attached hereto and marked “**JRR9**” is a true copy of the 2019 AGM Notice, dated 2 September 2019.
19. Draft minutes of the 2019 AGM of the Trust have been prepared. Attached hereto and marked “**JRR10**” is a true copy of draft 2019 AGM Minutes, undated.
20. On 15 March 2020, Western Australian Government declared a state of emergency in respect of the pandemic caused by COVID-19. Attached hereto and marked **JRR11** is a true copy of print out from the website <https://www.wa.gov.au/government/document-collections/covid-19-coronavirus->

western-australia-declaration-of-state-of-emergency-and-public-health-emergency-declarations.

21. The state of emergency which has restricted:
- (a) travel within Western Australia; and
 - (b) the size of gatherings in Western Australia,
- has had the result that it is inexpedient, impractical and difficult to hold the Trust's 2020/21 within the time period provided for in the Consolidated Trust Deed.
22. In addition, the Plaintiff has serious concerns about the health and well-being of the Beneficiaries should it be required to call the Trust's AGM prior to 31 December 2020.

Gumala Aboriginal Corporation's ORIC application

23. On 16 October 2020, the GAC board considered logistical issues in holding its AGM. Attached hereto and marked "JRR12" is a true copy of an extract of the GAC Board of Directors Meeting Minutes, dated 16 October 2020.
24. On 20 October 2020, GAC wrote to the Office of the Registrar of Indigenous Corporations (ORIC) and sought an exemption or extension of time to hold its AGM. Attached hereto and marked "JRR13" is a true copy of the ORIC Application and enclosures, dated 20 October 2020.
25. GAC sought to extend the time for holding its AGM for the following reasons:
- (a) logistical difficulties with organising the AGM within the current timeframe due to Western Australia's COVID-19 restrictions;



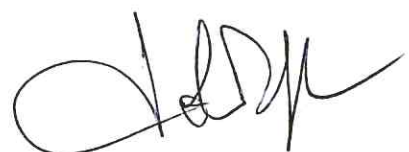
- (b) concerns raised by private electoral services and local electoral bodies regarding the ability to hold an AGM within the current time-frame;
 - (c) capacity limitations of Wanangkura Stadium (the proposed site of the AGM) and its function rooms due to current capacity restrictions in place;
 - (d) to prevent any detriment that would ensue from not holding an effective AGM and to ensure compliance of the CATSI Act; and
 - (e) to ensure due diligence to allow GAC to act in the best interests of the Banjima, Yinhawangka and Nyiyaparli members.
26. On 3 November 2020, ORIC wrote to GAC and granted an extension of time for holding its AGM. Attached hereto and marked “JRR14” is a true copy of the letter from ORIC to GAC, dated 3 November 2020.
27. Whilst GAC was able to defer its AGM via the ORIC approval processes, the Trust still requires its AGM to be held by 31 December 2020 under cl. 16.1 of the Trust Deed.
28. For the same reasons, or similar reasons, as identified by GAC in its application to defer its AGM, substituting the Corporations Act for the CATSI Act in paragraph 25(d), the Plaintiff seeks orders allowing it to defer its AGM, either through:
- (a) an amendment to the Consolidated Trust Deed;
 - (b) the conferral by this Honourable Court of the power to defer the AGM; or
 - (c) a direction stating that the Plaintiff is justified in deferring the AGM.



29. GAC is supportive of the deferral. Attached hereto and marked "JRR15" is a true copy of GAC Letter of Support to the Trust, dated 19 November 2020.


Deferral of the Trust AGM

30. Given the relationship between the Trust and GAC, the Trust's AGM is usually held in conjunction with GAC's AGM. By holding the AGM's conjunctionally, this reduces the costs, such as travel, living expenses (such as meals) and accommodation, and maximises attendance.
31. As the Trust does not see its AGM as a compliance process but rather as an avenue to allow participation and feedback from the Beneficiaries as to the performance of their future fund which has assets of +\$150M, maximising attendance is a high priority. By aiming to maximise attendance, the Plaintiff ensures that there is a high level of engagement by the Beneficiaries in the Trust.
32. As is usual practice, the Plaintiff intends to convene the Trust AGM at the same location and in conjunction with GAC's AGM. GAC intends on holding its AGM in Port Hedland on 27 February 2021.
33. The directors of the Plaintiff considered this issue at a board meeting held on 6 November 2020. Two options were presented to the board, namely, deferring the AGM due to concerns over COVID-19 health risks for the Beneficiaries, or holding the trust's AGM virtually.
34. The Plaintiff's board considered that using a virtual platform would be dependent on feedback from the Beneficiaries and would need to be trialled before being tested. That left only one viable solution, to try and obtain a deferral of the AGM.



Health Risks and compliance

35. COVID-19 has created several unexpected health and logistical issues associated with convening the Trust's AGM by 31 December 2020. The pandemic has resulted in it being inexpedient, impractical and difficult to hold the Trust's AGM in accordance with cl. 16 of the Consolidated Trust Deed.
36. A number of travel restrictions remain in place for some Aboriginal remote communities. The Remote Aboriginal Communities Directions (No 3) and WA remote travel advice identifies that the community of the Innawonga people, also known as Bellary Springs or Belleary Springs, has restrictions in place. Attached hereto and marked "JRR16" is a true copy of the Directions and WA Government advice, as at 16 November 2020.
37. Based on the Western Australian Government's advice, the Plaintiff has serious concerns about the health of the Beneficiaries, who are Aboriginal people at high risk of infections such as COVID-19. Travelling to and from communities and attending the Trust's AGM may create health risks to the Beneficiaries and the wider Aboriginal community in which they are based.
38. Deferring the Trust's AGM and holding it in conjunction with the GAC AGM will assist in reducing the health risks to the Beneficiaries of the Trust posed by COVID-19.
39. As set out in the application to ORIC by GAC, at annexure "JRR13" of this affidavit, it is expected that well in excess of 550 people will attend the GAC AGM. This estimate is consistent with the figure expected at the Trust's AGM.



40. In addition, the scale and size of the meetings have made it difficult for both GAC and the Trust to find appropriate venues that can cope with these numbers, whilst also complying with existing COVID-19 restrictions which remain in place (such as the 2 square metre rule).
41. To ensure the health and safety of the Beneficiaries of the Trust, the Plaintiff's position is that the AGM should be deferred so that it can be held with the GAC AGM, as is usual practice.

Voting

42. GAC also considered other options for voting at the GAC AGM, including virtual voting facilitated by a private provider and the Western Australian Electoral Commission (WAEC). However, GAC were advised that this would not be feasible due to the short timeframes.
43. On the basis of the advice given to GAC, the Plaintiff is of the view that it would not be feasible for a private provider or WAEC to conduct a virtual AGM. The Trust Deed currently makes no provision for online or virtual meetings.
44. There are also issues with limited remote access to technology and the age and experience of some Beneficiaries in using the technology associated with virtual AGMs.

Costs

45. In addition to the matters raised by GAC in its application to ORIC, deferral of the Trust's AGM, and rescheduling it to be held in conjunction with the GAC AGM, will reduce the costs of holding the event for the Trust and also reduce the costs of

