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Deed of Trust

Lachlan O'Brien Fund

Philip Diviny

and

Lachlan O'Brien Fund Limited

Middletons

Melbourne office
Ref: CEC.PGD.10031144

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Deed of Trust

Lachlan O'Brien Fund

Counterpart Declaration Of Trust
Stamped with \$200.00
Doc ID 2618471, 12 Aug 2010
SRO Victoria Duty: TRMO

Date 11 August 2010

1. Philip Diviny of [REDACTED] (Founder)
2. Lachlan O'Brien Fund Limited C/- St Kevin's College, 31 Moonga Road, Toorak, Victoria (Trustee)

Background

- A. Lachlan was permanently incapacitated as a result of an accident and now requires ongoing medical treatment and care.
- B. Lachlan and his family do not have the financial resources to pay for his ongoing treatment and care and ensure that he can maintain a modest standard of living in the Australian community.
- C. The Founder wishes to establish a perpetual charitable trust for Lachlan as a person in necessitous circumstances as prescribed by the provisions of the ITAA 97.
- D. The Founder has paid the Settled Sum to the Trustee to hold on the trusts outlined in this Deed.
- E. It is intended that the Trust will solicit and receive gifts from the public.

Operative Provisions

1. Name

The Trust is to be known as the **Lachlan O'Brien Fund**.

2. Definitions and interpretation

2.1. Definitions

In this Deed:

Accounting Period means the period from the date of this Deed to the following 30 June and then each period of 12 months ending on 30 June in each year, or any other period that the Trustee decides;

Advisory Committee means a committee established under clause 13;

Associate has the meaning outlined in section 78A of the *Income Tax Assessment Act* 1936 as if the reference to the "donor" in that section were a reference to the person who under this Deed is referred to in relation to the Associate;

Commissioner means the Commissioner of Taxation, a Second Commissioner of Taxation or a Deputy Commissioner of Taxation for the purposes of the ITAA 97;

Deed means this deed including its recitals, schedules and annexures (if any);

Donor means the donor of a gift to the Trust;

Gift Fund means a fund established by the Trustee in accordance with clause 6;

ITAA 97 means the *Income Tax Assessment Act 1997*;

Lachlan means Lachlan O'Brien, born 4 December 1992;

Principal Purpose of the Trust means the purpose outlined in clause 4;

Responsible Person means an individual who:

- (a) performs a significant public function;
- (b) is a member of a professional body having a code of ethics or rules of conduct;
- (c) is officially charged with spiritual functions by a religious institution;
- (d) is a director of a company whose shares are listed on the Australian Stock Exchange;
- (e) has received formal recognition from government for services to the community; or
- (f) is approved as a Responsible Person by the Commissioner;

Settled Sum means \$10.00;

Specified Income means income of the Trust other than donations, gifts, government grants, and other voluntary transfers of property to the Trust;

Trust means the Trust established under this Deed;

Trustee means the person or persons named in this Deed as the Trustee and any other trustee for the time being of the Trust; and

Trust Fund means:

- (a) the Settled Sum;
- (b) all money, investments and assets paid or transferred to and accepted by the Trustee as additions to the Trust Fund;
- (c) all accretions to the Trust Fund;
- (d) all accumulations of income; and
- (e) the money, investments and property from time to time representing the above or into which they are converted

and includes any part of the Trust Fund.

2.2. Interpretation

In this Deed, unless the context requires otherwise:

- (a) the singular includes the plural and vice versa;
- (b) a gender includes the other genders;

- (c) the headings are used for convenience only and do not affect the interpretation of this Deed;
- (d) other grammatical forms of defined words or expressions have corresponding meanings;
- (e) a reference to a document includes the document as modified from time to time and any document replacing it;
- (f) if something is to be or may be done on a day that is not a Business Day then it must be done on the next Business Day;
- (g) the word "person" includes a natural person and any body or entity whether incorporated or not;
- (h) the word "month" means calendar month and the word "year" means 12 months;
- (i) the words "in writing" include any communication sent by letter, facsimile transmission or email or any other form of communication capable of being read by the recipient;
- (j) a reference to a thing includes a part of that thing;
- (k) a reference to all or any part of a statute, rule, regulation or ordinance (**statute**) includes that statute as amended, consolidated, re-enacted or replaced from time to time;
- (l) wherever "include" or any form of that word is used, it must be construed as if it were followed by "(without being limited to)";
- (m) money amounts are stated in Australian currency unless otherwise specified; and
- (n) a reference to any agency or body, if that agency or body ceases to exist or is reconstituted, renamed or replaced or has its powers or functions removed (**defunct body**), means the agency or body that performs most closely the functions of the defunct body.

3. Declaration of trust

The Founder and the Trustee declare that the Trustee must hold the Trust Fund and the income from the Trust Fund on trust, with the powers and subject to the provisions contained in this Deed.

4. Purposes

4.1. Application of income and capital

- (a) The Trustee must hold the Trust Fund and the income of the Trust Fund derived in each Accounting Period on trust to pay or apply the income and, if and so far as it thinks fit, all or any part of the capital of the Trust Fund, solely for the principal purpose of providing for the relief and care of Lachlan, who is in necessitous circumstances.
- (b) No part of the Trust Fund or income may be paid, transferred or distributed directly or indirectly, by way of dividend, bonus or other profit distribution, to the Trustee or any of its members or directors. However, this clause 4.1(b) does not prohibit making a payment permitted by clause 16.

4.2. Factors Trustee may consider

In exercising its discretions under clause 4.1, the Trustee may have regard to any recommendations of an Advisory Committee and the provisions and objects, so far as they are consistent with the Principal Purpose of the Trust, of any other trust (including a trust established by a testamentary instrument) where:

- (a) the capital of the other trust has been transferred to or otherwise vested in the Trustee to hold on the trusts of this Deed; and
- (b) the trustee of the other trust has requested the Trustee to recognise the provisions or objects of the other trust in exercising the Trustee's discretions and powers under this Deed.

The Trustee must develop and implement a policy (which is updated from time to time) to determine what investments or disbursements constitute satisfactory use of the Trust Fund for the Principal Purpose of the Trust.

4.3. Policies and rules

For the purpose of paying or applying the income or capital, the Trustee may:

- (a) formulate policies;
- (b) make rules in connection with a policy; and
- (c) revoke or amend a policy or rule and formulate others.

4.4. Trustee may accumulate

Despite clause 4.1, the Trustee may, in any Accounting Period accumulate and retain so much of:

- (a) the Specified Income as is:
 - (i) necessary to maintain the capital of the Trust Fund at a level calculated by adjusting the capital at the beginning of that Accounting Period to reflect the movement in the All Groups Consumer Price Index during the Accounting Period immediately before that Accounting Period; or
 - (ii) from time to time approved by the Commissioner ; and
- (b) all other income of the Trust as is from time to time approved by the Commissioner .

5. Uncommercial Transactions

5.1. Prohibition

Apart from a payment or application under clause 4.1, a payment under clause 16 or a payment or application approved by the Commissioner, no part of the Trust Fund or the income may be paid or applied, directly or indirectly, to or for:

- (a) the Founder;
- (b) the Trustee;
- (c) a Donor; or

- (d) an Associate of the Founder, or the Trustee,
by way of an Uncommercial Transaction.

5.2. Uncommercial Transaction

In clause 5.1, an Uncommercial Transaction means the provision of a financial or other benefit on terms which:

- (a) would not be reasonable in the circumstances if the benefit were provided on an arms length basis; or
 - (b) are more favourable to the recipient than the terms referred to in clause 5.2(a),
- and which a reasonable person in the position of the Trustee would not have entered into having regard to all relevant circumstances.

6. Establishment and operation of Gift Fund

6.1. Maintaining Gift Fund

The Trustee must maintain for the Principal Purpose of the Trust a fund (**Gift Fund**):

- (a) to which gifts of money or property for that purpose are to be made;
- (b) to which any money received by the Trust because of those gifts is to be credited; and
- (c) that does not receive any other money or property.

6.2. Limits on use of Gift Fund

The Trustee must use the following only for the Principal Purpose of the Trust:

- (a) gifts made to the Gift Fund; and
- (b) any money received because of those gifts.

6.3. Winding up

At the first occurrence of:

- (a) the winding up of the Gift Fund; or
- (b) the Trust ceasing to be a deductible gift recipient under item 2 of the table contained in section 30-15, of the ITAA97,

any surplus assets of the Gift Fund must be transferred as the Trustee decides, to another fund, authority or institution which was established for the relief of necessitous circumstances and to which income tax deductible gifts can be made.

6.4. Bank account

The Trustee must maintain a separate bank account for the Gift Fund.

6.5. Gift Fund forms part of the Trust Fund

To avoid any doubt, it is declared that the Gift Fund forms part of the Trust Fund.

7. Qualifications of Trustee

- (a) The Trustee must be:
 - (i) a Responsible Person;
 - (ii) two or more persons, the majority of whom are a Responsible Person; or
 - (iii) a company or other body corporate whose board of directors or other controlling body includes a majority of Responsible Persons.
- (b) If the requirement in clause 7(a) is at any time not met, the Trustee must not exercise any discretion or power until the requirement is met, except:
 - (i) for the purpose of exercising a statutory power to appoint a new Trustee;
 - (ii) to protect the Trust Fund; or
 - (iii) in the case of urgency.

8. Replacement of Trustee

- (a) The provisions in this Trust Deed as to the appointment of a new Trustee and the discharge and retirement of Trustees will apply by way of extension to and not in substitution of the powers of appointment conferred upon trustees by the *Trustees Act 1958 (Vic)*.
- (b) The first Trustee and all succeeding Trustees will hold office until they resign or are removed pursuant to this clause 8.
- (c) Any Trustee may retire upon giving at least 2 months notice in writing of its intention to do so to the other Trustees for the time being and on expiration of such notice, the Trustee will cease to be a trustee and will be discharged from the trusts hereof, provided always:
 - (i) any corporate Trustee retiring who is the sole Trustee will have the power to appoint a replacement Trustee or Trustees subject to that replacement or those replacements complying with clause 7 and entering into a deed agreeing to abide by the terms of this Deed; and
 - (ii) the right to appoint a trustee may be exercised by the Trustee.

9. Trustee's powers

9.1. Investment

The Trustee must invest money of the Trust Fund only in a way in which trustees are permitted to invest under the laws of Australia or of any state or territory of Australia.

9.2. Other powers

The Trustee may:

- (a) change an investment for any others or vary the terms and conditions on which an investment is held;

- (b) sell or otherwise dispose of the whole or any part of the investments or property of the Trust Fund;
- (c) borrow or raise or secure the payment of money and secure the repayment of any debt, liability, contract, guarantee or other engagement in any way and, in particular, by mortgage, charge, lien, encumbrance, debenture or other security, fixed or floating, over any present or future asset of any kind and wherever situated;
- (d) take and act on the opinion of a barrister practising in Australia in relation to the interpretation or effect of this Deed or any of the trusts or powers of this Deed without responsibility for any loss or error resulting from doing so, but this provision does not stop the Trustee from applying to a court of competent jurisdiction;
- (e) take any action for the adequate protection or insurance of any part of the Trust Fund;
- (f) purchase, draw, make, accept, endorse, discount, execute and issue promissory notes, bills of exchange, and other negotiable or transferable instruments of any kind;
- (g) subject to the trusts of this Deed, generally:
 - (i) perform any administrative act; and
 - (ii) pay or deduct all costs, charges, commissions, stamp duties, imposts, outgoings and expenses of or incidental to the Trust Fund or its management (whether or not the Trustee is under any legal obligation to make the payment) or in connection with the preparation, execution and stamping of this Deed, as though the Trustee were the absolute owner of the Trust Fund and the income of the Trust Fund;
- (h) attract and encourage donations, gifts (by will or otherwise), endowments, trust distributions and other forms of financial assistance to or for the benefit of the Trust;
- (i) employ and pay or provide any benefit for any employee without being responsible for the default of the employee or for any loss occasioned by the employment;
- (j) engage and pay any agent, contractor or professional person without being responsible for the default of the agent, contractor or employee or for any loss occasioned by the engagement;
- (k) sponsor, organise and undertake fund raising activities and arrange for the issue of appeals to the public for donations;
- (l) accept as part of the Trust Fund any gifts (by will or otherwise), donations, settlements or other dispositions in money, moneys worth or property to or in favour of the Trust Fund and either retain them in their original form without selling or converting them into money, or invest, apply or deal with them in any way that the Trustee may invest, apply or deal with the Trust Fund under this Deed;
- (m) decline or otherwise refuse to accept as part of the Trust Fund any gift (by will or otherwise), donation, settlement or other disposition in money, moneys worth or property;
- (n) manage any real property it holds with all the powers of an absolute owner including, but not limited to, power to allow any Eligible Charity to occupy the property on the terms and conditions the Trustee thinks fit;

- (o) do all other things incidental to the exercise of the Trustee's powers under this Deed.

9.3. Powers are supplementary

The powers and discretions in clause 9.2 are to be treated as supplementary or additional to the powers vested in trustees by law.

10. Liability for breaches of trust

10.1. Trustee

The Trustee, where purporting to act in the exercise of the trusts of this Deed or exercise powers or discretions under this Deed is:

- (a) not liable for any loss or liability; and
- (b) entitled to be indemnified from the Trust Fund in respect of any loss or liability, unless the loss or liability is attributable to:
- (c) the dishonesty of the Trustee; or
- (d) the wilful commission or omission of an act known by the Trustee to be a fraudulent breach of trust in bad faith.

10.2. Officers, agents or employees

Any officer, agent or employee of the Trustee purporting to exercise powers or discretions under this Deed is:

- (a) not liable for any loss or liability; and
- (b) entitled to be indemnified from the Trust Fund in respect of any loss or liability, unless the loss or liability is attributable to:
- (c) the dishonesty of that officer, agent or employee of the Trustee; or
- (d) the wilful commission or omission of an act known by that officer, agent or employee of the Trustee to be a fraudulent breach of trust in bad faith.

11. Indemnity of Trustee from Trust Fund

The Trustee is entitled to be indemnified out of the Trust Fund in respect of:

- (a) all costs and expenses incurred by the Trustee relating to:
 - (i) entering into this Deed or any Deed amending this Deed;
 - (ii) establishing, operating, administering, amending, terminating and winding up the Trust; or
 - (iii) all matters incidental to the Trust; and
- (b) all liability incurred (including liability for income tax and any other taxes and all fines and penalties payable in relation to those taxes) and acts and things done in connection with or resulting from the matters referred to in clause 11(a) including, but

not limited to, the Trustee performing its duties and exercising its powers and discretions under this Deed.

12. Books of account and receipts

12.1. Trustee to keep accounts

The Trustee must keep or cause to be kept proper accounts in respect of all receipts and payments on account of the Trust Fund and of all dealings connected with the Trust Fund.

12.2. Financial statements

As soon as practicable after the end of each Accounting Period the Trustee must prepare or cause to be prepared a financial statement showing the financial position of the Trust Fund at the end of that Accounting Period.

12.3. Audit

The financial statement must be audited by a person registered, or taken to be registered as an auditor under Part 9.2 of the *Corporations Act 2001*

12.4. Receipts

Receipts issued for gifts must state:

- (a) the name of the Trust Fund;
- (b) the Australian Business Number applicable to the Trust; and
- (c) the fact that the receipt is for a gift.

13. Advisory Committees

- (a) The Trustee may establish Advisory Committees and appoint and remove, or make provision for the appointment and removal of, members of Advisory Committees.
- (b) Each Advisory Committee may consist of a single individual or the number of individuals that the Trustee decides.
- (c) The functions of each Advisory Committee will be decided by the Trustee and, subject to the Trustee's decision, will be to advise the Trustee on how payments or applications of income and capital should be made under clause 4.
- (d) The Trustee may specify:
 - (i) the manner in which proceedings of each Advisory Committee are to be conducted;
 - (ii) the matters which the Advisory Committee must have regard to in carrying out its functions; and
 - (iii) any other matters concerning the Advisory Committee or its functions that the Trustee decides.

14. Patrons

The Trustee may appoint any person as a patron of the Trust.

15. Amending this Deed

The Trustee may by Deed revoke, add to or vary any of the provisions of this Deed, so long as:

- (a) no part of the Trust Fund or the income of the Trust Fund becomes subject to any trusts other than public charitable trusts; and
- (b) unless the Commissioner consents to the revocation, addition or variation:
 - (i) no part of the Trust Fund or the income of the Trust Fund becomes subject to trusts other than trusts for the provision of money, property or benefits to or for people in necessitous circumstances;
 - (ii) no amendment is made to or affecting clause 5;
 - (iii) no amendment is made which authorises the Trustee to invest money of the Trust Fund other than in a manner in which trustees are permitted to invest under the laws of Australia or of any State or Territory of Australia;
 - (iv) no amendment is made to this clause 15 so as to permit this Deed to be amended in a manner prohibited by clause 15(b)(i), (ii) or (iii); and
 - (v) the Trustee notifies the Commissioner of the amendment.

16. Trustee's remuneration

The Trustee may charge and be paid out of any part of the capital or income of the Trust Fund the remuneration that the Trustee considers to be fair and reasonable. However, the maximum remuneration chargeable by the Trustee in respect of any Accounting Period must not exceed an amount equal to the maximum commission chargeable by trustee companies under the *Trustee Companies Act 1984 (Victoria)* in respect of that Accounting Period.

17. General

17.1. Receipts by others

The receipt of the person purporting to be the treasurer, secretary or other proper officer of any recipient of a payment or application of income or capital from the Trust Fund is a sufficient discharge to the Trustee and the Trustee need not see to the application of the payment or application.

17.2. Trustee's discretions and powers

Except where there is an express contrary provision in this Deed, every discretion given to the Trustee is absolute and uncontrolled and every power given to it is exercisable at its absolute and uncontrolled discretion.

17.3. Personal interest of Trustee

The Trustee and any person who is a member of the board or other controlling committee of the Trustee or a member of the Trustee may exercise or concur in exercising all powers and discretions given by this Deed or by law even though the Trustee or that person:

- (a) has or may have a direct or personal interest or a conflict of fiduciary duty in the method or result of exercising the power or discretion; or

- (b) may benefit either directly or indirectly from the exercise of any power or discretion, and even if the Trustee is a sole trustee.

17.4. Delegation of powers

The Trustee may by power of attorney or otherwise delegate to any person any of the discretions or powers given to it under this Deed. The exercise of any of the discretions or powers of this Deed by an attorney or delegate is valid and effectual and binds all persons interested under this Deed.

17.5. Trustee's receipts

The Trustee may receive money and other property and give valid receipts for all purposes including:

- (a) those of any statute; and
- (b) the receipt of any capital money which may or may not be deemed to be capital money for the purposes of any law relating to settled land,

and even if the Trustee is a sole trustee.

17.6. Trustee's decisions

The Trustee may decide:

- (a) whether any money is to be considered as capital or income;
- (b) whether any expense, outgoing or other payment ought to be paid out of capital or income; and
- (c) all questions and matters of doubt arising in the execution of the trusts of this Deed.

Every decision on these matters, whether made on a question actually raised or implied in the acts or proceedings of the Trustee, is conclusive and binds all persons interested under this Deed.

18. Winding up

- (a) If on the winding up of the Trust any property remains after the satisfaction of all its debts and liabilities, the Trustee must give and transfer the property to or for one or more funds, authorities or institutions which are charitable at law and gifts to which are deductible under Division 30 of the ITAA 97, as the Trustee decides.
- (b) Where gifts to a fund, authority or institution are deductible only if, among other things, the conditions set out in the relevant table item in Subdivision 30-B of the ITAA 97 are satisfied, the gift and transfer must be made in accordance with those conditions.

19. Governing law

This Deed is governed by the laws of Victoria.

Executed as a Deed

Signed Sealed and Delivered by Philip Diviny)
 in the presence of:)
)

.....
 [Redacted Signature]

Signature of witness

.....
 [Redacted Name]

Name of witness
 (please print)

.....
 [Redacted Signature]

Signature

Executed by Lachlan O'Brien Fund Limited in)
 accordance with section 127(1) of the)
Corporations Act 2001 (Cth):)
)

.....
 [Redacted Signature]

Signature of director

.....
 [Redacted Name]

Name (please print)

.....
 [Redacted Signature]

Signature of director or company secretary*
 *delete whichever does not apply

.....
 [Redacted Name]

Name (please print)

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