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**CONFIDENTIAL SPECIAL CHIEF  
EXECUTIVE OFFICER SELECTION PANEL  
MEETING**

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**CONFIDENTIAL MATTERS**

- 6.1 Chief Executive Officer (CEO) Appointment (Attachment) .....4
- 6.2 Draft Chief Executive Officer (CEO) Employment Agreement (Attachments) .....60

Released 27 July 2021

## 6.1 CHIEF EXECUTIVE OFFICER (CEO) APPOINTMENT

Contact Person: Mayor Glenn Docherty

### Why is this matter confidential?

Subject to an order pursuant to Section 90 (3) (a) of the Local Government Act 1999, this matter is confidential because the present matter relates to information pertaining to the personal affairs of persons and the disclosure of this information would be unreasonable because the information is sensitive to those persons and is not a matter of public knowledge.

### A. COUNCIL/COMMITTEE TO MOVE MOTION TO GO INTO CONFIDENCE

No action – this motion passed in the open section

### B. THE BUSINESS MATTER

## 6.1 CHIEF EXECUTIVE OFFICER (CEO) APPOINTMENT

Contact Person: Mayor Glenn Docherty

See Attachment No: 1. CEO Selection Panel Report - Provided by Jane Jeffreys Consulting

### Why is this matter before the Council or Committee?

Matters which cannot be delegated to a Committee or Staff

### Purpose

Committee to recommend to Council appointment of a Chief Executive Officer.

### RECOMMENDATION

That the CEO Selection Panel recommend to Council that it receive and note the CEO Selection Panel Report provided by Jane Jeffreys Consulting (as per **Attachment 1**).

### Relevance to Strategic Plan

Strategy 5. Building our capabilities

Outcome 5.1 Highly performing organisation

### Relevance to Public Consultation Policy

There is no requirement to consult the community on this matter.

### Background

The CEO recruitment process background is highlighted in **Attachment 1**.

## **Analysis of Issues**

A report has been provided by Jane Jeffreys Consulting as per **Attachment 1**. This report contains the analysis of the selection process used to recommend a preferred candidate to fill the position of CEO.

## **Options**

### Option 1

That the CEO Selection Panel recommend to Council that it receive and note the CEO Selection Panel Report provided by Jane Jeffreys Consulting (as per **Attachment 1**).

## **Analysis of Options**

### Option 1

Option 1 ensures the Panel and the Council are informed of the CEO recruitment process as outlined in the report provided by Jane Jeffreys Consulting.

## **Financial Implications**

Nil

## **Preferred Options and Justification**

Nil

**C. COUNCIL/COMMITTEE TO DECIDE HOW LONG ITEM 6.1 IS TO BE KEPT IN CONFIDENCE****Purpose**

To resolve how long agenda item 6.1 is to be kept confidential.

**STAFF RECOMMENDATION**

That pursuant to Section 90(2) and Section 91(7) of the Local Government Act 1999 the Council orders that the following aspects of Item 6.1 be kept confidential:

- Report for Item 6.1 until the Council have considered the matter and made this determination
- Attachment(s) for Item 6.1 until the Council have considered the matter and made this determination
- Discussion for Item 6.1 until the Council have considered the matter and made this determination
- Decision for Item 6.1 until the Council have considered the matter and made this determination

**Options**Option 1

That pursuant to Section 90(2) and Section 91(7) of the Local Government Act 1999 the Council orders that the following aspects of Item 6.1 be kept confidential:

- Report for Item 6.1 until the Council have considered the matter and made this determination
- Attachment(s) for Item 6.1 until the Council have considered the matter and made this determination
- Discussion for Item 6.1 until the Council have considered the matter and made this determination
- Decision for Item 6.1 until the Council have considered the matter and made this determination

**Analysis of Options**Option 1

This item is excluded from the public on the basis that it relates to Section 90 (3) (a) of the Local Government Act 1999.

Until the Council considers this matter and makes a determination, all aspects of this item should remain confidential as because the matter relates to information pertaining to the personal affairs of persons and the disclosure of this information would be unreasonable because the information is sensitive to those persons and is not a matter of public knowledge.

**6.2 DRAFT CHIEF EXECUTIVE OFFICER (CEO) EMPLOYMENT AGREEMENT**

Contact Person: Mayor Glenn Docherty

**Why is this matter confidential?**

Subject to an order pursuant to Section 90 (3) (a) of the Local Government Act 1999, this matter is confidential because the present matter relates to information pertaining to the personal affairs of persons and the disclosure of this information would be unreasonable because the information is sensitive to those persons and is not a matter of public knowledge.

**A. COUNCIL/COMMITTEE TO MOVE MOTION TO GO INTO CONFIDENCE**

No action – this motion passed in the open section

**B. THE BUSINESS MATTER****6.2 DRAFT CHIEF EXECUTIVE OFFICER (CEO) EMPLOYMENT AGREEMENT**

Contact Person: Rosemary Munslow

See Attachment No: 1. Draft CEO Employment Agreement  
2. Legal Advice - Norman Waterhouse

**Why is this matter before the Council or Committee?**

Matters which cannot be delegated to a Committee or Staff

**Purpose**

Chief Executive Officers (CEO) Selection Panel to review draft CEO Employment Agreement and make a recommendation to Council on acceptance/non-acceptance of the agreement.

**RECOMMENDATION**Option 1

1. Subject to Mr Hemmerling agreeing to the Employment Agreement (as per Attachment 1), the CEO Selection Panel recommend to Council that pursuant to Section 98(5) of the Local Government Act 1999, the Council appoint Mr Mal Hemmerling to the position of Chief Executive Officer of the Council on the terms and conditions set out in the Employment Agreement.
2. Subject to Mr Hemmerling agreeing to the Employment Agreement, the CEO Selection Panel recommend to Council that the Council authorise the Mayor to enter into and execute the Employment Agreement on behalf of the Council.

**Option 2**

1. Subject to Mr Hemmerling agreeing to the Employment Agreement (as per Attachment 1), with the following amendments:

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the CEO Selection Panel recommend to Council that pursuant to Section 98(5) of the Local Government Act 1999, the Council appoint Mr Mal Hemmerling to the position of Chief Executive Officer of the Council on the terms and conditions set out in the Employment Agreement with the amendments as contained in paragraph 1 of this resolution.

2. Subject to Mr Hemmerling agreeing to the Employment Agreement with amendments as contained in paragraph 1 of this resolution), the CEO Selection Panel recommend to Council that the Council authorise the Mayor to enter into and execute the Employment Agreement on behalf of the Council.

**Option 3**

That the CEO Selection Panel not agree with the amendments proposed by Mr Hemmerling in relation to the following clauses of the Employment Agreement (as per Attachment 1):

1. Clause X
2. Clause Y
3. Clause Z

and notify Mr Hemmerling accordingly.

**Relevance to Strategic Plan****Strategy 5. Building our capabilities**

Outcome 5.1 Highly performing organisation

**Relevance to Public Consultation Policy**

There is no requirement to consult the community on this matter.

**Background**

The Panel arranged for an Employment Agreement for the preferred candidate, Mr Hemmerling to be prepared and this was forwarded to Mr Hemmerling on 11 September 2015.

Mr Hemmerling reviewed the Employment Agreement and forwarded suggested amendments on 14 September 2015.

Norman Waterhouse provided advice on the proposed amendments on 15 September 2015 and provided an amended Employment Agreement.

**Analysis of Issues**

The Panel needs to now consider the draft amended Employment Agreement following requested amendments from Mr Hemmerling and following receipt of advice received from Norman Waterhouse Lawyers.



Following advice received from Norman Waterhouse (Attachment 2) there were no objections to proposed amendments received by Mr Hemmerling to the employment agreement, excluding two issues as outlined below which the Panel will need to consider:

#### **11. Clause 14 – Professional Development**

Mr Hemmerling has proposed that the original clause 14 (now clause 13 in attachment 1) be redrafted as set out below:

*'14.1 The Employer agrees to provide the CEO with professional development opportunities of up to two weeks' duration for each year of the Agreement.'*

*14.2 The CEO will notify the Employer of any professional development in writing at least one (1) month prior to attending the professional development.'*

Whilst Norman Waterhouse do not object to amending Clause 14.1 as proposed, the advice is that Mr Hemmerling should apply for any professional development entitlement. To that end, Norman Waterhouse have amended Clause 14.2 (now clause 13.2 in attachment 1) to read as follows:

*14.2 'Any application for professional development must be made by written application to the Council for its acceptance at least one month prior to the opportunity to which the application relates.'*

#### **12. Clause 18.4 – Increases to TEC Package**

It is proposed that Mr Hemmerling receive an automatic increase of at least CPI for each year of the Agreement. Norman Waterhouse advise that Clause 18.4 of the Employment Agreement, as drafted, reflects the standard practice across the Local Government sector, and do not consider Mr Hemmerling's proposal to be reasonable. Norman Waterhouse do not recommend that the Panel agree to this proposal.

Note that Attachment 1 does not contain the amendment requested by Mr Hemmerling. If the Panel wish to include this amendment the Panel will need to recommend to the Council this be amended as per option 2 of this report.

## Options

### Option 1

1. Subject to Mr Hemmerling agreeing to the Employment Agreement (as per Attachment 1), the CEO Selection Panel recommend to Council that pursuant to Section 98(5) of the Local Government Act 1999, the Council appoint Mr Mal Hemmerling to the position of Chief Executive Officer of the Council on the terms and conditions set out in the Employment Agreement.
2. Subject to Mr Hemmerling agreeing to the Employment Agreement, the CEO Selection Panel recommend to Council that the Council authorise the Mayor to enter into and execute the Employment Agreement on behalf of the Council.

### Option 2

1. Subject to Mr Hemmerling agreeing to the Employment Agreement (as per Attachment 1), with the following amendments:

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- 

the CEO Selection Panel recommend to Council that pursuant to Section 98(5) of the Local Government Act 1999, the Council appoint Mr Mal Hemmerling to the position of Chief Executive Officer of the Council on the terms and conditions set out in the Employment Agreement with the amendments as contained in paragraph 1 of this resolution.

2. Subject to Mr Hemmerling agreeing to the Employment Agreement with amendments as contained in paragraph 1 of this resolution), the CEO Selection Panel recommend to Council that the Council authorise the Mayor to enter into and execute the Employment Agreement on behalf of the Council.

### Option 3

That the CEO Selection Panel not agree with the amendments proposed by Mr Hemmerling in relation to the following clauses of the Employment Agreement (as per Attachment 1):

1. Clause X
2. Clause Y
3. Clause Z

and notify Mr Hemmerling accordingly.

## Analysis of Options

### Option 1

Should option 1 be adopted by the Panel. Mr Hemmerling will need to be notified to ascertain his position on the employment contract. If Mr Hemmerling does not agree to the terms and conditions set out in the employment contract, the panel will need to consider the matter further.

### Option 2

Should option 2 be adopted by the Panel, the employment contract will be amended and presented to Mr Hemmerling and subject to agreement be presented to Council for consideration to appoint.

Option 3

If option 3 is adopted by the Panel, negotiations will need to continue between both parties.

**Financial Implications**

Nil

**Preferred Options and Justification**

Staff do not have a preferred option on this matter.

Released 27 July 2021

## EMPLOYMENT AGREEMENT

City of Playford

and

Malcolm Hemmerling

Norman  
Waterhouse  
LAWYERS

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Adelaide SA 5000  
Telephone + 61 8 8210 1200  
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**THIS IS AN EMPLOYMENT AGREEMENT** between:

**CITY OF PLAYFORD** of 12 Bishopstone Road, Davoren Park in the State of South Australia  
(the Employer)

AND

**MALCOLM HEMMERLING** of ~~INSERT ADDRESS~~ 106 Grasby Road, Balhannah in the State  
of South Australia (the CEO)

## INTRODUCTION

- A. The Council is a body corporate constituted by proclamation pursuant to the *Local Government Act 1999* (SA).
- B. The Employer wishes to employ the CEO in accordance with Section 96 of the *Local Government Act 1999* (SA) and the CEO has agreed to accept that employment on the terms and conditions set out herein.
- C. Malcolm Hemmerling will be known as the Chief Executive Officer.

## 1. DEFINITIONS

In this Agreement, unless expressed or implied to the contrary:

**Act** means the *Fair Work Act 1994* (SA);

**Agreement** means this employment agreement;

**Award** means the South Australian Municipal Salaried Officers Award or a successor award;

**Commencement Date** means ~~14-21~~ September 2015;

**Confidential Information** means:

- (a) information relating to the business affairs and employees of the Employer;
- (b) matters of a technical nature, future directives and policies, technical data pertaining to the general affairs of the Employer, internal procedures and information, financial information, information pertaining to other employees, salaries, strategic and business plans and like information relating to the Employer;
- (c) other information which the Employer tells the CEO is confidential or which if disclosed, the CEO knows or ought reasonably to know would be detrimental to the Employer;
- (d) all other information which is imparted to the CEO in circumstances which the CEO knows or should reasonably know that the information is confidential to the Employer or any other persons with whom the Employer is concerned; and
- (e) excludes any information that is public knowledge otherwise than as a consequence of a breach by the CEO of obligations under this Agreement or breach by some other person of a duty of confidence to the Employer.

**Council** means the elected body of the City of Playford;

**Duties** means the responsibilities, duties and functions of the CEO specified in this Agreement and in Schedule 1;

**Expiry Date** means the date upon which this Agreement expires, being ~~14~~21 September 2018;

**TEC Package** means the monetary and non-monetary entitlements detailed at Clause ~~11~~11.12.

**Term** means the period of employment specified in Clause ~~3.13~~14.1.

## 2. APPLICATION OF OTHER INDUSTRIAL INSTRUMENTS

- 2.1 This Agreement shall be read in conjunction with the Act.
- 2.2 This Agreement shall not be read in conjunction with the Award, or any other industrial award or agreement.
- 2.3 The City of Playford Enterprise Agreement 2012, or a successor agreement, does not apply to the CEO's employment.

## ~~3. PROBATIONARY PERIOD~~

- ~~3.1 The Employer engages the CEO for a probationary period of six months from the Commencement Date.~~
- ~~3.2 The Employer must review the CEO's performance and discuss with the CEO before the end of the probationary period. The Employer may also discuss the CEO's performance with the CEO during the probationary period.~~
- ~~3.3 Before the consultation of the probationary period, the Employer must undertake an assessment of the CEO's performance to date and record it assessment in writing.~~
- ~~3.4 If the Employer determines in its written assessment that the CEO's performance has not met expectation and/or requires improvement, the parties agree that the probationary period may be extended by the Employer for a further period of up to three months. In such circumstances, the CEO will be given a copy of the written assessment.~~
- ~~3.5 At any time during the probationary period (including the extended period contemplated at Clause 3.4), either party may terminate the employment by giving one month's notice to the party.~~
- ~~3.6 If the Employer terminates the employment during the probationary period, it may pay one month's pay to the CEO in lieu of service. This right of termination (if exercised) is at the Employer's absolute discretion and without further liability.~~
- ~~3.7.2.4 The parties agree that the probation period, including the possible extension to nine months, is fair and reasonable for the Employer to assess the CEO's performance.~~



#### **4.3. TERM OF EMPLOYMENT**

**4.13.1** The CEO's employment commences on the Commencement Date and will continue under this Agreement for three years, concluding on the Expiry Date.

**4.23.2** The parties agree that the CEO's appointment and employment will terminate on the Expiry Date unless this Agreement is:

**4.2.1** ~~Terminated during the probationary period;~~

**4.2.23.2.1** Terminated prior to the Expiry Date pursuant to Clause ~~181819~~ of this Agreement; or

**4.2.33.2.2** Extended pursuant to Clause ~~445~~ of this Agreement.

**4.33.3** The parties agree that, in consideration of the terms and conditions of this Agreement, the employment of the CEO will not be ongoing but will continue only for the Term, subject to earlier termination in the terms of this Agreement, or such extension of the Term as may apply under Clause 4.15.1.

#### **5.4. FURTHER AGREEMENT**

##### **5.14.1 Six Month Extension of Agreement**

**5.1.14.1.1** At the CEO's sole discretion, ~~he may request in writing that~~ the Agreement may be extended for a period of up to an additional six months from the Expiry Date by the CEO notifying the Employer not less than six months before the Expiry Date of his wish to do so.

**5.1.24.1.2** If the Agreement is extended by the ~~Employer-CEO~~ pursuant to this ~~e~~Clause, the terms and conditions herein will continue to apply and the Agreement will terminate at the end of the additional ~~six month~~ period.

##### **5.24.2 Further Employment Agreement**

**5.2.14.2.1** At least six months prior to the Expiry Date, the CEO may make a written application to the Employer for a new employment agreement. Alternatively, the Employer may make an offer of further employment to the CEO no later than six months ~~of from~~ the Expiry Date.

**5.2.24.2.2** Following consideration of the CEO's application in Clause ~~4.2.15.1~~, the Employer must notify the CEO at least three months prior to the Expiry Date whether or not a new employment agreement is to be offered to the CEO.

**5.2.34.2.3** Following consideration of the Employer's offer under Clause ~~4.2.15.1~~, the CEO must notify the Employer at least three months prior to the Expiry Date whether or not he accepts the Employer's offer.

**5.2.44.2.4** If the CEO accepts an offer of a new employment agreement, the terms and conditions of that employment shall be set out in a further written agreement. If the terms of a new employment agreement cannot be agreed by the parties by the Expiry Date, the CEO's employment will conclude on the Expiry Date.

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5.2.54.2.5 If a new employment agreement is entered into by the parties under this Clause prior to the Expiry Date, the CEO will be deemed to have continuity of service with the Employer for the purpose of determining the CEO's accrued benefits under the new employment agreement.

5.34.3 Nothing in this Clause prevents the parties from discussing the terms and conditions of a new employment agreement during the Term.

## **6.5. HOURS OF WORK**

6.45.1 The CEO's hours of work average 38 hours per week and will be as required for him to perform the Duties and the other functions pursuant to this Agreement.

6.25.2 No additional remuneration or penalties are payable for hours additional to 38 hours per week or the circumstances in which they are performed. The TEC Package is in full compensation for all entitlements and hours of work performed.

## **7.6. REQUIREMENTS OF POSITION**

7.46.1 The CEO must perform the Duties set out in Clause 8 and Schedule 1 to this Agreement. The CEO will be consulted in the development of key performance indicators, which will be set by the Employer and appended to this Agreement within three months of the Commencement Date.

7.26.2 The Employer may change any of the Duties set out in Schedule 1, in consultation with the CEO, as long as those Duties remain within the skills and expertise of the CEO.

## **8.7. DUTIES AND RESPONSIBILITIES**

8.47.1 The CEO must:

8.1.17.1.1 Comply with the Code of Conduct for Council Employees;

8.1.27.1.2 observe and comply with statutory responsibilities arising from the *Local Government Act 1999* (SA) and all other applicable legislation;

8.1.37.1.3 observe and comply with all lawful directions and instructions of the Council;

8.1.47.1.4 perform the Duties with such a degree of skill, care and diligence, which is appropriate to the Duties;

8.1.57.1.5 be just and faithful to the Employer and shall promptly give to the Employer full information and truthful explanations of all matters relating to his Duties and responsibilities under this Agreement;

8.1.67.1.6 act in the best interest of the Employer at all times;

8.1.77.1.7 account to the Council for any remuneration or other benefit received from a third party in the CEO's capacity as CEO in any business conducted or promoted by the Employer or any related corporation;

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8.1.87.1.8 be informed and up to date on issues and developments that affect all areas of responsibility;

8.1.97.1.9 attend meetings of the Council and other bodies as required;

8.1.107.1.10 exercise responsibilities and Duties where the Employer has delegated authority;

8.1.117.1.11 personally observe the requirements of the Employer's policies and procedures in force from time to time;

8.1.127.1.12 carry out and perform the Duties:

8.1.12.17.1.12.1 lawfully;

8.1.12.27.1.12.2 with proper decorum;

8.1.12.37.1.12.3 to the best of the CEO's ability and judgment; and

8.1.12.47.1.12.4 to the satisfaction of the Employer;

8.1.137.1.13 promote the aims and objectives of the Employer;

8.1.147.1.14 maintain a current, unimpeded South Australian driver's licence throughout the Term; and

8.1.157.1.15 at all times comply with any legislation applying to matters within the scope of the CEO's employment.

8.27.2 The CEO accepts that the Council may require him to carry out any and all Duties which are within his skills and competence, including those Duties specifically outlined in Schedule 1.

#### 9.8. ACCOUNTABILITY

9.18.1 The CEO is accountable to the Council and is required to satisfactorily carry out the responsibilities, Duties and functions set out in the position description in Schedule 1, which forms part of this Agreement.

9.28.2 The CEO will be subject to the direction and control of the Council at all times.

9.38.3 The CEO will devote his whole time and attention during the hours reasonably required to properly perform the Duties.

#### 10.9. DISCLOSURE OF INTERESTS

10.19.1 The CEO will disclose to the Employer any interests (whether direct or indirect) which may give rise to a conflict with his performance of the Duties and responsibilities pursuant to this Agreement.

10.29.2 The parties acknowledge and agree that the CEO has involvement with the bodies currently listed on the CEO's return.

**11.10. OUTSIDE INTERESTS**

~~11.10.1~~ The CEO must not be directly or indirectly engaged, concerned or interested in any employment, trade, business, profession or occupation requiring the provision of services or advice by the CEO (other than the employment provided by this Agreement), except with the prior written consent of the Employer, which will not be unreasonably withheld.

~~11.210.2~~ If the Employer provides its consent to the CEO pursuant to Clause ~~10.110.111.4~~, the CEO agrees that he will give priority to the employment obligations under this Agreement over and above any other business or employment in which he is authorised by the Employer to engage.

**12.11. TOTAL EMPLOYMENT COST PACKAGE (TEC PACKAGE)**

~~12.111.1~~ In consideration of performing the Duties, the CEO is entitled to the TEC Package, which will incorporate annual salary, superannuation and a value in respect of the provision of a vehicle (howsoever provided) outlined in this Clause and Schedule 2.

~~12.211.2~~ Regardless of Clause ~~11.111.112.4~~, the parties may agree to enter into any lawful salary packaging arrangement by mutual agreement between them, which will be recorded in writing in Schedule 2 of this Agreement. The Employer will bear the cost of Fringe Benefits Tax (if any) associated with any salary packaging arrangements reached with the CEO.

~~12.311.3~~ No additional remuneration is paid for overtime worked by the CEO, it being noted that the salary component of the TEC Package is loaded in consideration of such hours.

~~12.411.4~~ The cash component of the TEC Package will be paid in arrears in equal fortnightly instalments, or as otherwise provided by the Employer, by direct deposit to an account nominated by the CEO.

**12.511.5 Superannuation**

~~12.5.111.5.1~~ The Employer must make superannuation contributions in accordance with its obligations under the *Superannuation Guarantee (Administration) Act 1992* (Cth), and as necessary to ensure that the Employer is not subject to the charge under the *Superannuation Guarantee (Administration) Act 1992* (Cth).

~~12.5.211.5.2~~ ~~If the CEO does not nominate a superannuation fund, contributions will be made to the Council's default fund, Statewide Super.~~ The CEO has nominated the Hemmerling Family Superannuation Fund as the fund into which superannuation contributions are to be made.

~~12.5.311.5.3~~ Any statutory increase to superannuation will be borne by the Employer as an addition to the TEC Package, as it applies at the time of the statutory increase.

**12.611.6 Deductions**

~~12.6.111.6.1~~ The Employer must:



~~12.6.1.1~~ 11.6.1.1 Deduct from the cash component of the TEC Package and remit to the Australian Taxation Office instalments of income tax in compliance with its obligations under the *Income Tax Assessment Act 1936* (Cth); and

~~12.6.1.2~~ 11.6.1.2 Make any other deduction which the Employer is lawfully authorised or obliged to make.

#### 12.7.11.7 **Vehicle**

~~12.7.4~~ 11.7.1 The Employer requires the CEO to have a vehicle and current, unimpeded driver's licence so as to fulfil the Duties in this Agreement. The Employer will provide the CEO with a fully maintained vehicle for business and private use, if the CEO so chooses.

~~12.7.2~~ 11.7.2 ~~The type of vehicle and any other vehicle-related matters shall be in accordance with the Employer's policies~~ Where the CEO chooses to be provided with a vehicle, the vehicle provided will be a Toyota Land Cruiser.

~~12.7.3~~ 11.7.3 The Employer will be responsible for the payment of the Fringe Benefits Tax associated with the vehicle (if any).

~~12.7.4~~ 11.7.4 Payments for fuel will be the responsibility of the Employer.

11.7.5 The parties agree that the CEO's spouse or partner may be nominated as a driver of the vehicle.

~~12.7.5~~ 11.7.6 Upon the cessation of the Agreement, the CEO will have the option to purchase the vehicle provided at the trade in price that is available to the Council. If this option is exercised, the Council will withhold monies owing to the CEO upon cessation of the Agreement to offset (either wholly or in part) the value of the vehicle. Any outstanding amount can be collected by the Council as a debt.

#### 13.12. **PROVISION OF WORK-RELATED EQUIPMENT**

~~13.1.1~~ 12.1 The Employer shall provide the CEO with the following equipment, and ensure payment in respect of the following services, to assist in the performance of his Duties:

~~13.1.1~~ 12.1.1 Mobile phone;

~~13.1.2~~ 12.1.2 Laptop computer;

~~13.1.3~~ 12.1.3 iPad;

~~13.1.4~~ 12.1.4 Establishment (if not established as at the Commencement Date) and maintenance of an internet connection at the CEO's residence;

~~13.1.5~~ 12.1.5 Establishment (if not established as at the Commencement Date) and maintenance of a telephone landline at the CEO's residence.

**13.212.2** The CEO is required to return the mobile phone, laptop computer and iPad to the Employer by the Expiry Date, unless otherwise agreed with the Employer.

**14.13. PROFESSIONAL DEVELOPMENT**

**14.113.1** The Employer agrees to provide the CEO with professional development opportunities of up to two weeks' duration for each year of the Agreement to meet the performance measurement requirements throughout the Term, as mutually agreed.

**14.213.2** Any application for professional development must be made by written application to the Council for its acceptance at least one month prior to the opportunity to which the application relates.

**15.14. PROFESSIONAL MEMBERSHIPS**

**15.114.1** The Employer will pay for the cost of the CEO's professional membership(s) to bodies relevant to the CEO's Duties and/or to fund professional development opportunities throughout the Term of this Agreement, including interstate and/or overseas travel, as nominated by the CEO, by agreement with the Employer.

**16.15. WORK-RELATED ALLOWANCE**

**16.115.1** The Employer agrees to provide the CEO with an allowance up to a maximum of \$15,000.00 per annum for work-related expenses incurred by the CEO in the course of his employment (excluding those incurred in relation to Clause 14 above) upon the provision of relevant invoices. This amount is to be utilised at the CEO's discretion.

**16.215.2** Any amount to the CEO's credit upon the anniversary of the Commencement Date for each year of the Term will be paid to the CEO as a lump sum, as wages.

**17.16. PERFORMANCE REVIEW**

**17.116.1** The parties agree that the CEO will undergo a performance review in accordance with the Personal Evaluation System each year, typically in July, for the Term of this Agreement. The CEO must participate in any performance review required by the Employer.

**17.216.2** The performance review shall be conducted by a Performance Review Panel appointed by the Council (**the Panel**).

**17.316.3** The Panel will assess the CEO's performance by reference to review process that currently exists at the Council measured against the CEO's Duties as outlined in this Agreement, Position Description and any other factors considered relevant by the Panel. The Panel will evaluate the extent to which the CEO has discharged the CEO's goals, objectives, responsibilities and Duties outlined in Schedule 1.

**17.416.4** The performance review will review the CEO's Position Description and key performance indicators through the review process that currently exists at the Council.

~~17.5~~16.5 A written report shall be compiled with respect to the performance review and a copy provided to the CEO. The report shall set out in detail any particular aspects of the CEO's performance that require improvement, together with reasonable time frames within which the Panel expects those areas of performance to be improved to a specified standard.

~~17.6~~16.6 The Employer must provide whatever counselling, advice and assistance are reasonably necessary to enable the CEO to improve his performance during that period.

~~17.7~~16.7 At the conclusion of the time frames referred to in Clause ~~16.5~~16.5~~17.5~~ and after taking into account the written report referred to in that Clause (and such other matters as the Employer considers relevant), the CEO will either:

~~17.7.1~~16.7.1 Be informed that performance has improved to the satisfaction of the Employer and that no further action will be taken; or

~~17.7.2~~16.7.2 Be provided with further written notice, providing final warning that unless the CEO's performance improves in the same stipulated areas, once again within a time frame, the Employer will terminate this Agreement pursuant to Clause ~~18.3.1~~18.3.1~~19.3.4~~.

~~17.8~~16.8 The CEO's Position Description must be reviewed and, if necessary, amended by agreement within two months after each performance review.

#### ~~18.17.~~ **TEC PACKAGE REVIEW**

~~18.1~~17.1 The TEC Package specified in Clause 12 and Schedule 2 shall be reviewed annually in conjunction with the performance review process.

~~18.2~~17.2 The TEC Package review will be conducted within one month of the performance review set out in Clause ~~16.1~~16.1 (if reasonably practicable), and any change to the TEC Package shall take effect from the date on which the performance review is concluded.

~~18.3~~17.3 The review of the TEC Package will take into account the following:

~~18.3.1~~17.3.1 The key performance indicators;

~~18.3.2~~17.3.2 The CEO's Position Description;

~~18.3.3~~17.3.3 Remuneration paid to CEO's of similar sized councils in South Australia; and

~~18.3.4~~17.3.4 Any other factor the Panel considers relevant.

~~18.4~~17.4 Despite the foregoing, the CEO is not entitled, by right, to any increase in the TEC Package during the Term.

#### ~~19.18.~~ **TERMINATION OF AGREEMENT**

##### ~~19.1~~18.1 **Summary Termination**

~~19.1.1~~18.1.1 This Agreement may be terminated by the Employer without notice and without the payment of compensation in lieu of notice in the event that the CEO:

~~19.1.1.1~~18.1.1.1 commits any serious or persistent breach of any of the terms of this Agreement;

~~19.1.1.2~~18.1.1.2 engages in serious and wilful misconduct;

~~19.1.1.3~~18.1.1.3 is guilty of serious neglect of duty in the discharge of the Duties;

~~19.1.1.4~~18.1.1.4 knowingly acts in breach of the Employer's policies in force from time to time;

~~19.1.1.5~~18.1.1.5 makes improper use of the Employer's property;

~~19.1.1.6~~18.1.1.6 fails to display and exercise the CEO's duty of fidelity or good faith towards the Employer which the Employer might reasonably expect of the CEO; or

~~19.1.1.7~~18.1.1.7 is convicted of any criminal offence which prescribes a term of imprisonment.

#### ~~19.2~~18.2 Termination due to illness or incapacity

The parties agree that this Agreement may be terminated by the Employer without notice and without the payment of compensation in lieu of notice in the event that the CEO is incapacitated from performing the Duties pursuant this Agreement due to ill health of any type for a period of greater than three months and where all leave entitlements have been exhausted, except where such illness constitutes a compensable disability pursuant to the provisions of the *Return to Work Act 2014* (SA), or successor legislation.

#### ~~19.3~~18.3 Termination by the Provision of Notice

~~19.3.1~~18.3.1 In the event that the Employer determines through the performance review process that the CEO has failed to reasonably meet the performance expected, and provided that the Employer has complied with the procedure as specified in Clause 16 above, the Employer may terminate this Agreement by giving no more than three months' notice or by making an equivalent payment of compensation in lieu of notice (or part thereof).

~~19.3.2~~18.3.2 This Agreement may be terminated by the Employer, without cause, by giving six months' notice, or the balance of the Term, whichever is the lesser. The Council may, at its absolute discretion, make a payment in lieu equivalent to the relevant notice (or part thereof) as required.

~~19.3.3~~18.3.3 This Agreement may be terminated by the CEO giving the Council a period of three months' notice in writing, unless otherwise negotiated with the Employer.

~~19.3.4~~18.3.4 In addition to any right of termination, and without derogating from any right available in this Agreement, the CEO's employment may at any time be terminated by the mutual agreement of the parties on whatever notice and terms upon which the parties may then agree.



**20.19. LEAVE****20.1.19.1 Annual Leave**

**20.1.19.1.1** The CEO is entitled to 30 working days annual leave per completed year of service, which may be taken at any time approved by the Employer. The CEO is not entitled to any leave loading payment.

**20.1.219.1.2** There should not be more than 30 days annual leave to the credit of the CEO at the end of any year of service. The Employer may direct the CEO to take any outstanding leave.

**20.1.319.1.3** Any entitlement to annual leave standing to the credit of the CEO at the time of cessation of employment shall be discharged by the Employer by payment based on the CEO's TEC Package.

**20.219.2 Sick/Carer's Leave**

**20.2.119.2.1** The CEO is entitled to 10 working days sick/carers' leave for each year of service for the purpose of:

**20.2.1.119.2.1.1** Convalescing in respect of a personal injury or illness (**sick leave**);

**20.2.1.219.2.1.2** Providing care and support to an immediate family or household member who is suffering from an injury or illness (**carer's leave**).

**20.2.219.2.2** There shall be no entitlement to payment in lieu of accrued sick/carers' leave entitlements upon cessation of the CEO's employment.

**20.2.319.2.3** The Employer may require the CEO to provide documentary evidence in support of any sick/carers' leave absence, whether or not the CEO seeks payment for such absence.

**20.319.3 Long Service Leave**

Long service leave entitlements will be accrued and granted in accordance with the provisions of the *Long Service Leave Act 1987* (SA).

**20.419.4 Bereavement Leave**

**20.4.119.4.1** The CEO is entitled to two days' paid bereavement leave on the death of the CEO's family member or in other special circumstances as are shown to exist to the satisfaction of the Employer.

**20.4.219.4.2** The CEO may be required to provide evidence to the Employer in respect of an absence for bereavement leave, whether or not the CEO seeks payment for such absence.

**20.519.5 Parental Leave**

The CEO is entitled to parental leave in accordance with the provisions of the Act.

**20.619.6 Leave at the direction of the Employer**

The Employer may, at any time during the employment, direct the CEO to take leave at full pay and direct the CEO not to report for Duties in whole or in part.

**21.20. CONFIDENTIALITY OF CONTRACT**

Subject to any applicable law and the written consent to disclosure by both parties, the terms of this Agreement will be kept confidential.

**22.21. CONFIDENTIALITY OF INFORMATION**

**22.121.1** The CEO will not at any time during this Agreement, nor at any time thereafter, otherwise than in the discharge of the CEO's Duties hereunder or with the prior consent of the Employer:

**22.1.121.1.1** Divulge to any other person any Confidential Information which the CEO may acquire or have acquired in the course of this Agreement.

**22.1.221.1.2** Use Confidential Information obtained for the CEO's own benefit or the benefit of any other person or entity.

**22.221.2** All documents, memoranda, reports, books, manuals, papers, records, tools, computer software and hardware and electronically stored information in respect of the operations or statutory obligations of the Employer shall be and remain the sole property of the Employer and shall be delivered up by the CEO to the Employer upon demand.

**22.321.3** The CEO acknowledges that the obligations imposed by this Clause shall be in addition to the obligations imposed or implied at common law in respect of CEOs.

**22.421.4** The CEO's obligations under this Clause shall survive the termination of this Agreement.

**23.22. INTELLECTUAL PROPERTY AND OTHER PROPERTY OF THE EMPLOYER**

**23.122.1 Intellectual Property**

**23.1.122.1.1** All materials provided to the CEO by the Employer, including materials provided to enable performance of the Duties, and all intellectual property in those materials, are and remain the property of the Employer.

**23.1.222.1.2** All material produced by the CEO in performing the Duties (in or out of working hours) and all intellectual property in that material are the property of the Employer alone, on and from creation, unless otherwise agreed in writing by the Employer.

**23.1.322.1.3** The CEO must do all acts and sign all documents the Employer reasonably requests to secure its ownership or registration of its intellectual property, during and after the Employment.

**23.1.422.1.4** At the Employer's request, the CEO must return all the Employer's materials (in any form) and the CEO is not entitled to retain copies of the Employer's materials in any form.

**23.222.2 Other property**

**23.2.122.2.1** The CEO must take all reasonable care in using the Employer's property.

**23.2.222.2.2** On termination of the CEO's Employment or upon the Employer's request, the CEO must return in good condition (subject to fair wear and tear) any property in the CEO's possession or control belonging to the Employer.

**23.322.3 Breach**

A breach of the CEO's obligations under this Clause is a serious breach of this Agreement. In addition to the Employer's other remedies, the Employer may sue the CEO for damages sustained as a result of such a breach, interest and legal costs on a solicitor and own client basis.

**24.23. GOVERNING LAW**

This Agreement shall be governed by, construed and take effect in accordance with the laws of South Australia and the parties hereto irrevocably submit to the jurisdiction of the courts of South Australia.

**25.24. WARRANTY OF QUALIFICATIONS**

**25.124.1** The CEO warrants that he holds the qualifications and has the requisite experience, as stated to the Council before the Commencement Date, to undertake the Duties. The parties acknowledge the provision of the signed, original academic transcripts by the CEO prior to the Commencement Date.

**25.224.2** If the CEO does not have the qualifications or experience stated, the Employer may summarily terminate this Agreement.

**26.25. ENTIRE AGREEMENT**

This Agreement constitutes the entire agreement of the parties regarding the employment of the CEO as herein provided and supersedes all prior agreements, understandings and negotiations regarding the employment of the CEO.

**27.26. DISPUTE RESOLUTION**

**27.126.1** Any dispute between the parties in relation this Agreement may be settled by any agreed process or, failing agreement as to a process, may be referred to an agreed third party for mediation and conciliation. Both parties may be represented at any mediation or conciliation.

~~27.226.2~~ The cost of engaging the agreed third party referred to in Clause ~~26.126.127.4~~, if any, will be borne equally by the parties.

~~28.27.~~ **NO WAIVER**

~~28.127.1~~ A party waives a right under this Agreement only by written notice to the other party that it waives that right.

~~28.227.2~~ A waiver is limited to the specific instance to which it relates and to the specific purpose for which it was given.

~~29.28.~~ **SEVERABILITY**

The Employer and the CEO consider the covenants, obligations and restrictions herein contained to be reasonable in all the circumstances of the employment and each and every one of such covenants, obligations and restrictions in each and every part thereof, shall be deemed to be a severable and independent covenant, obligation and restriction to the intent that, if they are taken together, be judged to go beyond what is reasonable in all the circumstances, but would be adjudged reasonable with any one or more such covenants, obligations or restrictions or any one or more parts thereof deleted the covenants, obligations and restrictions herein contained shall be deemed to apply as if such covenants, obligations or restrictions or parts thereof as are so adjudged, unreasonable were deleted.

~~30.29.~~ **NOTICES**

Any notice to be given pursuant to this Agreement shall be in writing and may be delivered personally or delivered by prepaid registered post to the address of the parties set out in this Agreement, or at the known place of abode or business of the party or such other address as the party may from time to time notify to the other party for the purposes of service of any notice.

~~31.30.~~ **VARIATION**

This Agreement shall only be varied by further agreement of the parties in writing.

~~32.31.~~ **SIGNATORIES**

**Signed** by an authorised representative of the **City of Playford** in the presence of:

.....  
Signature of witness

.....  
Authorised representative

.....  
Name of witness (print)

.....  
Date

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**Signed by Malcolm Hemmerling** in the presence of:

.....  
Signature of witness

.....  
Malcolm Hemmerling

.....  
Name of witness (print)

.....  
Date

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**SCHEDULE ONE**



**CHIEF EXECUTIVE OFFICER  
JOB & PERSON SPECIFICATION**

**[INSERT]**

**SCHEDULE TWO – TOTAL EMPLOYMENT COST PACKAGE**

Annual base salary (gross)	\$297,978.66
Superannuation contribution	\$35,000.00
Full and unrestricted use of a fully maintained vehicle	\$25,000.00
Work-related expenses allowance	\$15,000.00
<b>TOTAL (gross)</b>	<b>\$372,978.66</b>



# Norman Waterhouse

SINCE 1920 LAWYERS

By Email: <swatson@playford.sa.gov.au>

**CONFIDENTIAL**

Ref: AXG\M00286344F03847392

15 September 2015

Mr S Watson  
Service Coordinator Knowledge & Governance  
City of Playford  
12 Bishopstone Road  
DAVOREN PARK SA 5113

Dear Mr Watson

## **Draft CEO Employment Agreement**

Further to our communications today, I confirm that Mr Hemmerling's representative has reviewed and requested amendments to the draft CEO Employment Agreement (**the Agreement**) provided on 11 September 2015.

Following consideration of the proposed amendments and a subsequent discussion with Sathish Dasan, who has been liaising between the Committee and Mr Hemmerling's representative, I provide the following advice in respect of each of the proposed amendments.

For the Committee's convenience, I **enclose** a 'tracked' version of the Agreement, incorporating the amendments detailed below.

### **1. The Parties**

Information has been provided to populate Mr Hemmerling's address.

### **2. Clause 2 – Definitions**

As 14 September 2015 as now passed, it is proposed that the definition of '*Commencement Date*' be amended to '*21 September 2015*', and the definition of '*Expiry Date*' be amended to '*21 September 2018*'. I have no objection to this proposal.

### **3. Clause 3 – Probationary Period**

It is proposed that this Clause be entirely removed on the basis that Mr Hemmerling has been a contractor to the Council for some time and his standard of performance is well-known. It is considered that such a clause is only relevant to persons new to the Council.

I consider that the position to which Mr Hemmerling seeks to be appointed is a new employment position for him and a probationary period is appropriately included in the Agreement. This is regardless of the fact that he has been providing services to the Council as a contractor for some time. However, there is an emerging trend in Local Government CEO contracts toward the removal of probationary provisions, particularly where a



'termination without cause' clause applies, such as that detailed in Clause 19.3.2 of the Agreement.

If the Council were to agree to remove this Clause as requested, it could rely on Clause 19.3.2 to terminate the Agreement at any time during the Term, giving Mr Hemmerling six months' notice (or by making payment in lieu of notice). For the purposes of the enclosed document, I proceed on the basis that the Council is prepared to remove Clause 3 as requested.

4. **Clause 4.2.1 – Term of the Agreement**

It is proposed that Clause 4.2.1 be removed as a consequence of the removal of Clause 3. I agree that this amendment is necessary if Clause 3 is removed.

5. **Clause 4.3 – Term of the Agreement**

It is proposed that additional wording be added to this Clause which references the possible six-month extension at the discretion of the CEO. I have no objection to this proposal.

6. **Clause 5.1 – Further Employment Agreement**

It is proposed that this Clause be amended *'so that the Agreement is automatically extended for an additional six months upon a request in writing from the CEO rather than it being a request for an extension which is to be determined by the Employer'* and that any extension *'be subject to the same terms and conditions in the Agreement without the need for the parties to enter into and sign a new agreement'*.

I understand following my discussion with Mr Dasan that it is the Committee's intention that Mr Hemmerling maintains the sole discretion to extend the Term by six months, for practical purposes, given the timing of the Expiry Date and, on that basis, the Council is not likely to take issue with the requested amendments. To that end, I propose minor amendments to the Clause to record this agreement.

7. **Clause 5.2 – Further Employment Agreement**

It is proposed that the Clause references in Clauses 5.2.2 and 5.2.3 be amended to refer to a further employment agreement pursued pursuant to Clause 5.2.1, rather than Clause 5.1 (the discretionary extension of up to six months). I have no objection to this proposal.

8. **Clause 12.5.2 – Superannuation**

Information has been provided in relation to the superannuation fund into which Mr Hemmerling seeks his superannuation contributions be made.

9. **Clause 12.7.2 – Vehicle**

It is proposed that specific reference be made for the provision of a Toyota Land Cruiser rather than a vehicle in accordance with the Council's policy. I have no objection to this proposal.

10. **Clause 12.7.6 – Option to purchase vehicle**

It is proposed that an additional provision be inserted to allow Mr Hemmerling *'the option to purchase the vehicle he is given at the auction price at the end of the Agreement'*.

Whilst I have no objection to the nature of this request, I consider that any such agreement should be conditional upon the following:

- The price should be the 'trade in' price available to the Council at the relevant time, rather than the auction price;
- If the option is exercised, the Council may withhold monies owing to the CEO to offset the value of the vehicle (either wholly or in part); and
- Any outstanding amount should be collectable from Mr Hemmerling by the Council as a debt.

**11. Clause 14 – Professional Development**

It is proposed that the Clause be re-drafted as follows:

*'14.1 The Employer agrees to provide the CEO with professional development opportunities of up to two weeks' duration for each year of the Agreement.'*

*14.2 The CEO will notify the Employer of any professional development in writing at least one (1) month prior to attending the professional development.'*

Whilst I do not object to amending Clause 14.1 as proposed, I do object to the removal of the requirement that Mr Hemmerling apply for any professional development entitlement. To that end, I propose amending Clause 14.2 to read as follows:

*'Any application for professional development must be made by written application to the Council for its acceptance at least one month prior to the opportunity to which the application relates.'*

**12. Clause 18.4 – Increases to TEC Package**

Finally, it is proposed that Mr Hemmerling receive an automatic increase of at least CPI for each year of the Agreement. Clause 18.4 of the Agreement, as drafted, reflects the standard practice across the Local Government sector, and I do not consider Mr Hemmerling's proposal to be reasonable. I do not recommend that the Committee agrees to this proposal.

I understand that the Committee will reconvene shortly to discuss the Agreement and proposed amendments. Please do not hesitate to contact me should you or the Committee have any queries arising from this correspondence or the revised Agreement.

Yours faithfully  
Norman Waterhouse



Amanda Green  
Senior Associate  
Direct Line: (08) 8217 1306  
e-mail: [agreen@normans.com.au](mailto:agreen@normans.com.au)

**C. COUNCIL/COMMITTEE TO DECIDE HOW LONG ITEM 6.2 IS TO BE KEPT IN CONFIDENCE****Purpose**

To resolve how long agenda item 6.2 is to be kept confidential.

**STAFF RECOMMENDATION**

That pursuant to Section 90(2) and Section 91(7) of the Local Government Act 1999 the Council orders that the following aspects of Item 6.2 be kept confidential:

- The Report for Item 6.2 until the Council have considered the matter and made this determination
- Attachment(s) for Item 6.2 until the Council have considered the matter and made this determination
- Discussion for Item 6.2 until the Council have considered the matter and made this determination
- Decision for Item 6.2 until the Council have considered the matter and made this determination

**Options**Option 1

That pursuant to Section 90(2) and Section 91(7) of the Local Government Act 1999 the Council orders that the following aspects of Item 6.2 be kept confidential:

- The Report for Item 6.2 until the Council have considered the matter and made this determination
- Attachment(s) for Item 6.2 until the Council have considered the matter and made this determination
- Discussion for Item 6.2 until the Council have considered the matter and made this determination
- Decision for Item 6.2 until the Council have considered the matter and made this determination

**Analysis of Options**Option 1

This item is excluded from the public on the basis that it relates to Section 90 (3) (a) of the Local Government Act 1999.

Until the Council considers this matter and makes a determination, all aspects of this item should remain confidential as because the matter relates to information pertaining to the personal affairs of persons and the disclosure of this information would be unreasonable because the information is sensitive to those persons and is not a matter of public knowledge.