# **CONFIDENTIAL ITEM**

# **Deed of Arrangement – Olli Bus Trial**

Pursuant to Section 83(5) of the Local Government Act 1999 the Report attached to this agenda and the accompanying documentation is delivered to the Council Members upon the basis that the Council consider the Report and the documents in confidence under Part 3 of the Act, specifically on the basis that Council will receive, discuss or consider:

h. legal advice.

Recommendation - Exclusion of the Public - Section 90(3)(h) Order

- 1. That pursuant to Section 90(2) of the *Local Government Act 1999* Council hereby orders that the public be excluded from attendance at this meeting with the exception of the Chief Executive Officer and Staff in attendance at the meeting in order to consider in confidence a Deed of Arrangement related to the Olli Bus Trial.
- 2. That in accordance with Section 90(3) of the *Local Government Act 1999* Council is satisfied that it is necessary that the public be excluded to consider the information on a Deed of Arrangement related to the Olli Bus Trial on the following grounds:
  - h. pursuant to section 90(3)(h) of the Act, the information to be received, discussed or considered in relation to this Item includes legal advice from the Crown Solicitor.
- 3. The Council is satisfied, the principle that the meeting be conducted in a place open to the public, has been outweighed by the need to keep the information or discussion confidential.

Subject: **DEED OF ARRANGEMENT – OLLI BUS TRIAL** 

Date: 9 October 2018

Written By: General Manager, City Assets and Services

General Manager: City Assets and Service, Mr H Lacy

#### **SUMMARY**

As part of the proposed Olli Bus trial, Council determined that a Licence would need to be signed between City of Holdfast Bay and the proponents of the Olli Bus Trial – Local Motors and Sage Automation. The Licence provided a clear legal and risk framework for the Olli Bus trial which was to be conducted on community land rather than public roadway.

The Licence was drafted by Council's lawyers in consultation with the LGMLS and subsequently approved at the full Council meeting on 14 August 2018.

A key feature of the Licence was Council's power to suspend or terminate the Licence for certain events or situations (including community complaints) at our discretion, including where the project loses its "social licence" from the wider community. This unilateral power (ie for council to act independent of DPTI and/or the Minister) was considered unacceptable by DPTI.

To avoid an impasse, Administration negotiated with DPTI to establish a side letter (or Deed) which would define a process for Council to follow before exercising its powers under the Licence. The process would ensure all parties attempted to resolve any issue before Council needed to exercise its powers.

Crown Law has prepared a draft Deed which is submitted for consideration of Council.

Refer Attachment 1

The Deed needs to be executed under seal and as such this report seeks Council authorisation for the A/Mayor and CEO to sign the Deed on behalf of Council.

#### RECOMMENDATION

- 1. That Council authorise the Acting Mayor and Chief Executive to sign the attached Deed on behalf of Council and to affix the Common Seal subject to any minor amendments as necessary.
- 2. That Council endorse the allocation of up to \$50,000 in new operating budget to fund any contribution towards any necessary infrastructure required to enable the Olli Bus Trial to proceed, noting that DPTI and Local Motors will contribute \$15,000 each towards the works and Sage \$10,000 towards the works.

#### RETAIN IN CONFIDENCE - Section 91(7) Order

3. That having considered attached report and Deed in confidence under section 90(2) and (3)(h) of the Local Government Act 1999, the Council, pursuant to section 91(7) of that Act orders that the report, attachments and minutes be retained in confidence for a period of up to 18 months and the Chief Executive Officer is authorised to release the documents when the trial is completed and that this order be reviewed every 12 months.

#### **COMMUNITY PLAN**

Placemaking: Creating lively and safe places Economy: Supporting and growing local business Economy: Harnessing emerging technology Economy: Boosting our visitor economy Environment: Protecting Biodiversity

Environment: Building an environmentally resilient city

Environment: Using resource efficiently

#### **COUNCIL POLICY**

Not Applicable.

#### STATUTORY PROVISIONS

Not Applicable.

#### **BACKGROUND**

As part of the proposed Olli Bus trial, Council determined that a Licence would need to be signed between City of Holdfast Bay and the proponents of the Olli Bus Trial – Local Motors and Sage Automation. The Licence provided a clear legal and risk framework for the Olli Bus trial which was to be conducted on community land rather than public roadway.

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A key features of the Licence was Council's power to suspend or terminate the Licence for certain events or situations (including community complaints) at our discretion, including where the project loses its "social licence" from the wider community. This unilateral power (ie for council to act independent of DPTI and/or the Minister) was considered unacceptable by DPTI.

To avoid an impasse, Administration negotiated with DPTI to establish a side letter (or Deed) which would define a process for Council to follow before exercising its powers under the Licence. The process would ensure all parties attempted to resolve any issue before Council needed to exercise its powers.

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#### **REPORT**

In summary, the Deed:

- Establishes a detailed, but perhaps cumbersome process for Council to follow to raise concerns with the project partners which seems overly complicated, however Administration feels that we could work with this arrangement if needed
- 2) Requires the council to seek ministerial approval before exercising powers under our Licence agreement to either suspend or terminate the licence agreement this essentially gives the Minister a veto over council's decision making (however the minister must act reasonably in exercising this role)

The project is at a critical point. The Olli Bus and the two (2) Olli Stops are now delivered and working at Tonsley.

The plan is to test and obtain safe operation of the Olli Bus at Tonsley before certifying the bus as safe to be deployed to Glenelg. The Olli Bus would then undergo configuration and proving trials on-site at Glenelg before being opened for general service. The plan was to undertake the Glenelg based on-site testing, configuration and proving up in a low pedestrian environment (ie mid-week outside the popular events season).

For a variety of reasons delays have meant that the event season is now fast approaching with the 1<sup>st</sup> major event being the World Surf Life Saving Championships starting on 16 November to 2 December 2018.

It is proposed therefore to attempt to get the Olli Bus through testing at Tonsley, to install any necessary infrastructure at Glenelg and then have the Olli Bus onsite by around 5 November. This would allow 2 weeks prior to the Worlds to get the bus working safely on-site at Glenelg. If not, the bus could form a limited display during the Worlds event.

Should council wish to re-negotiate the proposed Deed with DPTI, the delay in signing the Licence and Deed will almost certainly delay deployment of the Olli Bus until after the Worlds and potentially into a packed event period that then runs through until late March. It could in effect put the whole trial at jeopardy again.

Administration are therefore recommending that Council sign the draft Deed as presented so that the project can progress as quickly as possible.

Even if all documents are signed by all parties and exemptions issued by the Minister, it is still not clear that the Olli Bus, the two (2) stations and supporting infrastructure can be delivered and be on-site ready for configuration testing on 5 November 2018.

#### **BUDGET**

For the trial to proceed, certain infrastructure is necessary to allow the Olli Bus to turn around at both the Moseley Square and Broadway ends of the route as well as to install the two (2) associated Olli Stops. The works involve temporary kerbing, paving, support structures, signage and power supplies which need to be installed and then removed after the trial has been completed. The proposed works also include full restoration of the occupied areas after infrastructure is removed. The estimated total cost is around \$75,000 with DPTI and Local Motors contributing \$15,000 each and Sage Automation contributing \$10,000. Council is being asked to contribute the remaining \$35,000 in cash or in kind.

The project partners have agreed that if for any reason the costs exceed these estimates, then the partners will reconsider the respective contributions to cover the cost of any cost increase.

#### LIFE CYCLE COSTS

The proposed works are of a temporary nature and the full value will be expended once complete. Some opportunity exists to reclaim some materials at the completion of the trial.

# ATTACHMENT 1

<b>DEED</b> of <b>AGREEMENT</b>
For
THE FUTURE MOBILITY LAB FUND PROJECT - OLLII SHUTTLE AND OLLISTOP TRIAL
Between
MINISTER FOR TRANSPORT, INFRASTRUCTURE AND LOCAL GOVERNMENT ("Minister")
-And-
THE CITY OF HOLDFAST BAY
("Council")

This Draft represents only **indicative terms**. The South Australian Government reserves the right to make changes as it deems fit. The Government Party and the Crown in right of the State of South Australia will **not** be bound unless and until an agreement is formally executed by the Parties and any action taken in anticipation of such formal execution is at the risk of the person taking such action.

#### **DEED** of **AGREEMENT** dated

Between:

And

THE CITY OF HOLDFAST BAY (ABN 62 551 270 492) of 24 Jetty Road, Brighton SA 5048 ......("Council")

It is agreed:

#### 1. BACKGROUND

- 1.1 The Minister on behalf of the South Australian Government established the Future Mobility Lab Fund with the objective of supporting projects that, amongst other things, promote and accelerate the development of connected and autonomous vehicles and other future mobility technology that provide benefits to road users or address real challenges.
- 1.2 The Ollie Shuttle and Olli Stop Trial (**the Trial**) involves the implementation of an autonomous bus or buses and automated bus stops on a designated route (referred to in this Deed as the **Pathway**).
- 1.3 The Council owns and has care, control and management of the land comprising the Pathway.
- 1.4 The Minister has entered into funding agreements with Local Motors (who own or and operate one or more Shuttles) and Sage (a smart bus stop provider) for the purposes of the Trial.
- 1.5 The Council's members unanimously approved the Council's support of the Trial by Council resolution on 14 August 2018.
- 1.6 The Council, Local Motors and Sage intend to enter into a licence agreement entitled "2018 Olli Shuttle Licence" on or around the date of this Deed (**Licence**).
- 1.7 The Minister and Council have a mutual interest in a successful and safe Trial and notwithstanding the provisions of that Licence, the Council and the Minister agree to the terms and conditions set out in this Deed in order to establish a framework for how the Council is to engage with the Minister before exercising certain rights under the Licence.

#### 2. **DEFINITIONS AND INTERPRETATION**

In this Deed, unless a contrary intention is evident:

- 2.1 **"Business Days"** means any day other than a Saturday, Sunday or public holiday in South Australia;
- 2.2 **"Bus Stop Infrastructure"** means: Olli Stops; being any paving, asphalt, support structure or foundations necessary to support or position the Olli Stops and to provide a connection for pedestrians to access the Olli Stop from the Pathway;
  - (a) underground conduit, electrical cabling, residual current devices connecting to the mains supply (whether connected to a Council

- supply under or adjacent the Pathway or other mains supply) to one or more Olli Stops; and
- (b) any necessary floor or other lighting required to illuminate the areas around the Olli Stops whether connected to a Council power supply or other mains supply including from the Olli Stop.
- 2.3 "Commencement Date" has the meaning set out in item 2 of Schedule 1;
- "Council" means the entity set out in item 1 of Schedule 1;
- 2.5 **"Council's Representative"** means the person holding the position set out in item 3 of Schedule 1;
- 2.6 "**Deed**" means this deed between the Parties and includes the Schedule, any attachments and any other document expressly incorporated by reference:
- 2.7 "**DPTI**" means the Department for Planning, Transport and Infrastructure;
- 2.8 "Expiry Date" has the meaning set out in item 2 of Schedule 1;
- 2.9 "Infrastructure" means both Bus Stop Infrastructure and Shuttle Infrastructure;
- 2.10 "Issue" means (a) any issue, dispute or difference of opinion arising out of or in relation to the Licence including as to costs or the operation of the Trial; or (b) any event or circumstance that the Council believes gives it a right to suspend or terminate the Licence or the service provided under the Licence or otherwise at law;
- 2.11 "Licence" means the licence agreement referred to in section 1.5;
- 2.12 "Local Motors" means Local Motors Australia Pty Ltd ABN 79 623 739 007 of Level 10, 10-14 Spring Street, Sydney NSW 2000;
- 2.13 "Minister's Representative" means the person holding (or acting in) the position set out in item 3 of Schedule 1;
- 2.14 "Olli Stop" means:
  - (a) Infrastructure to serve as a passenger embarkation or disembarkation point; and
  - (b) near each end of the Pathway, Infrastructure having a recharging facility for a Shuttle.
- 2.15 "Pathway" means the eastern most path of the two pathways within Jimmy Melrose Park and Jetty Forecourt (being community land) on the Glenelg Esplanade SA 5045 running between the Broadway Kiosk to about adjacent Moseley Square, as identified in green on the Plan;
- 2.16 "Parties" means the Minister and the Council and "Party" means any one of them;
- 2.17 **"Project Steering Committee"** means the committee comprising representatives of the Minister, Council, Local Motors and Sage established as a governance body to oversee the project;
- 2.18 "SAGE" means SAGE Automation Pty Ltd, ABN 59 104 119 833 of F22/6 MAB, Eastern Promenade, 1284 South Road, Tonsley SA 5042;
- 2.19 **"Shuttle"** means the electrically powered shuttle bus to be provided by Local Motors pursuant to the Licence;
- 2.20 "Shuttle Infrastructure" means:
  - (a) any new kerbing, paving, asphalt, road base, Service, gravel or similar surface required to be installed for the purpose of undertaking

- the Olli Bus trial and necessary for the Shuttle to manoeuvre or operate as part of the trial (excluding any Bus Stop Infrastructure);
- (b) any signage, line marking or other traffic or pedestrian control devices required to be installed for the trial;
- (c) any Council infrastructure that needs to be removed and/or relocated for the trial (excluding any Bus Stop Infrastructure) but including any existing Council owned lights and railings that may be removed to enable the trial to proceed; and
- (d) temporary garaging and recharge facilities for the Shuttle including any associated power supply.
- 2.21 "**Trial**" means the trial referred to in section 1.2;
- 2.22 the Background forms part of this Deed;
- a word in the singular includes the plural and a word in the plural includes the singular;
- a word importing a gender includes any other gender;
- 2.25 a reference to a person includes a partnership and a body corporate;
- 2.26 a reference to legislation includes legislation repealing, replacing or amending that legislation;
- the words "include", "includes", "including" or "for example" do not limit what else may be included; and
- 2.28 where a word or phrase is given a particular meaning other parts of speech or grammatical forms of that word or phrase have corresponding meanings.

#### 3. **TERM**

This Deed starts on the Commencement Date and ends on the Expiry Date.

#### 4. REPRESENTATIVES

- 4.1 The Minister's Representative may exercise all the powers and functions of the Minister under this Deed.
- 4.2 Council's Representative may exercise all the powers and functions of the Council under this Deed.

## 5. UNDERTAKINGS OF THE COUNCIL

- 5.1 The Council agrees that it is the intent of this Deed that its terms and conditions take precedence over the terms of the Licence and that before taking any action or giving any notice of an Issue under the Licence it will first follow the procedures in clause 8 of this Deed.
- 5.2 In particular, the Council agrees and undertakes to:
  - (a) reduce the bond required under the Licence to zero;
  - (b) contribute to the costs of both the Bus Stop Infrastructure and Shuttle Infrastructure (such costs to be shared equally by the Council, the Minister, Local Motors and Sage); and
  - (c) not to exercise any right of suspension or termination under the Licence without the written approval of the Minister (and after first following the procedures set out in this Deed).

#### 6. **BOND**

6.1 The Council agrees to reduce the bond under the Licence to zero and in any event agrees not to impose or require any form of bond or guarantee from either Local Motors or Sage under the Licence.

#### 7. INFRASTRUCTURE COSTS

- 7.1 The Council agrees to make a direct financial contribution towards the costs of Infrastructure to undertake the Trial.
- 7.2 It is acknowledged that such costs will be shared between the Council, the Minister, Local Motors and SAGE and that the exact contribution will be agreed by all parties through consultation by the Project Steering Committee. The Council agrees to act reasonably in relation to such consultation.

#### 8. **ISSUE RESOLUTION**

- 8.1 If there is an Issue, the Council agrees that before exercising any right to suspend or terminate the Licence and before issuing any notice under the Licence in relation to that Issue it agrees, to provide a notice in writing of the Issue and comply strictly with the following four step process set out in this clause 8.
- 8.2 **Step one:** The Council must deliver in writing to each of the nominees of the Project Steering Committee (as set out in item 4 of schedule 1), a notice adequately identifying and setting out details of the Issue. The nominees of the Project Steering Committee must meet as soon as practicable but in any event within [5] Business Days of delivery of that notice and use reasonable endeavors acting in good faith to resolve the Issue by joint discussion.
- 8.3 **Step Two**. If the Issue is not resolved at the meeting referred to in clause 8.2, the Council may refer the Issue to be resolved by the nominees of the Project Steering Committee and the Council's Chief Executive by submitting a written notice of the Issue to those parties (such notice to include information adequately identifying and setting out details of the Issue). The nominees and the Council's Chief Executive must meet as soon as practicable but in any event within [5] Business Days of delivery of that notice and use reasonable endeavors acting in good faith to resolve the Issue by joint discussion.
- 8.4 **Step Three.** If the Issue is not resolved at the meeting referred to in clause 8.3, the Council may refer the Issue to the Council's Chief Executive and the Minister for Transport, Infrastructure and Local Government by submitting a written notice of the Issue to both of those parties (such notice to include information adequately identifying and setting out details of the Issue). The Council's Chief Executive and the Minister for Transport, Infrastructure and Local Government must meet as soon as practicable but in any event within [5] Business Days of delivery of that notice and use reasonable endeavours acting in good faith to resolve the Issue by joint discussion
- 8.5 The Council agrees that it will not suspend or terminate the Licence or the operation of the Trial in any way without first obtaining the written approval of the Minster. The Minister agrees to act reasonably in relation to any such request and will place public safety as the paramount consideration in any such request.
- 8.6 Notwithstanding anything in this Deed or at law, the Minister will not be liable for any decision or actions taken by the Council.
- 8.7 For the avoidance of doubt a Notice issued under this Deed will not be taken to be a notice of breach pursuant to the Licence or any other contract.

- 8.8 Notwithstanding the existence of an Issue, each Party must continue to perform its obligations under this Deed and in the case of the Council, the Licence.
- 8.9 If an Issue is not resolved in accordance with the this clause 8, either Party may refer the Issue to any court of competent jurisdiction.

#### 9. **GENERAL PROVISIONS**

#### 9.1 Remedies

The rights and remedies provided under this Deed are cumulative and not exclusive of any other right or remedies provided by law.

#### 9.2 **Termination**

The Minister or the Council may immediately terminate this Deed by written notice, if the other Party is in breach of this Deed which is incapable of remedy or fails to remedy a breach of this Deed capable of remedy within 30 days from being issued with a notice to rectify.

#### 9.3 **Survival**

This clause is to remain in full force and effect following the expiration or termination of this Deed.

# 9.4 No assignment

Neither Party may assign or encumber any of its rights and obligations under this Deed without prior written consent of the other Party.

## 9.5 **No mutual liability**

Nothing in this Deed constitutes a partnership, joint venture or agency of any kind between the Minister and the Council or renders them liable for the debts or liabilities incurred by each other.

#### 9.6 Applicable law

The laws in force in South Australia apply to this Deed.

The courts of South Australia have non-exclusive jurisdiction to determine any proceeding in relation to this Deed.

Any proceeding brought in a Federal Court must be instituted in (and remain with) the Adelaide Registry of that Federal Court.

#### 9.7 Entire Agreement

This Deed contains the entire agreement between the Parties with respect to its subject matter and supersedes any prior agreement, understanding or representation of the Parties on the subject matter.

#### 9.8 Auditor-General

Nothing in this Deed derogates from the powers of the Auditor-General under the *Public Finance and Audit Act 1987* (SA).

#### 9.9 Notices

#### 9.9.1 A "**notice**" means:

- (a) a notice in writing; or
- (b) a consent, approval or other communication required to be in writing under this Deed.
- 9.9.2 A notice or other communication is properly given or served if the Party delivers it by hand, posts it or transmits it by email or facsimile,

to the address of the Representative of the other Party as set out in the Schedule

- 9.9.3 A notice must be signed by or on behalf of the sender addressed to the recipient and:
  - (a) delivered to the recipient's address;
  - (b) sent by pre-paid mail to the recipient's address; or
  - (c) transmitted by email to the recipient's address.
- 9.9.4 A notice given to a person in accordance with this clause is treated as having been given and received:
  - (a) on the day of delivery if delivered before 5.00 pm on a Business Day, otherwise on the next Business Day;
  - (b) if sent by pre-paid mail, on the third Business Day after posting; or
  - (c) if transmitted by transmitted by email:
    - (i) when the relevant email appears in the sender's sent log with properties disclosing an appropriate routing; and
    - (ii) the sender does not receive a message from the system operator to the effect that the relevant email was undeliverable.
- 9.9.5 A Party may from time to time notify its change of its contact details by written notice to the other Party.

#### 9.10 Waiver

Any waiver of any provision of this Deed is ineffective unless it is in writing and signed by the Party waiving its rights.

A waiver by either Party in respect of a breach of a provision of this Deed by the other Party is not a waiver in respect of any other breach of that or any other provision.

The failure of either Party to enforce at any time any of the provisions of this Deed must not be interpreted as a waiver of such provision.

#### 9.11 **Modification**

Any Modification of this Deed must be in writing and signed by each Party (or its Representative).

#### 9.12 Reading down & Severance

In the event that any provision (or portion of any provision) of this Deed is held to be unenforceable or invalid by a Court of competent jurisdiction the validity and enforceability of the remaining provisions (or portions of such provisions) of this Deed shall not be adversely affected.

The offending provision or part of a provision shall be read down to the extent necessary to give it legal effect, or shall be severed if it cannot be read down, and the remaining part and provisions of this Deed shall remain in full force and effect.

#### 9.13 **Publicity**

The Council must not make or permit a public announcement or media release to be made about any aspect of this deed without first obtaining the Minister's consent. The Council agrees that the Minister may provide a copy of this Deed to Local Motors and Sage.

#### 9.14 **Dispute resolution**

- 9.14.1 Except in a case of genuine urgency where a Party seeks immediate interlocutory relief or other interim remedy, no Party may take legal proceedings in respect of any dispute in relation to this Deed without attempting resolution in accordance with this clause.
- 9.14.2 Disputes must be addressed as follows:
  - (a) Each Party must submit the dispute to one of its senior officers who has not previously been involved in the dispute ("**Negotiators**") within 10 Business Days of the dispute arising.
  - (b) The Negotiators must meet as soon as practicable to resolve the dispute.
  - (c) If the Negotiators cannot resolve the dispute within 10 Business Days of its reference to them, each Negotiator must prepare a written summary of his or her attempts to resolve the dispute and immediately refer that summary to that Party's Executive Negotiator, being the persons specified in Item 5 of Schedule 1.
  - (d) The Executive Negotiators must meet as soon as practicable to resolve the dispute, but in any case within 10 Business Days of its reference to them. Each Party must authorise and inform its Executive Negotiator sufficiently so that he or she can undertake that meeting without detailed reference to another person.
- 9.14.3 Notwithstanding the existence of a dispute each Party must continue to perform its obligations under this Deed.
- 9.14.4 This clause survives any expiry or termination of this Deed.

#### 9.15 Formal consideration

Each Party must pay \$10 on demand to the other Party.

# **EXECUTED** as a **DEED**

THE COMMON SEAL of the MINISTER FOR TRANSPORT, INFRASTRUCTURE AND LOCAL GOVERNMENT	) ) ) ) ) ) ) ) ) ) ) )
was affixed on:(Date above)	(Affix Seal Above)
in the presence of:	
Witness Signature:	
SIGNED for THE CITY OF HOLDFAST BAY by its authorised delegate in the presence of: [Council to confirm form of execution and if common seal can be used.]	
Signature of authorised delegate	Signature of authorised delegate
Name of authorised delegate (print)	Name of authorised delegate (print)
Position of authorised delegate	Position of authorised delegate
Date	Date

#### SCHEDULE 1 - PARTICULARS

#### 1. COUNCIL

Registered Name: City of Holdfast Bay Address: 24 Jetty Road, Brighton

ABN: 62 551 270 492

2. TERM

Commencement Date: The date the last of the Parties executed this Deed.

Expiry Date: [The later of:

a. 30 June 2019; and

b. the date that the Licence validly expires or ends under

the Licence,

unless the Parties agree to a later date.]

#### 3. **REPRESENTATIVES**

DPTI:

Name: Jeremy Conway

**Position**: General Manager, Commercial and Legal Address: Level 7, 50 Flinders Street, Adelaide

Telephone: 0417 859 154

E-mail Address: Jeremy.conway@sa.gov.au

Council:

Name:
Position:
Address:
Telephone:
E-mail Address:

# 4. PROJECT STEERING COMMITTEE NOMINEES

DPTI: Joanne Murray, Manager, Strategic Projects

Phone: 0414 745 899

Email: joanne.murray@sa.gov.au

COUNCIL:

LOCAL MOTORS:

SAGE:

# 5. EXECUTIVE NEGOTIATORS

DPTI:

Council: