

**ADELAIDE HILLS COUNCIL  
ORDINARY COUNCIL MEETING  
Tuesday 26 September 2017  
CONFIDENTIAL AGENDA BUSINESS ITEM**

**Item:** 19.1

**Originating Officer:** Richard Fox, Senior Property Projects Officer

**Responsible Director:** Terry Crackett, Director Corporate Services

**Subject:** Assignment of a commercial lease at the Adelaide Hills Business and Tourism Centre

**For:** Decision

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**1. Assignment of a commercial lease at the Adelaide Hills Business and Tourism Centre – Exclusion of the Public**

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public, except:

- CEO, Andrew Aitken
- Director Engineering & Assets, Peter Bice
- Director Strategy & Development, Marc Salver
- Director Corporate Services, Terry Crackett
- Director Community & Customer Service, David Waters
- Executive Manager Governance & Performance, Lachlan Miller
- Manager Property Services, Natalie Westover
- Minute Secretary, Pam Williams

be excluded from attendance at the meeting for Agenda Item 19.2: Assignment of a commercial lease at the Adelaide Hills Business and Tourism Centre in confidence.

The Council is satisfied that it is necessary that the public, with the exception of Council staff in attendance as specified above, be excluded to enable Council to consider the report at the meeting on the following grounds:

Section 90(3)(d) of the *Local Government Act 1999*, the information to be received, discussed or considered in relation to this Agenda Item is commercial information of a confidential nature (not being a trade secret) that would, on balance, be contrary to the public interest, the disclosure of which could reasonably be expected to prejudice the commercial position of the business which supplied the information.

Accordingly, on this basis the principle that meetings of the Council should be conducted in a place open to the public has been outweighed by the need to keep the information and discussion confidential.

## 2. Assignment of a commercial lease at the Adelaide Hills Business and Tourism Centre – Confidential Item

### SUMMARY

Udder Delights Group Pty Ltd (“Lessee”) is the lessee of Buildings 15 to 19 at the Adelaide Hills Business and Tourism Centre (“AHBTC”).

The Lessee is undertaking a business restructure which necessitates an assignment of the Lease between the Lessee and Council to Udder Delights Australia Pty Ltd. It is a requirement of the Lease that the consent of Council be obtained in order for the Lease to be assigned.

### RECOMMENDATION

Council resolves:

1. That the report be received and noted.
  2. To consent to the assignment of the lease of Buildings 15 to 19 at the Adelaide Hills Business and Tourism Centre from Udder Delights Group Pty Ltd to Udder Delights Australia Pty Ltd
  3. That the Mayor and CEO be authorised to execute all documents required to provide consent to the assignment of the lease.
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## 1. GOVERNANCE

### ➤ Strategic Management Plan/Council Policy

Goal 2	Connect
Strategy 2.4	We will implement the Adelaide Hills Business and Tourism Centre (Old Woollen Mill) Masterplan to stimulate local job creation, boost tourism and create a vibrant cultural hub.

The transfer of what is now the Adelaide Hills Business and Tourism Centre site to the then District Council of Onkaparinga was on the basis that the site is to be used for the economic development of Lobethal and surrounding areas. As a major employer at the AHBTC, the smooth transition of the business restructure of Udder Delights will support this goal.

### ➤ Legal Implications

Consent by the Council to the assignment of the lease is a requirement of the terms of the lease.

### ➤ Risk Management Implications

Providing consent to the assignment of the lease will assist in mitigating the risk of:

*Failure of the business restructure plans of the Lessee leading to financial loss to the Lessee and potential community dissatisfaction with Council.*

Inherent Risk	Residual Risk	Target Risk
Extreme (4A)	Extreme (4A)	Low (1E)

Agreement to the assignment of the lease will ensure that finalisation of the business restructure of Udder Delights Group Pty Ltd to Udder Delights Australia Pty Ltd is able to occur on 28 September 2017. Without the assignment there is a reasonable likelihood that the restructure will be delayed.

➤ **Financial and Resource Implications**

Nil

➤ **Customer Service and Community/Cultural Implications**

Not applicable

➤ **Environmental Implications**

Not applicable

➤ **Engagement/Consultation with Committee, Regional Subsidiary, Advisory Group and Community**

Not applicable

**2. BACKGROUND**

Udder Delights is a successful long term tenant at AHBTC at Lobethal. It is one of the major employers at the site and the business has enjoyed steady growth over a number of years. It currently leases Buildings 15 to 19 at AHBTC.

Udder Delights is undertaking a business restructure which involves a new partner for the business.

The business that has been identified is the experienced dairy company Snow Brand and the changed partnership arrangement is intended to provide the restructured company with further business expansion opportunities. Snow Brand Australia has been making white mould cheese in Victoria for more than 30 years, and Meg Milk Snow Brand, the parent company, has been making a range of dairy products in Japan for more than 90 years.

Udder Delights Group Pty Ltd will change to Udder Delights Australia Pty Ltd and will have a new Australian Company Number. The restructured company will continue to be led by Saul and Sheree Sullivan in their respective roles of Managing Director and Chief Executive. The existing Udder Delights management and employees will remain the same.

### 3. ANALYSIS

A new Australian Company Number means that, legally, the Lessee will change, requiring consent to the assignment of the Lease by Adelaide Hills Council. There are no relevant delegations that would permit the assignment of the Lease to be authorized at officer level and therefore the consent of Council is required to authorize the assignment.

Clause 4.6.1 of the Lease stipulates that 'The Lessee must not transfer or assign the premises or any part thereof or assign, transfer or otherwise dispose of this Lease without the Lessor's prior written consent.' However, the circumstances in which Council can refuse its consent are limited and are itemised in clause 4.6.4 as follows:

*"4.6.4 The Lessor may withhold the Lessor's consent to the assignment of the premises or this Lease in any of the following circumstances:-*

- (1) if the proposed assignee proposes to change the use to which the premises are put;*
- (2) if the proposed assignee is unlikely (in the Lessor's reasonable opinion) to be able to meet the financial obligations of the Lessee under this Lease;*
- (3) if the proposed assignee's business skills are inferior (in the Lessor's reasonable opinion) to those of the Lessee, or*
- (4) if the Lessee has not complied with procedural requirements for obtaining the Lessor's consent"*

As none of these four circumstances apply in this case, there are no grounds for refusing consent.

Following completion of the restructure, Udder Delights intends to make a public statement.

The Lease Novation Deed documents were received on 5 September 2017 and the settlement for the business restructure has a target of 28 September 2017, leaving a very small window for completion of the transaction. Should consent to the assignment not be approved at this meeting of Council, the restructure of Udder Delights will be delayed.

### 4. OPTIONS

Council has the following options:

- I. Resolve to consent to the assignment of the Lease from Udder Delights Group Pty Ltd to Udder Delights Australia Pty Ltd (Recommended)
- II. Resolve to not consent to the assignment of the Lease from Udder Delights Group Pty Ltd to Udder Delights Australia Pty Ltd (Not Recommended)

### 5. APPENDIX

- (1) Lease Novation Deed

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# **Appendix 1**

*Lease Novation Deed*

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**3. Assignment of a commercial lease at the Adelaide Hills Business and Tourism Centre –  
Period of Confidentiality**

**Subject to the CEO, or his delegate, disclosing information or any document (in whole or in part) for the purpose of implementing Council's decision(s) in this matter in the performance of the duties and responsibilities of office, Council, having considered Agenda Item 19.2 in confidence under sections 90(2) and 90(3)(d)(ii) of the *Local Government Act 1999*, resolves that an order be made under the provisions of sections 91(7) and (9) of the *Local Government Act 1999* that the report, related attachments and the minutes of Council and the discussion and considerations of the subject matter be retained in confidence until the earlier of six months or until Udder Delights Australia Pty Ltd makes a public announcement regarding the business restructure.**

**Pursuant to section 91(9)(c) of the *Local Government Act 1999*, that Council delegates the power to revoke the confidentiality order either partially or in full to the Chief Executive Officer.**

## Lease Novation Deed

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1-3 Adelaide Road, Lobethal,  
South Australia

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## Introduction

- A. The Lessor is the registered proprietor of the Land.
- B. The Old Party is the current lessee of the Land pursuant to the Lease.
- C. The parties have agreed to novate the Lease on the terms and conditions of this Deed with effect from the Novation Date.

# Operative terms

## 1 Dictionary

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The meanings of terms used in this Deed are set out below (unless the contrary intention appears).

<b>Term</b>	<b>Meaning</b>
<b>Asset Sale Agreement</b>	the Asset Sale and Purchase Agreement dated 16 August 2017 between (among others) the Old Party and the New Party, in relation to the sale and purchase of the business conducted by the Old Party and the assets of that business (among other things)
<b>Claim</b>	any claim, cost (including legal costs on a solicitor and client basis), damages, debt, expense, tax, Liability, loss, obligation, allegation, suit, action, demand, cause of action, proceeding or judgment of any kind however calculated or caused, and whether direct or indirect, consequential, incidental or economic
<b>Deed</b>	this deed
<b>Land</b>	the property or premises leased by the Old Party under the Lease
<b>Lease</b>	the Memorandum of Lease dated 6 March 2015 over portions of the land comprised in Certificate of Title Register Book Volume 5897 Folio 516 and located at 1-3 Adelaide Road, Lobethal, South Australia between the Lessor as lessor and the Old Party as lessee, which was varied by the undated Deed of Variation of Lease between the Lessor and the Old Party
<b>Liability</b>	any liability, whether actual or contingent, present or future, quantified or unquantified
<b>Novation Date</b>	the day on which completion occurs under the Asset Sale Agreement, such date to be notified to the Lessor by the Old Party
<b>Share Sale Agreement</b>	the Share Sale and Purchase Agreement dated 16 August 2017 in relation to the sale and purchase of shares in the New Party

## 2 Rules of interpretation

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- (a) Any provision of this Deed must be read down to any extent necessary to be valid. If that is not possible, the provision must be severed. All other provisions of this Deed are unaffected.
- (b) A provision of this Deed must not be construed to the disadvantage of a party merely because that party was responsible for including that provision in this Deed or that provision benefits that party.
- (c) In this Deed, unless the contrary intention appears:
  - (i) a person includes a natural person, partnership, joint venture, unincorporated association, body corporate and any other legal entity;
  - (ii) the singular includes the plural and vice versa;
  - (iii) a gender includes the other genders;
  - (iv) where an expression is defined, its other grammatical forms have a corresponding meaning;
  - (v) a clause or party is a clause of or a party to this Deed;
  - (vi) reference to a document is to that document as amended or varied;
  - (vii) any legislation includes any subordinate legislation under it and includes that legislation and subordinate legislation as modified, amended or replaced;
  - (viii) conduct includes any act, omission, representation, statement or undertaking whether or not in writing;
  - (ix) 'writing', 'written' and 'in writing' include any mode of representing or reproducing words in a visible form; and
  - (x) 'includes' or 'including', 'for example', or similar words do not limit what else might be included.
- (d) Any heading, index, table of contents or marginal note is for convenience and does not affect the interpretation of this Deed.

## 3 Condition precedent

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- (a) This Deed is subject to, and will have no force or effect unless, completion occurs under the Asset Sale Agreement.
- (b) The Old Party will notify the Lessor as soon as practicable after completion has occurred under the Asset Sale Agreement, and the date of such event.

## 4 Novation of Lease

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### 4.1 Novation

- (a) With effect from the Novation Date the parties novate the Lease so that:
  - (i) the New Party assumes all of the Old Party's rights and obligations under and in connection with the Lease arising after the Novation Date as if the New Party had been a party to the Lease instead of the Old Party, and the Lessor agrees to such novation;
  - (ii) the Lessor and the Old Party have no further rights against each other and owe no obligations to each other in connection with the Lease, to the extent that those rights or obligations arise after the Novation Date; and
  - (iii) the New Party will be deemed to have become a party to the Lease in place of the Old Party.
- (b) **Clause 4.1(a)** applies to all rights and obligations between the Old Party and the Lessor (whether present or future, actual or contingent), arising after the Novation Date.

### 4.2 Release

- (a) Without limiting the operation of **clause 4.3**:
  - (i) the Lessor releases the Old Party from all obligations under the Lease (whether present or future, actual or contingent) arising after the Novation Date; and
  - (ii) the Old Party releases the Lessor from all obligations owed by the Lessor to the Old Party under the Lease (whether present or future, actual or contingent) arising after the Novation Date.
- (b) Nothing in this Deed releases the Old Party and the Lessor from their respective rights and obligations under the Lease (whether present or future, actual or contingent) arising on or before the Novation Date.

### 4.3 Observation of obligations arising on or after the Novation Date

The New Party agrees that, with effect from the Novation Date, it will be bound by and will duly and punctually perform and observe all of the Old Party's obligations under or in connection with the Lease, whether express or implied, arising after the Novation Date, as if the New Party was a party to the Lease and was expressly named in the Lease in place of the Old Party.

### 4.4 Old Party indemnity

The Old Party indemnifies the New Party against any Claim made or brought against or suffered or incurred by the New Party arising out of or in connection with any breach by the Old Party of:

- (a) this Deed; or
- (b) the Lease in respect of the period on or before the Novation Date.

#### **4.5 New Party indemnity**

The New Party indemnifies the Old Party against any Claim made or brought against or suffered or incurred by the Old Party arising out of or in connection with any breach by the New Party of:

- (a) this Deed; or
- (b) the Lease in respect of the period after the Novation Date.

### **5 Lessor's consent**

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The Lessor consents to:

- (a) the novation of the Lease on the terms and conditions of this Deed; and
- (b) the sale of shares in the New Party by the Old Party as seller to Megmilk Snow Brand Co., Ltd. Registration Number 8430001041570, Snow Brand Australia Pty Ltd ACN 057 664 034 and Sullivan Enterprises (SA) Pty Ltd ACN 620 978 547 in its capacity as trustee of the Sullivan Enterprise Trust as buyers.

### **6 Notices under the Lease**

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With effect from the Novation Date, for the purposes of any notice provisions in the Lease, the New Party's notice details are:

Address: Unit 15, 1 Adelaide Road, Lobethal, South Australia  
Attention: Saul Sullivan  
Email: saul@udderdelights.com.au

### **7 General**

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#### **7.1 Entire contract**

As between the Old Party, the New Party and the Lessor, this Deed records the entire contract between the parties as to its subject matter. Subject to its express terms:

- (a) only terms which must be implied by law are implied in this Deed;
- (b) as to any representation or promise given by a party which is not expressed in this Deed:

- (i) that representation or promise is withdrawn;
- (ii) that representation or promise is not relied upon by any person; and
- (iii) the parties release each other (and their officers, servants and agents) from all claims in connection with it.

## **7.2 Other acts**

Each party must, at their expense:

- (a) use their best efforts to promptly do all things reasonably necessary to give full effect to this Deed; and
- (b) maintain all consents, approvals and authorities necessary for any party to perform their obligations under this Deed.

## **7.3 Governing law**

The laws in South Australia govern this Deed. Each party:

- (a) submits to the exclusive jurisdiction of the courts of South Australia and the Federal Court of Australia (Adelaide Registry); and
- (b) irrevocably waives any right to object to proceedings being brought in those courts on the basis that proceedings have been brought in an inconvenient forum.

## **7.4 Rights and obligations granted by this Deed**

The rights and obligations under this Deed:

- (a) are, unless otherwise stated, not conferred upon a person who is not a party;
- (b) are in addition to and do not affect any other rights that party may have;
- (c) will not merge with any act done to complete or perform this Deed; and
- (d) can be amended only by the written agreement of all parties.

## **7.5 Waiver and exercise of rights**

- (a) Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power or remedy provided by law or under this Deed by a party does not preclude, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy.
- (b) A waiver by a party of a right, power or remedy provided by law or under this Deed is only effective and binding on that party if it is given or confirmed in writing by that party.

- (c) No party will be liable for any loss or expenses incurred by another party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right.

## **8 Execution**

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- (a) This Deed (and any other document contemplated by this Deed) may be signed in counterparts. Each counterpart is taken to be an original. All counterparts together constitute one deed. A signed counterpart may be exchanged or delivered by facsimile or by PDF attachment to an email transmission.
- (b) A person signing this Deed on behalf of a party warrants that they have authority to bind that party for that purpose.



# Execution

Executed as a deed.

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**Udder Delights Group Pty Ltd as trustee of the Udder Delights Trust**

.....  
Signature of director

.....  
Name of director

.....  
Signature of company secretary/director

.....  
Name of company secretary/director

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**Udder Delights Australia Pty Ltd**

.....  
Signature of director

.....  
Name of director

.....  
Signature of company secretary/director

.....  
Name of company secretary/director

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The common seal of the **Adelaide Hills Council** was hereto affixed on the      day of September 2017  
in pursuance of a resolution of the Adelaide Hills Council passed on the      day of September 2017  
and affixed in the presence of:

.....  
Mayor

.....  
Chief Executive Officer

.....  
Print name

.....  
Print name