

**KIAMA COUNCIL**

**SHELLHARBOUR COUNCIL**

**WOLLONGONG CITY COUNCIL**

**NOXIOUS WEEDS AGREEMENT**

**THIS AGREEMENT** is made on .....23 September.....1994

**1. PARTIES:**

- 1.1 **KIAMA COUNCIL** of 11 Manning Street, Kiama (“KC”).
- 1.2 **SHELLHARBOUR COUNCIL** of Administration Centre, Lamerton House, Blackbutt (“SC”).
- 1.3 **WOLLONGONG CITY COUNCIL** of 41 Burelli Street, Wollongong (“WCC”).

**2. RECITALS:**

- 2.1 Each Council is the local control authority with functions to control weeds within its area under the NW Act.
- 2.2 Section 55 (1) of the LG Act enables the Councils to exercise their functions jointly.
- 2.3 Section 68 of the NW Act enables each Council to delegate any of its functions under that Act other than this power of delegation.
- 2.4 Section 69 of the NW Act enables each Council to make arrangements with another person or body to assist in the exercise of any of its functions under that Act.
- 2.5 The Councils have each resolved to exercise their functions under the NW Act jointly as the IDNWA.
- 2.6 The Councils enter into this Agreement for the purposes of implementing those resolutions.

**3. DEFINITIONS:**

In this Agreement:

**“Agreement”** means this Agreement as amended from time to time.

**“Commencement date”** means 19 February 1993.

**“Committee”** means the Committee constituted under clause 7.

**“Council”** means KC, SC, or WCC as the case may be and **“Councils”** means each of them.

**“Facilities”** means those assets, including computers, office equipment, vehicles, communications equipment or other items required for the administration of the IDNWA.

**“Financial Year”** means each period of 12 months ending on 30 June.

**“IDNWA”** means Illawarra District Noxious Weeds Authority.

**“LG Act”** means Local Government Act 1993.

**“Manager”** means KC or any manager appointed in substitution under clause 8.6

**“Marriage Grant”** means an amount of \$80,000.00 provided to the Councils by the Noxious Weeds Advisory Committee of the Department of Agriculture to promote the establishment of the IDNWA.

**“NW Act”** means Noxious Weeds Act 1993.

**“Weeds”** means noxious weeds as declared by the Minister from time to time under the Noxious Weeds Act 1993.

#### 4. **JOINT VENTURE INFORMATION:**

4.1 The Councils agree to form and engage in an unincorporated joint venture, as the IDNWA, for the purpose of jointly carrying out their functions under the NW Act, except that each Council must separately appoint as an inspector under section 41 of the NW Act any person employed for that purpose by the IDNWA and issue to that person a certificate of authority under section 50 of the NW Act.

4.2 The respective interests of the Councils in the IDNWA are as follows:

4.2.1 WCC – 40%; and

4.2.2 KC – 30%; and

4.2.3 SC – 30%.

4.3 The Councils confirm that they own the assets of the IDNWA as tenants in common in accordance with their respective interests.

4.4 Each Council commits its interest to the joint venture and agrees to do all things necessary to enable their joint functions to be carried out.

#### 5. **TERM AND TERMINATION:**

5.1 This Agreement commences on the Commencement Date and terminates:

5.1.1. on the date that all the participants agree to terminate the Agreement; or

5.1.2. at the end of the Financial Year which begins after service by a Council on each other Council of notice of intention to terminate this Agreement.

5.1.3. As provided in Clause 8.6

5.2 On termination of this Agreement, all the assets of the IDNWA must be distributed to, or held for the benefit of, the Councils in whatever manner as the Councils agree, or sold. In the event of sale, the net proceeds of sale must be divided among the Councils on a pro rata basis in accordance with their respective interests.

**6. JOINT VENTURE RELATIONSHIP:**

6.1 The Councils agree that:

6.1.1 their functions are to be exercised by the IDNWA under the NW Act and LG Act;

6.1.2 the rights, duties, obligations and liabilities of the Councils in every case are several and not joint or joint and several;

6.1.3 the relationship between the Councils is one of joint venturers and limited to carrying out their functions under the NW Act, so that nothing contained in this Agreement constitutes any of them as agent or partner of any other of them, or creates any agency or partnership for any purpose whatsoever; and

6.1.4 except as otherwise specifically provided in this Agreement, a Council has no authority to act for, or to create or assume any responsibility or obligation on behalf of, any other Council.

6.2 Each Council ("the Indemnitor") irrevocably and unconditionally indemnifies and agrees to keep indemnified each other Council and its representatives ("the Indemnitee") from and against any and all liability, loss, harm, damage, cost or expense (including legal fees) that the Indemnitee suffers, incurs or sustains as a result of any act or omission of, or any purported assumption of any obligations or responsibility by, the Indemnitor or any of its Councillors, officers, employees, agents or representatives, done or omitted to be done, or undertaken, or apparently done or omitted to be done or undertaken, on behalf of the Indemnitee in connection with the joint venture and not authorised under this Agreement.

6.3 If at any time a Council incurs a liability for the purposes of the joint venture to an extent greater than its obligations by reason of its interest, then each other Council must indemnify and account to that Council so that all Councils share that liability in the proportions of their respective interests.

6.4 If any Council becomes liable to any other person for any tort committed in the course of exercising functions under the NW Act or arising from the ownership of the IDNWA assets, except when that liability arises due to negligence or default of that Council, each Council must promptly discharge its proportion of that liability according to its interests and must indemnify and account to each other Council to the extent that it does not do so.

## 7. COMMITTEE

7.1 There is to be a joint venture operating Committee.

### 7.2 Committee Membership

7.2.1. Each Council must appoint one member to the Committee. Each Council can appoint one alternate member for the member appointed by it.

7.2.2. Each Council must give notice to the other Councils of the appointment of its member and alternate member.

7.2.3. An alternate can act only if the member for whom he is appointed alternate is not present at a meeting of the Committee, in which event, he is for the purposes of this Agreement deemed to be that member and can exercise all powers of the member for whom he is appointed alternate to the extent that the member has not exercised them.

7.2.4. Each Council can change any of its members and alternates at any time by notifying the other Councils to that effect.

### 7.3 Chairman

7.3.1 The Committee must from time to time appoint one of the members of the Committee to be Chairman. The Chairman holds office for a term of one (1) year and can be reappointed. In the event of an equality of votes the Chairman has a casting as well as a deliberative vote.

7.3.2 Any casual vacancy occurring in the position of Chairman must be filled at the next meeting of the Committee and the Chairman so appointed holds office until the expiration of the term of the appointment of the Chairman whom he replaces.

7.3.3 If at any meeting the Chairman is not present at the time appointed for holding the meeting, the members present can choose one of their number to preside at that meeting.

### 7.4 Secretary

7.4.1 The members of the Committee must appoint a person, who may but need not, be a member of the Committee, to act as Secretary of the Committee.

7.4.2 The Secretary must attend all meetings of the Committee but is not, unless he is a member entitled to vote.

7.4.3 The members of the Committee can at any time remove the Secretary from office and appoint another in his place.

### 7.5 Quorum

- 7.5.1 Subject to sub-clause 7.5.3, the quorum for each meeting of the Committee is two (2) members of the Committee.
- 7.5.2 If a quorum is not present within one (1) hour after the arranged time for a meeting, the meeting must stand adjourned for one (1) week at the same place.
- 7.5.3 If at the time fixed for the commencement of the adjourned meeting a quorum is not present, the meeting is to be abandoned.

## **7.6 Proceedings at Committee Meeting**

- 7.6.1 The committee has full and complete power and authority and the Councils empower and direct the Committee to give all approvals and to make all decisions and determinations required or permitted to be given or made by the Councils under this Agreement with respect to the exercise of their functions under the NW Act, including the power:
  - 7.6.1.1 to adopt (with or without amendment) or modify annual programs; and
  - 7.6.1.2 to supervise the activities of the Manager
- 7.6.2 All approvals, decisions and determinations given or made by the Committee are to be binding on each of the Councils.
- 7.6.3 All approvals, decisions and determinations at a meeting of the Committee are to be made by a simple majority vote of the votes cast at the meeting.
- 7.6.4 The Committee must meet whenever called upon seven (7) days' written notice, or such lesser period as the members may agree, to be given by the Secretary of the Committee whenever any member or the Manager request the Secretary to do so. The Committee must meet at least once in each Financial Year to consider a proposed annual program for the following Financial Year.
- 7.6.5 Each notice convening a meeting must enclose the agenda for the meeting and must be sent by facsimile and confirmed by letter to each member. Not less than three (3) days prior to the meeting, a member can request that an item be included in the agenda and the agenda must be amended accordingly. A copy of the amended agenda must be given or sent to each member not less than one day prior to the meeting in accordance with this sub-clause. Any matter not included in the agenda cannot be dealt with at the meeting unless all members present agree.
- 7.6.6 A written record of decisions made at each meeting of the Committee must be kept by the Secretary of the Committee who must distribute copies of the record to each Council as soon as practicable following the meeting. If a Council has not commented on the written record within 14 days of receipt, it is deemed to have accepted that written record as an accurate recording of the decisions noted in the record. On the written

record being accepted by Councils under this sub-clause and being signed by the Chairman, it becomes prima facie evidence of the decisions and proceedings of the meeting to which it relates.

7.6.7 An approval, decision or determination which the Committee is competent to give or make can be submitted to the members of the Committee for consideration and vote, without holding a meeting, and the vote is treated as a vote made at a meeting of the Committee, if:

7.6.7.1 each member is given written notice of such matter;

7.6.7.2 each member or his alternate has a period of a least five (5) days after receiving notice of the matter (or such other agreed period) to vote on the matter; and

7.6.7.3 within that period, no member requests that the matter be considered at a meeting of the Committee. Whenever a matter is so submitted, each member can vote by giving written notice of his vote to the Secretary of the Committee and any matter which received unanimous approval of the votes so cast becomes binding on each Council as if the resolution had been passed at a meeting of the Committee. The written record of each decision made under this sub-clause must be kept by the Secretary and a copy of the record must be distributed to each Council as soon as practicable after the vote is taken.

7.7 The Committee can establish such sub-Committees as the Committee deems appropriate. The functions (which are advisory only) of each sub-Committee must be determined by the Committee.

7.8 Meetings of the Committee are to be held in KC's administrative office or at such other place as the Committee from time to time decides.

7.9 Costs and expenses incurred by the Councils relating to the attendance of their respective members at meetings of the Committee must be borne by them and are not part of the IDNWA's expenses.

## 8. **APPOINTMENT AND DUTIES OF MANAGER:**

8.1 The Councils hereby appoint KC as the Manager, for the term of this Agreement, to administer the IDNWA for and on behalf of, and for the account of the Councils, and KC hereby accepts that appointment.

8.2 Subject to the timely provision of funds by the Councils, the Manager must, either itself or through agents or employees it engages, do all things necessary or advisable for the efficient and economic administration of the IDNWA.

- 8.3 KC agrees that it will carry out its duties and obligations as Manager in accordance with:
  - 8.3.1 this Agreement;
  - 8.3.2 good management methods and the requirements of the LG Act and NW Act; and
  - 8.3.3 such instructions as it receives from the Committee.
- 8.4 KC can retire from the position of Manager on the expiration of six (6) months' notice in writing to the other Councils.
- 8.5 KC can be removed from the position of Manager on the expiration of six (6) months' notice from both the other Councils.
- 8.6 If at the expiration of the notice under clause 8.4 the Councils have not agreed to the appointment of a new Manager then this Agreement terminates.

**9. POWERS OF MANAGER:**

- 9.1 The Manager is to have possession and control but not ownership of the IDNWA's assets and have charge of, and responsibility for, the administration of the IDNWA.
- 9.2 The Manager is to have such powers, functions and authority from the Councils as are necessary to enable the Manager to carry out its duties and obligations set out in clause 8 including but not limited to the power of:
  - 9.2.1. repair and maintain the IDNWA's assets;
  - 9.2.2. employ, engage, appoint and contract with agronomists, engineers, solicitors, barristers and other professional or technical advisers, consultants, contractors and experts to do all things usual or desirable to be done for the purpose of exercising the IDNWA's functions;
  - 9.2.3. negotiate and enter into (and renew, extend or vary) Agreements for the supply (by purchase or lease) of materials, equipment and services in connection with those functions;
  - 9.2.4. institute, prosecute, defend and compromise legal proceedings in the name of the Council in respect of which or to whose area those proceedings relates;
  - 9.2.5. dispose of the IDNWA's assets whether by sale or otherwise in accordance with prior authorisation from the Committee
  - 9.2.6. in the case of any emergency or accident, take such action as is necessary for the protection of life and property; and
  - 9.2.7. do any other act or thing which may be required by the Manager by this Agreement or which the Councils may authorise or require.



- 9.3 The grant of powers, functions and authority under sub-clause 9.2 is not revocable or variable by the Councils without the prior written consent of the Manager.
- 9.4 Except as authorised or required by the Councils the Manager must not encumber any of the IDNWA's assets.

## 10. **PROGRESS REPORTS:**

- 10.1 The Manager must deliver to the Councils, within 25 days following the end of each March, June, September, and December, a progress report;
  - 10.1.1 outlining the work performed on behalf of the IDNWA during the period of three (3) months to the end of those respective months;
  - 10.1.2 summarising all expenses incurred or accrued during that period;
  - 10.1.3 comparing that work and those expenses with estimates made in any relevant annual program; and
  - 10.1.4 outlining the plans for the further work to be performed in the current Financial Year.
- 10.2 Each progress report must contain the detail necessary for an adequate analysis and be prepared in such a way as to meet the reasonable requirements of the Councils.
- 10.3 If requested by the Committee, the Manager must prepare and submit the following reports on a quarterly basis which must include but not be limited to:
  - 10.3.1 industrial relations;
  - 10.3.2 government affairs;
  - 10.3.3 staff organisation;
  - 10.3.4 all Agreements which the Manager has entered into; and
  - 10.3.5 matters relating to the IDNWA which have been reasonably requested by a Council.
- 10.4 In addition to the reports referred to in sub-clauses 10.1 and 10.3, the Manager must provide to the Committee such statements and other information relating to the IDNWA as the Committee may reasonably request from time to time.

## 11. **RECORDS AND ACCOUNTS**

- 11.1 The Manger must:
  - 11.1.1 keep or cause to be kept comprehensive, true and accurate records and accounts of the IDNWA and of the Manager's performance of its duties under this Agreement, and of all

property belonging to, and of all transactions entered into by, or on behalf of, the Councils in connection with the IDNWA (so far as known to the Manager) and of the costs and expenses of those transactions;

- 11.1.2 maintain proper systems of internal control to enable the IDNWA's assets to be adequately controlled and accounted for and to provide reasonable control of transactions;
- 11.1.3 ensure that all invoices and financial settlements, financial reports and billings rendered by the Manager to the Councils reflect properly the facts of all activities and transaction handled for the account of the Councils; and
- 11.1.4 keep all such records and accounts in accordance with generally accepted accounting principles in Australia, consistently applied, and in particular for Local Government.

11.2 Upon not less than 14 days' prior notice to the Manger, a Council can, by its servants or agents and at its sole cost, inspect and obtain copies of all documents, records and accounts under the control of the Manager relating to the IDNWA.

11.3 The Manager must furnish to the Councils within two (2) months after the end of each Financial Year, a statement of account audited by the Manager's auditor, reflecting for that Financial Year:

- 11.3.1 all transactions in connection with the IDNWA during the Financial Year, as disclosed by the records and accounts kept or caused to be kept by the Manager under clause 11.1;
- 11.3.2 all expenses incurred or accrued by the INDWA during the Financial Year; and
- 11.3.3 all the IDNWA assets in the custody or control of the Manager as at the end of the Financial Year.

## **12. REMUNERATION AND EXPENSES OF MANAGER**

12.1 Subject to clause 12.1, the Manager is not entitled to claim or receive any remuneration, management or other fee or other profit for, or in connection with, the administration of the IDNWA and its services, and the payments referred to in sub-clauses 12.2 and 12.3 constitute full and complete compensation for the Manager's services under this Agreement.

12.2 The Councils must pay to the Manager for the Manager's services a fee as determined by the Committee from time to time.

12.3 The Councils must pay or reimburse the Manager for all expenses incurred on behalf of the IDNWA.

## **13. LIABILITY AND INDEMNITY**

- 13.1 The Manager is not responsible to the Councils for any liability, loss, harm, damage, cost or expense (including legal fees) that the Councils may suffer, incur or sustain and arising out of the activities of the Manager in performing its duties or obligations under this Agreement, except to the extent that such liability, loss, harm, damage, cost or expense arises directly from the Manager's willful misconduct or bad faith.
- 13.2 The Councils irrevocably and unconditionally indemnify and undertake to keep indemnified and saved harmless the Manager from and against any and all liability, loss, harm, damage, cost or expense (including legal fees) that the Manager suffers, incurs or sustains as a result of any suit, claim or demand brought or made against the Manager and arising out of the activities of the Manager in performing its duties or obligations under this Agreement, except to the extent that such liability, loss, harm, damage, cost or expense arises directly from the Manager's willful misconduct or bad faith.
- 13.3 In this clause 13 references to the "Manager" include references to the servants, employees and sub-contractors of the Manager.
- 13.4 The Manager must effect professional indemnity insurance for an amount not less than the amount specified by the Committee from time to time and the premiums for such insurance are to be part of the IDNWA's expenses.

14. **EFFECT OR AGREEMENT:**

- 14.1 This Agreement:
- 14.1.1 comprises the entire Agreement between the Councils and no earlier representation or Agreement, whether oral or in writing, in relation to any matter dealt with in this Agreement has any effect from the date of this Agreement; and
  - 14.1.2 cannot be varied in any way except with the written Agreement of all Councils.
- 14.2 Each Council must do or cause to be done or refrain from doing all such acts or things necessary to give effect to this Agreement.
- 14.3 This Agreement may be executed in any number of counterparts and those counterparts when executed and taken together constitute this Agreement.
- 14.4 None of the terms or conditions of this Agreement, or any act, matter or thing done under this Agreement or any other Agreement, instrument or document, or judgement or order of any court of judicial proceeding, operates as a merger of any of the rights and remedies under this Agreement, and these rights and remedies at all times continue in force.

14.5 If any provision of this Agreement is void or voidable or unenforceable in accordance with its terms, but would not be void, voidable, unenforceable or illegal if it were read down and, it is capable of being read down, that provision is to be read down accordingly.

15. **WAIVER:**

15.1 The failure, delay or omission by a Council to exercise any power or right conferred on that Council by this Agreement does not operate as a waiver of that power or right; nor does any single exercise of any such power or right preclude any other or future exercise of the power, or the exercise of any other power or right under this Agreement.

15.2 A waiver of any provision of this Agreement, or consent to any departure by a Council from any provision of this Agreement, must be in writing and executed by all Councils and is effective only to the extent for which it is given.

16. **NOTICES:**

16.1 Any notice, request, consent or other communication ("Communication") to be given to a Council under this Agreement must be in writing addressed to the address of that Council appearing in this Agreement or to such other address for that Council as is notified in writing by that Council to the other Councils.

16.2 Each Communication must be delivered by hand or pre-paid post, or sent by facsimile provided that a Communication sent by facsimile is immediately confirmed in writing by the sending Council by hand delivery or pre-paid post.

16.3 A Communication is deemed to be received:

16.3.1 if hand delivered, on the next following business day;

16.3.2 if posted, on the second business day after posting; and

16.3.3 if sent by facsimile, on the next following business day unless the receiving Council has requested re-transmission before the end of that business day.

17. **GOVERNING LAW AND INTERPRETATION:**

17.1 This Agreement is to be governed by and construed in accordance with the law for the time being in force in New South Wales and the Councils, by agreeing to enter into this Agreement, are deemed to have submitted to the non-exclusive jurisdiction of the courts of that State.

17.2 In this Agreement, except to the extent that the context otherwise requires:

- 17.2.1 any term defined in the statement of the names and descriptions of the participants has the meaning there defined;
- 17.2.2 reference to any legislation or any provision of any legislation includes any modification or re-enactment of the legislation and statutory instruments and regulations issued under the legislation;
- 17.2.3 words denoting the singular include the plural and vice versa;
- 17.2.4 words denoting individuals or persons include bodies corporate and trusts and vice versa;
- 17.2.5 headings are for convenience only and do not effect interpretation;
- 17.2.6 reference to a clause or sub-clause is a reference to a clause or sub-clause in this Agreement;
- 17.2.7 reference to any document or Agreement includes reference to that document or Agreement as amended, novated, supplemented, varied or replaced from time to time;
- 17.2.8 words denoting any gender include all genders;
- 17.2.9 where any work or phrase is given a definite meaning in this Agreement any part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- 17.2.10 where, by virtue of the provisions of the Agreement, the day on or by which any thing is to be done is a Saturday, a Sunday or a public holiday in the place in which that thing is to be done, then that thing must be done on the next succeeding day which is not a Saturday, a Sunday or a public holiday.

**18. DISPUTE RESOLUTION:**

- 18.1 If a dispute arises out of or relates to this Agreement, including any dispute as to breach or termination of this Agreement or as to any claim in tort, in equity or under any statute ("Dispute"), a Council cannot commence any court or arbitration proceedings relating to the Dispute unless that Council has complied with the following sub-clauses, except where that Council seek urgent interlocutory relief.
- 18.2 A Council claiming that a Dispute has arisen must give notice to the other Councils specifying the nature of the Dispute.
- 18.3 On receipt of that notice by those other Councils, the Councils must endeavour in good faith to resolve the Dispute expeditiously using informal dispute resolution techniques such as mediation, expert evaluation or determination or similar techniques agreed by them.
- 18.4 If the Councils do not agree within seven (7) days of receipt of the notice or such further period as agreed in writing by them, as to:
  - 18.4.1 the dispute resolution technique and procedures to be adopted;
  - 18.4.2 the timetable for all steps in those procedures; and
  - 18.4.3 the selection and compensation of the independent person required for that technique;

the Councils must mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales and must request the President of the Law Society of New South Wales or the President's nominee to select the mediator and determine the mediator's remuneration.