

29 April 2022

Department of Planning and Environment  
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Dear Sir/Madam

**Draft Regulatory framework for Local Water Utilities (March 2022)**

Council wishes to thank you for the opportunity to provide a response to the call for submissions on the draft regulatory framework for Local Water Utilities.

Bathurst Regional Council operates a town water supply and sewerage service that supports the city of Bathurst and Environs. Bathurst Regional Council has a population circa 40,000 people.

During the most recent drought, which for the Bathurst water supply was the worst drought on record, the Bathurst supply was identified as at risk, with day zero horizons of well less than 12 months during a continuing drought and very strong restrictions placed on water users.

Council responded with a suite of actions inter alia including:

1. Strong restrictions, which were implemented well in advance of Council's adopted Drought Management Plan.
2. Unpicking of an inappropriate and potentially catastrophic irrigation allocation (put in place by a NSW Agency), through Council driving support for a section 324 instrument.
3. Consolidation of Council's water efficiency actions for example recycling of process water, irrigation efficiency for Parks and Gardens.
4. Exhaustive analysis of factors, issues and emergency supply projects.

5. The Winburndale Dam Pipeline Project and defence of the Dam's secure yield after dispute with the regulator over interpretation of operating conditions which would reduce secure yield from circa 1,000ML/a to 28 M/a (which remains unresolved).
6. The Bathurst Water Harvesting Project which can lift the secure yield of the Bathurst supply by around 1,500ML/a

Through the ensuing project development processes under both the Water Supply, Critical Needs Legislation, the Part 5 EPA Act, relevant Water Legislation such as the Section 60 provisions and numerous other legislation and regulations that combine to regulate such projects, Council is in a sound position to provide feedback.

For some years there has been problem and gridlock in both the framework and operation of the framework resulting in excessive time to gain approvals/endorsement for projects and for Integrated Water Cycle Management Plans (IWCM's) with horror stories discussed across the industry of unnecessary and disputed requirements and indirect control of projects and strategies through the funding and approvals roles as well as multiple rescoping and scoping creep due to preferences of agency staff.

The Bathurst experience of approvals has not been great. Council still does not have approval for a critical water security project for which design and documentation commenced in 2019, with initial draft Environmental Assessment completed in that year. Council has suffered continued scope creep on the documentation required to justify this project, experienced even during the drought when no other options were put forward by the State Government in a time when Bathurst had less than 12 months of water supply available.

It is considered fair to say that the outcomes/track record of some elements of the framework is unsatisfactory.

This is borne out in the strongly critical findings of the 2020 Auditor General's Report into the Support for Regional Town Water Infrastructure.

An economic analysis was carried out on behalf of Council by the Western Research Institute on the costs of placing the Bathurst Town Water Supply on restrictions, as follows:

Water restriction level	Contribution to economy - Output	Household Income	Employment Full time equivalents (FTE)
Unrestricted	\$1,709,940,000	\$723,810,000	9769
Level 5 (25% business reduction)	\$1,526,330,000	\$660,870,000	8957
Level 6 (50% business reduction)	\$1,057,120,000	\$454,570,000	5882
100% reduction	\$130,630,000	\$66,780,000	901

Based upon the economic data as above, it is clear that any Town Water Supply should not impact upon business activities. In Bathurst's case, approximately \$650M of economic loss per annum should Bathurst be forced to Level 6 Restrictions. This is not a position which the Bathurst community would find acceptable with their legitimate expectation of proper planning and development of the water supply.

Given recent experience, Council particularly wishes to reinforce its feedback relating to:

1. The very wide discretion under which DPE and other relevant agency staff operate, and the culture of staff involved. Also, ever-changing requirements and repeatedly rescoping/scope creep afforded by the wide discretion.
2. Section 60 and other relevant approvals.
3. Environmental Assessment of Projects.
4. The need to also review other parts of the regulatory framework beyond the scope of DPE Water Utilities as only part of the challenge is being covered in this review (also drawing on part 3 above).
5. Support and guidance with a minimum of regulation allowing increased self-sufficiency and autonomy.
6. A further round of consultation otherwise Council is being asked to support some light detail in elements of the proposed changes.

Council is very interested in seeing improvement and hopes to see results from the review of the regulatory framework. Accordingly, Council is grateful for the opportunity to provide feedback.

**Other Submissions where Bathurst Regional Council has had input – the Central JO and the Water Directorate submissions.**

Council is a member of the Central JO and Council expert staff are participating members of the Water Directorate. Council has had input and is familiar with both submissions. Council endorses the submissions of the Central JO and the Water Directorate noting that there are some differences and some additional amplification of some topics between the two submissions. Council's position on the elements of difference between the submissions into which it has had involvement is made clear following:

1. **Section 409 of the Act**  
This part of the Act is not suitable in relegating the regulatory and strategic framework to a secondary position. The Central JO has correctly identified the IP and R provisions and other options to properly place the framework.
2. **Disputes and resolution**  
While the escalation and dispute resolution proposals are promising, given the industry feedback of a track record of poor resolution of disputes and differences of professional opinion and other opinions sometimes outside of relevant roles it is strongly suggested that provision for independent determination under the Land and Environment Court (LEC) be provided for as a further step should disputes be unable to be resolved.
3. **S60 – Regulation by DPE or not.**

The Central JO has suggested "...Further, it is difficult to imagine how an advisory and support process as described by DPE water can end in a non-approval by DPE as regulator. This region is of a view that examples of the tendency for agencies with a regulatory role to crawl into that role, rather than provide the support required to deliver an outcome; are prolific. In our view the best way to resolve this risk is to extinguish the regulatory role. It is possible to do both – however DPE will need to structure and carefully manage itself to address the conflict..."

Council's view is that unless DPE Water Utilities can effectively manage the various roles it will be necessary to make the changes suggested above by Centroc. (Centroc has also acknowledged that legislative reform of section 60 is not contemplated at this time).

### **Broad discretion afforded agency staff is a significant risk to Water and Sewer Projects**

Across the various state agencies involved in the regulatory framework there is significant potential to impact projects as officers can determine the criteria for projects with much flexibility and additionally can re-determine these criteria multiple times throughout a project application. Bathurst Regional Council has experienced this.

The weighting of relevant heads of consideration is also able to be changed. Additionally, officers have much discretion to include modify or reject agency technical documents or otherwise accepted documents and demand more and more data. Officers can also bring their preferences into the assessment as well.

This is evident in ever increasing assessment requirements and difficulties in gaining sensible and practical approvals.

Simply put if criteria are revised upwards often enough and assessment weightings revised and revised, any project can be blocked.

This behaviour/practice can in some circumstances go to cultural issues.

Escalation has been difficult in the past and in combination with broad discretion and cultural issues, the project environment has become extremely difficult.

From some reports from other LWU's it is understood the IWCM (Strategic Planning) environment has also been significantly difficult.

Council seeks resolution of this failing environment with a cultural change and an appropriate mix of management, policy and control and if needed greater regulation or ministerial policy to give guidance to agency staff rather than broad discretion.

The dispute resolution process as discussed above inclusive of LEC determination is essential. It has not worked with wide discretion and no dispute resolution mechanism to this point. It is also suggested that a more structured scope for applications/assessments be established to end the practice of numerous rescoping/scope creep. It is also suggested that disputes regarding scope creep and excessive study requirements for applications be included in the dispute resolution process should disagreements arise.

## **Section 60 and Other Relevant Approvals**

In addition to supporting the abovementioned submissions, Council wishes to reinforce the following:

- Funding must be decoupled from regulation and approvals. It is not appropriate to indirectly exert control over a LWU/Council project through control of funding or approvals.
- Refer to above comments with regard to Broad discretion of agency staff and Disputes and resolution.
- Section 60 also in its wording seeks to encourage innovation. Experience and industry feedback would show that some innovation is very difficult to progress. This can be expanded upon if requested however acceptance of greater innovation is absolutely needed to meet future challenges. An ongoing Business as Usual approach is unlikely to work.

## **Environmental Assessment of Projects and Many Regulators**

Larger Water and Sewer project approvals often involve multiple parts of the state agencies as well as multiple sections of DPE. The comments above in relation to broad discretion apply across these multiple agencies and sections of DPE. This can result in multiple and conflicting issues to resolve.

For example, the relevant part of some water legislation provides that:

*"In considering whether or not to grant an approval, the Minister must take into account:*

- (a) Such matters as are prescribed by the regulations, and*
- (b) Such other matters as the Minister considers to be relevant."*

In some areas of the assessment framework there are no regulations or guidance by the Minister in which case agencies and staff have an unbridled power to operate as referred to in the section regarding broad discretion.

DPE Water should expand its review or take on a supplementary review to properly fulfil its role in supporting regional water and sewer infrastructure as it is missing from that part of the framework where in an unfettered environment, criteria are being set around the priority or not of Town Water Supplies, critical human need, river flows and other essential factors for Town Water Supplies.

It is also evident from Council's experience that when such multi section/ multi agency applications are dealt with that each section strictly looks at its own bounded remit with little consideration of overall merit or co-ordination to facilitate compromise between parties to refine progress of strong public interest projects, nor an overall assessor to weigh up all the pros and cons of a project for determination. Councils are left to seek support from each agency in isolation.

An oversight role is needed and in circumstances where the project requires overall approval of the State Government such a role is needed in combination with the role of an

assessor to weigh up the pros and cons rather than be strictly limited to each discrete agency position.

### **General**

As articulated above Council endorses both the Central JO submission and the Water Directorate submissions into which it has participated. Council has also provided clarity where there are differences or expanded suggestion differences between the submissions.

To this Council has added its specific comments borne from recent difficult experiences during the drought in particularly progressing key projects and ensuring the secure yield of the Bathurst supply. As with all LWUs, Council faces climate change impacts and ensuring secure supply for its growing community. In such circumstances an improved regulatory, operating and infrastructure delivery environment is key.

In this regard and picking up on the remaining points which Council has earlier identified it wishes to emphasize Council seeks an environment of support and guidance with a minimum of regulation allowing increased self-sufficiency and autonomy.

Further, given the lite detail of some elements of the proposed framework and if key suggestions made by Council in this submission are not supported/able to be supported or are to be deferred it is suggested that a further round of consultation be held as Council would wish to see particularly and expanded dispute mechanism.

Council looks forward to improvements in the regulatory framework that town water utilities operate under and again, Council wishes to thank you for the opportunity to provide a submission.

Should further information be required or clarification of the items, raise, please contact the undersigned.

Yours faithfully,



Darren Sturgiss  
**DIRECTOR**  
**ENGINEERING SERVICES**