

Draft Regulatory Framework for Local Water Utilities

April 2022



**CENTRAL NSW
JOINT ORGANISATION**

- Bathurst
- Blayney
- Cabonne
- Cowra
- Forbes
- Lachlan
- Oberon
- Orange
- Parkes
- Weddin



Central NSW
Joint Organisation
PO Box 333
Forbes NSW 2871
Phone: 0428 690 935

Chair Cr Kevin Beatty, Mayor, Cabonne Council

Email: jenny.bennett@centraljo.nsw.gov.au

29 April 2022

Reference: mm:kb 220429
Enquiries: Ms J Bennett: 0428 690 935

Department of Planning and Environment
Locked Bag 5022
Parramatta NSW 2124

regional.town.water@dpie.nsw.gov.au

To whom it may concern,

Re: Consultation draft: Regulatory framework for local water utilities Replacing the Best-Practice Management for Water Supply and Sewerage Guidelines March 2022

Local Government Regional Joint Organisations (JOs) were proclaimed in May 2018 under the NSW Local Government Act 1993. The Central NSW Joint Organisation (CNSWJO) represents over 200,000 people covering an area of more than 50,000sq kms comprising the Local Government Areas of Bathurst, Blayney, Cabonne, Cowra, Forbes, Lachlan, Oberon, Orange, Parkes, Weddin, and Central Tablelands Water.

Tasked with intergovernmental cooperation, leadership and prioritisation, JOs have consulted with their stakeholders to identify key strategic regional priorities. The CNSWJO Strategic Plan can be found here: https://docs.wixstatic.com/ugd/51b46b_31886650ecf546bc916f15e99a733b3e.pdf

We welcome the opportunity to continue the conversation about the regulatory framework for local water utilities.

Councils in the region will provide their individual advice however the feedback from discussion in region is summarised as follows. For further advice or to discuss any matters raised in this response please do not hesitate to contact me on 0428 690 935 or email me on jenny.bennett@centraljo.nsw.gov.au

Yours sincerely,

A handwritten signature in black ink that reads "Jennifer Bennett".

Jennifer Bennett
Executive Officer
Central NSW Joint Organisation (CNSWJO)

The Central NSW JO speaks for over 157,000 people covering an area of more than 47,000sq kms comprising of Bathurst, Blayney, Cabonne, Cowra, Forbes, Lachlan, Oberon, Orange, Parkes, and Weddin.

CENTRAL NSW JO RESPONSE

Introduction

This region would firstly like to acknowledge the DPE in creating the Town Water Risk Reduction Program (TWRRP) in response to the Auditor General's Report on *Support for Regional Town Water Infrastructure* released in September 2020.

The report assessed how effectively the Department of Planning, Industry and Environment (now DPE) has supported the planning and funding of town water infrastructure in regional NSW towns and cities. The audit focused on the department's activities since 2014, in particular, examining the administration of the Integrated Water Cycle Management (IWCM) planning guidance; the design and implementation of the Safe and Secure Water Program; and the progress of state-wide, strategic water planning through the Regional Water Strategies Program.

The audit found that:

- The department has not effectively supported or overseen town water infrastructure planning since at least 2014.
- It does not have a clear regulatory approach and lacks internal procedures and data to guide its support for local water utilities that service around 1.85 million people in regional NSW
- The department has not had a strategy in place to target investments in town water infrastructure to the areas of greatest priority. A state-wide plan is now in development.
- A continued focus on coordinating town water planning, investments and sector engagement is needed for the department to more effectively support, plan for and fund town water infrastructure, and to work with local water utilities to help avoid future shortages of safe water in regional towns and cities.'

While good work is being done by the TWRRP the timeframe is driving perverse outcomes of which the draft direction for the regulatory framework is one. Of particular concern is the direction of regulating Local Water Utilities strategy seeking gazettal of a regulation under Section 409 (6) of the Local Government Act.

On the one hand the 11 LWUs in the CNSWJO region welcome an outcomes' focus to strategy. This is how Local Government does its business and goes to the heart of Integrated Planning and Reporting (IP&R). Further, removing prescription, adding 'stop the clock' provisions and having an escalation process are all good.

However, we have failed to ask the fundamental questions: "do we need to regulate?" and/or "Is regulation the best approach to managing the risks for communities in an assured quality water supply and waste-water service?"

This region suggests the answer to both these questions is "no."

In every area of water and waste-water service delivery, Local Water Utilities need the appropriate level of funding, support and guidance informed by leading practice. Resourcing ought to be directed into this area instead of **years** of negotiation on Section 60 and Integrated Water Cycle Management (IWCM) planning. Years. And this is still happening, right now, in this region, in more than one member Council.

It is acknowledged that from July 1 there will be change in the DPE Water Utilities' Team and it is suggested that this structural and cultural change ought to be given the time to progress a 'support' approach before any guidance is mandated through gazettal.

This ongoing travesty has resulted from the linkage of the release of funds for water supply works being held up by DPE and now Water Infrastructure NSW practitioners leveraging an inappropriate interpretation of Section 409(6) of the Local Government Act. This has been exacerbated by the absence of one agreed source of truth for secure yield. **None of this will be corrected by gazettal under Section 409 (6) of the Local Government Act.**

Finally, Councils and Local Water Utilities are being asked to "trust" that good will come from the proposed approach where detail on implementation is scant and the same old problems are being experienced on the ground. While this region has welcomed the engagement to date and is more than impressed by the TWRRP team – there is little or no faith that any good will come from the proposed approach until the fundamental issues around State agency organisational culture are addressed.

This process is suffering poor quality as it is too rushed. In the rush the real risks to community are not being addressed and the easy wins that the TWRRP can deliver in the time frame including amending the regulatory framework **without appropriate legislative imprimatur** are being progressed.

The problems identified in the Auditor General's report will not be ameliorated by the described approach. The likelihood of a perverse and worse outcome by not addressing the real problem – the culture of the organisation enabled by a poor regulatory and legal framework - has not changed and arguably the new approach will enable further problems.

Support and guidance is what is required; with a minimum of regulation.

The funding framework and its linkages to the regulatory framework have not been addressed and this is what has enabled the problems identified in the Auditor General's Report.

Section 409 (6) of the Local Government Act

Please find following Section 409 of the Local Government Act, a section on the management of General Purpose Councils' consolidated fund, in its entirety where the relevant clauses at 5, 6, 7 and 8 for water utilities are highlighted.

LOCAL GOVERNMENT ACT 1993 - SECTION 409

The consolidated fund

409 The consolidated fund

(1) All money and property received by a council must be held in the council's consolidated fund unless it is required to be held in the council's trust fund.

(2) Money and property held in the council's consolidated fund may be applied towards any purpose allowed by this or any other Act.

(3) However--

(a) money that has been received as a result of the levying of a special rate or charge may not be used otherwise than for the purpose for which the rate or charge was levied, and

(b) money that is subject to the provisions of this or any other Act (being provisions that state that the money may be used only for a specific purpose) may be used only for that purpose, and

(c) money that has been received from the Government or from a public authority by way of a specific purpose advance or grant may not, except with the consent of the Government or public authority, be used otherwise than for that specific purpose.

(4) Pending its expenditure for the purpose for which it is held, money of the kind referred to in subsection (3)(a), (b) or (c) may not be held otherwise than in an account with a bank, building society or credit union or in an investment in which such money is, by or under this or any other Act, authorised to be invested.

(5) Despite subsections (3) and (4), a council may--

(a) deduct, from the money required by subsection (3) to be used only for the specific purpose of water supply or sewerage services, an amount in the nature of a return on capital invested payment (dividend), and

(b) apply that amount towards any purpose allowed for the expenditure of money by councils by this Act or any other Act.

(6) The Minister for Water, Property and Housing, with the concurrence of the Minister administering this Act--

(a) is to cause guidelines to be prepared and published in the Gazette relating to the management of the provision of water supply and sewerage services by councils, and

(b) may, if of the opinion that a council has not substantially complied with the guidelines, direct the council to comply with any particular aspect of the guidelines before making any further deduction under subsection (5).

(7) Before making a deduction under subsection (5), a council must--

(a) comply with the guidelines published under subsection (6) and any direction given under that subsection, and

(b) indicate in an open meeting of the council that the guidelines and any such direction have been complied with in relation to the making of the deduction.

(8) Subsections (5)-(7) extend to a council that is a water supply authority within the meaning of the [Water Management Act 2000](#) .

(9) This section does not affect the requirements of the [Fire and Emergency Services Levy Act 2017](#) with respect to the payment of collection instalments to the Treasurer.

Section 409 specifies the funds of Council within which money is to be quarantined for use. **The purpose of this Section of the Act is about financial management, not best practice in strategy.**

This Section casts an obligation on the respective Water and Local Government Ministers to publish and gazette guidelines, which if followed, **provide a financial opportunity for Councils. It does not mandate compliance for LWUs with a strategic framework for water supply and then direct that, if not followed, funding for infrastructure will not be provided as has been the practice of the DPE.**

Compliance is mandatory *if a dividend is being taken* however not mandatory per se.

Section 406 of the Act refers to the Council and LWU strategic obligations and mandated compliance with IP&R. Clear, specific and consistent statutory provision for the aspirations of the DPEs regulatory approach to strategy are already in place.

CNSWJO argues that the DPE will not fulfill its obligations to the Auditor General as it will not have a clear regulatory approach to guide its support for Local Water Utilities that service around 1.85 million people in regional NSW if it uses Section 409 (6) of the Act to gazette guidance for Local Water Utilities.

CNSWJO appreciates that effecting the right change to better strategy for secure quality water supply is long and hard work, however it must be done if we are to get better outcomes for our communities in the next drought.

The key risks to Local Water Utilities

The keys risks to water utilities to their delivery of quality secure water and waste water services are:

1. Insufficient funds for Councils and communities to resource the infrastructure required for quality secure water and sewer services;
2. Poor data on secure yield modelling that did not deliver the right advice to manage the last drought – not yet resolved;
3. Fragmented, poorly coordinated and non-strategic responses by State agencies and poor collaboration with Local Government during and between droughts;
4. Lack of registered training organisations in NSW to deliver units of competency to grow capacity of Council staff in providing quality secure water and waste-water services; and
5. Poor processes driven by DPE and now Water Infrastructure NSW leading to blown out timeframes and impacts on Council funding that can go on for years enabled by a funding framework linked to varying interpretations of various Acts, regulations and guidelines with little or no right of appeal. Ultimately, this impacts on service delivery to communities and drought response.

It is acknowledged that the new regulatory approach will go some way to being helpful in the 'stop the clock' and appeal provisions. However, the potential number of and reasons for stopping the clock leaves a high degree of uncertainty.

It is acknowledged that sound outcomes based strategic planning based on best practice principles is critically important. Indeed, this is why the IP&R framework was mandated. It is also acknowledged that not all Councils are as strong at the delivery of IP&R. This is where the support and guidance from DPE is critical.

How the State ought to provide support to Councils in managing these risks

Given the recent drought, the absolute focus should be a coordinated State agency response to supporting Councils in managing the water security risk. This coordination should be led by the DPE.

Frankly, the heavy lifting needs to be done by the State in terms of understanding the water security outcome. Examples of poor understanding of the outcome by the State are :

- the Water Sharing Plans that have the social value of water as an afterthought;
- the needs for urban water in the Regional Water Strategies were included as an afterthought;
- the need for interventions like the Water Supply (Critical Needs) Act 2019 No 16; and
- the need for the intervention of the Regional Town Water Supply Coordinator to overcome the barriers and challenges in the existing system in the recent drought.

That Councils and Local Water Utilities are being schooled in strategy while we are currently being asked by the Natural Resources Commission if a ten-year-old State-owned water sharing plan using 20-year-old data ought to be reviewed beggars belief.

Support for Local Water Utilities in managing these risks includes:

1. Sorting secure yield modelling as “one source of truth;”
2. Supporting and implementing the regional governance arrangements. This region has provided advice in this regard on a number of occasions. More detail can be provided on request where it includes a coordinated drought response and implementation of the Regional Water Strategies; and
3. Effort on integrating water supply and waste-water strategy into IP&R to replace the current system as described elsewhere in this submission.

None of this is resolved in the suggested approach to regulation leveraging Section 409 (6) of the Act.

IP and R is the regulatory answer for water strategy by Council

IP&R **IS** the regulatory framework for strategy in Local Government. What is being proposed is duplicative and confusing and based on a poor interpretation of Section 409 (6) of the Local Government Act.

It is acknowledged that time will be required to ensure that the IP&R framework is being optimally leveraged. However, this ought to be undertaken before considering any other regulatory change to be gazetted.

At no time ought Section 409 (6) be used. Quite simply it sends the wrong messages to the sector to be seeking gazettal for strategy per se from the part of the Act referring to the consolidated fund.

What ought to happen next regarding regulation

Decouple funding from regulation

In the first instance, where possible under legislation, funding ought to be decoupled from regulation. This is particularly critical for water supply where the time lost as Councils wend their way through regulation in an attempt to secure funding is substantial. The best way to manage this risk leading into the next drought is to extinguish it where possible. This seems to have “dropped off the agenda” for the TWRRP where it was well supported in early days.

Funding for water and waste-water projects ought to be subject to business case analyses of some type as per any other State funding round. DPE ought to be supporting Councils in developing these business cases based on data from one source of truth.

LWU Strategy

In the context of “Principle 6: The simplification, repeal, reform, modernisation or consolidation of existing regulation should be considered” of the NSW Better Regulation Requirements of Treasury – water strategy ought to fall under IP&R.

Gazettal of guidance for water strategy per se under Section 409 (6) ought not happen as it is an inappropriate interpretation of the Act.

It is recommended that advice to the Minister for Water and the Minister for Local Government be that the most appropriate approach would be for the TWRRP to continue its good work in having leading practice in water strategy subsumed into Integrated Planning and Reporting.

The need for cultural change within the DPE Water Utilities section has been identified and a commitment has been made effecting this change. Time should be allowed to deliver the anticipated results before any regulation and guidance is considered.

Regarding paying a dividend under Section 409 (6) of the Local Government Act

It is good to see the recognition of the purpose of Section 409 (6) of the Local Government Act is to provide guidance on the determination of a dividend. General Purpose Councils not seeking to realise a dividend from the LWUs have no compunction under the Act to undertake strategy. However, they are obligated to undertake strategy through IPandR. CNSWJO makes no commentary about how this impacts County Councils.

Guidance on paying a dividend has not been reviewed since the issue of the Best Practice Management of Water Supply and Sewerage Guidelines in August 2007 - 15 years ago. Only 9 out of 92, or about 10% of Local Water Utilities have paid a dividend in the last 6 years reporting years.¹ The amount of the dividend available has been capped at \$30/property assessment for each of the water and sewer funds respectively since the Best Practice guidelines were introduced. This represents about 4% of the weighted median Typical Residential Bill in 2021/22 (water and sewerage combined). An additional cap is placed with a maximum 50% of a surplus is available to be paid as a dividend.²

¹ Source: DPE Water LWU performance monitoring data

² NSW Water Directorate Submission to Draft Regulatory Framework

The Guidelines require an independent compliance audit report against the Best Practice elements, plus an independent financial audit report to ensure that internal overhead allocation is charged at a fair and reasonable cost

It appears that the cap on the dividend, and the compliance costs to obtain a dividend is a disincentive to councils paying a dividend from its water and sewerage funds.

Arguably, this approach needs a complete rethink. However, overhauling this element of the regulation will not substantially help the less well-resourced Councils and communities who struggle to fund the requisite infrastructure with existing water rates. Modelling done in region shows that even with the highest water rates in NSW, it is very difficult or impossible for smaller utilities to deliver on their community service obligations of safe and secure potable water.

CNSWJO has not had sufficient time to take a deeper dive into this issue and would welcome the opportunity to review any suggested gazettal before proceeding any further. Given it's not overly material to the risks to community, this region recommends more time be given to codesign guidance on paying a dividend under Section 409 (6) of the Local Government Act.

Section 60 of the Local Government Act

It is acknowledged that legislative reform is not contemplated at this time. It is to be noted, however, that despite recognition of a level of maturity and skill by LWUs in providing safe, secure and cost-effective water supply and sewerage services, NSW is the only state in Australia with a Section 60 type regulatory approach. In all other states the liability and control rests between the water utility, the designer and the construction contractor.

This region would like to state loudly and clearly that our lived experience through the drought was that Councils were delivering remarkable outcomes in the face of day zero scenarios. Councils continue to deliver exemplary service despite our considerable constraints. While we acknowledge there is always room for improvement – the change required needs to start at the State level.

This is reflected in the Government's 2015-16 NSW Water Supply and Sewerage Performance Monitoring Report, the most recently published edition, the then Minister made the following comments:

"I am pleased to note that the evidence shows the regional NSW local water utilities are continuing to perform well"; and

"DPI Water [now DPE] in consultation with stakeholders is undertaking a major review of regulation of the regional NSW local water utilities to ensure regulatory arrangements for this important sector are suitable for the challenges of the 21st century. The review will build on the success of the present arrangements, reflect the now mature regional NSW water utility environment, and work to further streamline regulation and reduce financial and regulatory burdens on the utilities."

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.

Again, what Councils really need is an appropriate level of funding, support and guidance informed by leading practice. Resourcing ought to be directed into this area instead of long-running negotiations on Section 60 approvals. This includes implementation of place-based regional governance arrangements that provide support to LWUs where it is most needed and understood.

There are numerous examples in our region where Councils have been in extended and costly disputes over section 60 approvals, exacerbated by the existing DPE regulatory culture. This includes constraining innovation in effective and efficient solutions to deliver safe and secure water. Further, Section 60 disproportionately affects less resourced Councils – arguably in the most need.

The DPE needs to take a ‘hands off’ approach to LWU procurement of consultants and contractors. This is particularly necessary for design and construction contracts involving innovation clauses which gives incentive for newer more efficient and effective technology and designs to be pursued during the design and construction process.

The administration of Section 60 has been particularly poor and the changes suggested do not instil a great deal of confidence. However, any improvement is welcomed.

There have been long held concerns that the Department requests extensive design and tendering information which it is not resourced to review. Therefore, the suggestion of assessment of proposed work as at early design phase is welcomed.

Where the addition of ‘stop the clock’ provisions and an escalation process in the new regulatory approach are all good there continues to be no statutory right of appeal regarding decisions made by the Department under Section 60 of the Local Government Act.

The only process available is one of judicial review of an administrative decision. Such a challenge is not a merit appeal but a consideration of the application of due process. The right of appeal on the merits would allow adjudication of the real technical issues in dispute.

In this regard the Land and Environment Court has jurisdiction in merit review where it is available under the LGA and the Water Management Act. The Land and Environment Court would be well placed and well skilled to be empowered as the review body. This is recommended.

Our inspectors in the region- action in place is what we value

The role of DPE inspectors working in Council LWUs in the region is highly valued. Accessibility in regional areas to the inspectors with an understanding of the context that the site operates in and a trust relationship to work collaboratively to understand the risks and address them before they happen will be critical. It is important that these inspectors are adequately resourced, enabled and trained to support LWUs on-the-ground in the regions.

Proof in effectiveness of LWUs in managing risks will be in the capacity and capability of council staff to act on recommendations from inspections. It is therefore critical that the results of inspections are communicated electronically in a timely and clear and concise manner. Inspections results should be evidence based and draw on data trends to enable tracking of improvements.

The Department should not publish information about the results of inspections unless agreed by the LWU. An effective trust relationship between regulator and regulated that enables proactive resolution of risk and issues will not be built by naming and shaming but rather by working together to resolve issues collectively. Operators should feel supported in addressing risks not fearful of raising issues.

Councils already have obligations on reporting and these ought be sufficient.

Performance monitoring and reporting

In the first instance effort needs to be undertaken in aligning performance monitoring and reporting to the accountability and reporting framework in IP&R.

In its current state, the level of data required – approximately 600 fields of data, with 1200 indicators after calculation and aggregation – is excessive and needs to be reduced. Where it is understood that work is underway by the TWRRP team to review data requirements, the level of duplication of data provided to various state agencies must be addressed.

Review of decisions

Firstly, the proposed internal review approach is not appropriate. Where the addition of ‘stop the clock’ provisions and an escalation process in the new regulatory approach are all good, as detailed above, there continues to be no statutory right of appeal regarding decisions made by the Department under Section 60 of the Local Government Act.

The only process available is one of judicial review of an administrative decision. Such a challenge is not a merit appeal but a consideration of the application of due process. The right of appeal on the merits would allow adjudication of the real technical issues in dispute.

If the challenge is reliant only upon the review of process it will often not achieve the best community outcome as the administrative process is reviewed, not whether a better decision could be achieved.

In this regard the Land and Environment Court has jurisdiction in merit review where it is available under the LGA and the Water Management Act. The Land and Environment Court would be well placed and well skilled to be empowered as the review body.

Coordination between regulators

The barrier to managing potential risks to town water supplies includes negotiating a solution between regulators but also between different sections within the DPE itself and other State agencies. The extent to which DPE Water frustrates progress for Councils due to its broad discretion engaging with other regulators is profound.

The need for a whole-of-government approach and better collaboration for water planning and management beyond just the regulators is a common theme through all strategic reviews of water management at the State and Federal level including by the Productivity Commission, the State Government in its NSW and Regional Water Strategies, in reports by the NSW Auditor-General and inquiries by various State Standing Committees into the drought response and water security.

The CNSWJO has long advocated that the missing piece in regional water planning and management is effective inter-governmental collaboration and co-ordination between regulators and key State agencies at the regional level in strategic water management.

Through the drought, development of the Regional Water Strategies and work by the TWRRP, this region has identified the need for a strategic committee to enable better coordination and decision making with delegation at the regional level with local government at the table.

This was supported by the Town Water Security Co-ordinator who recognised through the drought that issues associated with town water security are not the remit of any one level of government but require collaboration between multiple government agencies, Councils, Joint Organisations as well as local and regional stakeholders including water reliant industries. He recommended that the most expedient method to facilitate this collaboration is the formation of a Regional Town Water Drought Response Steering Committee.

The vision was that this committee would facilitate and guide collaboration to develop and execute plans to most effectively utilise available water to support social, economic, cultural and environmental outcomes for communities in drought conditions. It would also support the longer-term development of town water security and quality solutions across the region through the Regional Water Strategies under development by the State Government.

The CNSWJO Board continue to advocate to the State Government for the formation of this type of Steering Committee as part of the Governance and Implementation Plans for the Regional Water Strategies for the Lachlan and Unregulated Macquarie catchments.

While emergency action including inter-agency coordination was undertaken at the local and regional level through the Town Water Drought Coordinator during the peak of the drought, this role has now been dissolved. At its meeting in November 2021, the CNSWJO Board resolved to advocate for the role of Town Water Security Co-ordinator to be made permanent with a structure that enables authentic engagement with communities, particularly elected representatives.

The proposed regulatory framework presents the opportunity to improve communication, inform strategic work and support a more coordinated regional approach to a multi sourced strategy for longer term water security through a more collaborative whole-of-government approach by regulators and other state agencies that sees Local Government more actively engaged.

As the purpose of JOs under the Local Government Act is to provide strong cohesive leadership that aligns all tiers of government to deliver region's community derived strategic priorities, the ideal is for long-term regional water security and management solutions to be developed and implemented in cooperation with the State Government.

The CNSWJO region is interested in testing this as a potential mechanism for the delivery of options under the Regional and State Water Strategies for its region. It is suggested that this committee and working parties comprising identified stakeholders could also be used to inform and ground truth priorities in the State Water Strategy including:

(Priority 1.3) Enhance modelling and capabilities and make more data and models openly available

(Priority 4.1) New actions to improve and apply our understanding of climate variability and change.

(Priority 3.7) Work with communities to better understand and improve system connectivity

(Priority 4.2) Review water allocation and water sharing in response to new climate information

(Priority 5.4) identify infrastructure and operational plans for each region.

(Priority 6.2) Work collaboratively with local water utilities to reduce risks to town water supplies

(Priority 6.5) A new state-wide Water efficiency framework and program

The challenge, risk and opportunity continue to be that the knowledge and expertise of Local Government in planning and managing water for their communities in regional NSW is recognised

with Local Government included as active partners at the decision-making table. What is needed is true partnership and collaboration in the development and implementation of plans, policies and optimisation of options that will influence infrastructure (and non-infrastructure) solutions and funding for communities into the future. This expertise must be recognised in a less prescriptive and paternalistic way- which we would argue will not be delivered through the regulatory framework as described.