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## **Re: Draft Regulatory framework for local water utilities (March 2022)**

On behalf of the Orana Water Utilities Alliance (OWUA) I write in response to the call for submissions on the draft regulatory framework for local water utilities.

The OWUA represents 12 Local Government Water Utilities in the Orana and Western Division of NSW. Amongst these LWU's are some of the most drought vulnerable and socially disadvantaged communities in NSW.

The OWUA member Councils welcome the release of the draft framework. Our member Councils in regional NSW operate in a complex strategic and regulatory environment with numerous regulating agencies. Ideally, the revised regulatory framework will need to overcome a number of barriers, especially prescriptive and conflicting regulatory requirements and unclear roles for urban water management in the regional setting.

Our members have long held the view that water management in NSW is fragmented and confusing with many opportunities for improvement, by:

1. Clarifying roles and responsibilities for regulating agencies and operators;
2. Setting a clear pathway for the future with strategic directions and goals;
3. Establishing accountability for a result's driven process;
4. More effective engagement with stakeholders; and
5. Provision of sustainable, affordable and resilient water services for the people of regional NSW.

Although there is still some concern among our member Councils that there is still a lot of detail yet to be seen, we believe it is imperative to work with the Department to maintain momentum built by the Town Water Risk Reduction Group during the last two years. To that end we have prepared the following comments with the intent of contributing in a positive manner to the process. During the most recent Drought it became apparent that regulatory change was absolutely essential if we were to avoid the mistakes that left numerous communities in the west contemplating a day zero scenario occurring.

The need to set aside much of the current framework just to cope with the drought and the other recent challenges such as bushfires, floods and the pandemic, support the regulatory framework moving away from its current prescriptive approach to an outcomes focussed approach, fit for the circumstances of any local water utility. We ask that the Department consider the benefits of increased self-sufficiency and autonomy over the longer-term through a structured capacity building partnership and by acknowledging that risk is best managed locally wherever possible. Our Submission is structured to address each of the sections in the draft.

## Section 1: Vision and objectives

*Does the approach outlined in Section 1 represent an appropriate approach for government to take to the regulation of the work of local water utilities?*

This section does seem to represent an appropriate approach for government to take to the regulation of the work of local water utilities and reflects a triple bottom line approach with customer needs and expectations in mind.

## Section 2: The department's regulatory role

*Does the approach outlined in Section 2 represent an appropriate approach for government to take to the regulation of the work of local water utilities?*

This section seems to only partially represent an appropriate approach for government to take to the regulation of the work of local water utilities and much further clarity is needed in the areas below:

1. There is insufficient role clarity between DPE Water Utilities Branch's regulatory function, support/advisory function and technical review for funding approvals. These functions are managed with the input of one group of subject matter experts with no clear separation of functions.
2. The lack of clarity in relation to roles is a form of proxy or quasi regulation of strategic planning which leads to a withholding of funding under the Safe and Secure Water Program or works approval under section 60. This means that unless a non-mandatory current IWCM Strategy is supplied funding can be withheld. The requirement of a utility to provide a current IWCM strategy to be eligible for funding support is not cited anywhere within the Local Government Act or as a requirement to comply with Best Practice Management Guidelines.
3. There appears that there is a lack of role clarity between technical advisory on capital funding and selection/procurement of consultants (for IWCM) and engagement of designers and contractors for capital works.
4. There remains a lack of clarity in relation to the regulatory functions of other NSW agencies such as NSW Health and NSW EPA, where the technical support function of DPE Water is implied as a regulatory function. We feel it is vital that the water management and service delivery framework for local water utilities be clearly articulated, and explicitly mention the numerous pieces of legislation governing local water utilities.
5. The involvement of Water Infrastructure NSW in project management as well as funding approvals appears at odds with probity around funding approvals and is confusing.
6. There are still deficiencies in establishing the minimum levels of service to underpin the regulation of local water utility performance.
7. A gap still exists in addressing the powers and duties of local water utilities and regulators due to shortcomings in the NSW Local Government Act.

### Section 3: Strategic planning oversight

*Does the approach outlined in Section 3 represent an appropriate approach for the department to take regarding the regulation of strategic planning conducted by local water utilities?*

The approach outlined in this section is only partially what is required however there are some shortcomings. It is our belief that strategic planning is only regulated by indirect regulatory powers not a direct power. DPE Water are currently using financial and works approvals to indirectly regulate strategic planning. In saying this we strongly support a continuing role in an advisory and technical support capacity, particularly where community and regulatory feedback from all regulators is transparent and publicly available.

#### *1. Do the identified strategic planning outcomes address the key risks?*

From the perspective of the Far West of NSW:

The connection between LWU strategic planning, the NSW Water Strategy and the Regional Water Strategies both Surface and Groundwater based needs to be explicitly recognised to identify the NSW government's role for strategic planning in water. We would also make the following observations:

1. Existing secure yield guidance for local water utilities are out of date and inconsistent with water security modelling undertaken in the Regional Water Strategies. This guidance needs to be updated and consistent with what is being presented to the MDBA.
2. The Department's Eligible Risks and Issues List (ERIL) needs to be managed on an iterative and collaborative basis with Local Water Utilities as the environmental scan for strategic planning. The risk assessment methodology used in ERIL needs to be revised to reflect a contemporary risk management approach.
3. The handover of the Safe and Secure Water Program to Water Infrastructure NSW has not had the intended outcome of streamlining the project pipeline for local water utilities. This move maybe fine for some very large projects but the costs and resources available are not appropriate for small Utilities whose projects would be better served by expansion of the Regional Departmental Teams.
4. We would hope that the Department will look to address many of these challenges through the NSW Water Strategy and Regional Water Strategies, however other challenges such as the training market are specific to the local water utility sector. It is also our firm belief that the Department should write, implement and continually review specific strategic action plans to address these sector challenges.

#### *2. Is the reasonable standard test applied to strategic planning outcomes appropriate?*

It is vital to apply reasonable standards to strategic planning outcomes and reference to contemporary national and international standards, otherwise terms such as 'sufficient, appropriate and robust' will likely to be interpreted under the old Best Practice Guidance. In saying this, reviewing the regulatory framework will not address the internal culture of the subject matter experts in the Department. Addressing culture is a key risk to efficient delivery of this regulatory framework, along with the structure (particularly role definition), staff skills/capability. Obviously, the imposition of certain standards and audit procedures can be costly to small utilities and it must be remembered that DPE are not solely responsible for strategic planning as the above functions are largely regulated by other regulators, such as NSW Health, Office of Local Government and NSW EPA.

Many of the standards that the current IWCM Check List attempts to impose are well covered by the Local Government IP&R Framework and are nothing but an extremely expensive duplication. This duplication must be kept in mind when deciding on standards to be applied within the framework.

*3. What factors may indicate that a local water utility is no longer achieving strategic planning outcomes to a reasonable standard?*

These issues should be identified via benchmarking within the performance monitoring framework otherwise what is the point in having it. This question overlooks the fact that the majority of strategic challenges are outside of the control of an LWU solely to resolve. These factors include but are not limited to:

- Regulated rivers and dams that are operated by Water NSW;
- Catchment and water quality challenges that tend to be as a result of a tragedy of nature well beyond the control of the LWU;
- Environmental planning approvals for major projects are regulated by Planning NSW;
- Timely capital project funding approvals from Water Infrastructure NSW and the Commonwealth i.e. only ever in response to a crisis; and
- The failing market for water operator training and poor wages structure within state and local government that makes the retention of operators, engineer's and other industry professional nigh on impossible.

The biggest factor impacting severely on our most disadvantaged and remote communities though is the total absence of an explicit Community Service Obligation that would assist our smallest communities to achieve strategic outcomes. These issues are only ever addressed as a result of major issues such as drought, fires and floods and tend always to be branded by some within government as a local failure.

We have heard during this consultative process that there maybe plans to address these matters. It is a fact that, unless this is addressed by the Department in an ongoing manner the problems within the far west will never be resolved.

*4. How should the department arrive at an overall assessment result based on the assessments of the individual strategic planning outcomes?*

Any assessment must recognise that LWU's operate in distinctly different operating environments across NSW with different climatic, hydrological and demographic conditions. Modern risk management principles are seen as a spectrum and should not produce a pass fail or punitive result but instead identify where the risks are highest and seek out ways to assist LWU's to overcome these through supporting mechanisms and expert guidance at a regional level. This Regional level approach is critical in saving time and money to more rapidly and efficiently identify and overcome the risks. From this perspective we applaud DPE for its expansion of Regional Teams but remain very concerned about the recent centralisation of some of the partner agencies.

*5. What tools should the department use for compliance?*

The Alliance member Councils suggest an annual 'check-in' process as a means of ensuring compliance in relation to strategic planning and the implementation of appropriate strategic actions, provided that it is driven by the Department's regional managers and inspectors. Ideally this should be conducted on a 'roundtable' basis with regional staff from NSW Health

and EPA to maintain familiarity and a consistent approach to strategic regulatory risks and issues.

Any assessment must recognise that LWU's operate in distinctly different operating environments across NSW with different climatic, hydrological and demographic condition even within an area such as the OWUA. There seems to be within the draft a lack of any discussion around engagement on these topics with the various water utility alliances across the state. These groups can and should be involved by the Department to assist assessing and driving compliance through their ability to support and assist weaker member utilities.

*6. What are the priority areas for additional guidance for strategic planning, that should be delivered by the department as early as possible?*

The ability and power of regional alliances of councils such as OQUA and CENTROC to truly 'integrate' water cycle management at the catchment, town scale, as a support body to the service provider for water, sewerage, stormwater, rainwater, recycled water, land use planning, community education and engagement needs a greater level of support engagement and guidance from the Department at Strategic level. This combined with the implementation of Water Sensitive Urban Design principles, the ability to utilise stormwater harvesting to offset the use of drinking water for green liveable spaces is critical for the health of all western communities. This is a strategic advantage local councils have that metropolitan water utilities do not have.

*7. What requirements or guidance do local water utilities need for the 'understanding water security outcome'?*

This is a major issue that needs to be addressed for this region in that a significant proportion of our utilities operate on regulated rivers and groundwater systems operated or administered by Water NSW. Water security in this context is not solely the responsibility of the Local Councils. Regional water strategies and Water Sharing Plans operating rules need explicit recognition of town water supplies, most importantly an understanding of contingencies when the primary source is at risk of failing.

In this region's case, every utility needs a 'Plan B' or 'C', diversifying from one source of water. The Department's subject matter experts should not be requesting secure yield modelling from our local water utilities, this work is duplicating regional water strategy modelling in both Surface and Groundwater at a considerable cost to the State and Local utilities.

*8. How should the regulatory framework integrate with the Integrated Planning and Reporting framework?*

It is the firm belief of the OWUA that there should be one point of truth for water related risks and strategic actions, embedded in the IP&R Framework. Key features are that the Community Strategic Plan for a council is 'owned' by the community, meaning improved connection and consistency with customers and community for the strategic planning of their water and sewerage services. LWU's will have all of their strategic planning documents publicly available on their website, along with the recurrent progress reporting that is present in the IP&R Framework.

9. *How should the department transition utilities that have or are preparing an 'IWCM strategy' under the existing regulatory framework?*

Many of our member Councils have current contractual commitments to consultants as well as commitments through community and regulator engagement plans that should be respected and completed. Some of our Councils that are earlier in their IWCM process – particularly the 'issues paper' development phase might be able to comfortably pause at the completion of the issues paper and progress towards integrating IWCM components into the IP&R process as water related strategic actions and outcomes. There are 4 of our member Councils of the OWUA that have been stalled at the Issues paper concurrence stage of trying to complete an IWCM for over 3 years this is in no way acceptable and seems to come down to a dispute between the Consultancy involved and the Departments subject matter expert. This example highlights possible concerns being felt about being trapped during a regulatory activity.

#### **Section 4: Assessment and approval of dividends**

*Does the approach outlined in Section 4 represent an appropriate approach for the department to take to the assessments and approvals of dividend payments by local water utilities?*

This area of regulation has very few implications in relation to our member utilities as none of us are likely to be able to declare a dividend. Even if it was possible the rules around doing so and the caps placed via the regulation and the compliance costs to obtain a dividend is a disincentive to councils paying any dividends from their water and sewerage funds.

10. *How can the department improve its methodology for dividend assessment?*

This would be best done by reviewing the caps on dividend payments regularly and by reviewing the compliance requirements for paying a dividend.

#### **Section 5: Assessment and approvals of proposed works**

*Does the approach outlined in Section 5 represent an appropriate approach for the department to take regarding the technical assessment and approval under section 60 of the Local Government Act?*

A collaborative and co-operative approach to Section 60 approvals is what is most required.

The current argumentative and highly complicated process is not only costly but delays essential projects. This adds cost through re-design and delay, and consequently delays benefits to regional communities. Funding approvals from Water Infrastructure NSW need to be wholistic as well to provide more project certainty. The current evidence is that projects are being broken into smaller phases/funding deeds, requiring up front pre-construction expenditure from LWU's without certainty over construction funding.

The Department 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 technologies and designs to be pursued during the design and construction process.

Recognition that many projects proceed on more difficult, higher risk 'brownfield' sites where existing operations need to be maintained during construction. Approvals may be required to temporarily depart from licence conditions during this period, which should be minimised.

It should also be recognised that no other state in Australia seems to have regulation similar to NSW's Section 60. In all other states the liability and control rests between the water utility, the designer and the construction contractor.

*11. Is it appropriate to assess the proposed works at an early design phase for approval?*

Yes. This is most definitely required to be able to progress design and construction activities in a timely, efficient and cost-effective manner. The approval process needs to allow for innovation to be applied during the design and construction process.

*12. What are the priority areas for additional guidance for section 60 assessment and approval that should be delivered by the department as early as possible?*

The priorities that require early delivery are as follows:

1. An early consultation process framework at Regional Level is vital for any new project and should be a priority for the Department. The early consultation process with regulators would also benefit from a Value Management/Value Engineering<sup>1</sup> approach.
2. There should be an immediate adoption by the Department of the principles of HAZOP and CHAIR reviews as part of the Section 60 process this would greatly improve risk management within projects and reduce the need for numerous hold points.
3. An escalation/appeal/decision review process should be implemented without delay. While it is acknowledged that there is a general right for administrative appeal of any government decision, we believe that an escalation process should first attempt to resolve appeals via a peer review process with a competent, experienced and independent water industry engineering expert – a 'second opinion'. An onerous administrative appeals process should be a last resort for intransigent disputes.

*13. Are the proposed standard conditions for section 60 appropriate?*

No, not entirely. Some proposed standard conditions seem redundant for example:

1. A condition directing a LWU to comply with legislation seems to suggest that LWU's would not comply with legislation unless the Department directed it? If legislation is overseen by another agency, then it is not the Department's role to regulate it.
2. For the last two decades there has been a culture within the Department of minimising advancement of new technologies by using the excuse of requiring robustness and ease of operation. In fact, automation and online technology contributes significantly to effective plant operation, risk reduction and 'due diligence' along with better optimisation. There needs to be a means by which Industry or Utilities can put forward advanced technologies for fair and unbiased assessment for use in Infrastructure construction.
3. The Department needs to be cognisant that liability for the design of a treatment plant remains with the designer and construction contractor with any residual risk managed by the LWU as the owner and operator of the asset. If the Department was to provide a direction on a design, the Department must accept liability for that direction which it currently never does.
4. There has been a long history in this region that the Department requests enormous volumes of design and tendering information which it is not resourced to look at. It

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<sup>1</sup> Source, NSW Government at: [https://www.infrastructure.nsw.gov.au/media/1974/26\\_value-management-and-value-engineering.pdf](https://www.infrastructure.nsw.gov.au/media/1974/26_value-management-and-value-engineering.pdf)

follows that the need to direct any changes in the later part of the design process should be questioned where early design involvement has been achieved.

5. There has also been a long history in this region of inappropriate interference in the procurement process. The provision of the intended approach to procurement as a requirement in section 5.4 while understood should not imply any right for subject matter experts to interfere in the Council Procurement process.
6. The requirement in section 5.4 for a Preliminary Water Safety Design assessment in Conjunction with NSW Health while a great idea needs further expansion especially from NSW Health with there currently being no formal documentation surrounding this requirement available on their website.
7. There has been long held concerns that the Department requests enormous volumes of design and tendering information which it is not resourced to look at. It follows that the need to direct any changes in the later part of the design process should be questioned where early design involvement has been achieved.
8. There has been a culture in the Department of attempting to direct the removal of technology to make treatment plants 'robust, and easy to operate' when in fact automation and online technology contributes significantly to effective plant operation, risk reduction and 'due diligence'. In addition, directing LWU's to retain existing aging or out-of-date treatment technology which is no longer performing satisfactorily or fit-for-purpose is not appropriate risk management, noting that the risk remains with the LWU, not the Department.

## **Section 6: Inspection of water and sewage treatment works**

*Does the approach outlined in Section 6 represent an appropriate approach for the department to take regarding the inspection of water and sewage treatment works of local water utilities?*

This approach will work if the Departments inspectors undertake training on the use of emerging data management technology such as Power Apps, Teams Meetings, Teams Audits and Use of Virtual and Remote Technology systems.

*14. How should the department communicate the result of inspections including any improvement actions with individual local water utilities?*

The use of soft copy inspection reports including sample results, meeting notes data, trending and use of visual recordings to identify long term opportunities for improvement. These activities will complement visual inspections and onsite inspections.

*15. How should the department integrate the result of inspections with other performance monitoring including sharing with other regulators.*

The Department should identify as many opportunities as possible to act in a collaborative manner with other regulators especially in situations where problems are identified so that LWU's can confidently seek help from the inspectors without fearing sanctions or reputational risk. Other opportunities should include the participating in Drinking Water Quality Incident and Emergency Exercises and Pollution Incident Response Exercises to help facilitate relationships with other agencies.

*16. Should the department publish information about the results of inspections.*

Inspection results shouldn't be distributed without the approval of the LWU to avoid eroding the trust between the Department and the Council (LWU), who carry the reputational risk and to whom being able to bring problems to the inspectors without recriminations especially to their operational staff is critical.

**Section 7: Trade waste concurrence**

*Do you have any comments on section 7?*

In the case of the OWUA there are regular comments from our members about the complexity of the regulation. The fee calculations are considered onerous and expensive to calculate and apply for small LWU's with low population growth rates. A brief review of simplified methods would be merited for these LWU's. The other problem for small and remote communities is access to qualified inspectors and the costs involved in employing and training them.

**Section 8: Performance monitoring and reporting**

*Does the approach outlined in Section 8 represent an appropriate approach for the department to take to the performance monitoring and reporting of local water utilities?*

OWUA Members Councils find the annual performance monitoring exercise largely time consuming and would support a tiered approach, whereby the National indicators are the 'key' performance indicators, with additional NSW-specific indicators only collected where justified. There is some merit in conducting benchmarking exercises on a broader range of indicators on a lesser frequency – two-yearly to five-yearly.

*17. Are the criteria identified for considering whether to collect information for performance monitoring appropriate?*

Yes, we would suggest the use and support of automated data collection to reduce the burden on the small LWU's. Much of the data requested is already held by the state in numerous data bases i.e. NSW Drinking Water Data Base, LG financial reports, EPA Annual returns etc

*18. Is the proposed information required to be reported appropriate?*

No, 600 plus data fields is excessive when compared to the 160 National indicators. This reporting process has grown to the point where it has become extreme, especially for small utilities with limited resources. We understand that the new regulatory framework will reduce this level of data and agree with this direction, acknowledging that the revision process is yet to be completed.

*19. Is the streamlined approach to performance indicators and benchmark data appropriate?*

Yes

*20. What performance outputs would be most useful for local water utilities and other stakeholders?*

The most useful outputs are those that assist utilities to justify decisions and actions that are required to effect improvement to the utility such as the former Action Plans which are no longer supplied.

### Section 9: Review of decisions

*Does the approach outlined in Section 9 represent an appropriate approach for the department to take to the review of decisions requested by local water utilities?*

The OWUA would support a structured escalation process that allows escalation to the DPE Water Executive, on the basis that the review is not simply referred back to the same subject matter experts that made the original decision. LWU's do not want to jeopardise funding opportunities for their future projects, nor unnecessarily delay project approvals. There is insufficient freedom for an LWU to exceed a minimum standard. It is felt by many in the sector that an imbalance exists and that in the first instance any escalation process should involve a peer review by a competent, experienced and independent water industry engineering expert – a 'second opinion'.

#### *21. Is the internal review approach appropriate?*

We see a limited benefit in a decision review being returned to the subject matter experts that made the original decision. It should be recognised that the costs of obtaining additional engineering advice and providing additional justification for an alternative approach can be significant. The Department should not be requesting this lightly. LWU's shouldn't have to provide additional justification for exceeding a standard. Any administrative appeals process should be the last resort for disputes.

### Section 10: Coordination between regulators

*22. Does the approach outlined in Section 10 represent an appropriate approach for government to take to the regulation of local water utilities?*

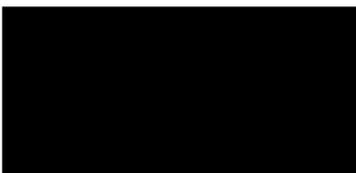
Yes. We would recommend that regular engagement occur especially at regional level preferably via the Alliance Structure and involving the DPE Regional Teams.

### Final Comments

It is well known that good regulation needs to be proportionate, flexible and outcomes focussed. Whilst we applaud this welcome review and restructure, the need to effect cultural change in the Department is vital. That said Local Government and the Department have had to face many new and different challenges in recent years such as droughts, bushfires, floods and of course the pandemic. These issues aside the challenge for the Department will be to adapt to this less prescriptive, outcomes focussed approach. The OWUA strongly supports this initiative and the principles of collaboration and co-design and a whole-of-government approach to regulation of local water utilities

Please do not hesitate to contact me at [REDACTED] if any further information is required on this submission.

Yours sincerely,



Doug Moorby  
Chairperson