Submission

How are NSW Local Councils expected to maintain competitive neutrality ?

The contention.

NSW Local Councils must comply with the Competition Principles Agreement and underlying National Competition Principles even though they are not signatories of that Agreement, in order to achieve pricing neutrality which by its very nature includes compliance with relevant law, regulations, guidelines and standards.

While a Council's compliance with relevant law may seem an obvious thing, Councils may, like any person or entity, be wont to interpret legislation, regulations or guidelines for financial gain, for which purpose a Council can have undue acquiescence of Government Departments far beyond complaint resolution sought by an ordinary ratepayer, which is anything but competitive as far as a ratepayer may be concerned.

A specific example of competitive advantage taken by a Council, including complete disregard for neutrality.

A specific example of disregard for competitive neutrality is Bathurst Regional Councils inclusion of fire service supply capacity where such supply is made under the BCA in compliance with AS2441 in making S501 Annual Charges to both Sewer and Water Charges to non-residential properties.
Note - Fire services are not services at S501 of the Local Government Act in the first instance and though proper interpretation of S501 is at b) Sewer Pricing, page 9 of the Best-Practice Management of Water Supply and Sewerage Guidelines August 2007 (as well as in the 2004 version of these Guidelines issued to Councils)

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Council ignores this proper interpretation at ***b) Sewerage Pricing*** in the Guidelines evidenced and in practice never having acknowledged this proper interpretation , choosing rather to claim other parts of the Guidelines are relevant, which is patently not the case despite having / claiming acquiescence / approval from NSW Government Offices / officers, none of whom to date have gone as far as mentioning **b) Sewer Pricing** from the Guidelines, which gives no leeway to Council to interpret S501 of the LGA any different from how it is written, ie. exclusive of fire services, (hydraulic or otherwise). It is unfortunate that this matter has been ongoing since 2004, however it is well documented in Submissions I have made to Bathurst Council, available at Councils Business papers at website pre and post 2009, the Council meetings dealing with Councils Management Plans generally held on the third or fourth Wednesday of June annually wherein the tacit approval if not directly approving Bathurst Regional Council's use of the full size of water meters when making Annual / Availability / Access charges to fire services in the one of three fire service types, hose reel fire service supply capacity among hydrant and sprinkler fire service water supplies is given by NSW Government Offices and officers, when the LG Act allows nil charge applicable to all three fire service types.

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The following are the reasons given by Council for rejection of my submission Re Councils charges to fire services , made to the Council meeting of 29 June 2022. From Bathurst Regional Council's website – Business Papers.

Submission 12 – *Ray Carter A submission has been received from Mr Ray Carter, shown at attachment 12, regarding Council's method of calculation for non-residential water and sewer availability charges. The submission requests Council to review the method of water and sewer fund non1residential access charges.*

- *Council has reviewed these access charges and has found that they reflect a cost recovery on each of the services.**1)** Council's Water and Sewer Funds are based on Council recovering its operational costs by way of income received respectively from water and sewerage access charges together with income from usage charges. **2)***
- ***Mr Carter contends that Council is unable to make an annual charge under section 501 of the Local Government Act 1993, as amended, for a charge to a fire service through a dedicated pipe or through the same pipe and meter that supplies drinking water**.*
- *As has previously been explained to Mr Carter, Council does not levy a charge for fire fighting services under section 501; **3)** Council levies a charge for the availability of water under section 501, as it is entitled to do. **4)** Those charges are determined with regard to the best practice pricing principles issued by the NSW Government. **6)** The water may be connected to a fire service, but the charge is for the availability of that water, not for the provision of "fire services".*

Section 501 of the Act states that: 501 For what services can a council impose an annual charge?
***(1)** A council may make an annual charge for any of the following services provided, or proposed to be provided, on an annual basis by the council— • water supply services • sewerage services • drainage services • waste management services (other than domestic waste management services) • any services prescribed by the regulations.*
***(2)** A council may make a single charge for two or more such services.*
***(3)** An annual charge may be levied on each parcel of rateable land for which the service is provided or proposed to be provided.*

*- Council, in accordance with the Act, imposes an annual charge on each parcel of rateable land for which a water service is provided or proposed to be provided. Council's water supply responsibility ends at the meter servicing the property and charges the property **7)** based on the size of the meter installed as this reflects the load that can be potentially placed on Council's infrastructure.***8)** Council, in relation to that water supply, does not*

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*direct, once the water enters the property, how that water is used nor whether it is used for drinking or for fire fighting purposes required under the relevant BCA Standards.**9)** Council has previously provided the opportunity for meter downsizing where available. **10)***
*- Council uses the availability pricing method shown in NSW Government's Best Practice Management of Water Supply and Sewerage Guidelines. **11**) Council's calculation of the access charges have been reviewed by the Minister for Water and Utilities in 2004 and the Minister for Water in 2009. Both Ministers have supported Council's approach as "responsible" and "appropriate". **12)***

*- The power to impose availability (s501) and usage (s502) charges has also been contested in court and found to be legally imposed charges. Horton Rhodes Lawyers represented Prefabricated Buildings Pty Ltd, one of Mr Carter's companies, in the NSW Land and Environment Court against Council regarding this matter.**13**)*
*- Prefabricated Buildings Pty Ltd.'s application was dismissed with Robson J finding that "it appears clear that Council is entitled to charge for services based on both actual use and availability of those services" and that the accessibility charges had not been unlawfully levied under the Act in [2017] NSWLEC 44. **14)***
***Recommendation:** That the information be noted, and no amendment be made to the Delivery Program 2022-2026 and Operational Plan 2022/2023*

The contention of this Submission

In its Rates and Charges Notices Council calls it charges to Sewer and Water Services not S501 Annual Charges to Sewer and Water Services but "Availability Charges" clearly to deflect attention from the unlawful nature of these charges.

Bathurst Council makes "Availability Charges" which would be lawful only if Availability Charges to Sewer and Water Services are in practice "Annual Charges" as envisaged to the Services listed at S501 of the LG Act, which they are not.
Council's Availability Charges to Sewer and Water Services are based on the full size of water meters thereby including, at non-residential properties with hose reel systems conditioned as per AS2441 , the fire service capacity supply not relative to residential properties as spelt out at **b) Sewerage Pricing in the Best Practice Guidelines** which is the intended interpretation of the intention of non inclusion of fire service provision at S501 of the LG Act.
Bathurst Council's as made Availabity Charges to Sewer and Water Services are unlawfully constructed not being charges compliant with S501 of the LG Act.

- **1) Council states** *"Council has reviewed these access charges and has found that they reflect a cost recovery on each of the services."* **This is not true** of fire service capacity provision. Fire services are not listed anywhere in the LG Act or any Act for cost recovery other than the financing of the same by S94 Contributions.

- **2) Council states** "*Council's Water and Sewer Funds are based on Council recovering its operational costs by way of income received respectively from water and sewerage access charges together with income from usage charges."* **This is not true**. Fire services are not listed anywhere in the LG Act or any Act for cost recovery other than the financing of the same by S94 Contributions.

- **3) Council states** "*As has previously been explained to Mr Carter, Council does not levy a charge for fire fighting services under section 501;"* **This is doubly not true**. By using the full size of water meters, thereby including fire service supply capacity in the as made Availability Charges to both Sewer and Water Services, instead of properly calculated S501 Annual Charges, **Council makes unlawful charges to fire services not once but twice.**

- **4) Council states** *" Council levies a charge for the availability of water under section 501, as it is entitled to do."* **This is not true**. Council's as made "Availability Charges" are constructed inclusive of fire fighting supply capacity while properly constructed S501 Annual Charges do not envisage this as per the advice of b) Sewerage Pricing in the Best Practice Guidelines.

- **5) Council states** *"Those charges are determined with regard to the best practice pricing principles issued by the NSW Government."* **This is not true.** Council's as made Availability Charges do not comply with any part of the Best Practice Guidelines, specifically b) Sewerage Pricing page 9 which not only makes clear that the service to receive an Annual Charge is the one service "relative" to both residential and non residential properties, being the one service with service capacity supplied to load the sewerage system, identifying the difference between drinking and fire service essential services as made clear at S4(1)c,h & l of the Essential Service Act 1988.

- **6) Council states** *"The water may be connected to a fire service, but the charge is for the availability of that water, not for the provision of "fire services".* **This is not true.** It is the purpose of the availability of supply capacity that determines true Water and Sewer service Annual Charges. Council's as made Availability Charges to both Sewer and Water Services is predicated on there being no fire services made which is contrary to Development and Occupation Approvals as per the BCA requiring those very services be installed to the extent of requiring annual certification.

- **7) Council states***. "Council's water supply responsibility ends at the meter servicing the property and charges the property.."* **This is not true.** Where the EP&A Act requires fire hose reel systems to be installed at non residential properties, Councils responsibilities continue annnually to the extent that occupation rights can be withdrawn if fire services are not annually certified as per Development and Occupation Approvals.

- **8) Council states.** "*the size of the meter installed as this reflects the load that can be potentially placed on Council's infrastructure.* **This is not true**. It is clear that fire service capacity provision (which is omitted from S501 Annual Charges) are not purposed to load Council's sewerage system and the so called "potential" to place load on Council's infrastructure is immaterial as purposed by that omission.

9) Council states. "Council*, in relation to that water supply, does not*

direct, once the water enters the property, how that water is used nor whether it is used for drinking or for fire fighting purposes required under the relevant BCA Standards. **This is untrue**. The BCA references AS2441 which makes clear that the water on entering a non residential property is for both fire fighting and drinking purposes.

10) Council states. "*Council has previously provided the opportunity for meter downsizing where available."* **This contention is irrelevant and misleading** as the downsizing of meters did not eliminate fire service capacity supply as implied.

11) Council states. "*Council uses the availability pricing method shown in NSW Government's Best Practice Management of Water Supply and Sewerage Guidelines.* **This is not true**. Council's as made Availability Charges to both Sewer and Water Services are not made using b) Sewer Pricing at p9 of the NSW Government's Best Practice Management of Water Supply and Sewerage Guidelines.

12) Council states " *Council's calculation of the access charges have been reviewed by the Minister for Water and Utilities in 2004 and the Minister for Water in 2009. Both Ministers have supported Council's approach as "responsible" and "appropriate".* **This is a deceptive statement**. No government minister has ever given support to Council making charges to fire services , only to "*Council's approach*" excepting of Council stating they would look to making the Availability Charges comply in due course. This is irrelevant in any case, as the LG Act is specific in not listing fire services at S501 in the first instance since 2004.

13) Council states. "*The power to impose availability (s501) and usage (s502) charges has also been contested in court and found to be legally imposed charges. Horton Rhodes Lawyers represented Prefabricated Buildings Pty Ltd, one of Mr Carter's companies, in the NSW Land and Environment Court against Council regarding this matter."* **This is not true.** This court case did not deal with the legality or otherwise of Council making charges to fire service provision but to whether Council can make both Annual and Access charges. This is made clear in the Judgement and especially so at 30 in the Costs.

14) Council states. "*Prefabricated Buildings Pty Ltd.'s application was dismissed with Robson J finding that "it appears clear that Council is entitled to charge for services based on both actual use and availability of those services" and that the accessibility charges had not been unlawfully levied under the Act in [2017] NSWLEC 44.* **This is both untrue and deceptive.** Robson J did find that *"it appears clear that Council is entitled to charge for services based on both actual use and availability of those services"* , however this is not applicable as Council states "*and that the accessibility charges had not been unlawfully levied under the Act in [2017] NSWLEC 44."* , implying that this applies to Council's charges to fire service capacity provision, the subject of my submission.

CONCLUSION

In regard to this conduct by Bathurst Regional Council be regarded as uncompetitive.
An ordinary ratepayer can surely view the matter of Council's behaviour as uncompetitive and certainly not neutral. The distortions illustrated herein are predicated on Council reliance on unfair tacit approval of Council's charges to fire service provision concealed in Availability Charges that are not compliant Annual Charges and therefore anything but competitive neutral.
This tacit approval or reluctance to properly administer uncompetitive / unlawful Council policy and decisions is a ratepayer-overwhelming power, especially when demonstrably practiced by virtually every NSW Government Office, officer and politician approached since 2004, any of which could have taken Council to task before the matter of unlawful charges become a not small matter.
This reluctance of Government Offices to intervene in demonstrably unfair charging practices illustrated as done by Bathurst Council, must be remedied, otherwise what can a ratepayer view such things as, other than complicity, given that the proper workings of competitive / lawful neutrality are given the appearance of normality.
I contend that competitive neutrality is entirely reliant on the proper workings of the State Government Offices identifying without fear or favour, anomalies in Council Policies and decisions, when brought properly and repeatedly to their attention as this as per the heading of this submission is the only way NSW Local Councils can be expected to maintain competitive neutrality