

Assessment of Aquacell's network operator's licence application and variation to an existing retail supplier's licence

**Prepared under the *Water Industry Competition
Act 2006 (NSW)***

Report to the Minister
May 2014

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1 Summary

Aquacell Pty Ltd (Aquacell) has lodged an application under the *Water Industry Competition Act 2006* (NSW) (the Act) for:

- ▼ a network operator's licence for an existing recycled water scheme located at 48 Pirrama Road, Pyrmont
- ▼ a variation to its existing retail supplier's licence (09_004R), to include this scheme.

This is a pre-existing scheme that has been operating since 2009 in a commercial building in Pyrmont (Workplace 6). To date it has been operating under an approval obtained under section 68 of the *Local Government Act 1993*, granted by City of Sydney Council. The scheme supplies non-potable water for toilet flushing within the building and irrigation of adjoining parks. The plant has been operating without any public health incident.

There have been delays in the processing of this application due to concerns related to the multi barrier treatment process. These issues were resolved and a recommendation to the then Minister to grant the network operator's licence and vary Aquacell's existing retail supplier's licence (09_004R) was made on 15 August 2013.

However, in October 2013, a further treatment process issue was identified and a hold was placed on the application until the issue was investigated by City of Sydney Council.¹ This investigation included discussions with the applicant, NSW Health and the City of Sydney Council. A solution acceptable to NSW Health has been identified and, as a result, the treatment plant is subject to further upgrades. Additional information about this investigation is available in section 4.1.5 of this report.

We are now satisfied that Aquacell has satisfactorily met the licensing criteria under section 10 of the Act, having regard to the licence application, submissions made, and the licensing principles under section 7 of the Act.

Further, based on our recent investigation, updated documentation, changes to the treatment process and noting that the scheme has been operating with no reported health incident since 2009, we conclude that sufficient evidence to grant the licence has been provided. NSW Health supports this position, subject to audit of the scheme's Recycled Water Quality Management Plan in the next 6 months. IPART will arrange the audit within this timeframe.

¹ See letter from IPART to the then Minister for Finance and Services dated 11 October 2013, re Potential water quality concern at Workplace 6 - Pyrmont.

We recommend that the Minister grants a network operator's licence to Aquacell and a variation to its retail supplier's licence (09_004R), subject to the conditions as set out in licence numbers 13_023 and 09_004R.

2 Background

On 28 March 2011, we received Aquacell's licence application for a network operator's licence under the Act. In May 2013, we received a request from Aquacell to vary its existing retail supplier's licence rather than grant a new licence for the Workplace 6 scheme.

In accordance with the Act, IPART must consider the licence application and any stakeholder submissions, and provide a report on the application to the Minister. The Minister is required to determine an application for a licence by granting the licence or refusing the application, and determining the conditions to which the licence (if granted) should be subject.²

This report summarises our analysis, issues raised by stakeholders through submissions and our recommendation to grant the network operator's licence and vary the existing retail supplier's licence. It also contains proposed licence conditions.

Aquacell operates a number of recycled water treatment facilities across Australia and currently holds a WICA network operator's licence and a retail supplier's licence for a scheme it operates at 1 Bligh Street Sydney. The Bligh Street scheme is similar to the scheme Aquacell is seeking a licence for at Workplace 6.

The recycled water treatment plant at Workplace 6 was designed and constructed by GE Water. The scheme was granted a section 68 Approval to Construct in October 2007 and Approval to Operate in June 2009, by the City of Sydney Council under the *Local Government Act 1993*. The scheme has been operating under the consent conditions since this date. Aquacell took over operation and maintenance of the plant from GE Water in April 2011.

A WICA application for this scheme was originally submitted in August 2010 by Permeate Partners. As the operators were to be replaced by Aquacell, the WICA application was resubmitted by Aquacell in March 2011.

² *Water Industry Competition Act 2006* (NSW), section 10(1).

Aquacell currently treats black water collected from within the Workplace 6 building, fire test water and sewerage collected through sewer mining to a standard suitable for the following purposes:

- ▼ toilet flushing within the building
- ▼ sub-surface irrigation of Pyrmont Park and Metcalf Park managed by Sydney Harbour Foreshore Authority(SHFA).

Aquacell supplies recycled water to 2 customers (Jones Lang LaSalle, the building manager of 48 Pirrama Road, Pyrmont and SHFA). Jones Lang LaSalle distributes the recycled water for toilet flushing only. The SHFA uses the recycled water to provide sub-surface irrigation of Metcalf Park and Pyrmont Park.

The potable water supply system is maintained as a contingency and, where required, to top-up the recycled water system, to minimise the risk of loss of supply to the customer.

3 Stakeholder consultation and submissions

On 2 August 2011, we provided the licence application to, and invited submissions from, the following Ministers and their relevant departments:

- ▼ Minister administering the *Public Health Act 2010* (NSW) (Minister for Health)
- ▼ Minister administering Chapter 2 of the *Water Management Act 2000* (NSW) (Minister for Primary Industries)
- ▼ Minister administering the *Protection of the Environment Operations Act 1997* (NSW) (Minister for the Environment)
- ▼ Minister administering the *Environmental Planning and Assessment Act 1979* (NSW) (Minister for Planning and Infrastructure).³

We also provided a copy of the licence application to the then Minister for Finance and Services, as the Minister administering the Act at the time.

The closing date for the submissions was 31 August 2011. We received submissions from the Minister for Health, the Minister for Primary Industries, the Minister for Planning and Infrastructure and the Minister for Environment and Heritage. These submissions are available on our website.

The submissions were generally supportive of the proposed scheme and the application. However, The Minister for Health raised some public health concerns, which are addressed in section 4.1.5 of this report.

³ *Water Industry Competition Act 2006*, section 9(1)(b).

We also called for submissions on the application from the public.⁴ Advertisements were placed in the Sydney Morning Herald and the Daily Telegraph on 2 August 2011 and public submission closed on 31 August 2011. No public submissions were received.

As a result of our assessment, consideration of the submissions received and concerns identified about the treatment process, further information was requested from the applicant on 6 October 2011, 21 November 2011, 22 October 2012 and 28 January 2014.

In finalising our assessment of this application, we have also closely liaised with NSW Health and the City of Sydney Council.

4 Assessment of application

This section of the report contains our assessment of Aquacell's application for a network operator's licence and a variation to its existing retail supplier's licence, and our recommendations. To assess the applicant's capability as a network operator and retail supplier, we considered the information the applicant provided in its licence application, stakeholder submissions, and additional information submitted by the applicant through subsequent requests.

Our assessment is based on each of the licensing criteria and principles outlined in the Act. The Minister may not grant the licence unless satisfied of certain licensing criteria, namely that the applicant:

- ▼ is not a disqualified corporation (ie, 'fit and proper' criteria)
- ▼ has, and will continue to have, the technical, financial and organisational capacity to carry out the activities to be authorised by the licence
- ▼ has the capacity to carry out its activities in a manner that does not present a risk to public health or a significant risk of harm to the environment
- ▼ has made, and will continue to maintain, appropriate insurance arrangements
- ▼ in the case of a licence to supply water, will supply sufficient quantities of water that have not been obtained from a public water utility
- ▼ such other matters as the Minister considers relevant, having regard to the public interest.⁵

⁴ *Water Industry Competition Act 2006*, section 9(1)(c).

⁵ *Water Industry Competition Act 2006* (NSW), sections 10(3) and (4).

In considering whether or not to grant the licence, and what conditions (if any) to impose on the licence, the Minister must also have regard to the following licensing principles:

- ▼ the protection of public health, the environment, public safety and consumers generally
- ▼ the encouragement of competition in the supply of water and the provision of sewerage services
- ▼ the ensuring of sustainability of water resources
- ▼ the promotion of production and use of recycled water
- ▼ the promotion of policies set out in any prescribed water policy document
- ▼ the potential for adverse financial implications for small retail customers generally arising from the activities proposed to be covered by the licence
- ▼ the promotion of the equitable sharing among participants in the drinking water market of the costs of the water industry infrastructure that significantly contributes to water security.⁶

4.1 Licensing criteria

The section below outlines our assessment of the applicant's capability to meet the licensing criteria in the Act.

4.1.1 Disqualified corporation

Aquacell is not a disqualified corporation. Its Director is not a disqualified individual.

In making this finding, we have considered the following information:

- ▼ Results of the ASIC and ITSA searches provided in the Dunn & Bradstreet report that we have obtained, confirming the above.⁷
- ▼ The statutory declaration made by the Director, stating that Aquacell, nor any director or person concerned in the management of Aquacell, is or would be a disqualified corporation or disqualified individual within the meaning of the Act.⁸
- ▼ Results of our search of the Act's licence database,⁹ confirming the above.

⁶ *Water Industry Competition Act 2006* (NSW), section 7.

⁷ Dunn and Bradstreet, Company and Directors extract viewed on 26 July 2013.

⁸ Statutory Declaration was signed on 27 March 2013.

⁹ There are currently no disqualified corporations or individuals on the register pursuant to the *Water Industry Competition Act 2006*, section 16(1)(e) and 16(1)(f).

4.1.2 Technical capacity

Network operator

We are satisfied that Aquacell has adequate technical capacity to operate and maintain water industry infrastructure.

The assessment was based on the information provided as part of Aquacell's application as well as further information instalments as requested by IPART, including:

- ▼ Previous experience operating a licenced network at 1 Bligh Street, including retail supply to that site since February 2010.
- ▼ Technical compliance with the section 68 approval¹⁰ to construct and operate the Workplace 6 scheme, issued by City of Sydney Council (approval to construct: 27 October 2007, approval to operate: 11 June 2009).
- ▼ The scheme design and operations manuals developed by GE Water. The scheme design is consistent with a number of systems designed and constructed by Aquacell, with similar or the same technology components.
- ▼ Operational performance: the scheme has been operating since 2009, and been operated by Aquacell since April 2011, without major incident.
- ▼ Technical details of the constructed water industry infrastructure including operating and maintenance plans and procedures developed by Aquacell.
- ▼ Risk assessment for the ongoing operation and maintenance of the scheme, including health and environmental risks and the mitigation measures intended to address any such risks.
- ▼ Licence plans for the scheme at Workplace 6, including the infrastructure operating plan and the recycled water quality management plan.

Our analysis showed that Aquacell has demonstrated technical capacity:

- ▼ to safely and reliably operate and maintain water industry infrastructure from its preliminary and draft reports and plans for the proposed scheme
- ▼ to safely and reliably operate and maintain water industry infrastructure from the final reports and plans that the applicant prepared for a similar project which is in operation at 1 Bligh Street Sydney
- ▼ to understand and implement the Australian Guidelines for Water Recycling from the preliminary risk assessment provided.

Further, Aquacell has previous technical experience (within Australia) and has specific personnel with such experience nominated to the project, as shown in the information provided to us in its application form.

¹⁰ Under the *Local Government Act 1993*.

We received no submission regarding Aquacell's technical capacity as a network operator.

We recommend that the common ministerially imposed licence conditions should apply.

Retail supplier

We are satisfied that Aquacell has adequate technical capacity to supply water (non-potable water) to its intended customers.

Our assessment was based on:

- ▼ Our analysis of Aquacell's Retail Management Plan developed for Workplace 6, which addressed the supply of non-potable water to the site.
- ▼ Aquacell's retail experience within the Australian water industry including its operation under its existing retail supplier's licence for 1 Bligh Street, Sydney.

We received no submission regarding Aquacell's technical capacity as a retail supplier. We consider that Aquacell has demonstrated sufficient technical capacity.

We recommend that the common ministerially imposed licence conditions should apply.

4.1.3 Financial capacity

We are satisfied that Aquacell has adequate financial capacity to construct, operate and maintain water industry infrastructure and provide the proposed retail services.

We conclude that the applicant has satisfactorily demonstrated the ongoing financial capacity to carry out the activities to be licensed based on assessment of its financial records.¹¹

We would like to emphasise that our financial assessment represents the applicant's financial capacity at one point in time. Our recommendation to grant Aquacell a licence should not be viewed as an endorsement of the future viability of the corporation. The assessment is based on a combination of information sources, none of which is to be regarded as individually determinative. This assessment is done for our own purpose and for the Minister's purposes in assessing the application. The conclusion is not to be relied upon for any other purpose by any other person.

¹¹ Financial assessment was completed on 7 August 2013, based on financial records for 2011, 2012 and 2013.

Regardless of our assessment, IPART notes that this project could readily convert to the use of potable water in the event that Aquacell is unable or unwilling to continue the supply of recycled water.

We received no submission regarding Aquacell's financial capacity. We consider that Aquacell has demonstrated sufficient financial capacity.

We recommend that the common ministerially imposed licence conditions should apply.

4.1.4 Organisational capacity

We are satisfied that Aquacell has adequate organisational capacity (current and ongoing) to operate and maintain water industry infrastructure and supply services to its intended customers, in a manner that would protect health and the environment

Aquacell has been operating since 1996. Its core business is design, construction and operation of decentralised recycled water schemes. Currently, Aquacell has more than 25 schemes operating or under construction around Australia. These schemes use similar technology to the Workplace 6 scheme.

Aquacell is also involved in various other water and wastewater projects through which it has developed extensive experience in servicing equipment and technology designed and constructed by others.

While the plant at Workplace 6 was not designed and constructed by Aquacell, the membrane bio-reactor (MBR) plant contains many similarities to a number of its other projects. Aquacell's experience in MBR technology combined with its experience in operating non-Aquacell technology demonstrates the organisational capacity to operate the scheme installed at Workplace 6.

Our analysis showed that Aquacell has:

- ▼ previous experience (within Australia) in the water industry and has personnel with relevant experience nominated to the project as shown in the CVs of its key personnel provided to us in its application form
- ▼ appropriate organisation size and expertise to manage the proposed scale of work, from its resourcing plan
- ▼ demonstrated that business risks have been identified and managed, in its risk assessment.

We received no submission regarding Aquacell's organisational capacity. We consider that Aquacell has demonstrated sufficient organisational capacity.

We recommend that the common ministerially imposed licence conditions should apply.

4.1.5 Public health

We are satisfied that Aquacell is capable of operating and maintaining water industry infrastructure and providing retail services by means of water industry infrastructure, in a manner that protects public health.

Our analysis showed that:

- ▼ Aquacell has previous experience (within Australia) in the water industry and has sufficient technical and organisational capacity to satisfactorily operate and maintain the proposed system and manage risks associated with this type of scheme.
- ▼ Aquacell has demonstrated technical capacity to analyse and manage hazards from source to end use through the risk management plan provided.
- ▼ There is no record of incidents related to this corporation that affected or may affect public health.

We have also considered NSW Health's submission on Aquacell's capacity to protect public health.

NSW Health supports the licence application, subject to the applicant:

- ▼ Providing evidence to NSW Health that the treatment system has been validated and verified, in accordance with the *Australian Guidelines for Water Recycling: Managing Health and Environmental Risks (2006)* (AGWR), to meet the treatment requirements needed for the end uses of the scheme.
- ▼ Consulting with NSW Health regarding the adequacy of the Recycled Water Quality Management Plan, particularly regarding the incident notification and management procedures, training, and arrangements for ongoing maintenance of the system.

Our initial assessment of the application identified problems with the scheme's validation. It appeared that the UV unit was not validated to the appropriate standards and there was some concern surrounding the management of critical control points.

We requested additional information in response to our concerns and those identified by NSW Health. Aquacell provided this information and also upgraded the treatment process to meet validation requirements in the AGWR. In particular, the UV unit has been replaced and the critical control points management system has been upgraded.

In October 2013, we identified further treatment process concerns.¹² Aquacell notified us that due to the colour of the treated effluent, the UV unit cannot operate within the UV unit's validated parameters. This could reduce the effectiveness of disinfection, which could pose a risk to public health. Aquacell are in the process of upgrading the scheme by installing an ozone unit, due to be completed by June 2014.¹³ The ozone unit should reduce the colour in the water so the UV unit can operate within its validated parameters. In the meantime, Aquacell has proposed temporary operating parameters that will provide adequate treatment of the effluent. These temporary measures have been included in Aquacell's water quality management plan for the scheme. NSW Health has endorsed these temporary measures.¹⁴

Clause B4 of the Network Operator's Licence requires all licensee's to comply with any requirements of NSW Health that we have agreed to, and that we have notified the licensee about, in writing. We intend to write to Aquacell under the provisions of this clause to ensure it operates the scheme under the temporary operating conditions identified in Aquacell's Recycled Water Management Plan Revision 11, dated 12 February 2014, as required by NSW Health.

Based on the updated information, and noting that the scheme has been operating with no major incident since 2009, we conclude that sufficient evidence to grant the licence has been provided. NSW Health supports this position, subject to audit of the scheme's Recycled Water Quality Management Plan in the next 6 months.¹⁵ IPART will arrange this audit within this timeframe.

We recommend that the standard ministerially imposed licence conditions should apply.

4.1.6 Environment

We are satisfied that the proposed activities of Aquacell will not present a significant risk of harm to the environmental as a network operator and retail supplier at Workplace 6.

Environmental impacts at this proposed scheme are primarily associated with the construction and operation of the water industry infrastructure. We consider environmental impacts from retail activities are minimal.

¹² See letter from IPART to the then Minister for Finance and Services dated 11 October 2013, re potential water quality concern at Workplace 6 - Pyrmont.

¹³ Letter from Warren Johnson (Aquacell) to Bill Potter (City of Sydney), 22 November 2013, CC'ed to IPART, NSW Health and GPT, Workplace 6.

¹⁴ Email sent from Leslie Jarvis (NSW Health) to Maria Morahan (IPART), RE: Workplace 6 RWQMP revision, 25 February 2014.

¹⁵ Request made through various discussions and meetings in 2012, about the Water Quality Management Plan.

The scheme at Workplace 6 has been operating since June 2009 without reports of any environmental incident. We do not consider that this scheme poses a risk to the environment. Aquacell has identified environmental risks as part of the hazard identification and risk assessment framework, and intends to incorporate measures to manage environmental risk into the management framework.

Further, the submission received from the Minister for the Environment states that the development is not a scheduled activity under the provisions of the *Protection of the Environment Act 1997* (POEO) and so does not need to be licensed by the Office of Environment and Heritage (OEH).

In relation to the capacity of the applicant, OEH has not initiated any prosecutions against Aquacell for breaches of any of the legislation it administers.

We conclude that the location and nature of the scheme presents a low risk of any negative environmental impacts.

We recommend that the common ministerially imposed licence conditions should apply.

4.1.7 Insurance

We are satisfied that Aquacell has made, and will continue to maintain, appropriate insurance arrangements.

We assessed Aquacell's arrangements with respect to insurance. We based this assessment on the information provided as part of Aquacell's application, including certificates of currency and the insurance report provided as a requirement of Aquacell's Bligh Street WICA licences.¹⁶ We are satisfied that the information provided by Aquacell demonstrates it has made, and will continue to maintain, appropriate arrangements in respect to insurance, subject to the licence conditions described below.

Aquacell will be subject to standard licence condition B3 (approved by the Minister and imposed on all licences issued under the Act). Condition B3 requires Aquacell to maintain appropriate insurance sufficient for the size and nature of the activities authorised by the licence. It also requires Aquacell to notify IPART of any change in the type or levels of insurance held and provide a copy of the certificate of currency within 10 days of the change being made. This condition also allows IPART to request a report from an insurance expert certifying that, in their opinion, the type and level of insurance obtained by Aquacell is appropriate for the size and nature of the activities authorised under the licence.

¹⁶ Insurance brokers report received for 1 Bligh Street dated November 2011. Updated insurance certificates of currency for all sites including workplace 6 were provided 17 May 2013.

We consider that Aquacell has demonstrated sufficient insurance coverage in the area of professional indemnity, public liability, workers compensation and product liability, through its insurance certificates provided in its licence application.

We received no submission regarding Aquacell's insurance arrangements.

We recommend that the common ministerially imposed licence conditions should apply.

4.1.8 Sufficient quantities of water not from public water utility (*Retail Supplier of water only*)

We are satisfied that Aquacell will obtain sufficient quantities of water not from public water utility.

At Workplace 6, non-potable water will be sourced from wastewater that would have otherwise been treated and released to the environment. The plant has capacity to produce sufficient quantities of water for its intended uses. Only a very small quantity of potable water is supplied from a public water utility. This is for top-up purposes when, for example, the plant is not operating during maintenance.

We received no submission regarding Aquacell's quantities of water sourced.

We recommend that the common ministerially imposed licence conditions should apply.

4.1.9 Additional public interest considerations

There are no additional matters that were raised with regard to public interest during the stakeholder consultation process.

4.2 Licensing principles

We are satisfied that granting a network operator's licence to Aquacell and the variation to Aquacell's existing retail supplier's licence (09_004R) is consistent with the licensing principles.

We considered each of following licensing principles in making a recommendation as to whether or not the licence should be granted/varied, and what licence conditions to impose:

- ▼ Protection of public health, environment, public safety and consumers: this principle was considered as part of the technical assessment. In particular, IPART and NSW Health consider that Aquacell has the technical capacity and experience to undertake activities in a way that will manage risks to public health and the environment at an acceptable level.
- ▼ Encouragement of competition: the scheme proposes to supply non-potable water to the Workplace 6 Building and adjoining parks in Pyrmont, Sydney. The non-potable water will be supplied in direct competition to the existing drinking water supply.
- ▼ Ensuring sustainability of water resources: the non-potable water will be sourced from wastewater that would have otherwise been treated and discharged to the environment. It will replace drinking water for toilet flushing in the Workplace 6 building and sub-surface irrigation of Metcalf and Pyrmont parks.
- ▼ Promotion of production and use of recycled water: the supply of recycled water by Aquacell to the Workplace 6 building and adjoining parks promotes the use of recycled water and the substitution for potable water.
- ▼ Promotion of policies set out in any prescribed water policy document: the supply of recycled water by Aquacell to the Workplace 6 building and adjoining parks is consistent with the objectives of the NSW Metropolitan Water Plan.
- ▼ Potential for adverse financial implications for small retail customers generally arising from activities proposed to be covered by the licence: Aquacell will only be supplying 2 customers connected to its Workplace 6 scheme (Jones Lang LaSalle, the building manager of Workplace 6, and SHFA). Both are commercial customers, who have negotiated customer contracts in place.
- ▼ Promotion of the equitable sharing among participants in the drinking water market of the costs of water industry infrastructure that significantly contributes to water security: this principle is not applicable since the Workplace 6 scheme does not involve the production or supply of drinking water.

4.3 Additional matters considered

4.3.1 Monopoly supplier

We considered that Aquacell is not a monopoly supplier.

Under section 51 of the Act, the Minister may declare a licensed retail supplier or licensed network operator to be a monopoly supplier in relation to a specified water supply or sewerage service, area and class of customers. Such a declaration would result in the licensee being subject to pricing regulation.

A declaration can only be made in relation to a service if it is a service:

- ▼ for which there are no other suppliers to provide competition in the part of the market concerned, and
- ▼ for which there is no contestable market by potential suppliers in the short term in that part of the market, and
- ▼ in the case of a water supply service for recycled water, that connection of land to that service is required by or under some other Act.¹⁷

This scheme produces recycled water and there is no legislative obligation for this supply. Therefore, Aquacell cannot be declared a monopoly supplier for this scheme.

4.3.2 Retailer of last resort

We consider that a retailer of last resort is not required in these circumstances.

We note that this project could readily convert to the use of potable water in the event that Aquacell was unable or unwilling to continue the supply of recycled water.

5 Recommendations

We are satisfied that Aquacell has satisfactorily met the licensing criteria under section 10 of the Act, having regard to the licence application, submissions made, and the licensing principles under section 7 of the Act.

IPART therefore recommends:

- ▼ **That the Minister grant a network operator's licence to Aquacell , subject to the conditions as set out in licence number 13_023.**
- ▼ **That the Minister vary Aquacell's retail supplier's licence (09_004R), subject to the conditions as set out in licence number 09_004R.**

We consider that Aquacell is not a monopoly supplier and a retailer of last resort is not required in these circumstances.

¹⁷ *Water Industry Competition Act 2006* (NSW), section 51(2).

The Minister must consider, but is not bound to accept, any advice or recommendation in this report in determining the licence application. The Minister may, if circumstances so require, seek further advice from us in relation to the licence application.¹⁸

The Minister is required to provide us with a notice of the decision and of the reasons for the decision on making a decision whether or not to grant the licence.¹⁹ We will then make the information in the notice available to the public on our website, in accordance with the requirements of the Act.²⁰

¹⁸ *Water Industry Competition Act 2006*, section 10(2).

¹⁹ *Water Industry Competition Act 2006*, section 10(5).

²⁰ *Water Industry Competition Act 2006*, section 10(6).