



Independent Pricing and Regulatory Tribunal

# **Application for a Network Operator's and Retail Supplier's Licence from Orica Australia Pty Ltd**

## **IPART's report to the Minister**

**Water — Ministerial report**  
February 2012



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## 1 Background

On 6 August 2010 IPART received an application for a Network Operator's and Retail Supplier's licence under the *Water Industry Competition Act 2006* (the Act) from Orica Australia Pty Ltd (Orica).

Orica commenced operation of the Groundwater treatment Plant (GTP) on 21 January 2006. The plant is located in the Botany Industrial Park within the City of Botany Bay and consists of:

- ▼ groundwater extraction areas and transfer pipelines;
- ▼ groundwater conditioning;
- ▼ volatile organics removal into off-gas;
- ▼ off-gas treatment;
- ▼ wastewater treatment; and
- ▼ distribution pipeline to supply treated water to customers

The GTP was constructed in response to a "Notice of Clean Up Action" issued by the Environment Protection Authority of NSW (EPA), related to contamination of soil and groundwater at the Orica site at Botany. Orica's extraction of groundwater is currently licensed under the *Water Management Act 2000*. The operation of the GTP and the treatment of the extracted groundwater are licensed under the *Protection of Environment and Operation Act 1997*.

Orica supplies treated water from the GTP, under contract, to 3 industrial customers through pipelines. Current customers are the Chlor-alkali a division of Orica, Qenos Pty Ltd and Solvay Interlox Pty Ltd. These end-users are located near the GTP, in or adjacent to the Botany Industrial Park, within City of Botany Bay Local Government Area. Since the demand from these 3 customers for non-potable water matches Orica's licensed groundwater extraction rate, Orica has no current plans to expand its customer base for treated groundwater.

It is a condition of Orica's supply contracts that all end-users maintain connection to Sydney Water's potable water supply to provide contingency supply in the event of operational shutdown of the GTP.

Orica currently treats the groundwater to a standard suitable for the following purposes:

- ▼ Feedwater for Industrial Cooling Towers
- ▼ Feedwater for Demineralisation plants
- ▼ Non-potable plant process water
- ▼ Make-up water for Boilers
- ▼ Make-up water for packed columns

In accordance with the Act, this report sets out IPART's consideration of the application and submissions, in particular in relation to whether the licensing criteria/ principles have been satisfied.

We initially made a recommendation to grant the licences in late August 2011. However, the initial assessment of the application was undertaken before Orica's ammonia nitrate plant in the Hunter Region experienced a significant ammonia leak. In response the Premier announced an inquiry into this incident. Further incidents at other plants led to the Minister for the Environment ordering an audit of all Orica's licensed premises, including the site at Botany containing the GTP. In light of the events at Orica's production plants the Minister for Finance and Services (the Minister) requested in November 2011 a reassessment of Orica's application to take account of these developments.

The Act was amended by the *Water Industry Competition Amendment Act 2011* on 30 January 2012 to include 3 additional licensing principles in section 7. As these changes were promulgated before the reassessment was completed we have reviewed the licence application in light of the new principles. The licensing principles are set out in section 3.2 of this report.

We have now completed our further assessment and our recommendation has not changed. This report concludes with a recommendation to grant both licences. The report proposes the conditions to which the licence should be subject.

## 2 Submissions

IPART must provide the application to, and invite submissions from, the following Ministers:

- ▼ Minister administering the *Public Health Act 1991* (Minister for Health)
- ▼ Minister administering Chapter 2 of the *Water Management Act 2000* (the then Minister for Water)
- ▼ Minister administering the *Protection of the Environment Operations Act 1997* (the then Minister for Climate Change and the Environment)
- ▼ Minister administering the *Environmental Planning and Assessment Act 1979* (Minister for Planning).<sup>1</sup>

On 15 December 2010, the application was provided to the Ministers with submissions requested by 28 January 2011.

IPART received submissions from the then Minister for Water, NSW Health, NSW Planning, and the Department of Environment, Climate Change and Water (DECCW now OEH).

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<sup>1</sup> *Water Industry Competition Act 2006*, section 9(1)(b)

The content of these submissions were generally supportive of the application for a network operator's and retail supplier's licence made by Orica with the inclusion of some licence conditions. NSW Health raised some matters for consideration and these are addressed in section 3.1.5. The OEHL raised issues regarding any extension of the permitted water sources supplying the infrastructure and this is addressed in section 3.1.6.

IPART must also call for submissions on the application from the public.<sup>2</sup> On 22 December 2010 IPART advertised in the Sydney Morning Herald and the Daily Telegraph for public submissions. On 28 January 2011 public submissions closed.

We received one submission which raised the issue that Orica should be required to compensate the local people and the local environment for the damage done to the environment by the previous operation of the chemical plant. We consider that the issues raised in this submission are unrelated to the licensing criteria for granting of WICA licences to Orica.

### 3 Assessment of application

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.<sup>3</sup> The Minister may not grant the licence unless satisfied of certain licensing criteria, namely that the applicant:

- ▼ is not a disqualified corporation (i.e. '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, 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 be obtained from a public water utility
- ▼ such other matters as the Minister considers relevant, having regard to the public interest.<sup>4</sup>

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

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<sup>2</sup> *Water Industry Competition Act 2006*, section 9(1)(c).

<sup>3</sup> *Water Industry Competition Act 2006*, section 10(1).

<sup>4</sup> *Water Industry Competition Act 2006*, sections 10(3) & (4).

- ▼ 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<sup>5</sup>
- ▼ The promotion of policies set out in a prescribed water policy document<sup>6</sup> (presently, this is the NSW Government's *Metropolitan Water plan*)
- ▼ The potential for adverse financial implications for small retail customers generally arising from the activities proposed to be covered by the licence; and
- ▼ The promotion of the equitable sharing among participants in the drinking water market of the costs of water industry that significantly contributes to water security.

The following sections of this report are structured to address each of the licensing criteria and principles outlined above.

### 3.1 Licensing criteria

#### 3.1.1 Disqualified corporation

In making an assessment of the standing of Orica, its related entities, directors and persons concerned in its and its related entities' management, regard was given to:

- ▼ the statutory declaration made by two Directors of Orica, that neither the applicant corporation, nor any director or person concerned in the management of the applicant corporation is or would be a disqualified corporation or disqualified individual within the meaning of the Act
- ▼ results of the ASIC and IISA searches provided in the Dun & Bradstreet report obtained by IPART
- ▼ results of IPART's search of the Water Industry Competition Act licence database<sup>7</sup>.

**IPART is satisfied that Orica has satisfactorily met this criterion.**

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<sup>5</sup> *Water Industry Competition Act 2006*, section 7.

<sup>6</sup> A "prescribed water policy document" is a plan or other policy document concerning the use of water resources, which is issued by the Government or on its behalf and is prescribed by the regulations. The Amendment Act Amended the Regulations to prescribe the NSW Government's *Metropolitan Water Plan* as in force from time to time.

<sup>7</sup> There are currently no disqualified corporations or individuals on the register pursuant to the *Water Industry Competition Act 2006*, section 16(e) and 16(f).

### 3.1.2 Technical capacity

#### Network Operator

IPART undertook a detailed assessment of Orica's technical capacity (current and ongoing) to operate and maintain water industry infrastructure for the purpose of supplying non-potable water in a manner that would protect public health and the environment. The assessment was based on the information provided as part of Orica's application and advice from OEH/EPA confirming the following:

- ▼ construction of the infrastructure that was completed in January 2006 was to the satisfaction of the then EPA
- ▼ operation of the infrastructure since January 2006 has also been to the satisfaction of the OEH/EPA
- ▼ preparation and submission of reports on operational and validation audits in September 2006, September 2007, and September 2008. These reports were required to demonstrate the compliance with the EPA licence requirements, which include the technical capacity of the corporation to safely and reliably operate and maintain water industry infrastructure
- ▼ technical details of the constructed water industry infrastructure including operating and maintenance plans and procedures
- ▼ results of the audit of the Orica's premises located at Botany are contained in the NSW EPA "Final Compliance Audit Report Orica Australia Pty Ltd 16-20 Beauchamp Road Matraville NSW 2036, December 2011"
- ▼ further discussions were held with OEH officers about the performance of the GTP following the incidents at Orica's other plants. During these discussions OEH officers stated that all non-compliances at the GTP have been minor since its commissioning in January 2001 and been adequately addressed by the Company.

As a result of this assessment, IPART concluded that Orica has and will continue to have the technical capacity to carry out the activity for which a licence has been sought.

**IPART is satisfied that Orica has satisfactorily met this criterion.**

#### Retail Supplier

Currently Orica supplies non-potable water for industrial purposes to three customers under an Agreement for Supply of Treated Water that specifies, inter alia, the billing, metering and other retail-specific arrangements. The 3 existing customers are located close to the GTP. Since the demand from these customers matches Orica's licenced groundwater extraction rate, Orica has no plans to expand its customer base for treated groundwater.



IPART considers that its operational experience since 2007 demonstrates its technical capacity to be granted a retail supplier's licence especially in light of the limited supply scenarios described above.

**IPART is satisfied that Orica has satisfactorily met this criterion.**

### **3.1.3 Financial capacity**

Orica Australia Pty Ltd is a 100% owned subsidiary of Orica Ltd., a major Australian company, listed on the ASX. While a separate entity, we have taken account of the considerable assets of Orica Australia Pty Ltd. We also note that the satisfactory operation of the GTP is a requirement of the Environment Protection Licence issued by the EPA. As part of that licence, Orica Australia Pty Ltd is required to maintain a surety of \$14.4 million in favour of the EPA/ OEHL.

IPART commissioned an assessment of Orica's financial capacity from Vincents, Chartered Accountants. This assessment considered various financial reports and a range of financial indicators. It concluded that Orica has a low risk of financial failure and that Orica's licence does not require any conditions to ensure it maintains its financial viability.

**IPART is satisfied that Orica has satisfactorily met this criterion.**

### **3.1.4 Organisational capacity**

In making an assessment of the organisational capacity of Orica regard was given to Orica's experience in operating the GTP, specific positions nominated to the project and its corporate structure.

No issues were identified by IPART regarding the applicant's organisational capacity to hold a network operator's or retail supplier's licence. IPART concluded that Orica has and will continue to have the organisational capacity to carry out the activity for which a licence has been sought.

**IPART is satisfied that Orica has satisfactorily met this criterion.**

### **3.1.5 Public health**

The capacity of Orica to operate and maintain water industry infrastructure in a manner that protects public health was considered as part of the technical, financial and organisation capacity assessments.

NSW Health comprehensively assessed the public health aspects of Orica's application and supports the granting of the licence to Orica. NSW Health also referred to a study undertaken in 2008 by URS and entitled "Use of Groundwater - Assessment of Risks to Human Health and the Environment". This document

concluded that risks to human health and risks to the environment associated with potential use of treated water from the GTP were essentially negligible.

NSW Health also suggested that water quality data should be assessed to confirm assumptions made in the risks assessments conducted at the GTP. This assessment will be undertaken at a later licensing phase when Orica's Water Quality Plan is reviewed and audited.<sup>8</sup> The Plan will be audited by an independent technical consultant from IPART's Water Licensing Audit Panel and NSW Health will also be given an opportunity to review this plan. . If the plan is considered inadequate, the Minister can require the plan to be amended to satisfy any concerns.

**IPART is satisfied that Orica has satisfactorily met this criterion.**

### **3.1.6 Environment**

The environmental impacts of the GTP have been assessed during the planning approval stage and through the process of obtaining and varying an Environment Protection Licence (EPL) under the *Protection of the Environment Operations Act 1997* (POEO). A Joint Determining Authority was set up to consider the GTP, known at that time as the Botany Groundwater Cleanup Project. This determining authority consisted of:

- ▼ the then Department of Environment and Conservation,
- ▼ the then Department of Infrastructure, Planning and Natural Resources,
- ▼ NSW Maritime,
- ▼ Sydney Water Corporation and
- ▼ Sydney Ports Corporation.

The Joint Determining Authority granted approval for the project. The EPA subsequently varied Orica's existing EPL to take account of the construction and on-going operation of the GTP.

The submission received from OEH expressed some concerns that wastewater from other sources could potentially be accepted by Orica for treatment through the GTP. To address this concern the proposed licence has been drafted to limit the source of water to groundwater.

We consider the proposed network operator's and retail supplier's licences are not inconsistent with the approval by the Joint Determining Authority or Orica's existing EPL.

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<sup>8</sup> Under transitional arrangement network operators of existing infrastructure that is already operating are required to submit licence plans within 6 months of being licensed.

As part of the reassessment of the licence application, we reviewed the results of the audit of the Orica's premises located at Botany contained in the NSW EPA "Final Compliance Audit Report Orica Australia Pty Ltd 16-20 Beauchamp Road Matraville NSW 2036, December 2011." The audit was carried out by the OEHL on the 27 and 28 September 2011. Compliance was assessed against the requirements of the *Protection of the Environment Operations Act (1997)* and Orica's Environment Protection Licence (EPL 2148). There were no non-compliances for the management of major environmental risks. Only 2 minor non-compliances were noted. Both had no direct environmental impact, they related to recording of pollution complaints and advertising the telephone complaints line to the public. Further these non-compliances did not directly relate to the operation of the GTP.

Despite this, one issue was identified in the audit that related to the operation of the GTP. This matter was outside the scope of the audit and related to the potential for a contaminated groundwater spill to go undetected for periods up to a week. Orica have addressed these concerns by outlining the additional controls which limit the potential for an environmental spill from the extraction point.

**IPART is satisfied that Orica has satisfactorily met this criterion.**

### **3.1.7 Insurance**

An assessment was made of Orica's existing arrangements with respect to insurance. The assessment was based wholly on the information provided as part of Orica's application including the certificates of currency. Orica advised that due to the geographic scope and nature of Orica's business operations, the activities conducted at the Botany site will be covered under the Orica Group global insurance program. According to Orica, the coverage provided under the global program is significantly in excess of the limits required for the size and nature of the activities at Botany.

IPART is satisfied on the information provided that Orica has demonstrated that it has made, and will continue to maintain, appropriate arrangements in respect to insurance.

Orica will also be subject to standard licence conditions B2 and B3 (approved by the Minister to be imposed on all WICA licences). Condition B2 requires Orica to provide a report from an independent insurance expert certifying that in the insurance expert's opinion the type and level of insurance obtained by Orica is appropriate for the size and nature of the activities authorised under the licence. Condition B3 requires Orica to maintain appropriate insurance sufficient for the size and nature of the activities authorised by the licence. It also requires Orica to notify IPART of any change in the type, level or period of insurance held by Orica and provide a copy of the certificate of currency within 10 days of the change being made. This condition also enables IPART to request further insurance expert reports from Orica in future, should it consider it necessary.

**IPART is satisfied that Orica has satisfactorily met this criterion and notes that standard licence conditions B2 and B3 will apply.**

**IPART is satisfied that Orica has satisfactorily met this criterion.**

### **3.1.8 Sufficient quantities of water not from a public water utility**

Orica sources all water for the GTP from groundwater and will not source any water it proposes to retail from a public water utility.

**IPART is satisfied that Orica has satisfactorily met this criterion.**

### **3.1.9 Additional public interest considerations**

To date the plant has successfully achieved containment of the contaminated groundwater, protecting Botany Bay and the local environment, and is currently supplying three local industrial customers with high quality treated water, replacing up to 7 ML/day of demand on Sydney's potable water supply.

**IPART is satisfied that Orica has satisfactorily met this criterion.**

## **3.2 Licensing principles**

Each of the licensing principles was considered in making a recommendation as to whether or not the licence should be granted and what licence conditions to impose, as follows:

- ▼ Protection of public health, environment, public safety and consumers. The GTP has been satisfactorily operating since 2006 and its continued operation is the subject of an EPL and is being monitored by the EPA/OEH to ensure adequate public health, public safety and the protection of the environment. The results of the recent audit of the Orica's Botany site indicate that there were no non-compliances for the management of major environmental risks
- ▼ Encouragement of competition. The GTP provides a supply of non-potable treated water to 3 industrial customers. This supply is provided to customers in competition to potable water from Sydney Water. .
- ▼ Ensuring sustainability of water resources. The source of water for the GTP is contaminated groundwater. Orica's operations are designed to clean up this contamination of an environmental water source.
- ▼ Promotion of production and use of recycled water. Remediating contaminated groundwater and large scale reuse of the treated water for industrial purposes is not common. Orica has developed innovative processes and techniques to integrate unit operations that each had a proven history of successful operation into a system that successfully met the remediation requirements. The scheme saves Sydney Water Corporation 2GL of potable water per year.

- ▼ The promotion of policies set out in a prescribed water policy document<sup>9</sup> (presently, this is the NSW Government’s Metropolitan Water Plan). A key initiative of the plan is the promotion of recycled water schemes. This includes schemes like Orica’s GTP which supplies large industrial customers from alternative water sources. We therefore conclude that Orica’s scheme meet this principle.
- ▼ The potential for adverse financial implications for small retail customers generally arising from the activities proposed to be covered by the licence. This licensing principle is not applicable to the licence they will be granted.
- ▼ The promotion of the equitable sharing among participants in the drinking water market of the costs of water industry that significantly contributes to water security. This licensing principle is not applicable to the licence they will be granted.

**IPART is satisfied that the grant of a Network Operator’s and Retail Supplier’s licence to Orica is consistent with the licensing principles.**

## **4 Recommendations**

In determining the licence application the Minister must consider, but is not bound to accept, any advice or recommendation in this report and may seek further advice from IPART in relation to the application.<sup>10</sup>

**IPART is satisfied that Orica 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 grants a Network Operator’s and Retail Supplier’s licence to Orica, subject to the conditions as set out in licence number 12\_016 and 12\_017R.**

On making a decision whether or not to grant the licence, the Minister is required to provide IPART with a notice of the decision and of the reasons for the decision.<sup>11</sup> IPART will then make the information in the notice available to the public on IPART’s internet website in accordance with the requirements of the Act.<sup>12</sup>

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<sup>9</sup> A “prescribed water policy document” is a plan or other policy document concerning the use of water resources, which is issued by the Government or on its behalf and is prescribed by the regulations. The Amendment Act Amended the Regulations to prescribe the NSW Government’s *Metropolitan Water Plan* as in force from time to time.

<sup>10</sup> *Water Industry Competition Act 2006*, section 10(2).

<sup>11</sup> *Water Industry Competition Act 2006*, section 10(5).

<sup>12</sup> *Water Industry Competition Act 2006*, section 10(6).