

# **Procurement of Strategic Water Entitlements**

Department of Agriculture, Water and the Environment

© Commonwealth of Australia 2020

ISSN 1036–7632 (Print)

ISSN 2203–0352 (Online)

ISBN 978-1-76033-569-4 (Print)

ISBN 978-1-76033-570-0 (Online)

Except for the content in this document supplied by third parties, the Australian National Audit Office logo, the Commonwealth Coat of Arms, and any material protected by a trade mark, this document is licensed by the Australian National Audit Office for use under the terms of a Creative Commons Attribution-NonCommercial-NoDerivatives 3.0 Australia licence. To view a copy of this licence, visit <http://creativecommons.org/licenses/by-nc-nd/3.0/au/>.

You are free to copy and communicate the document in its current form for non-commercial purposes, as long as you attribute the document to the Australian National Audit Office and abide by the other licence terms. You may not alter or adapt the work in any way.

Permission to use material for which the copyright is owned by a third party must be sought from the relevant copyright owner. As far as practicable, such material will be clearly labelled.

For terms of use of the Commonwealth Coat of Arms, visit the *It's an Honour* website at <https://www.pmc.gov.au/government/its-honour>.

Requests and inquiries concerning reproduction and rights should be addressed to:

Senior Executive Director  
Corporate Management Group  
Australian National Audit Office  
GPO Box 707  
Canberra ACT 2601

Or via email:

[communication@anao.gov.au](mailto:communication@anao.gov.au).



Canberra ACT

16 July 2020

Dear Mr President  
Dear Mr Speaker

In accordance with the authority contained in the *Auditor-General Act 1997*, I have undertaken an independent performance audit in the Department of Agriculture, Water and the Environment. The report is titled *Procurement of Strategic Water Entitlements*. Pursuant to Senate Standing Order 166 relating to the presentation of documents when the Senate is not sitting, I present the report of this audit to the Parliament.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's website — <http://www.anao.gov.au>.

Yours sincerely



Rona Mellor PSM  
Acting Auditor-General

The Honourable the President of the Senate  
The Honourable the Speaker of the House of Representatives  
Parliament House  
Canberra ACT

## **AUDITING FOR AUSTRALIA**

The Auditor-General is head of the Australian National Audit Office (ANAO). The ANAO assists the Auditor-General to carry out his duties under the *Auditor-General Act 1997* to undertake performance audits, financial statement audits and assurance reviews of Commonwealth public sector bodies and to provide independent reports and advice for the Parliament, the Australian Government and the community. The aim is to improve Commonwealth public sector administration and accountability.

For further information contact:  
**Australian National Audit Office**  
**GPO Box 707**  
**Canberra ACT 2601**

**Phone: (02) 6203 7300**  
**Email: [ag1@anao.gov.au](mailto:ag1@anao.gov.au)**

Auditor-General reports and information about the ANAO are available on our website:  
<http://www.anao.gov.au>

### **Audit team**

Tara Rutter  
Jacqueline Hedditch  
Taela Edwards  
Yvonne Buresch  
Jason Depasquale  
Michael White

# Contents

---

Summary and recommendations.....	7
Background .....	7
Conclusion .....	8
Supporting findings.....	9
Recommendations.....	10
Summary of entity response.....	11
Key messages from this audit for all Australian Government entities .....	12
<b>Audit findings.....</b>	<b>13</b>
1. Background .....	14
Introduction .....	14
History and development of water policy.....	15
Commonwealth water recovery .....	17
Administrative arrangements and reviews of Basin management .....	20
Rationale for undertaking the audit .....	21
Audit approach .....	22
2. Program design, planning and guidance.....	23
Was program design thorough and were appropriate competitive opportunities generated? .....	23
Did the department establish an appropriate purchasing framework, specific to the purchase of water entitlements? .....	28
Did the department have clear policy and guidance to support decisions to procure strategic water entitlements? .....	30
3. Program execution .....	32
Did the department follow guidelines for limited tender procurements? .....	32
Did the department provide appropriate information to decision-makers to enable informed decisions? .....	36
Did the department execute the Minister's instructions?.....	40
Did the department appropriately recognise and manage procurement risks? .....	42
Did the department conduct appropriate due diligence before entering into the contracts?.....	44
4. Value for money approach .....	46
Did the department document how value for money was considered and achieved? .....	46
Did the department conduct an evaluation of the effectiveness of the limited tender approach to strategic water procurements? .....	55
<b>Appendices .....</b>	<b>57</b>
Appendix 1      Entity response .....	58
Appendix 2      2019 Upper Condamine Alluvium limited tenders .....	61



# Audit snapshot

## Auditor-General Report No.2 2020–21

### *Procurement of Strategic Water Entitlements*



#### Why did we do this audit?

- ▶ To provide assurance to the Parliament and the public that strategic water procurements were planned for and executed appropriately and achieved value for money for the taxpayer.
- ▶ Water regulation is a topic of parliamentary and public interest.



#### Key facts

- ▶ There are approximately 2.6 million Australians living within the Murray-Darling Basin and it supports the production of \$22 billion worth of food and fibre per year.
- ▶ The Murray-Darling Basin Plan sets limits on the amount of water available for urban, industrial and agricultural use to ensure the ongoing health and resilience of the environment.
- ▶ In recent years, the Australian Government has purchased water entitlements for environmental purposes. Water for the environment is used to improve the health of rivers, wetlands and floodplains.



#### What did we find?

- ▶ Strategic purchases of water through limited tender contributed to the government policy to bridge the gap and obtain water for the environment. The arrangements in place to support these procurements were not fully effective.
- ▶ The program design and planning to support strategic water procurements was largely appropriate.
- ▶ The department did not consistently apply approved policy, planning and guidance to the assessment of all limited tender procurements.
- ▶ The department did not develop a framework designed to maximise value for money.



#### What did we recommend?

- ▶ The Auditor-General made four recommendations aimed at:
  - ▶ improving procurement guidance;
  - ▶ developing assurance mechanisms for procurement processes;
  - ▶ updating conflict of interest management arrangements; and
  - ▶ developing a clear evaluation framework.

# Summary and recommendations

---

## Background

1. The Murray-Darling Basin (the Basin) is a major water catchment area that includes parts of Queensland, New South Wales, Victoria, South Australia and the Australian Capital Territory. These are known as the Basin states.
2. The Basin is of major social, economic and environmental significance. There are approximately 2.6 million Australians living within the Basin and it supports the production of \$22 billion worth of food and fibre per year. The Basin supports 120 waterbird species, 46 native fish species and 16 internationally recognised and protected wetlands.<sup>1</sup>
3. The *Basin Plan 2012* (the Basin Plan) sets limits on the amount of water available for urban, industrial and agricultural use, to ensure the ongoing health and resilience of the 'environment'. The Basin Plan sets out local water recovery targets for each Sustainable Diversion Limit (SDL) area and shared water recovery targets within the Basin states for SDL resource units in a zone.<sup>2</sup> The recovery target must be met by recovering water from within that SDL resource unit area and must be fully recovered in order to successfully 'bridge the gap'.
4. In order to better balance the demands placed on the Basin water supply, the Australian Government has procured water entitlements for environmental purposes. Water for the environment is used to improve the health of rivers, wetlands and floodplains. Purchasing water to assist with bridging the gap is undertaken through the Sustainable Rural Water Use Infrastructure Program (SRWUIP) within the Department of Agriculture, Water and the Environment (the department).<sup>3</sup>
5. The government's 2014 *Water Recovery Strategy for the Murray-Darling Basin* outlined how the government intended to meet the gap-bridging requirements, including that the strategy would 'focus on strategically important water purchases'<sup>4</sup>, in areas where water was still required. In January 2016, following ministerial approval, the department implemented arrangements to procure water entitlements directly from sellers through limited tender arrangements.
6. The recovery target (known as 'the gap') for surface water recovery under the Basin Plan is currently 2075 gigalitres. As at 31 December 2019, 46.7 gigalitres remain to be recovered.

---

1 Murray-Darling Basin Authority, *Murray-Darling Basin Authority Annual Report 2018–19*, p. XI.

2 A surface water resource unit is a defined region within specific water resource plan areas. The surface water SDL resource unit dataset defines the boundary of 29 surface water SDL areas in the *Basin Plan 2012*.

3 Responsibility for water policy and resources was transferred to the Department of Agriculture from the Department of Environment through an Administrative Arrangement Order made on 21 September 2015. In February 2020, further machinery of government changes came into effect which saw the Department of Agriculture, Water and the Environment consolidate the Department of Agriculture with the environment functions from the Department of the Environment and Energy.

4 Department of the Environment, *Water Recovery Strategy for the Murray-Darling Basin*, June 2014, available from <https://webarchive.nla.gov.au/awa/20160113200050/http://www.environment.gov.au/system/files/resources/4ccb1c76-655b-4380-8e94-419185d5c777/files/water-recovery-strategy-mdb2.pdf> [accessed January 2020].

## Rationale for undertaking the audit

7. Water regulation is a topic of parliamentary and public interest. The audit examines \$190 million of strategic water procurements through limited tender arrangements, to provide assurance to the Parliament and the public that these procurements were planned for and executed appropriately and achieved value for money.<sup>5</sup>

8. This audit was also undertaken as part of the Auditor-General's continued focus on water regulation within the Commonwealth.<sup>6</sup> This audit topic was included in the Australian National Audit Office (ANAO) 2018–19 Annual Audit Work Program. The Auditor-General also received requests from a number of members of Parliament for a performance audit on this topic, including the responsible Minister.<sup>7</sup>

## Audit objective and criteria

9. The objective of the audit was to examine whether strategic water procurements by the department were conducted consistent with government policy, were supported by appropriate program design, were planned and executed appropriately, and achieved value for money.

10. To form a conclusion against the audit objective, the ANAO adopted the following high level criteria:

- Did the department have appropriate program design, planning and guidance in place to support strategic water procurements?
- Did the department execute the program consistent with approved policy, planning and guidance?
- Did the department achieve value for money?

11. This audit focused on completed strategic water procurements undertaken through limited tender arrangements between January 2016 and December 2019. A total of 27 transactions were considered.

## Conclusion

12. The department's strategic purchases of water through limited tender contributed to the government policy to bridge the gap and obtain water for the environment. The arrangements in place to support these procurements were not fully effective.

---

5 This audit did not examine water procurements undertaken through open tender, or limited tender procurements conducted prior to 2016.

6 See Auditor-General Report No.30 2017–18 *Design and Governance of the National Water Infrastructure Development Fund*; Auditor-General Report No.17 2017–18 *New South Wales' Protection and use of Environmental Water in the Murray-Darling Basin*; Auditor-General Report No.29 2014–15 *Funding and Management of the Nimmie-Caira System Enhanced Environmental Water Delivery Project*; Auditor-General Report No.17 2013–14 *Administration of the Strengthening Basin Communities Program*; and Auditor-General Report No.27 2010–11 *Restoring the Balance in the Murray-Darling Basin*.

7 The correspondence and the Auditor-General's responses are available from [www.anao.gov.au/work/request/audit-purchases-environmental-water-the-commonwealth-and-behalf-the-commonwealth](http://www.anao.gov.au/work/request/audit-purchases-environmental-water-the-commonwealth-and-behalf-the-commonwealth); [www.anao.gov.au/work/request/allegations-concerning-the-purchases-water-environmental-flows-the-murray-darling-basin](http://www.anao.gov.au/work/request/allegations-concerning-the-purchases-water-environmental-flows-the-murray-darling-basin); and [www.anao.gov.au/work/request/further-allegations-concerning-procurement-water-entitlements-the-murray-darling-basin](http://www.anao.gov.au/work/request/further-allegations-concerning-procurement-water-entitlements-the-murray-darling-basin).



13. The program design and planning to support strategic water procurements was largely appropriate. The department developed guidance that aligned with the high level policy objective to assist in the assessment of limited tenders. However, it is not clear how the department assessed individual procurements to determine their strategic priority or considered how to encourage competition within the limited tender process.
14. The department did not consistently apply approved policy, planning and guidance to the assessment of all limited tender procurements. The department advised the Minister that it would assess limited tender offers against specific criteria, however, briefings to the Minister did not consistently address these criteria or provide appropriate advice.
15. It is not clear whether two of the seven instructions given to the department by the Minister were fully executed. Information provided to departmental delegates to seek approval to enter into contractual arrangements did not clearly outline the delegations required.
16. The department did not develop a framework designed to maximise the value for money of strategic water entitlements purchased through limited tender arrangements. Rather, the department relied on a methodology of valuations where gap-bridging water was required. The price the department paid for water entitlements was equal to or less than the maximum price determined by valuations. The department only negotiated price for one procurement.
17. The department has not reviewed the water recovery strategy or its approach to procurement of strategic water entitlements. The department has not adequately planned for evaluation of the strategic water purchasing program.

## Supporting findings

18. The department identified several options under which to procure strategic water entitlements. However, the department's design of the limited tender approach did not appropriately consider opportunities to generate competitive opportunities between sellers, and a communications strategy was not developed.
19. The department developed a draft framework for strategic surface water procurements, including through limited tenders, which aligned with high level policy objectives. This draft framework was not finalised or endorsed. For limited tender procurements conducted in 2016 to 2017, the department used the additional rules for the conditions for limited tenders for exceptionally advantageous circumstances. The department did not develop a definition for exceptionally advantageous.
20. The department developed internal policy and guidance materials to assist officials' review of limited tender procurement offers. These materials align with the principles of the draft framework and outlined the process to be followed when assessing limited tenders.
21. The department did not consistently apply the guidelines it developed to all limited tender procurements. Four offers were assessed and provided to the Minister for approval prior to the guidelines being fully developed and approved.
22. Briefings to the Minister did not provide a clear indication of how the procurements would obtain a triple bottom line outcome as in the original commitment. The department did not consistently provide complete information to enable departmental decision-makers to make informed decisions.

23. For the strategic water procurements examined, the department mostly executed the Minister's instructions. There are two instances where it is unclear whether the actions undertaken by the department and subsequent advice provided to the Minister fully addressed the intent of the instructions.

24. The department did not appropriately manage procurement risks. While the department identified risks associated with the broader water recovery strategy, there is limited evidence of risks being raised or managed for individual procurements.

25. The department undertook a due diligence process for most procurements within an appropriate timeframe. Two contracts were not dated by at least one relevant party.

26. The department did not develop a framework designed to maximise value for money. Rather, the department relied on a methodology of valuations of water entitlements where gap bridging was required. In the advice to the Minister and the departmental delegate, information relating to a value for money assessment as well as triple bottom line outcomes was limited. There is limited evidence of appropriate assessment to inform these statements. The department did not negotiate the price for the water entitlements it purchased in all but one instance. Probity management arrangements were different to those applied to open tenders and conflict of interest declarations were not clearly documented. The department has not adequately planned for evaluation of the strategic water purchasing program.

27. The department has not reviewed or updated the Water Recovery Strategy or the water purchasing program. An evaluation is planned for September 2020 following the conclusion of the Sustainable Rural Water Use and Infrastructure Program. The department has not yet developed an evaluation framework.

## Recommendations

28. The report makes four recommendations.

### Recommendation no.1 Paragraph 3.35

The Department of Agriculture, Water and the Environment review and update internal procurement guidance to ensure delegations are accurately identified in approval briefs.

**Department of Agriculture, Water and the Environment response:**  
*Agreed.*

### Recommendation no.2 Paragraph 3.65

The Department of Agriculture, Water and the Environment develop assurance mechanisms for procurement processes to ensure all necessary documentation is completed and documented in a timely manner prior to execution of contracts.

**Department of Agriculture, Water and the Environment response:**  
*Agreed.*

**Recommendation no.3**  
**Paragraph 4.43**

The Department of Agriculture, Water and the Environment review and update arrangements for managing real or perceived conflicts of interest including assurance mechanisms to ensure these are consistently implemented and communicated.

**Department of Agriculture, Water and the Environment response:**  
*Agreed.*

**Recommendation no.4**  
**Paragraph 4.49**

The Department of Agriculture, Water and the Environment implement a framework which requires the development of evaluation strategies early in the program design process and regular monitoring and review throughout the lifecycle.

**Department of Agriculture, Water and the Environment response:**  
*Agreed.*

## **Summary of entity response**

The department acknowledges the ANAO's overall findings and recommendations and appreciates the opportunity to comment on the audit report on the Procurement of Strategic Water Entitlements.

29. The department's full summary response, and the ANAO rejoinders to that response, can be found at Appendix 1.

## Key messages from this audit for all Australian Government entities

30. Below is a summary of key messages, including instances of good practice, which have been identified in this audit and may be relevant for the operations of other Australian Government entities.

### **Policy/program implementation**

- Entities should ensure that advice provided to Ministers and decision-makers clearly and consistently addresses key policy commitments and provides sufficient information to inform decisions. Quality assurance mechanisms can support the development of quality advice.

### **Governance and risk management**

- Probity is important as it helps ensure decisions are made with integrity, fairness and accountability, while attaining value for money. Entities should ensure appropriate policies are developed, regularly reviewed and demonstrably adhered to through appropriate reporting on compliance. This involves an active rather than passive approach to acting on probity risks.
- Entities should actively manage risk including regular review of identified risks and their mitigation strategies to ensure these remain appropriate and sufficient. Advice to Ministers and decision-makers should clearly outline key risks and mitigation strategies.

### **Procurement**

- Clear identification of both financial and non-financial considerations as well as determining the importance of each consideration supports entities to demonstrate the achievement of value for money outcomes.
- Entities should seek to negotiate on price to optimise value for money outcomes. Where a decision is made not to negotiate, the decision including reasons should be clearly documented.
- Entities and departmental officials must ensure delegations are executed in compliance with the *Public Governance, Performance and Accountability Act 2013*. Appropriate assurance mechanisms should be developed to identify non-compliance and rectify the cause.

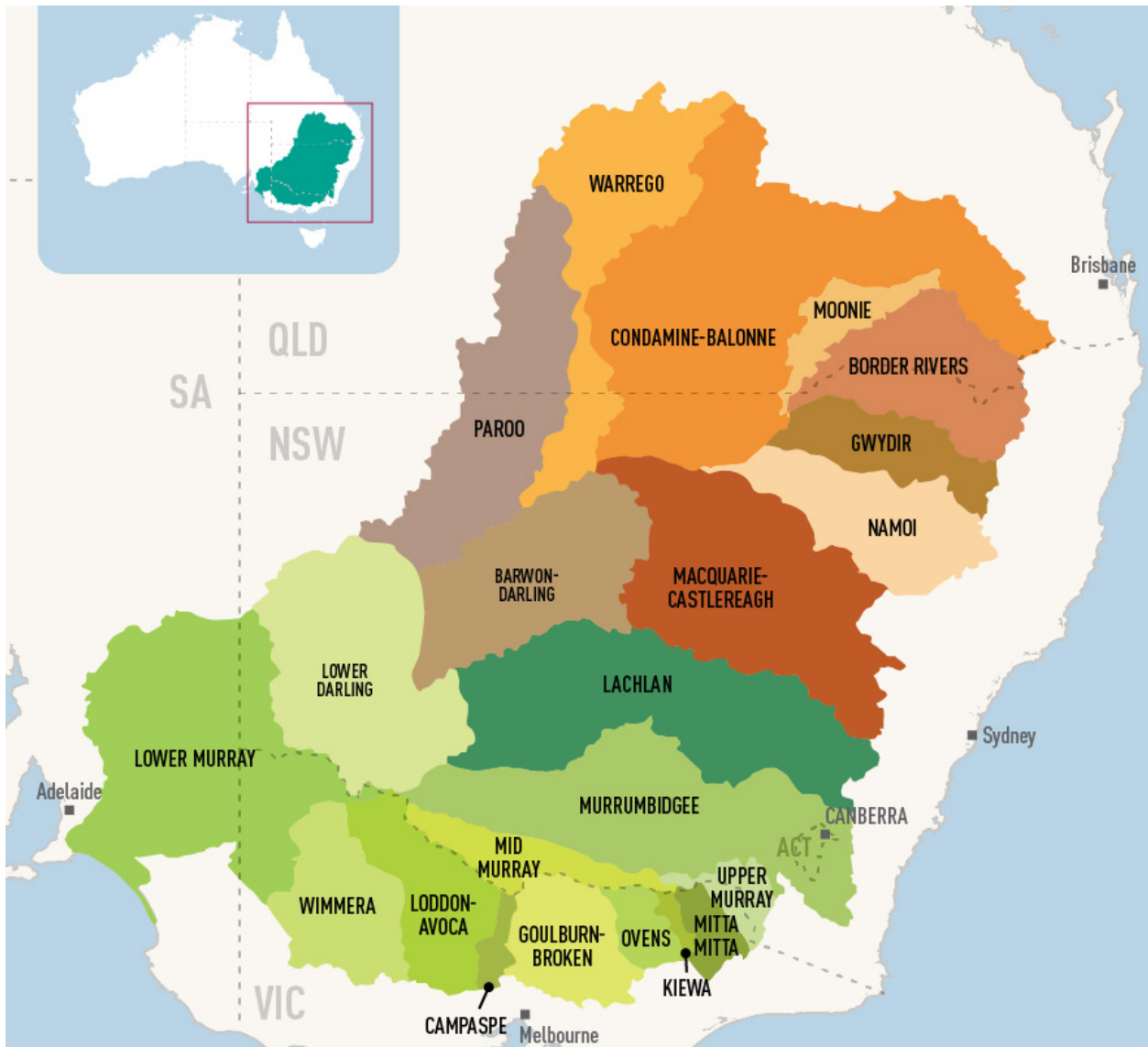
## **Audit findings**

# 1. Background

## Introduction

1.1 The Murray-Darling Basin (the Basin) is a major water catchment area that includes parts of Queensland, New South Wales, Victoria, South Australia and the Australian Capital Territory. These are known as the Basin states. Figure 1.1 shows the Basin area.

**Figure 1.1: The Murray-Darling Basin catchments**



Source: Murray-Darling Basin Authority, available from <https://www.mdba.gov.au/discover-basin/catchments> [accessed 10 March 2020].

1.2 Water in the Basin is used for drinking water, supplying water for irrigated agriculture and industry, recreational and cultural purposes and maintaining freshwater ecosystems.<sup>8</sup>

<sup>8</sup> The Basin Plan 2012, Schedule 1, paragraph 26.

1.3 Water entitlements are rights to an ongoing share of water within a particular area of the Basin. An entitlement to water in the Basin can be bought or sold, either permanently or temporarily.

1.4 Water allocations are the amount of water entitlement holders are allocated in a given year, and can change based on factors such as rainfall, inflows into storages and how much water is already stored. Allocating water to entitlement holders is the responsibility of the Basin states, and each has its own processes and rules for allocating water.

1.5 Water is traded on markets: within catchments, between catchments (where possible) or along river systems. This allows water users to buy and sell water according to their individual needs. The financial value of a water entitlement is determined by the water market.<sup>9</sup>

1.6 In recent years, the Australian Government has purchased water entitlements for environmental purposes. Water for the environment is used to improve the health of rivers, wetlands and floodplains.

## History and development of water policy

1.7 An Intergovernmental Agreement (the Agreement) outlines arrangements between the Australian Government and states to implement the *Basin Plan 2012* (the Basin Plan).<sup>10</sup> Under the Agreement, the Australian Government and Basin states agreed to cooperate in the implementation of the Sustainable Diversion Limits (SDL) in the Basin Plan. SDLs limit how much water, on average, can be used in the Basin by towns, communities, industry and farmers.<sup>11</sup>

1.8 To support implementation of the Basin Plan, the Basin states are:

- developing supply measures for SDL adjustment and proposals to address physical or administrative restrictions on the flow of water;
- identifying ways to maximise water savings through infrastructure;
- preparing water resource plans and long-term environmental watering plans; and
- implementing state water trading rules consistent with the Basin Plan rules.<sup>12</sup>

1.9 Key milestones and changes to the governance of the Basin are shown in Figure 1.2.

9 Water markets first emerged in Australia in the 1980s with the introduction of limited water trading in Victoria. National water reforms in the early 1990s and 2000s resulted in the expansion of water markets across state borders in the Murray-Darling Basin.

10 Intergovernmental agreement on implementing water reform in the Murray-Darling Basin, June 2013.

11 Murray-Darling Basin Authority, *Sustainable diversion limits* [Internet], MDBA, available from <https://www.mdba.gov.au/basin-plan-roll-out/sustainable-diversion-limits> [accessed 17 May 2020].

12 The Basin states have other water management roles through state legislation outside the Basin plan.

**Figure 1.2: Key milestones and changes to the governance of the Murray-Darling Basin**

<p><b>The Murray-Darling Basin Act 1993 and The Murray-Darling Basin Agreement 1992</b> An agreement between the Commonwealth and states regarding the Basin resources. Establishes the <b>Murray-Darling Basin Commission (MDBC)</b>, and the <b>Murray-Darling Basin Ministerial Council</b>.</p>	1992	<p><b>The Cap on surface water diversions</b> The Ministerial Council introduced the Cap to protect the environment and the rights of water users. The Cap introduced long-term limits on how much water could be taken.</p>
<p><b>National Water Commission (NWC)</b> Established to drive water reform under the NWI. Monitors, audits and assesses progress on the NWI and other activities.</p>	1995	<p><b>National Water Initiative (NWI)</b> A commitment by governments to increase the efficiency of Australia's water use, aiming to increase certainty for investment, communities and the environment.</p>
<p><b>The Water Act 2007 (the Water Act)</b> The legislative framework for ensuring the Basin is managed in the national interest. Establishes: the <b>Murray-Darling Basin Authority (MDBA)</b> with the functions and powers to ensure that Basin resources are managed sustainably; and the <b>Commonwealth Environmental Water Holder (CEWH)</b> to manage water acquired by the government.</p>	2004	<p><b>Restoring the Balance program</b> commences, a Commonwealth program committing \$3.1 billion to purchase water entitlements from sellers in the Basin in order to reduce water use; provide water for the environment, and ease the transition to the Basin Plan.</p>
<p><b>The Water Amendment Act 2008</b> repeals the <i>Murray-Darling Basin Act 1993</i>, transfers the MDBC's functions to the MDBA.</p>	2007	<p><b>Sustainable Rural Water Use and Infrastructure Program</b> commences, a Commonwealth program investing in rural water use, management and efficiency, including improved water knowledge and market reform, and water purchase for the environment.</p>
<p><b>Amendment to the Water Act</b> establishes the Water for the Environment Special Account.</p>	2008	<p><b>The Basin Plan 2012</b> established under the Water Act. Sets the amount of water that can be taken from the Basin each year, including the sustainable diversion limits (SDLs). The key intended outcome is a healthy and working Basin. Sets the recovery target of 2750GL.</p>
<p><b>NWC Abolished</b> with the repeal of the <i>National Water Commission Act 2004</i>. Functions transferred to the Productivity Commission, the department, ABARES, and the Bureau of Meteorology.</p>	2012	<p><b>Water Recovery Strategy (the Strategy)</b> The government's approach to recovering water for the environment while maximising positive outcomes for farmers and communities in the Basin.</p>
<p><b>Water Purchasing Plan 2015–2019</b> Builds on the Strategy, and sets out a range of methods that may be used to acquire water to meet the Basin Plan SDLs through to 2019.</p>	2013	<p><b>Amendment to the Water Act</b> introduces <b>1500 GL limit on surface water purchases</b>.</p>
<p><b>Northern Basin Review</b> by the MDBA reviews the Basin Plan recovery targets and proposed resetting the recovery targets. Adjustment targets were released for public consultation in 2017.</p>	2014	<p><b>Minister approves new approach to procurement of strategic water entitlements, including through limited tenders.</b></p>
<p><b>Adjustment to sustainable diversion limits introduced. The recovery target was reduced to 2075GL.</b></p>	2015	<p><b>The Interim Inspector-General of Murray-Darling Basin Water Resources</b> appointed to help deliver the basin plan, and improve transparency, accountability and community confidence. Subsumes the Northern Basin Commissioner role.</p>
<p><b>Northern Basin Commissioner</b> established to oversee the implementation of the Northern Basin Review.</p>	2016	
	2018	
	2019	

Source: ANAO analysis.



1.10 The *Water Act 2007* (Water Act) and the Basin Plan are intended to provide a coordinated approach to water use and management across the Basin states.<sup>13</sup> The Water Act provides the legislative framework for ensuring the Basin is managed in the national interest and establishes the Murray-Darling Basin Authority (MDBA).<sup>14</sup> The MDBA's role includes developing and implementing the Basin Plan, managing the water resources of the Basin, and undertaking compliance, enforcement, monitoring and evaluation work.

1.11 The Basin Plan sets out the regulatory framework for the Basin. Chapter 5 of the Basin Plan sets out the overarching objectives:

- to give effect to relevant international agreements through the integrated management of water resources;
- to establish a sustainable and long-term adaptive management framework for water resources that takes into account the broader management of natural resources;
- to optimise social, economic and environmental outcomes arising from the use of water resources in the national interest; and
- to improve water security for all users of Basin water resources.

1.12 The Basin Plan sets limits on the amount of water available for urban, industrial and agricultural use to ensure the ongoing health and resilience of the environment. These limits are known as the SDLs.

## Commonwealth water recovery

1.13 The aim of the Basin Plan is to return the Basin to a healthier and sustainable level while continuing to support farming and other industries.<sup>15</sup> The Commonwealth undertakes water purchasing to recover water from communities, industries and irrigators to ensure enough water remains in the Basin for environmental purposes.<sup>16</sup> The Department of Agriculture, Water and the Environment (the department) undertakes water procurements to achieve these objectives.

1.14 Water recovery by the Australian Government can occur through investments in water-saving infrastructure, procurement of water entitlements (including surface and ground water<sup>17</sup>), or other water recovery programs.<sup>18</sup>

1.15 The 2014 *Water Recovery Strategy for the Murray-Darling Basin* (the Water Recovery Strategy) outlines how the Australian Government intends to meet the commitment to 'bridge the

13 The *Basin Plan 2012* is made under subparagraph 44(3)(b)(i) of the Water Act.

14 The Murray-Darling Basin Authority replaced the Murray-Darling Basin Commission.

15 Murray-Darling Basin Authority, *A plan for the Murray-Darling Basin* [Internet], available from <https://www.mdba.gov.au/basin-plan/plan-murray-darling-basin> [accessed 18 May 2020].

16 Murray-Darling Basin Authority, *Water recovery* [Internet], available from <https://www.mdba.gov.au/basin-plan-roll-out/water-recovery> [accessed 18 May 2020].

17 Surface water is water that collects on the surface of the ground, such rivers and lakes. Ground water is water found underground such as water found in cracks or pores in rocks.

18 Commonwealth Environmental Water Office, *Managing the Commonwealth Environmental Water Portfolio*, available from <https://www.environment.gov.au/system/files/resources/1a947b47-08ac-453b-901e-4ed59c0b76cc/files/managing-cew-portfolio.pdf> [accessed 11 March 2020].

gap' to achieving the SDL identified by the Basin Plan.<sup>19</sup> While the strategy states that the Australian Government will prioritise water recovery for environmental purposes through infrastructure investment over procurement of water entitlements, it also emphasises that:

... water buybacks will no longer be the main focus for water recovery. Purchasing will progress at a significantly slower and more predictable pace with Government's **focus on strategic and targeted initiatives** [ANAO emphasis added].

... The Australian Government will focus on strategically important water purchases, which will occur either **in areas where there is a remaining gap to be bridged to the SDLs, or where aligned with irrigation delivery system reconfiguration or rationalisation** [ANAO emphasis added].

... The Australian Government may also consider **other small and orderly water purchase opportunities from 2014 to 2016 where they are consistent with the Government's stated priorities, clearly contribute to bridging the gap and represent value for money** [ANAO emphasis added].<sup>20</sup>

1.16 The recovery target (known as 'the gap') for surface water recovery under the Basin Plan was initially set at 2750 gigalitres.<sup>21</sup>

1.17 In October 2015, the *Water Amendment Act 2015* introduced a limit of 1500 gigalitres on Commonwealth procurements of surface water. The 1500 gigalitre limit was intended to provide confidence to the basin irrigation industry and communities on the availability of surface water.<sup>22</sup>

1.18 Amendments to the Basin Plan following the Northern Basin Review in November 2016 and introduction of the SDL adjustment mechanism in January 2018 has seen the recovery target reduced. The current recovery target is 2075 gigalitres.<sup>23</sup>

1.19 Under the current recovery target and with the limit placed on surface water recovery, 575 gigalitres is to be recovered primarily by investment in water-saving infrastructure, efficiency projects, or environmental works and measures.<sup>24</sup>

1.20 Enforcement of the SDLs commenced on 1 July 2019.<sup>25</sup> However, water purchasing has been extended to 30 June 2020 as the SDLs have not yet been met. As at 31 December 2019, 2028.3

---

19 Department of the Environment, *Water Recovery Strategy for the Murray-Darling Basin*, June 2014, available from <https://webarchive.nla.gov.au/awa/20160113200050/http://www.environment.gov.au/system/files/resources/4ccb1c76-655b-4380-8e94-419185d5c777/files/water-recovery-strategy-mdb2.pdf> [accessed January 2020].

20 *ibid.*, pp. 3 and 19.

21 A recovery target of 40.4 gigalitres was set for groundwater recovery.

22 B Baldwin, 'Second reading speech: Water Amendment Bill 2015', House of Representatives, Debates, 28 May 2015.

23 The Northern Basin Review resulted in a reduction in the recovery target for the northern basin of 70 gigalitres. The SDL adjustment mechanism saw the recovery target reduced by 605 gigalitres in the southern Basin.

24 The department advised the ANAO that either water purchasing or infrastructure investment can contribute to bridging the gap.

25 Department of Agriculture, Water and the Environment, *Sustainable Diversion Limits (SDL) adjustment mechanism and its implementation*, available from <https://www.agriculture.gov.au/water/mdb/policy/sdl-adjustment-mechanism> [accessed 11 March 2020]

gigalitres has been recovered under the Basin Plan, with 46.7 gigalitres total water recovery remaining against the target.<sup>26</sup>

## Procurement of strategic water entitlements

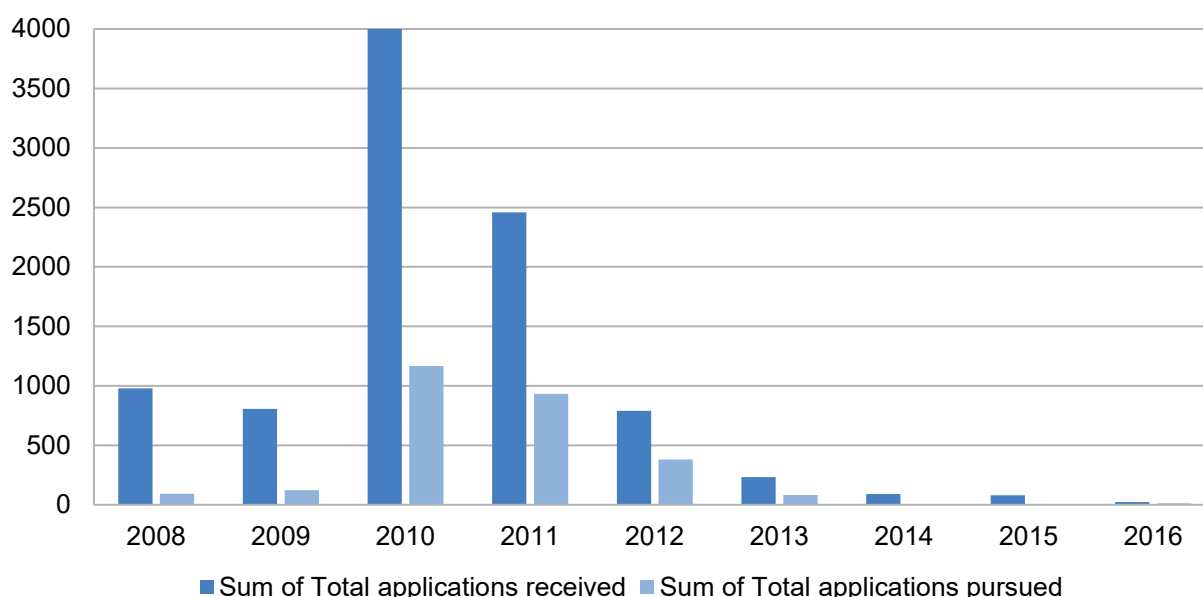
1.21 In February 2008, the department commenced purchasing water entitlements to return water to the environment under the *Restoring the Balance in the Basin* program. Between 2008 and 2015, water purchasing occurred primarily through a series of open tenders.<sup>27</sup>

1.22 As part of the 2014 Water Recovery Strategy, the government stated it would focus on strategically important water recoveries. These were defined as those in areas where there is a remaining gap to be bridged to the SDLs, or where aligned with irrigation delivery system reconfiguration or rationalisation. The strategy also allowed for consideration of other small and orderly water purchase opportunities from 2014 to 2016 where they were consistent with priorities, clearly contribute to bridging the gap and represented value for money.

1.23 In 2015, the department also identified that the number of offers of water entitlements were declining in open tender rounds. As part of the Water Purchasing Plan, presented to the Water Project Board, the department noted that over the previous 18 month period the department had received 'almost no applications to sell at or below the benchmark prices during open competitive tenders'.<sup>28</sup>

1.24 Figure 1.3 shows the number of applications received and pursued through open tenders.

**Figure 1.3: Applications received and pursued through open tender rounds 2008–2016**



Source: ANAO analysis of Department of Agriculture, Water and the Environment information.

26 Department of Agriculture, Water and the Environment, *Surface water recovery required under the Basin Plan including the Sustainable Diversion Limit Adjustment Mechanism*, available from <https://www.agriculture.gov.au/water/mdb/progress-recovery/progress-of-water-recovery> [accessed 11 February 2020].

27 Open tenders involve publishing an approach to market and inviting submissions.

28 The Water Project Board is a departmental management committee chaired by a Deputy Secretary to provide oversight and governance to programs of water reform.

1.25 In 2016, the department implemented arrangements to undertake water entitlement procurements through limited tenders on strategically important water recoveries. Table 1.1 provides an overview of strategic water procurements conducted through limited tender arrangements.

**Table 1.1: Strategic water procurements through limited tender 2016–2019**

No.	State and catchment area	Water type	Contract date	Price per ML (\$)	Volume purchased (ML)	Value (\$m)
No.1	Queensland — Border Rivers	Surface water	April 2016	1500	256	0.4
No.2	South Australia — Murray	Surface water	May 2016	2500	3200	8.0
No.3	Queensland — Central Condamine Alluvium	Ground water	May 2016	1850	500	0.9
No.4	Queensland — Central Condamine Alluvium	Ground water	June 2016	1850	334	0.6
No.5	New South Wales — Murrumbidgee (Lowbidgee)	Surface water	January 2017	370	12,117	4.5
No.6	New South Wales — Lower Darling <sup>a</sup>	Surface water	June 2017	1356 3253	21,901	78.0
No.7	Queensland — Warrego	Surface water	June 2017	1600	10,611	17.0
No.8	Queensland —Condamine Balonne	Surface water	July 2017	2745	28,740	78.9
No.9	Queensland — Upper Condamine Alluvium (19 grouped purchases) <sup>b</sup>	Ground water	February – May 2019	1800–2000	912	1.7
<b>Total</b>					<b>78,571</b>	<b>190</b>

Note a: The Lower Darling purchase included 19,361 megalitres of general security entitlements at \$1356 per megalitre and 2540 megalitres of high security entitlements at \$3253 per megalitre. The purchase also included \$40 million (plus GST) in compensation for the transformation of the property to dryland farming, cancellation of works approvals and the decommissioning of irrigation infrastructure.

Note b: The department conducted the Queensland — Upper Condamine Alluvium limited tender procurement following six open tender rounds held between February 2014 and July 2018. The department sought approval from the Minister to pursue a number of procurements within the unspent budget utilising the maximum price and evaluation criteria published under Round 6 of the open tender. More detail on these procurements is in Appendix 2.

Note: This audit focused on completed strategic water procurements undertaken through limited tender arrangements between January 2016 and December 2019. Two procurements which commenced but were not completed during audit fieldwork have not been included in this audit. These were the purchase of 13,506 megalitres in New South Wales — Murrumbidgee and the purchase of 1159 megalitres in New South Wales — Lower Darling.

Source: ANAO analysis of Department of Agriculture, Water and the Environment information.

## Administrative arrangements and reviews of Basin management

1.26 Purchasing water to assist with bridging the gap to the SDLs in the Basin Plan is undertaken through the Sustainable Rural Water Use Infrastructure Program (SRWUIP) managed by the

department.<sup>29</sup> This includes those strategic water procurements undertaken through a limited tender approach which are the focus of this audit.

1.27 Water entitlements procured by the department are subsequently managed by the Commonwealth Environmental Water Holder (CEWH). The role of the CEWH is established by the Water Act.

1.28 There have been a number of reviews of the management of the Basin in recent years, including by the Australian Bureau of Agricultural and Resource Economics and Sciences, the MDBA, the Productivity Commission, and prior Australian National Audit Office (ANAO) audits.<sup>30</sup> In addition, on 1 October 2019, the government appointed an Inspector-General of Murray-Darling Basin Water Resources to provide oversight and monitoring of progress of water resource management in the Basin.<sup>31</sup>

1.29 These reviews highlighted:

- the importance of water recovery strategies including explicit consideration of socio-economic impacts;
- the importance of appropriately documenting decisions relating to assessment and selection of applications for grants supporting water-saving initiatives;
- the increased likelihood of higher water prices under buyback arrangements than where no buyback arrangements are in place; and
- that prioritising infrastructure investment over water purchasing may minimise negative social and economic impacts.

## Rationale for undertaking the audit

1.30 Water regulation is a topic of parliamentary and public interest. The audit examines \$190 million of strategic water procurements conducted through limited tender arrangements, to provide assurance to the Parliament and the public that these procurements were planned for and executed appropriately and achieved value for money. This audit was also undertaken as part of the Auditor-General's continued focus on water regulation within the Commonwealth.<sup>32</sup>

29 Responsibility for water policy and resources was transferred to the Department of Agriculture from the Department of Environment through an Administrative Arrangement Order made on 21 September 2015. In February 2020, further machinery of government changes came into effect which saw the Department of Agriculture, Water and the Environment consolidate the Department of Agriculture with the environment functions from the Department of the Environment and Energy.

30 Australian Bureau of Agricultural and Resource Economics and Sciences, *Assessing the future impact of the Australian Government environmental water purchase program*, April 2010; Murray-Darling Basin Authority, *The Northern Basin Review*, November 2016; and Productivity Commission, *Murray-Darling Basin Plan: Five-year assessment*, December 2018.

31 Interim Inspector-General of Murray-Darling Basin Water Resources, *About us* [Internet], available at <https://www.igmdb.gov.au/about> [accessed 17 March 2020].

32 See Auditor-General Report No.30 2017–18 *Design and Governance of the National Water Infrastructure Development Fund*; Auditor-General Report No.17 *New South Wales' Protection and use of Environmental Water in the Murray-Darling Basin*; Auditor-General Report No.29 2014–15 *Funding and Management of the Nimmie-Caira System Enhanced Environmental Water Delivery Project*; Auditor-General Report No.17 2013–14 *Administration of the Strengthening Basin Communities Program*; and Auditor-General Report No.27 2010–11 *Restoring the Balance in the Murray-Darling Basin*.

1.31 This audit topic was included the ANAO's 2018–19 Annual Audit Work Program. The Auditor-General also received requests from a number of members of Parliament for a performance audit on this topic, including the responsible Minister.<sup>33</sup>

## Audit approach

### Audit objective, criteria and scope

1.32 The objective of the audit was to examine whether strategic water procurements by the department were conducted consistent with government policy, supported by appropriate program design, were planned and executed appropriately and achieved value for money.

1.33 To form a conclusion against the audit objective, the following criteria were adopted:

- Did the department have appropriate program design, planning and guidance in place to support strategic water procurements?
- Did the department execute the program consistent with approved policy, planning and guidance?
- Did the department achieve value for money?

1.34 This audit focused on completed strategic water procurements undertaken through limited tender arrangements between January 2016 and December 2019. A total of 27 transactions were considered (See Table 1.1).

### Audit methodology

1.35 The audit methodology included:

- examining design and approval documentation related to the development of the limited tender procurement approach;
- review of advice provided to the Minister and departmental delegate;
- examining procurements and related policy documentation maintained by the department; and
- interviews with departmental staff involved in water purchasing.

1.36 The audit was conducted in accordance with ANAO Auditing Standards at a cost to the ANAO of approximately \$698,700.

1.37 The team members for this audit were Tara Rutter, Jacqueline Hedditch, Taela Edwards, Yvonne Buresch, Jason Depasquale and Michael White.

---

33 The correspondence and the Auditor-General's responses are available at [www.anao.gov.au/work/request/audit-purchases-environmental-water-the-commonwealth-and-behalf-the-commonwealth](http://www.anao.gov.au/work/request/audit-purchases-environmental-water-the-commonwealth-and-behalf-the-commonwealth), [www.anao.gov.au/work/request/allegations-concerning-the-purchases-water-environmental-flows-the-murray-darling-basin](http://www.anao.gov.au/work/request/allegations-concerning-the-purchases-water-environmental-flows-the-murray-darling-basin), and [www.anao.gov.au/work/request/further-allegations-concerning-procurement-water-entitlements-the-murray-darling-basin](http://www.anao.gov.au/work/request/further-allegations-concerning-procurement-water-entitlements-the-murray-darling-basin).

## 2. Program design, planning and guidance

### Areas examined

This chapter examines whether the Department of Agriculture, Water and the Environment (the department) had appropriate program design, planning and guidance in place to support strategic water procurements.

### Conclusion

The program design and planning to support strategic water procurements was largely appropriate. The department developed guidance that aligned with the high level policy objective to assist in the assessment of limited tenders. However, it is not clear how the department assessed individual procurements to determine their strategic priority or considered how to encourage competition within the limited tender process.

2.1 To assess whether the department undertook appropriate program design, planning and guidance, the following matters were examined:

- if program design was thorough and generated appropriate competitive opportunities;
- whether the department established an appropriate purchasing framework; and
- whether the department developed clear policy and guidance to support officials in making decisions.

### Was program design thorough and were appropriate competitive opportunities generated?

The department identified several options under which to procure strategic water entitlements. However, the department's design of the limited tender approach did not appropriately consider opportunities to generate competition between sellers, and a communication strategy was not developed.

2.2 In 2015, the department identified a decreasing number of applications received through open tender. This included 'almost no applications to sell at or below the benchmark prices during open competitive tenders'. However, the department received a number of unsolicited offers.<sup>34</sup> The department did not formally consider why sellers were approaching the department directly.

### Developing options for undertaking strategic water procurements

2.3 In April 2015, the department commissioned the Commonwealth Scientific and Industrial Research Organisation (CSIRO) to prepare a report to:

- provide insights into the current rolling open tender and pay as bid process<sup>35</sup>;
- provide advice as to whether revealing the department's benchmark price would stimulate competition in the market; and

34 Unsolicited offers are defined as those instances where a potential seller or a water broker approaches the department directly with an offer to sell water entitlements outside of open tender arrangements.

35 Pay as bid refers to the seller specifying the price per unit.



- identify new options to engage with the water market.

2.4 A report titled *Motivating the Market* was provided to the department in May 2015.<sup>36</sup> The report noted that:

- to ensure bids are competitive, sellers should not be afforded repeated opportunities to submit bids (through rolling tenders or repeated tender rounds), as it facilitates strategic bidding and inflated prices and the format essentially positions the department as the price maker in the wider market when purchases occur;
- for regions and/or entitlements of which the government requires small amounts of water relative to the volumes traded on the open market, making opportunistic purchases on the existing market is likely to be the best strategy with lower administrative costs and greater flexibility; and
- for regions and/or entitlements where there are few potential sellers relative to the volume sought, a tender is not likely to be effective; and direct negotiation may be the most viable option (including bundled land and water purchases with the land sold on).

2.5 The report recommended that benchmark prices should not be applied as a 'reserve price' to future water tender rounds, particularly where prices are rising, as it risks not achieving the objective as the price is too low.

2.6 In August 2015, the department established a register of unsolicited offers to record contact from prospective sellers.<sup>37</sup> Prior to the establishment of the register, unsolicited offers were received but not recorded. It is unclear whether the department responded to all approaches prior to the establishment of the register.

2.7 In addition to being incomplete, for more than half of the offers captured in the register there is no detail as to why an offer was accepted, rejected, or not pursued, or why the offer has not been formally closed off in the register. While further detail for individual offers is recorded within tender administration documentation, the lack of a single source of complete information limits the department's ability to quickly and easily compare offers and key decisions.

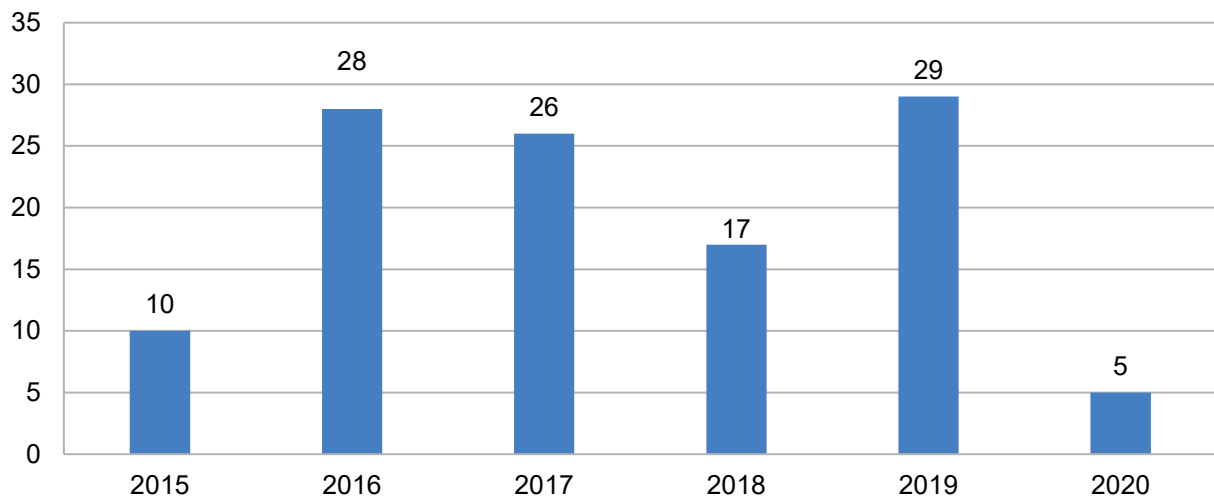
2.8 Figure 2.1 shows the number of unsolicited offers recorded in the register.

---

36 A Reeson and SM Whitten, *Motivating the Market: A brief review of options for improving water purchases*, Commonwealth Scientific and Industrial Research Organisation, 29 May 2015, available from <https://www.agriculture.gov.au/sites/default/files/documents/motivating-market-report.pdf> [accessed February 2020].

37 On establishment, the department included offers received between April and August 2015.



**Figure 2.1: Unsolicited offers recorded in the department's Limited Tender register**

Source: ANAO analysis of departmental information.

## Water Purchasing Plan 2015–2019

2.9 The Water Purchasing Plan (the Plan) sets out the department's framework and parameters for assessing strategic water procurements. On 8 December 2015, the Plan was submitted to and endorsed by the Water Project Board. The purpose of the Plan was to establish:

... a range of methods that may be used to acquire water to meet the SDLs<sup>38</sup> set out in the Basin Plan through to 2019. It expands on the current approaches to include some additional options which increase the Department's flexibility and responsiveness in purchasing water. These approaches are consistent with the Commonwealth Procurement Rules (CPRs). Water purchasing to date has mainly been done in accordance with Division 1 of the CPRs to purchase water through open competitive tenders. The WPP proposed greater application of Division 2 of the CPRs to purchase water through Limited Tender.<sup>39</sup>

2.10 The Plan included six proposed methods of procurement. These were:

- open water purchase tenders, where the department determined to continue open tenders with a variable pricing strategy<sup>40</sup>;
- 'unsolicited' offers, where the department proposed to assess all unsolicited offers received;
- partial purchases, where the department could seek to enter into transactions where water entitlements are transferred under contracted milestones over a number of years;
- align with grant programs, where the department flagged programs where greater alignment could occur with the water purchasing program;

38 Sustainable Diversion Limits.

39 Department of Agriculture, Water and the Environment, *Water Purchasing Plan 2015-2019*.

40 The department published the maximum price for the Upper Condamine Alluvium open tender round and utilised these prices for the limited tenders that followed. Subsequently, all limited tender applications were at the benchmark price. This limited tender and the use of the maximum price is discussed further in Chapter 4 at Table 4.1 and paragraphs 4.29 to 4.32.

- sector-specific purchasing, where the department could explore means for purchasing from specific sectors of the water market, such as non-agricultural investment businesses; and
- using intermediaries: the department considered a number of approaches in which third parties could be utilised in the sourcing of water.

2.11 For unsolicited offers, the following assessment criteria were to apply:

- (a) in an area where further water is required to bridge the gap to the SDL after taking into account all the possible adjustments (i.e. based on the best possible scenarios for supply measure offsets, infrastructure recoveries and expected NBR outcomes);
- (b) represent value for money, or may achieve value for money through negotiations;
- (c) would contribute to attaining a triple bottom line outcome, including that there would not be significant adverse social or economic impacts;
- (d) that the relevant state government is not opposed to the transaction; and
- (e) can be executed under the CPRs.

Should the offer meet these criteria, the program sponsor will brief the Minister on the evaluation including social and economic impact concerns. The Department would consult with the relevant state government senior officials in confidence on proposals, to identify any particular concerns the state may have, prior to settling any purchase transaction. The seller will be contacted and the offer pursued through the legal due diligence process until a contract is executed.<sup>41</sup>

2.12 The Plan did not include:

- preferred or priority approaches, or an approach to maximise competitive opportunities;
- expectations of water purchases from particular catchment/s or timeframes;
- key performance indicators through which progress could be tracked;
- expectations of senior officers charged with achieving specific objectives; or
- consideration of risk for oversight by the Board.

2.13 The Plan as presented to the Water Project Board also included a commitment for review within 12 months of implementation to consider its effectiveness. The Plan stated that the next phase would set priorities for purchases, including a catchment by catchment approach assessing where 'gap-bridging' requirements remained. A formal review process for the Plan was not conducted.

## **Ministerial briefing and approval of approach**

2.14 The department wrote to the Minister on 10 December 2015, seeking agreement to pursue unsolicited offers and utilise open tenders for surface water only in limited circumstances. This briefing outlined the following proposed approach:

Open tenders for surface water in the Murray-Darling Basin are subject to ongoing community concern. While water purchasing will be necessary to bridge the gap in some catchments, the smaller scale of the task means that a lesser focus on open tenders is feasible (at least in the short

---

<sup>41</sup> Extract from the Water Purchasing Plan 2015 – 2019.

term) and the use of a slower, more low-key approach is appropriate, particularly up to June 2016 and the implementation of the Sustainable Diversion Limits (SDLs) Adjustment Mechanism.<sup>42</sup>

2.15 The Minister was advised that as part of the proposed approach, the department would assess all unsolicited offers it received and seek the Minister's review and decision on offers that met specific criteria. The department also advised that if approved, the department would continue to engage with the Minister on specific transactions:

While departmental delegations under the *Public Governance, Performance and Accountability Act 2013* are sufficient to execute such transactions, we expect that you may wish to consider all potential purchases due to the high interest in the water purchasing program.

2.16 The briefing outlined that while infrastructure investment remained the priority means for water recovery, limited tenders and other forms of purchasing will be considered in certain circumstances.

2.17 The Minister agreed to the approach on 13 January 2016. Following ministerial approval, the department implemented arrangements to pursue unsolicited offers and focus water entitlement procurements through limited tenders on strategically important water recoveries.

2.18 The department did not develop a specific list to identify or prioritise strategically important recoveries. Rather, the department referred to the SDLs established by the Basin Plan to validate the need to purchase entitlements in any given resource unit area.

### **Maintaining competitive opportunities through limited tenders**

2.19 Competition is a key element of the Australian Government's procurement framework. The Commonwealth Procurement Rules (CPRs) outline that procurements should encourage competition to support the achievement of value for money.<sup>43</sup> By its nature, limited tender is less competitive than open tender as it does not provide an opportunity for all potential suppliers to compete for the provision of goods and services.<sup>44</sup> Entities may seek to encourage competition in limited tender approaches by ensuring all potential sellers are aware of the opportunity to sell.

2.20 The department publishes updates on its progress towards achieving the 'bridging the gap' targets on its website, making information publicly available to potential sellers in the locations or catchments where further water purchasing is still required. The website states that updates on progress against targets are provided monthly. However, the website is updated less frequently than this.

2.21 The department has also not updated its website to include information relating to all completed limited tender water procurements, although this information is available on AusTender.

2.22 The department published information on the limited tender approach to strategic water purchases on its website in July 2017, more than 18 months after the department implemented the limited tender approach.

The department can consider proposals to sell water directly to the government in limited circumstances. To consider any proposal, the department would need the following information: water license number, water licence location, water licence volume and proposed price per

42 Extract from ministerial briefing to the Minister for Agriculture and Water Resources.

43 Department of Finance, *Commonwealth Procurement Rules*, April 2019, p. 13.

44 Auditor-General Report No.48 2014–15, *Limited Tender Procurement*.

megalitres. For further information about water purchasing, email Water Purchasing or call the Water Information Line on 1800 218 478.

The department reports on all water purchased in the monthly report at progress of water recovery towards bridging the gap to SDLs. For contracts valued at or above the reporting threshold outlined in the Commonwealth Procurement Rules, a contract notice is published on AusTender within 42 days of entering into the contract. Disclosure of information in these notices must comply with the requirements set out in the Privacy Act 1988.

Pricing information is usually published at the conclusion of an open water purchase tender to help provide greater transparency and to assist water entitlement holders who may be considering placing an offer to sell water in the future.<sup>45</sup>

2.23 Ministerial advice provided the basis for the department to communicate to stakeholders, including through its website. The department had also advised the Water Project Board on 8 December 2015 that 'a communication strategy will be developed to support the implementation of the Water Purchasing Plan, if approved.' A communication strategy was not developed.

2.24 The department had no mechanism in place to evaluate the reach of its communication and to make adjustments to ensure adequate awareness of the limited tender arrangements within the market of potential sellers.

2.25 The department did not actively generate competitive opportunities during the limited tender process. Some limited tenders were accepted prior to other offers in the same catchment being received. The department did not inform the market in a timely manner, nor develop rules or parameters to encourage price pressure.

### Did the department establish an appropriate purchasing framework, specific to the purchase of water entitlements?

The department developed a draft framework for strategic surface water procurements, including through limited tenders, which aligned with high level policy objectives. This draft framework was not finalised or endorsed. For limited tender procurements conducted in 2016 to 2017, the department used the additional rules for the conditions for limited tenders for exceptionally advantageous circumstances. The department did not develop a definition for exceptionally advantageous.

### Commonwealth Procurement Rules

2.26 The CPRs govern the way in which government entities undertake their processes when conducting procurement activities.<sup>46</sup> In July 2015, the department sought advice from the Department of Finance (Finance) on its responsibilities under the CPRs. Finance advised that:

Division 1 provides the rules for all procurements, principally the achievement of value for money and non-discrimination; and Division 2 provides the rules for all procurements above the relevant

45 Department of Agriculture, Water and the Environment, *Commonwealth water purchasing in the Murray-Darling Basin* [Internet], available from <http://www.agriculture.gov.au/water/markets/commonwealth-water-mdb> [accessed 12 February 2020].

46 Department of Finance, *Commonwealth Procurement Rules*, April 2019.

threshold (currently \$80,000 for general goods and services, and \$7.5 million for construction services), principally the requirement to approach the open market. Only in certain circumstances can entities directly approach suppliers. These scenarios are laid out in paragraph 10.3 and Appendix A of the CPRs.<sup>47</sup>

2.27 At the time, in order to pursue a limited tender, the CPRs required that the department only conduct a procurement through limited tender when:

- previous attempts to procure water through open tender had failed; or
- for reasons of extreme urgency, the goods and services could not be obtained in time under open tender or prequalified tender; or
- an opportunity to procure water in ‘exceptionally advantageous’ circumstances existed; or
- the goods and services can be supplied only by a particular business and there is no reasonable alternative or substitute; or
- additional deliveries of goods and services by an original supplier were intended as replacement parts, extensions, or continuing of services; or
- the procurement exists in a commodity market; or
- the procurement applies to a prototype or a first good or service intended for limited trial; or
- a contract is awarded to a winner of a design contest; or
- construction services are required for repetition of similar construction services.

2.28 On 20 August 2015, the department met with Finance to discuss the intended approach to water recovery via limited tenders. This discussion focused on using Division 2 subsection 10.3(a)(i) or Division 2 subsection 10.3(c) of the CPRs as the basis for the procurement approach.<sup>48</sup> Division 2 subsection 10.3(a)(i) allows for limited tenders when, in response to an open approach to market, no submissions or no submissions that represented value for money, were received. Division 2 subsection 10.3(c) allows for limited tenders for procurements under exceptionally advantageous conditions that arise only in the very short term. Finance advised:

To meet the ‘exceptionally advantageous’ precondition, an opportunity has to be truly exceptional.

2.29 Neither the department nor Finance defined what constituted ‘exceptionally advantageous’. The department assessed all strategic water procurements under Division 2 subsection 10.3(c) for the 2016 to 2017 procurements, using the requirement for procurements to be exceptionally advantageous.

2.30 Changes to exemptions in the CPRs came into effect on 1 March 2017.<sup>49</sup> On 13 April 2017, the department wrote to Finance seeking an exemption from Division 2.<sup>50</sup> This exemption would

47 Meeting between the then Department of the Environment and the Department of Finance.

48 Department of Finance, *Commonwealth Procurement Rules*, April 2019.

49 Until July 2014, Exemption No.1 under Appendix A of the CPRs stated that ‘procurement of real property of accommodation (note: the procurement of construction services is not exempt)’.

50 From March 2017 to June 2020, Exemption No.1 under Appendix A of the CPRs states that ‘procurement including leasing of land, existing buildings or other immovable property or any associated rights (note: the procurement of construction services is not exempt)’.

mean the department would no longer need to justify 'exceptionally advantageous' conditions in their pursuit of unsolicited offers. Finance advised:

After consideration of the scenarios presented, we are comfortable that for the purposes of the Commonwealth Procurement Rules (exemption No. 1 in Appendix A), 'associated rights' does capture tradeable water rights as described in your email.

2.31 The department used the exemption for the 2019 procurements.

### **Draft Framework for Strategic Surface Water Purchasing**

2.32 In June 2016, the department developed a draft Framework for Strategic Surface Water Purchasing (the draft framework), limiting surface water purchasing to situations where it would achieve one or more identified social, economic or environmental objective. The draft framework states:

All purchase opportunities would be assessed against the principles and outcomes described in the framework, with the department generally pursuing solicited and unsolicited proposals that are consistent with one or more principles.

2.33 The draft framework describes two sets of principles the department will have regard to: 'first principles' that reflect current practices and mandatory legislative requirements for the water recovery program; and 'strategic principles' that build on the government's triple bottom line approach to Basin Plan implementation.<sup>51</sup>

2.34 The draft framework outlines the following strategic principles.

- Financial and non-financial costs to sellers, third parties and the department will be minimised relative to other water recovery methods.
- Transactions will result in benefits for the seller, third parties, broader community, the environment or state governments, noting that benefits may be immediate or delayed, direct or indirect.
- Priority will be given to unique or otherwise time-bound purchase opportunities.
- Consideration will be given to the possible impact of a transaction on water markets, including price and competition, with reference to alternative recovery scenarios.

2.35 The department did not finalise or endorse the framework. Despite this, the framework is referred to on several occasions in the detailed guidance documentation.

### **Did the department have clear policy and guidance to support decisions to procure strategic water entitlements?**

The department developed internal policy and guidance materials to assist officials' review of limited tender procurement offers. These materials align with the principles of the draft framework and outlined the process to be followed when assessing limited tenders.

---

<sup>51</sup> The triple bottom line approach is the delivery of economic, social and environmental benefits.

## The Guidelines for Limited Tenders

2.36 The Guidelines for Limited Tenders (the Guidelines) were approved on 23 June 2016 and updated on 12 December 2016. This was the primary guidance document for assessing limited tenders. The Guidelines were not approved until after the first limited tender purchase was completed.

2.37 The Guidelines provide a set of general principles, which includes links to the CPRs and the draft framework as well as a step by step guide from receipt of an offer through to completion of a purchase where the offer is accepted.

2.38 The Tender Administration File is the key supplementary document to the Guidelines. This form is intended to capture the key information and decisions relevant to the assessment. Application of the Guidelines and the Tender Administration File for the water purchases examined in this audit are covered in Chapter 3 at paragraphs 3.2 to 3.11.

2.39 The department's process for limited tenders requires that as part of the pre-assessment phase, the department must 'determine whether the proposal represents value for money, or could attain value for money through further negotiations with a proponent'. The Guidelines also state that the department should determine the environmental value of the offer.

2.40 The Commonwealth Environmental Water Holder (CEWH) provided the department with acquisitions advice intended to guide the department to achieve a portfolio of water holdings that maximised environmental utility.<sup>52</sup> The advice provided general principles for Commonwealth water recovery, Northern Basin-specific principles and further criteria regarding bundled entitlements and groundwater entitlements.

2.41 The document also included specific advice on individual catchment areas within the Murray-Darling Basin. The detail of advice varied based on the catchment area.

## Departmental oversight and governance

2.42 The department's draft Framework for Strategic Surface Water Purchasing and resulting purchases were overseen by senior officers within the Water Division and the Water Project Board.

2.43 For the strategic water purchases considered in this audit, the Board received updates or provided endorsement for some purchases. This did not occur consistently for all purchases. The Board received regular Water Project Status Reports for the *Restoring the Balance in the Murray-Darling* project and reviewed two limited tender procurements.<sup>53</sup>

---

52 The CEWH manages a large portfolio of environmental water entitlements with annual allocations that are acquired through the Australian Government's investment in water-saving infrastructure and strategic water purchasing throughout the irrigation districts of the Basin.

53 The New South Wales – Lower Darling and the Queensland – Condamine Balonne procurements were reviewed by the Board.

### 3. Program execution

#### Areas examined

This chapter examines whether the Department of Agriculture, Water and the Environment (the department) executed limited tender procurements of strategic water entitlements consistent with approved policy, planning and guidance.

#### Conclusion

The department did not consistently apply approved policy, planning and guidance to the assessment of all limited tender procurements. The department advised the Minister that it would assess limited tender offers against specific criteria, however briefings to the Minister did not consistently address these criteria or provide appropriate advice. It is not clear whether two of the seven instructions given to the department by the Minister were fully executed.

Information provided to departmental delegates to seek approval to enter into contractual arrangements did not clearly outline the delegations required.

#### Areas for improvement

The ANAO made two recommendations aimed at the department reviewing and updating procurement documentation to ensure appropriate execution within delegations and developing assurance mechanisms for procurement activities to support effective records management.

The ANAO also suggested the department develop a quality framework to ensure that comprehensive advice is consistently provided to the Minister.

3.1 To assess whether the department executed procurements of strategic water entitlements consistent with approved policy, planning and guidance, the following matters were examined:

- whether the department followed guidelines for limited tender procurements;
- whether appropriate information was provided to decision-makers to enable informed decisions;
- whether the department appropriately recognised and managed risks; and
- whether appropriate due diligence was conducted prior to entering into contracts.

#### Did the department follow guidelines for limited tender procurements?

The department did not consistently apply the guidelines it developed to all limited tender procurements. Four offers were assessed and provided to the Minister for approval prior to the guidelines being fully developed and approved.

3.2 The department's *Guidelines for Limited Tenders* (the Guidelines) were approved on 23 June 2016. The Guidelines outline the approach to assess a procurement of strategic water entitlements as part of a limited tender process. The Guidelines include four stages that must be completed prior to commencing a limited tender procurement, each of which includes several actions that must be completed.

- Proposal — record the proposal a potential seller makes to the department in the register.
- Pre-assessment — assess the proposal's eligibility for limited tender. The factors required to be considered in the pre-assessment phase include whether:



- it contributes to bridging the gap to the Sustainable Diversion Limits (SDLs);
- the proposal represents value for money;
- proceeding with the proposal via limited tender would be consistent with the Commonwealth Procurement Rules (CPRs); and
- the proposal is consistent with the ‘Strategic Principles’ of the draft framework.<sup>54</sup>
- State consultation — seek agreement to the proposed procurement from the relevant state government, providing ‘minimum amount of information necessary’.
- Delegate decision — brief the delegate on the outcomes of the above and provide contextual information on the location and community, any non-standard terms of the proposed contract and maximum price.

## Application of the Guidelines to strategic water procurements

### 2016 and 2017 procurements

3.3 In 2016 and 2017, eight strategic water procurements were conducted by limited tender. Three of the eight procurements were conducted under the Guidelines. Four offers were assessed and provided to the Minister for approval prior to the department fully developing and approving guidance documents to support the assessment of limited tender procurements.

3.4 The department advised that these procurements were conducted consistent with the Guidelines despite the Guidelines not being approved. The Lower Darling procurement was managed by a different team within the department. The Guidelines were not used for this procurement.

3.5 The ANAO examined procurement documentation against the assessment process outlined in the Guidelines. The application of the Guidelines varied between procurements including the extent to which the actions within each stage were completed or documented. Table 3.1 outlines the ANAO’s assessment of the department’s application of elements of the Guidelines which were key policy requirements or specifically identified in the department’s commitment to the Minister.

**Table 3.1: ANAO’s assessment of the application of the Guidelines to strategic water procurements conducted in 2016 and 2017**

No.	State and catchment area	Triple bottom line outcomes	Exceptionally advantageous	Impact on water market	Consideration of infrastructure investments
No.1	Queensland — Border Rivers	✗	✗	✓	✗
No.2	South Australia — Murray	✗	✗	✓	✗
No.3	Queensland — Central Condamine Alluvium	✗	— <sup>a</sup>	✗	✗
No.4	Queensland — Central Condamine Alluvium	✗	— <sup>a</sup>	✗	✗

<sup>54</sup> The pre-assessment phase determines whether the proposal will progress to a potential procurement.

No.	State and catchment area	Triple bottom line outcomes	Exceptionally advantageous	Impact on water market	Consideration of infrastructure investments
No.5	New South Wales — Murrumbidgee (Lowbidgee)	✓	✗	✗	✗
No.6	New South Wales — Lower Darling	✓	✗	✓	✗
No.7	Queensland — Warrego	✓	✗	✗	✗
No.8	Queensland — Condamine Balonne	✓	✗	✗	✗

Note a: These procurements used Division 2 subsection 10.3(a)(i) of the CPRs which allows for limited tenders when, in response to an open approach to market, no submissions or no submissions that represented value for money, were received.

Source: ANAO analysis of Department of Agriculture, Water and the Environment information.

3.6 As outlined in paragraph 1.15, the Commonwealth committed to prioritising water recovery for environmental purposes through infrastructure investment. The department could not demonstrate that the assessment of strategic water procurements consistently took into consideration infrastructure investment.

3.7 Neither the Guidelines nor the Tender Administration File provide clear guidance for assessors to consider infrastructure investments or the impact water procurements may have on these investments. Further, the department did not provide details of current or future infrastructure projects to assist informing the Minister of water recovery within that catchment.

3.8 For five of the eight 2016 and 2017 procurements, the Murray-Darling Basin Authority's (MDBA) advice was sought on whether strategic water entitlements would be 'gap-bridging'. The department advised the ANAO that it only sought advice on whether an entitlement is 'gap-bridging' for instances where it considered the entitlement was not standard or not usually traded. It is unclear whether the department defined 'not standard'.

#### *2019 procurements (Upper Condamine Alluvium)*

3.9 In 2019, a further 19 procurements were conducted via limited tender in the Upper Condamine Alluvium.<sup>55</sup> These limited tenders were conducted following six open tender rounds which were unsuccessful in recovering the required amount of water.

3.10 At the closure of the sixth open tender, the department advised the Minister that water recovery was still required in the catchment and \$29.75 million remained unspent. In August 2018, the Minister approved pursuit of the remaining volume with the unspent budget by limited tender.<sup>56</sup>

<sup>55</sup> This audit focused on completed strategic water procurements undertaken through limited tender arrangements between January 2016 and December 2019. Open tender procurements were not examined as part of this audit.

<sup>56</sup> Ninety-eight per cent of the water recovery target had been achieved in the Central Condamine Alluvium catchment. Five per cent of the water recovery target had been achieved in the Upper Condamine Alluvium Tributaries.

3.11 The department assessed these limited tender procurements against criteria similar to the open tender round rather than against the Guidelines. The Minister also approved the department to utilise the maximum prices and evaluation criteria published under Round 6 of the open tender rather than the Guidelines.<sup>57</sup> The evaluation criteria set out in the procurement plan includes two phases as outlined in Table 3.2.

**Table 3.2: Limited tenders conducted in 2016 and 2017, and 2019**

Key element	2016 and 2017 limited tenders	2019 Upper Condamine Alluvium limited tenders
Average value per procurement	\$23.53 m	\$0.092 m
Average volume per procurement	8,629ML	48ML
CPRs alignment	Procurements conducted to meet the conditions for limited tender under Division 2.	Procurements conducted using exemption one of the CPRs.
Evaluation criteria	As defined in the Guidelines for limited tender, the department conducts a pre-assessment to determine whether: <ul style="list-style-type: none"> <li>the water is gap-bridging;</li> <li>the offer represents value for money;</li> <li>undertaking a limited tender is compliant with CPRs; and</li> <li>the procurement aligns with draft Framework for Strategic Water Purchasing general and strategic principles.</li> </ul>	Phase one: <ul style="list-style-type: none"> <li>Determine whether the proposal meets the minimum content and format requirements, and conditions for participation.<sup>a</sup></li> </ul> Phase two: <ul style="list-style-type: none"> <li>Value for money assessment including: <ul style="list-style-type: none"> <li>Cost — represented by the price of the eligible licence;</li> <li>Value — taking into account the volume offered and any other information available to the department including the risk profile presented by the tenderer and the tender.</li> </ul> </li> </ul>
Approval of expenditure for each procurement	Ministerial approval for each procurement under s71 of the <i>Public Governance, Performance and Accountability Act</i> .	Ministerial approval to pursue the remaining volume within the unspent budget from the open tender.  Departmental delegate approval for each individual procurement under s32B of the <i>Financial Framework (Supplementary Powers) Act 1997</i> .

Note a: The minimum content and format requirements require the tender to be written in English and measurements be expressed in Australian legal units of measurement. The conditions for participation require that: the tenderer exists as a legal entity; the price per megalitre for the licence provided in a tender must not exceed the Maximum Price per megalitre for the relevant sub-area as specified in the tender documentation; and the volume of the licence offered must not be less than one megalitre.

Source: ANAO analysis of Department of Agriculture, Water and the Environment documentation.

<sup>57</sup> The department relied on an exemption to Division 2 of the CPRs to conduct the limited tender, on the basis that the water entitlements are an 'associated right' listed under part 1 of Appendix A: Exemptions.

3.12 As part of the value for money assessment, the procurement plan states that the maximum prices for each groundwater management sub-area, as set out in the open tender round, would be relied upon for the limited tender procurements.

3.13 Assessments of individual procurements were limited to whether the price offered was at or below the maximum price set. Under the approach used for the 2019 procurements, it is not clear to what extent triple bottom line outcomes were considered as per the commitment to the Minister in the original proposal to pursue limited tender water procurements.

3.14 While the brief seeking approval to undertake limited tenders in the Upper Condamine Alluvium indicated a need to procure further water to reach the SDL, there is no evidence that the department provided the delegate with updated advice on the remaining gap as procurements were made.

3.15 In 2015, the department sought advice from the Commonwealth Environment Water Holder (CEWH) and MDBA relating to the open tender approach to procurements in the Upper Condamine Alluvium. The department utilised this advice in the subsequent limited tender approach. The department did not seek to confirm the advice remained current and appropriate when commencing the limited tender in 2018.

3.16 The department sought advice from the MDBA in July 2017. The advice indirectly discussed the role of water recovery in the catchment in bridging the gap.

3.17 The ANAO did not identify any quality assurance or moderation mechanisms in place to provide assurance around the consistency of assessments for any of the 2019 limited tender purchases.

### **Did the department provide appropriate information to decision-makers to enable informed decisions?**

Briefings to the Minister did not provide a clear indication of how the procurements would obtain a triple bottom line outcome as in the original commitment. The department did not consistently provide complete information to enable departmental decision-makers to make informed decisions.

3.18 Following the pre-assessment for each of the 2016 and 2017 limited tenders, the department first sought Ministerial approval for the procurement and then sought final approval from the departmental delegate to enter into contractual arrangements as per the process outlined in the Guidelines.

3.19 In the 2019 Upper Condamine Alluvium procurements, the Minister approved the use of limited tenders to purchase additional water using the remaining budget allocation. The individual procurements were then provided directly to the departmental delegate for approval.

### **Advice provided to the Minister**

3.20 As outlined in paragraph 2.15, the Minister was advised that all unsolicited offers would be assessed and his decision sought on offers that:

- were gap-bridging after taking into account all the possible adjustments;
- represented value for money or may achieve value for money through negotiations;

- would contribute to attaining a triple bottom line outcome<sup>58</sup>, including that there would not be significant adverse social or economic impacts;
- that the relevant state government is not opposed to the transaction; and
- can be executed under the CPRs.

### *2016 and 2017 procurements*

3.21 For the limited tender procurements during 2016 and 2017, the Minister was presented with 10 decisions briefs.<sup>59</sup> Four offers were presented with the December 2015 request for approval of the procurement approach.

3.22 Of these four offers, three were approved by the Minister, and one required the department to undertake further consultation with the relevant state and re-brief the Minister before proceeding with the purchase.<sup>60</sup> The department re-briefed the Minister as required. The content of this briefing is discussed at paragraphs 3.38 to 3.42.

3.23 The briefs for procurements in 2016 and 2017 had the characteristics detailed below.

- All briefs clearly informed the Minister that the water proposed for procurement was in an area where further recovery was required.
- Three briefs did not provide a clear statement of whether the procurement could be executed under the CPRs.<sup>61</sup>
- Four briefs advised that the department was yet to consult relevant state governments and one brief stated that consultation had occurred but the state government officials were not authorised to specifically endorse the purchase.<sup>62</sup> Two briefs did not outline whether the relevant state government had been consulted or the outcome of any consultation. The remaining briefs confirmed that the state government supported the procurement.
- Two briefs clearly described how the procurement would contribute to attaining a triple bottom line outcome.<sup>63</sup> The remaining briefs commonly described the profile of the relevant community including details such as the rate of unemployment and the dominant industry in that area, but did not articulate what impact the procurement would have. In particular, there were only three instances where the environmental benefits of obtaining the entitlements were clearly articulated.

---

58 The Murray-Darling Basin Authority's *The triple bottom line framework of November 2016* sets out the process it used to assess water recovery options for the Northern Basin as part of that review. It requires that water recovery options are assessed with consideration given the economic, social and environmental outcomes of the different options.

59 Some purchases were presented to the Minister multiple times before approval was received.

60 The Minister also requested that the department consult with the Queensland Government on one of the four offers prior to proceeding with the procurement, however gave approval for the procurement to proceed.

61 The Lower Darling and follow-up briefs for the Condamine Balonne and NSW Murrumbidgee procurements did not confirm that the procurements remained compliant with the CPRs.

62 This is discussed further at paragraphs 3.36 to 3.10.

63 These were the NSW Murrumbidgee and Warrego procurements.

### *2019 Upper Condamine Alluvium procurements*

3.24 The Minister was not provided with the same level of information for the 2019 Upper Condamine Alluvium procurements. When the department sought approval to pursue, via limited tender, the remaining volume within the agreed budget from the preceding open tender, the brief advised that the portion of the water recovery target outstanding in the area, and that the approach was consistent with the CPRs.

3.25 The brief provided limited information relating to:

- value for money;
- attaining triple bottom line outcomes; and
- whether the relevant state government (Queensland) supported or opposed the procurement.

3.26 There is scope for the department to improve advice provided to the Minister by ensuring that consistent advice is provided for related activities, and that the advice addresses all elements outlined in the original commitment.

### **Advice provided to the departmental delegate**

3.27 The 2016 and 2017 procurements were approved by the Minister under section 71 of the *Public Governance, Performance and Accountability 2013* (PGPA Act). The departmental delegate provided approval for the department to enter into a contract under subsection 23(1) of the PGPA Act.<sup>64</sup>

3.28 As outlined in paragraph 3.24, the 2019 Upper Condamine Alluvium procurements were provided to the delegate for approval for expenditure and to enter into a contract under section 32B of the *Financial Framework (Supplementary Powers) Act 1997*.

3.29 Across all procurements, the briefs to the departmental delegate did not consistently outline under what delegation that individual was authorised to provide approval. In particular, seven of the 2016 and 2017 procurements did not include a statement about the individual's delegation, and 14 of 2019 Upper Condamine Alluvium procurements included an incorrect statement about who was the appropriate delegate.<sup>65</sup>

3.30 For the 2016 and 2017 procurements, all contracts were signed by the appropriate delegate however two issues identified by the ANAO were:

- The two 2016 Condamine Alluvium offers (\$620,400 and \$950,000 respectively) were accepted by a Senior Executive Service (SES) Band 1. An SES Band 1 at that time had a maximum PGPA Act section 23(1) delegation of \$250,000.<sup>66</sup> The final contracts for both procurements were signed by the correct delegate.

---

64 *Public Governance, Performance and Accountability Act 2013*, subsection 23(1) states that 'The accountable authority of a non-corporate Commonwealth entity may, on behalf of the Commonwealth:

(a) enter into arrangements relating to the affairs of the entity; and  
(b) vary and administer those arrangements.'

65 For the 2016 and 2017 procurements, the briefing for the Lower Darling procurement included a statement regarding delegation, however this was incorrect.

66 In March 2017, SES Band 1 delegation was increased to \$1 million.

- The 2017 Lower Darling contract (\$78 million) was signed by an SES Band 2. An SES Band 2 at that time had a maximum PGPA Act section 23(1) delegation of the limit of the division's budget. The department's delegations were unclear in relation to the separation of departmental and administered expenditure. The department has advised the ANAO that current delegations have been made clearer.

3.31 For all 2019 Upper Condamine Alluvium procurements, the appropriate departmental delegate was engaged. The departmental delegate was:

- provided with an assessment of the proposed procurement;
- assured of ministerial approval to proceed<sup>67</sup>; and
- informed that the procurement could be executed under the CPRs.

3.32 Across all purchases, the delegate was not always provided with an update on the status of water recovery within the catchment. All except two of the 2016 and 2017 briefs informed the delegate that the water proposed for procurement was in an area where further recovery was still required. Fourteen of the 2019 Upper Condamine Alluvium briefs did not provide an update on status of water recovery within the catchment.<sup>68</sup>

3.33 The briefs did not consistently provide a statement regarding whether the procurement represented value for money.

- All eight 2016 and 2017 briefs included a statement that the procurement represented value for money and provided a range of rationales.
- Briefs relating to the 2019 Upper Condamine Alluvium procurements included a statement that the price did not exceed the maximum price set for the area; the price was always equal to the maximum price.
- The majority of briefs did not clearly outline how the procurement would attain a triple bottom line outcome or how these elements influenced the overall assessment of value for money.<sup>69</sup>

3.34 The department's assessment of value for money is discussed further in Chapter 4 at paragraph 4.5.

---

67 For the 2019 Upper Condamine Alluvium procurements, this was a confirmation of the minister's approval to pursue, via limited tender, the remaining volume within the agreed budget from the preceding open tender, rather than ministerial approval of each individual purchase.

68 The briefs for the 2016 and 2017 procurements in the Border Rivers and Murray catchments also did not include any statement on gap-bridging. Most instances where the delegate was not informed if the water was in an area where further recovery was required related to the 2019 Upper Condamine Alluvium procurements where this was inherent to the nature of the tender.

69 Only the Condamine Balonne and Lower Darling procurements clearly addressed all three triple bottom line outcomes.

## Recommendation no.1

3.35 The Department of Agriculture, Water and the Environment review and update internal procurement guidance to ensure delegations are accurately identified in approval briefs.

**Department of Agriculture, Water and the Environment response:** *Agreed.*

3.36 *The department has extensive procurement guidance and templates available to support procurement processes which are periodically updated and reviewed.*

## Did the department execute the Minister's instructions?

For the strategic water procurements examined, the department mostly executed the Minister's instructions. There are two instances where it is unclear whether the actions undertaken by the department and subsequent advice provided to the Minister fully addressed the intent of the instructions.

3.37 In response to briefs related to the approval of limited tender strategic water procurements, the Minister gave the department seven individual directions. There are two instances where it is not clear whether the actions undertaken by department and subsequent advice to the Minister fully addressed the intent of the original instruction. These are detailed below.

### *Ministerial instruction to seek NSW agreement for the NSW Murrumbidgee purchase*

3.38 Internal correspondence between department officials<sup>70</sup> and the Minister's Office dated 10 September 2015 noted that a New South Wales Government official advised the department that:

... as his [NSW official's] Minister has made clear that NSW did not support any further purchases, it would be best to inform him 'after the event' but before the outcome became public. This approach would mean he and NSW could not be seen to be consenting to the transaction, which NSW would not do if asked, but would mean he could ensure his Minister was not blindsided by any leaking of the transaction.<sup>71</sup>

3.39 On 10 December 2015, the department sought Ministerial approval for the procurement of 10,000 megalitres of New South Wales Murrumbidgee Supplementary (Lowbidgee) entitlements as a limited tender procurement. The Minister declined to make a decision at that time, and provided the following instruction to the department:

Please consult with the NSW Government over the Murrumbidgee purchase to seek agreement. The NSW Minister's Office has agreed for this conversation to take place. Please provide further consideration on any third party impacts resulting from the purchase and likely responses from the community. Please consult with my office again before proceeding with the purchase.<sup>72</sup>

3.40 On 15 March 2016, the department wrote to the Minister's Office and advised that in response to this instruction, the department had consulted with New South Wales Government

70 Department of Agriculture, Water and the Environment officials.

71 Extract from email correspondence between the Department of Agriculture, Water and the Environment officers and the Minister's Office.

72 Extract from ministerial briefing.



officials and were advised that 'NSW opposes any non-strategic purchases, and would not regard this offer, being unsolicited, as 'strategic'.<sup>73</sup>

3.41 On 7 October 2016, the department briefed the Minister stating that the 'NSW Government has been consulted and has no specific objections to the proposed procurement of NSW Murrumbidgee Supplementary (Lowbidgee) entitlements'. Further detail in the brief caveated that statement with the following:

The department has consulted with the NSW Government regarding the proposal to sell 10,000 ML of NSW Murrumbidgee Supplementary entitlements. NSW officials have not raised any objections to the proposed transaction but have also not been authorised to specifically endorse it.<sup>74</sup>

3.42 In response to the briefing, on 26 October 2016, the Minister approved the procurement of 10,000 megalitres of New South Wales Murrumbidgee entitlements via limited tender.

*Ministerial direction to explore work to address flooding in southern St George Basin*

3.43 In March 2017, the department wrote to the Minister to seek approval for the procurement of 14,202 megalitres of entitlements in the Condamine Balonne catchment. The Minister approved the purchase with a number of conditions, including that the department 'explore the possibility to incorporate works to address flooding in southern St George as part of the transaction.'

3.44 In May 2017, the department wrote to the Minister to again request approval for the entitlements at a revised quantity and cost, noting that:

The department has also explored the possibility of incorporating decommissioning works to address flooding in St George as part of the transaction. A report, which has been verified by the Department of Natural Resources and Mines, indicates that the removal of sections of levee bank at six locations would re-open old flood channels and lessen the potential for local flooding in St George. The company has agreed to undertake these works at no cost as a component of the transaction. The Commonwealth Environmental Water Office has advised that on the information provided they consider the proposed works would enhance floodplain and river connectivity.<sup>75</sup>

3.45 There is no evidence that the department obtained verification of the report from the Queensland Department of Natural Resources and Mines.

3.46 The report cited in the ministerial brief consisted of a single page, including one satellite image of the location with red ink annotations and the following text:

In the 2010, 2011 and 2012 floods, the levees on the eastern side of "Kia-Ora" raised floodwater levels. Removal of sections of the embankments at 6 locations would re-open the old flood channels. The entire length of embankments don't need to be removed, as a large percentage has minimal depth of water ponded against it, or the embankment is running parallel to the flow direction. Marked with red ink in the figure below are the sections to be removed.<sup>76</sup>

3.47 The advice provided by the CEWH cited in the brief consisted of the following email:

73 Extract from email correspondence between Department of Agriculture, Water and the Environment officers, and the Minister for Agriculture's office.

74 Extract from ministerial briefing.

75 Extract from a ministerial briefing response dated 2 May 2017.

76 Extract from a report prepared by an engineer and provided to the department.

In brief we think it's OK on the basis of the limited information available. It would provide better connectivity between floodplain and river which is generally a good thing. Other impacts are harder to predict without more work.

3.48 The CEWH confirmed in March 2020 that the decommissioning had occurred and subsequently allowed water to return to the floodplain.<sup>77</sup>

## Did the department appropriately recognise and manage procurement risks?

The department did not appropriately manage procurement risks. While the department identified risks associated with the broader water recovery strategy, there is limited evidence of risks being raised or managed for individual procurements.

### Program and project level risks

3.49 To implement the SDLs as required by the Basin Plan, Basin state governments may decide to reduce water allocations for the purpose of meeting the SDLs. Under the risk assignment framework established by the *Water Act 2007* (the Water Act), if entitlement holders meet the qualification criteria in section 77, the reduction in water allocations for the purpose of meeting the SDL may create financial liability for the Commonwealth.<sup>78</sup>

3.50 As a result, if the Commonwealth fails to acquire sufficient water to bridge the gap to the SDLs and a Basin state makes consequential reductions in water allocations, the Commonwealth may be required to make payments to affected entitlement holders. As outlined in successive budget papers, the department considers the risk to be an unquantifiable financial liability:

If water recovery is insufficient to bridge the gap, the *Water Act 2007* provides a risk assignment framework whereby entitlement holders with reductions in water allocations, or changes in the reliability of water allocations, may be eligible for payment from the Commonwealth.<sup>79</sup>

3.51 This risk is captured in the department's risk plan for the Sustainable Rural Water Use and Infrastructure Program (*Restoring the Balance*) dated September 2014, identifying the following risks:

- required volumes to 'bridge the gap' are not met through the *Restoring the Balance in the Murray-Darling Basin* water purchasing program;
- program funding is insufficient to recover the required volumes to meet environmental needs in line with the Basin Plan, up to the 1500 gigalitre limit on surface water and groundwater requirements through purchasing; and
- poor program administration.

3.52 The risk plan outlines several potential treatment strategies, including:

---

77 Commonwealth, *Rural and Regional Affairs and Transport Legislation Committee*, 6 March 2020, Ms Swirepik, Commonwealth Environmental Water Holder.

78 The *Water Act 2007*, section 77.

79 Australian Government, Budget Paper No. 1 — Budget Strategy and Outlook 2019–20; Statement 8 — Statement of Risks, available from [https://budget.gov.au/2019-20/content/bp1/download/bp1\\_bs8.pdf](https://budget.gov.au/2019-20/content/bp1/download/bp1_bs8.pdf) [accessed 12 March 2020].

- ensuring procurements take into account the gap-bridging nature of entitlements;
- ongoing communication through states on progress through infrastructure and supply measures projects as well as consultation with states prior to any tender;
- continuing to explore purchasing options with reference to the CPRs (such as developing policy to conduct purchases through limited tenders and unsolicited offers); and
- improving pricing and tender strategies in anticipation of changing market expectations, including limited tenders.

3.53 Regular status reporting to the Water Project Board during the period from December 2016 to December 2018 for the *Restoring the Balance in the Murray-Darling Basin* project included updates to risks with a high or extreme rating. These risks included:

- compressed period for water purchasing resulting from lower than expected participation in infrastructure programs, adjustment of cap factors in revised water resource plans, or a shortfall in the supply measure 'offsets'<sup>80</sup>;
- no or limited value for money applications submitted under the tenders; and
- some state governments and irrigator groups not supporting further water purchases.

3.54 Remedial actions outlined in these reports provide an update on water recovery against targets.

### Introduction of the limited tender approach

3.55 The department did not conduct a specific risk assessment relating to the change in procurement approach from open tender to limited tender. When seeking approval from the Minister to procure water through a limited tender approach, the only risk outlined in the brief was that the risk of over recovery was low.

3.56 The department also gave consideration to the risk that the limited tender approach would not be valid under the requirements of the CPRs. The department consulted with the Department of Finance to address this risk.

3.57 Neither the Guidelines nor supporting templates require departmental staff to:

- give specific consideration to either project level risks or broader program risks when assessing individual offers;
- make a statement on risk within the assessment; or
- make a statement to the delegate of risks identified or a positive statement on the absence of risk.

3.58 As such, it is not clear whether the department has given adequate consideration to ensuring that individual project risks align with the broader program.

---

80 Supply measure projects are intended to offset a quantity of water which would otherwise be required to be recovered from the Basin. They seek to provide equivalent environmental outcomes with a reduced volume of water and therefore reduce the amount of water required to be recovered to meet the SDL. Project examples include environmental works, changes in river operations and works to reduce evaporation losses.

3.59 The department did not provide adequate detail on risk management in Ministerial or delegate briefings. Only one brief included any statement on risk, other than a standard statement that the offer will not increase the risk of over-recovery in the Murray-Darling Basin.

3.60 Specifically, the briefing for the Lower Darling procurement included a statement in regard to advice from the Australian Government Solicitor (AGS) on constitutional and legal risk. The advice obtained from the AGS on 21 April 2017 stated there was a low level of both constitutional and legislative risk.<sup>81</sup>

### Did the department conduct appropriate due diligence before entering into the contracts?

The department undertook a due diligence process for most procurements within an appropriate timeframe. Two contracts were not dated by at least one relevant party.

3.61 Prior to entering into all except one of the contracts, the department undertook due diligence processes and briefed the delegate on the outcome. The department did not undertake due diligence for the Murray catchment procurement from the South Australian Government. The department advised the ANAO that they considered water transferred from a state government to be of low risk of being encumbered.

3.62 A standardised due diligence process is designed to verify the:

- registered owner of the water entitlement;
- water entitlement type and reference number;
- whether the volume offered is available and able to be transferred; and
- if there are any mortgages or encumbrances registered against the water allocation.

3.63 Except for the South Australian procurement, the delegate was provided with a minute informing them of the outcome of the final due diligence report. In one instance, the 2017 Lower Darling procurement, the final due diligence report was not completed until five weeks after the contract to procure the water was executed.

3.64 For most procurements, there is a contract between the seller and the Commonwealth that is signed, dated and witnessed by both parties. In two instances, the contract between the government and the seller was signed and dated by the department on behalf of the Commonwealth, and was signed but not dated by the seller or their witness.<sup>82</sup>

---

81 The constitutional risk consideration was related to the compensation component of the total payment. The legislative risk consideration was the application of the Financial Framework (Supplementary Powers) Regulations 1997.

82 The contract for the NSW Murrumbidgee (Lowbidgee) 12,711 megalitres purchase was signed but not dated by the seller or the witness. The Upper Condamine Alluvium purchase of 20 megalitres was not dated by the seller's witness.

## Recommendation no.2

3.65 The Department of Agriculture, Water and the Environment develop assurance mechanisms for procurement processes to ensure all necessary documentation is completed and documented in a timely manner prior to execution of contracts.

**Department of Agriculture, Water and the Environment response:** *Agreed.*

3.66 *The department's quality assurance mechanism includes the Australian Government Solicitor and the department's Office of the General Counsel, who reviews contracts prior to their execution. The department has updated its administrative and other processes, including that all documentation is appropriately dated by all parties and their witnesses.*

## 4. Value for money approach

### Areas examined

This chapter examines the Department of Agriculture, Water and the Environment's (the department) approach to considering and achieving value for money through limited tender procurements of strategic water entitlements. This chapter also examines whether the department has evaluated the effectiveness of the limited tender procurement approach.

### Conclusion

The department did not develop a framework designed to maximise the value for money of strategic water entitlements purchased through limited tender arrangements. Rather, the department relied on a methodology of valuations of water entitlements where gap bridging was required.

The price the department paid for water entitlements was equal to or less than the maximum price determined by valuations. The department only negotiated price for one procurement.

The department has not reviewed the water recovery strategy or its approach to procurement of strategic water entitlements. The department has not adequately planned for evaluation of the strategic water purchasing program.

### Areas for improvement

The ANAO has made two recommendations aimed at the department ensuring its arrangements for managing real or perceived conflicts of interest are consistently implemented and communicated to staff and developing evaluation activities during planning to allow for baseline measures to be adequately identified.

For future procurements, the department should ensure that valuations are complete and up to date, or where the validity period has been exceeded, provide assurance that the valuation remains appropriate.

4.1 To assess whether the department established appropriate arrangements for considering and achieving value for money, the following matters were examined:

- whether the department documented how value for money was considered and achieved; and
- whether the department evaluated the effectiveness of the limited tender procurement approach.

### Did the department document how value for money was considered and achieved?

The department did not develop a framework designed to maximise value for money. Rather, the department relied on a methodology of valuations of water entitlements where gap bridging was required. In the advice to the Minister and the departmental delegate, information relating to a value for money assessment as well as triple bottom line outcomes was limited. There is limited evidence of appropriate assessment to inform these statements.

The department did not negotiate the price for the water entitlements it purchased in all but one instance. Probity management arrangements were different to those applied to open

tenders and conflict of interest declarations were not clearly documented. The department has not adequately planned for evaluation of the strategic water purchasing program.

4.2 The Commonwealth Procurement Rules (CPRs) outline that price is not the sole factor to be considered when assessing value for money. When conducting a procurement, officials must consider the relevant financial and non-financial costs and benefits.<sup>83</sup> A clearly defined value for money methodology enables entities to undertake a consistent approach across procurements and ensure that procurements meet their intended objectives.

4.3 The department advised the Minister that it would present offers for approval which met specific criteria, including that such offers would:

- represent value for money or may achieve value for money through negotiations; and
- contribute to attaining a triple bottom line outcome, including that there would not be significant adverse social or economic impacts.

4.4 The *Water Purchasing Plan 2015–2019* also requires that surface water procurements demonstrate value for money and a contribution to triple bottom line (social, economic or environmental) outcomes. In addition, the *Water Recovery Strategy* requires that an appropriate level of regard is given to value for money.

## Value for money

4.5 The department did not use a value for money approach for procurement of strategic water entitlements. The department commenced work on two value for money approaches, however neither were endorsed nor implemented. In September 2015 and July 2016, the department developed draft *Value for Money Considerations* and *Framework for Assessing Value for Money* documents.

4.6 These documents detail factors which could be taken into account when undertaking a value for money assessment of procurements. The *Framework for Assessing Value for Money* also provided weighting factors applicable to assessments where the department places additional value against certain criteria.<sup>84</sup> A documented and approved value for money approach would have assisted the department to more clearly demonstrate its achievement of value for money.

4.7 Examination of departmental documentation found that two key elements were the most influential in the department's assessment of a proposal and whether the department would pursue the offer: whether the purchase was considered 'gap-bridging' and whether the price offered was equal to or less than the maximum price identified by valuation. A summary of this analysis is set out in Table 4.1.

83 Department of Finance, *Value for Money* [Internet], available from <https://www.finance.gov.au/government/procurement/commonwealth-procurement-rules/value-money> [accessed February 2020].

84 These included: market activity; environmental value; size of the entitlement; whether the purchase offered an extraordinary opportunity for water recovery in the area to date; whether the procurement would have benefits beyond the water yielded (such as minimal negative social or economic benefit); and previous success of purchasing in the resource area.

**Table 4.1: ANAO analysis of value for money assessments for strategic water procurements**

	State and catchment area	CEWH (Environmental Advice)	Socio-economic assessment	Valuation amount (market price)	Benchmark (maximum considered)	Amount offered by seller	Counter offers	Final purchase price
No. 1	Queensland — Border Rivers	▲ The entitlement class in question is acceptable, however it is a lower priority.	Nil	\$460,800	\$386,500	\$384,000	Nil	\$384,000
No. 2	South Australia — Murray	◆ Acquisition of Class 1, 2 and 3 South Australian Murray entitlements is recommended at this time due to their high security characteristics and ability to be transferred/traded interstate.	Nil	\$8,400,000	\$8,000,000	\$8,000,000	Nil	\$8,000,000
No. 3	Queensland — Central Condamine Alluvium	◆ The Commonwealth Environmental Water Office (CEWO) recommends the acquisition of groundwater entitlements in the Upper Condamine Alluvium, as prescribed in Schedule 4 of the Basin Plan, subject to the confirmation of this commitment from the Queensland Government.	Nil	\$950,000	\$927,500	\$925,000	Nil	\$925,000
No. 4				\$634,600	\$620,400	\$617,900	Nil	\$617,900
No. 5	New South Wales — Murrumbidgee (Lowbidgee)	■ As a general principle the CEWH seeks a balanced portfolio without over-reliance on a particular class of entitlement. Murrumbidgee Supplementary (Lowbidgee) are not a priority for further acquisition because we already have a substantial holding of this class of entitlement, primarily from the Nimmie Caira acquisition. The CEWO wishes to avoid, if possible, situations where it holds all of the entitlements in a particular category.	Nil	\$6,664,350	\$4,483,290	\$4,483,290	Nil <sup>a</sup>	\$4,483,290



	State and catchment area	CEWH (Environmental Advice)	Socio-economic assessment	Valuation amount (market price)	Benchmark (maximum considered)	Amount offered by seller	Counter offers	Final purchase price
No. 6	New South Wales, Lower Darling	▲ The acquisition of the water entitlements is consistent with the standing CEWO advice from 2014. Attachment A to the CEWO advice recommends the acquisition of general security and high security entitlements in the Lower Darling. <b>No evidence of updated consultation.</b>	Yes	\$25,000,000 – \$52,000,000	Not provided	\$38,000,000	Nil	\$38,000,000 <sup>b</sup>
No. 7	Queensland — Warrego	■ Based on the existing flow gauging network and low level of monitoring and knowledge of environmental asset requirements in the catchment, it would be difficult for the CEWO to demonstrate specific flow and environmental benefits.	Yes	\$7,718,700	\$7,718,700	\$7,484,800	Nil	\$7,484,800
				\$9,789,450	\$9,789,450	\$9,492,800	Nil	\$9,492,800
No. 8	Queensland — Condamine Balonne	◆ The CEWO strongly supports the acquisition of water entitlements from the Kia-Ora and Clyde properties, and the decommissioning of some infrastructure on the Clyde property.	Yes	\$43,650,000	\$44,286,373	\$42,937,050	Yes	\$39,939,750
				\$42,570,000	\$43,190,627	\$41,874,690	Yes	\$38,951,550
No. 9	Queensland, Upper Condamine Alluvium (19 purchases)	N/A	Nil	\$1,800/ML to \$2,000/ML	\$1,800/ML to \$2,000/ML	Refer to Appendix 2	Nil	\$18,000 to \$446,500

Legend: ■ Negative advice; ▲ Neutral or unclear advice; ◆ Positive advice

Note a: Between the seller's initial approach to the department and the procurement being finalised, an internal valuation of the entitlement identified an increase in price from \$370 per megalitre to \$500 per megalitre. The final purchase price was maintained at the initial valuation.

Note b: The Lower Darling purchase also included an additional \$40 million compensation payment.

Source: ANAO analysis of Department of Agriculture, Water and the Environment information.

## **Social, economic and environmental considerations**

4.8 As outlined in paragraph 4.3, the department committed to assessing and providing advice on any social, economic and environmental impacts of potential procurements. Advice on these impacts provided to the Minister and the departmental delegate was limited, and there is limited evidence of the department undertaking appropriate assessments to inform these statements.

### ***Socio-economic assessment***

4.9 As part of the initial briefing to the Minister, the department advised that it would:

provide advice on the likely economic and social impacts of any recommended purchase. At a minimum, this advice will have regard for the location of the offer and the size of the offer relative to the local consumptive pool. We will also draw on independent reports and information from state government agencies to identify any particular local impacts that can be anticipated.

4.10 Only three procurements included detail relating to socio-economic impacts of proposed procurements. These were the Lower Darling, Warrego and the Condamine Balonne procurements.

#### **New South Wales — Lower Darling**

4.11 When seeking Ministerial approval to commence negotiations, the department provided advice relating to the expected savings from a reduced requirement to store water to service the entitlements being considered for purchase.

4.12 When seeking approval to enter into an agreement, the department advised the Minister that it considered that the Lower Darling procurement would be ‘unlikely to have a significant socio-economic impact.’ This advice was informed by information provided by the seller.

4.13 In both briefings, the department outlined concerns held by Broken Hill and Lower Darling communities that the acquisition of water entitlements by the Commonwealth would allow greater changes to the Menindee Lakes, potentially causing a loss of recreational amenity and a reduction in agriculture and tourism activity in the region. There is no evidence of any further information relating to the above concerns for Broken Hill and Lower Darling communities within the procurement documentation.

#### **Queensland — Warrego**

4.14 The department advised the Minister that the Warrego procurement would have ‘less socio-economic impact than acquiring an equivalent volume in other catchments’. Additionally, the department advised that Murray-Darling Basin Authority (MDBA) advice was that ‘the consequences of the purchase on employment in the area would be fairly neutral relative to pre Basin Plan conditions’, and the seller had indicated that they expected to continue to employ a similar number of people. The brief also included a summary of socio-economic advice and regional profiles that contained the department’s analysis of the socio-economic impact of the proposed purchase.

#### **Queensland — Condamine Balonne**

4.15 The department referred to an existing MDBA review of socioeconomic analysis in the Northern Basin from November 2016 to outline the socio-economic impacts of the Condamine-Balonne procurement on the local economy. This review noted that achieving the required Sustainable Diversion Limits (SDLs) for the area would have a substantive effect on the region’s economy, with modelling predicting reductions in irrigation, agricultural and non-agricultural

employment. As the procurement progressed, the department provided advice to the Minister in several briefs relating to potential socio-economic impacts and options to minimise impacts.

#### 2019 Upper Condamine Alluvium procurements

4.16 The department sought advice from MDBA regarding the potential socio-economic impacts of water recovery in the Upper Condamine Alluvium to inform an open tender approach. The department advised the Minister that this advice was positive. The advice used to inform the open tender rounds was also used to inform the subsequent 2019 limited tender approach.

#### *Environmental*

4.17 The department advised the Minister it would consider procurements ‘in an area where further water is required to bridge the gap to the SDLs after taking into account all the possible adjustments’.<sup>85</sup> Possible adjustments included scenarios for supply measure offsets, infrastructure recoveries and the expected Northern Basin review outcomes.<sup>86</sup>

4.18 For the majority of procurements, the advice provided to the Minister and the departmental delegate was limited to whether the purchase was gap-bridging. The advice did not provide any information about other adjustments, such as infrastructure investment recoveries. The exceptions to this are the Lower Darling, Warrego and Condamine Balonne procurements.

- The New South Wales — Lower Darling procurement included advice which indicated that by acquiring these entitlements the department would avoid the requirement for the Menindee project to include infrastructure works to update the Pennellco channel.<sup>87</sup>
- The advice to the Minister related to the Queensland — Warrego procurement stated that:

the purchase would allow us to reallocate infrastructure funds currently earmarked for the Border Rivers to the Condamine Balonne, where there would still be a large gap to bridge and high stakeholder interested in mitigating socio-economic impacts of water recovery.<sup>88</sup>

- Advice to the Minister related to the Queensland — Condamine Balonne procurement provided a summary of the progress of the infrastructure program including the expected yield from investments and the remaining gap.

4.19 While all the 2016 and 2017 procurements were considered to be ‘gap-bridging’, not all were considered priority purchases by the Commonwealth Environmental Water Holder (CEWH). In particular, there were three procurements where advice from the CEWH indicated that the water being purchased was not considered a priority at the time.

- The Queensland — Border Rivers and New South Wales — Murrumbidgee procurements were not a priority given the class of entitlement for each procurement.

---

85 Extract from Ministerial brief dated 10 December 2015.

86 Supply measure projects can offset a quantity of water which would otherwise be required to be recovered from the Basin.

87 The Menindee Lakes Water Saving Project included upgrades to the Pennellco Channel at an estimated cost of \$72 million which would be required if irrigation continued at Tandou station.

88 Extract from Ministerial brief dated 17 March 2017.

- The Queensland — Warrego procurement did not have a strong environmental basis, as it was difficult to demonstrate water flows and the environmental benefits.

4.20 The CEWH stated that despite not being a priority, the entitlements were considered acceptable at the time.

4.21 The above information was not included in the advice to the Minister when seeking approval for the purchase. Advice to the departmental delegate stated of the Queensland — Border Rivers procurement that ‘the entitlement tendered is acceptable for the CEWH environmental water portfolio’.

4.22 The department relied on CEWH advice provided in 2013 (and confirmed in 2014 and 2015) for the open tender procurement rounds in the Upper Condamine Alluvium for the subsequent 2019 limited tender procurements.

## Valuations

4.23 The *Methodology for valuation of water entitlement* was used to determine the price the department was willing to pay for water entitlements in particular catchments, as well as whether an internal or external valuation was required. The methodology was endorsed by the Water Project Board in November 2015.

4.24 The methodology outlines the department’s approach to:

- valuing entitlements to be acquired through infrastructure investments (active market)<sup>89</sup>;
- setting benchmark prices for direct water purchases (active market);
- valuing water entitlements in non-active markets, either for direct water purchases or acquisitions through infrastructure; and
- establishing book values (undertaking internal valuations).

4.25 For active markets, the Water Market Policy Section within the department provides internal advice on market activity and observed trends sourced from the state register of sales to the relevant line area, including:

- the highest market transaction, preferably in the six months prior to the assessment;
- the highest price paid three-month extrapolation using the Volume Weighted Average Price (VWAP) trend;
- monthly average prices, trend and three-month extrapolation on trend; and
- quarterly average prices, trend and three-month extrapolation on trend.

4.26 Additionally, the methodology notes that the Water Market Policy Section will also provide information from other sources such as short-term views from water brokers, consultants, major market participants and short-term weather outlooks.

4.27 The methodology provides scope for the line area to select and justify the most appropriate approach and make additional allowances to account for other factors that may make it more advantageous to purchase a specific entitlement such as enhanced environmental benefits. The

---

89 The Department of Environment’s consideration of valuation of water and market activity is included in its Annual Report.

Department of the Environment and Energy, *Annual Report 2018–19*, p. 175.

methodology also notes that the department should not set an upper limit on willingness to pay and should negotiate openly on a case by case basis.

4.28 For non-active water markets, the department is required to seek expert advice from a registered valuer. The methodology allows for the department to make additional upward adjustments if it considers it suitable and defensible. The relevant line area will then make recommendations to the Valuations Committee or Water Project Board. The department did not develop Terms of Reference for the Valuations Committee or record meeting minutes.

4.29 The department obtained external valuations for all procurements examined in this audit, with two exceptions. The New South Wales — Murrumbidgee and South Australia — Murray purchases valuations were conducted internally.

4.30 For the 2016 and 2017 procurements, financial valuations were obtained for each procurement. For the 2019 Upper Condamine Alluvium procurements, the department sought one financial valuation for the entire catchment as part of the open tender held prior to the acceptance of limited tender offers, which was then used for the limited tender approach. The department defined and published the maximum values for each catchment sub-area.

4.31 Within procurement documentation the department stated that procurements were considered value for money. However, the assessment was almost always limited to a pricing assessment, specifically a statement that the offered price is less than the valuation.

4.32 The value for money assessment summary does not clearly articulate how the triple bottom line outcomes influenced the price the department is willing to pay. As a result, the information that is provided to the Minister and departmental delegate is also price focussed.

4.33 Valuations provided by external valuers note they are valid for 90 days. The department's valuation methodology states that the department considers valuations to be valid for six months. For the 2016 and 2017 procurements, all procurements were approved within the 90 day validity period set by the valuer.

4.34 For the 2019 Upper Condamine Alluvium procurements, at the time the individual procurements were approved, these valuations were between 174 and 372 days old. The department did not provide any assurance that the valuations remained appropriate once the validity period had passed either the period defined by the valuer or the period set by the department's valuation methodology.

4.35 For future procurements, the department should provide appropriate assurance that, where the validity period for a valuation has been exceeded, the valuation remains appropriate, to ensure that advice provided to decision-makers is relevant and accurate.

### *Negotiation*

4.36 Negotiation allows the buyer to seek to improve value for money outcomes, or confirm that value for money has been maximised. While all procurements were equal to or below the valuation amount<sup>90</sup>, the department only negotiated against the price offered for one of the eight 2016 to

90 In the case of the Lower Darling purchase, a valuation range was provided as the valuation provided for several scenarios where market value and water allocations varied. This purchase also included a compensation payment which was paid in addition to the purchase price for the water entitlement.

2017 procurements.<sup>91</sup> Evidence of the department making a counter-offer to a seller is available for one purchase, the 2017 sale of water in the Condamine Balonne.

4.37 The 2017 Condamine Balonne purchase had two parts: the Kia-Ora entitlement, and the Clyde entitlement. The initial offer for the Clyde entitlement comprised both water and water storage infrastructure. After receiving advice that the Commonwealth Environmental Water Office (CEWO) was not seeking storage infrastructure, and that constitutional and legislative constraints could complicate an infrastructure purchase, the department negotiated with the seller to exclude the storage component from the sale. The seller agreed and offered the storage component to be included in the purchase at no cost. The storage component was not included in the final contract.

4.38 The department did not attempt to negotiate price for any of the 2019 Upper Condamine Alluvium procurements.

## **Probity management**

4.39 Australian Government officials undertaking procurement activities are required to act in an ethical manner, including recognising and managing potential and perceived conflicts of interest.<sup>92</sup> Additionally, the Australian Public Service Code of Conduct requires all employees to declare any interests that may be a conflict.<sup>93</sup> Appropriate arrangements to manage conflicts of interest are particularly important for building and maintaining public confidence.

4.40 For the assessment of limited tender procurements, the department relied on officials to self-declare any real or perceived conflicts of interest. This differs from the process set for open tender procurements where panel members assessing applications are required to complete a specific conflict of interest declaration.<sup>94</sup>

4.41 Valuers undertaking water valuations on behalf of the department are required to self-disclose any potential or actual conflicts of interest. The ANAO reviewed the valuations for the purchases undertaken in 2016 and 2017 for the inclusion of probity management arrangements. For four of these purchases, the valuer declared in the valuation that there were no pecuniary interests that would conflict with them conducting a proper valuation of the property.

4.42 A further two valuers did not specifically declare that there were no real or perceived conflicts of interest but signed a standard Commonwealth contract with the department that included a clause that any real or perceived conflicts had been declared, or stated that no conflicts exist or are anticipated.<sup>95</sup> Neither contract noted any real or perceived conflicts. Valuations for the remaining two procurements were conducted internally by the department. No conflicts of interests were raised for any procurements.

---

91 The department negotiated with the seller for the Condamine Balonne purchase.

92 Department of Finance, Commonwealth Procurement Rules, April 2019, section 6.

93 *Public Service Act 1999*, section 13.

94 This audit did not assess the arrangements in place for probity management under open tenders.

95 These were the Condamine Balonne purchase and the Warrego purchase.

### Recommendation no.3

4.43 The Department of Agriculture, Water and the Environment review and update arrangements for managing real or perceived conflicts of interest including assurance mechanisms to ensure these are consistently implemented and communicated.

**Department of Agriculture, Water and the Environment response: Agreed.**

4.44 *The department has already updated its conflict of interest reporting protocols for all departmental officers, contractors and consultants undertaking work in relation to the procurement of water entitlements.*

### Did the department conduct an evaluation of the effectiveness of the limited tender approach to strategic water procurements?

The department has not reviewed or updated the Water Recovery Strategy or the water purchasing program. An evaluation is planned for September 2020 following the conclusion of the Sustainable Rural Water Use and Infrastructure Program. The department has not yet developed an evaluation framework.

4.45 Good evaluation practice includes considering the evaluation approach during the design phase of a program.<sup>96</sup> Adequate resourcing including sufficient budget should be included within new policy proposals or implementation planning for all programs.<sup>97</sup>

4.46 The department's approach to procurement of strategic water entitlements was based on the 2014 *Water Recovery Strategy for the Murray-Darling Basin* (the Water Recovery Strategy):

This Water Recovery Strategy sets out the Australian Government's approach to environmental water recovery in the Murray-Darling Basin. It outlines how the Australian Government will deliver its commitment to bridge the gap in a way that restores the basin environment to health, while delivering a positive outcome for the economy and for Basin communities.<sup>98</sup>

4.47 The Water Recovery Strategy includes a commitment of an annual update to incorporate the latest information on the volume of environmental water recovered through various programs.<sup>99</sup> Additionally a major review and update of the Water Recovery Strategy was intended in 2016 following the operation of the SDL Adjustment Mechanisms.<sup>100</sup> The Water Recovery Strategy stated that:

96 Auditor-General Report No.47 2018–19 *Evaluating Aboriginal and Torres Strait Islander Programs*.

97 Department of the Prime Minister and Cabinet, *Cabinet Implementation Unit Toolkit: Monitoring, review and evaluation*, June 2013.

98 Department of the Environment, *Water Recovery Strategy for the Murray-Darling Basin* June 2014, p. 10.

99 *ibid.*, p. 31.

100 The department released the 'Northern Basin Programs Taskforce Report' in November 2017. 'Appendix D' of that report contained a 'Northern Basin Catchment by Catchment Water Recovery Strategy'. While not addressing the needs of the Basin as a whole, it identifies how the department will use its programs to recover water in the Condamine Balonne, Queensland Border Rivers, Namoi, and New South Wales Border Rivers catchments.

By 2016, it will be possible to more precisely target remaining water recovery activities to meet all water recovery targets in the Basin Plan.<sup>101</sup>

4.48 As at January 2020, neither the annual updates nor the 2016 major review of the Water Recovery Strategy had occurred. As at April 2020, the department had not defined any evaluation criteria or measures.

#### Recommendation no.4

4.49 The Department of Agriculture, Water and the Environment implement a framework which requires the development of evaluation strategies early in the program design process and regular monitoring and review throughout the lifecycle.

**Department of Agriculture, Water and the Environment response: Agreed.**

4.50 *The department has an overall evaluation framework for the broader Sustainable Rural Water Use and Infrastructure Program of which the Restoring the Balance in the Murray-Darling Basin (water purchasing) Program fits within. The department will review this plan to ensure there is a sufficient focus on the water purchasing program.*

---



Rona Mellor PSM  
Acting Auditor-General

Canberra ACT  
16 July 2020

---

101 Department of the Environment, *Water Recovery Strategy for the Murray-Darling Basin June 2014*, p. 33.



## **Appendices**

## Appendix 1 Entity response



**Australian Government**  
**Department of Agriculture,  
Water and the Environment**

**ANDREW METCALFE AO  
SECRETARY**

Ref: EC20-000310

18 June 2020

Mr Grant Hehir  
Auditor-General for Australia  
GPO Box 707  
Canberra ACT 2601

Dear Mr Hehir

Thank you for your email of 25 May 2020 regarding the proposed report under section 19 of the *Auditor-General Act 1997* on the Procurement of Strategic Water Entitlements and for the opportunity to respond to the report.

The Department of Agriculture, Water and the Environment agrees with all four recommendations made by the ANAO and is implementing the administrative changes where relevant.

The department's comments for inclusion in the Audit Report Summary are enclosed.

The department has also provided detailed feedback, including a number of technical corrections, clarifications and edits, to the ANAO separate to this response.

If you require any further clarification on our comments, please contact Ms Tanya Stacpoole, Acting Assistant Secretary, Water Recovery Branch, on 02 6272 5247 or via [tanya.stacpoole@awe.gov.au](mailto:tanya.stacpoole@awe.gov.au).

With regards

Andrew Metcalfe AO

T +61 2 6272 3933  
F +61 2 6272 5161

18 Marcus Clarke Street  
Canberra City ACT 2601

GPO Box 858  
Canberra ACT 2601

[awe.gov.au](http://awe.gov.au)  
ABN 24 113 085 695

The department acknowledges the ANAO's overall findings and recommendations and appreciates the opportunity to comment on the audit report on the Procurement of Strategic Water Entitlements.

Under the Sustainable Rural Water Use and Infrastructure Program, the Australian Government has committed \$3.1 billion to purchase water to assist with bridging the gap to the sustainable diversion limits in the Murray-Darling Basin Plan. The Government is committed to ensuring the water purchased continues to provide long-term benefits for the environment while maximising positive outcomes for farmers and communities in the Basin. Therefore, the Government is continuing to prioritise investment in water-saving infrastructure over water purchases, but where necessary, considers strategic purchases in circumstances where they provide significant benefit, while minimising negative social and economic impacts.<sup>a</sup>

The department has conducted ten strategic water purchases since 2016 (and a further 19 limited tenders that formed part of a strategic water recovery approach in the Queensland Upper Condamine Alluvium). These purchases achieved value for money with the price paid being at or below the maximum price identified by independent market valuations. The department relied on market valuations and considers this to be appropriate given the nature of water markets and is confident it has achieved value for money for all purchases. The department carefully considered the unique terms and benefits of each proposal including their gap-bridging capacity, ability to deliver environmental outcomes, uniqueness in size or location or otherwise unique opportunity.<sup>b</sup>

The department has received over 100 unsolicited offers for the sale of water entitlements from interested sellers since 2015. Due to circumstances changing over time, not all of these unsolicited offers have been closed off in the unsolicited offer database. For example, upon initial assessment some offers have been placed on hold until the water can be adequately protected from downstream extraction.<sup>c</sup>

All instructions provided by the Minister have been executed appropriately. In two particular instances the department took further actions consistent with the intent of these instructions. Firstly, the Minister requested that the department seek agreement from the NSW government for the purchase of NSW Murrumbidgee water entitlements. The department engaged with the NSW government on the purchase. The department then briefed the Minister on this consultation and the Minister subsequently approved the purchase to proceed. Secondly, the Minister requested the department explore the possibility of incorporating works to address flooding in southern St George as part of the 2017 Condamine-Balonne purchase. The department explored this possibility through an independent report and consultation with the Commonwealth Environmental Water Office as requested. The department then re-briefed the Minister on its findings and the Minister subsequently approved the purchase to proceed.<sup>d</sup>

It is pleasing that the ANAO have confirmed that the program design and planning to support strategic water procurements to date was largely appropriate. The department acknowledges the administrative process improvements identified by the ANAO and has already implemented most changes. The department is committed to ensuring its policies and processes for conducting strategic water purchases are fit-for-purpose, with the ability to evolve over time with continuous improvement as required.

*ANAO comment on Department of Agriculture, Water and the Environment summary response*

- (a) Paragraphs 4.2 to 4.4 outline the parameters on which the department is required to demonstrate value for money. Paragraphs 4.5 to 4.38 outline the department's approach to assessing value for money for strategic water procurements.
- (b) As outlined in Chapter 3, briefings to the Minister did not provide a clear indication of how the procurements would obtain a triple bottom line outcome as in the original commitment. The department did not consistently provide complete information to enable departmental decision-makers to make informed decisions. Table 3.1 outlines the ANAO's assessment of the application of the Guidelines to strategic water procurements conducted in 2016 and 2017.
- (c) As outlined in paragraphs 2.6 to 2.7, in August 2015, the register of unsolicited offers is incomplete and limits the department's ability to quickly and easily compare offers and key decisions.
- (d) As outlined in Chapter 3, there are two instances where it is unclear whether the actions undertaken by the department and subsequent advice provided to the Minister fully addressed the intent of the instructions. As discussed in paragraphs 3.38 to 3.42 there is no evidence that the department obtained agreement from the NSW government for the purchase. As discussed in paragraphs 3.43 to 3.48, there is no evidence that the department obtained verification of the report from the Queensland Department of Natural Resources and Mines as advised to the Minister.

## Appendix 2      2019 Upper Condamine Alluvium limited tenders

**Table A.1:      Strategic water procurements conducted through limited tender in the Upper Condamine Alluvium**

Contract date	Price per megalitre (\$)	Volume purchased (megalitres)	Value (\$)
March 2019	1,800	10	18,000
April 2019	1,800	20	36,000
May 2019	1,800	15	27,000
April 2019	1,900	67	127,300
March 2019	1,950	229	446,000
April 2019	1,800	18	32,000
April 2019	1,950	206	401,000
May 2019	2,000	138	276,000
April 2019	1,800	9	16,000
April 2019	1,800	5	9,000
April 2019	1,800	18.5	33,000
February 2019	1,900	12	22,000
April 2019	1,900	61	115,000
February 2019	1,900	7	13,000
May 2019	1,800	13	23,000
March 2019	1,950	5	9,000
April 2019	1,800	32.4	58,000
Aril 2019	1,800	8	14,000
April 2019	1,800	38.3	68,000
<b>Total</b>		<b>912</b>	<b>1,743,300</b>

Source: ANAO analysis of Department of Agriculture, Water and the Environment information.