



**Australian Government**

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**Commonwealth Environmental Water Office**

# **Sale of Water Allocation**

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## **Terms of Offer**

TERMS OF OFFER IN RELATION TO SALE OF WATER ALLOCATION BY THE COMMONWEALTH OF AUSTRALIA (**SALE**)

Last updated 27 August 2018

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## **1. Recitals**

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- 1.1. The Commonwealth (as represented by and acting through the Commonwealth Environmental Water Holder in the Department of the Environment and Energy) designs and implements the Australian Government's policies and programmes to protect and conserve the environment, water and heritage and promote climate action.
- 1.2. To perform its functions, the Commonwealth wishes to sell the Sale Volume.
- 1.3. The Commonwealth approached the market seeking purchase bids on particular terms.
- 1.4. The Buyer has made a Bid to purchase the Agreed Volume from the Commonwealth.
- 1.5. The Commonwealth has accepted the Bid and provided an Acceptance of Bid to the Buyer.
- 1.6. The parties have agreed to transfer the Agreed Volume in accordance with the Terms of this Agreement.

## **2. Buyer Acknowledgements and Warranties**

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### **Ability to Purchase Water Allocation**

- 2.1. The Buyer warrants that at the Contract Date:
  - a. it has the right to purchase the Agreed Volume;
  - b. to the best of its knowledge, there is no impediment which would prevent or materially delay the transfer of the Agreed Volume from the Commonwealth's to the Buyer's Allocation Account; and
  - c. the Buyer has complied with all requirements of the Act and any other relevant Laws in relation to the Water Allocation.

### **Trading Rules**

- 2.2. The Buyer warrants that it is familiar with and understands the Trading Rules including those determined by the Authority responsible for dealings of Water Allocations including, without limitation:
  - a. restrictions on the transfer of the Agreed Volume out of the Source Jurisdiction and/or the Trading Zone;
  - b. restrictions on the transfer of the Agreed Volume into the Destination Jurisdiction and/or the Destination Trading Zone;
  - c. any capacity limits which apply to the Trade or to the total of trades in and out of the Trading Zone; and
  - d. critical dates and time limits which apply in relation to the Trade.

### **Warranty**

- 2.3. The Buyer will ensure that the warranties contained in clause 2.1 and 2.2 remain true until such time as the Trade is approved by the Authority.

### **Adjustment to Volume**

- 2.4. The Buyer acknowledges that the Commonwealth is not responsible for any difference between the Agreed Volume and the volume of the Water Allocation received by the Buyer where there is an adjustment to the volume received into the Buyer's Allocation Account made by the Authority to account for losses or for any other reason.

### **Publication of Details of Sale**

- 2.5. The Buyer:
- a. acknowledges that the Commonwealth is subject to a range of laws and policies which may require the Commonwealth to publish certain details of the Agreement, and details relating to the Trade (subject to the limitations of the *Privacy Act 1988* (Cth) and without identifying the Buyer); and
  - b. consents to publication by the Commonwealth of any information to the extent required under Commonwealth laws or policies (except for information which would identify the Buyer).

### **Commonwealth Enquiries**

- 2.6. The Buyer:
- a. acknowledges that the Commonwealth may conduct enquiries and gather information in relation to the Buyer and the information provided by the Buyer to the Commonwealth in relation to the Bid; and
  - b. authorises the Commonwealth to use (and to disclose to third parties if reasonably necessary) all or any part of the information provided by the Buyer to the Commonwealth and to contact any person in order to conduct its enquiries and gather information in relation to the Bid, but only to the extent permitted under the *Privacy Act 1988* (Cth).

### **Breach of Related Agreement to Purchase or Sell Water Allocations**

- 2.7. The Buyer acknowledges and agrees that where any other agreement between the Buyer and the Commonwealth relating to the purchase or sale of water allocations is terminated as a result of the Buyer's default, that termination will constitute a Default under the Agreement which will entitle the Commonwealth to exercise, without limitation, the remedies available to it under clause 8.

### **Commonwealth Not Liable for Buyer's Works or Arrangements**

- 2.8. The Buyer acknowledges that the Commonwealth is not responsible for:

- a. any works which may be required by the Authority to be carried out on the Buyer's land, or on land where the Water Allocation will be delivered after completion of the Trade, or the cost of those works; or
- b. any arrangements relating to the use or management of the water by the Buyer.

### **Nature of Authority**

- 2.9. The parties acknowledge that in these Terms, Authority means the authority having responsibility for dealings (including without limitation assignment and transfers) of water allocations in the Source Jurisdiction (and where applicable the Destination Jurisdiction) including, without limitation and to the extent applicable, the relevant water corporation, the state office responsible for water management, and the private irrigation corporation (or any one or all of them as the situation requires).

### **Formation of Agreement**

- 2.10. The parties acknowledge that the Agreement is formed and is enforceable from the point in time at which the Commonwealth sends the Acceptance of Bid.

## **3. Payment of Value, Fees and Costs**

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### **Requiring Payment**

- 3.1. The Buyer is liable for all lodging and registration fees associated with the Trade.
- 3.2. The Buyer acknowledges that the Commonwealth may pay any applicable lodging or registration fees and may require the Buyer to pay or reimburse those amounts to the Commonwealth at any time (where permitted by the Agreement).
- 3.3. The Commonwealth will use reasonable endeavours to ensure that the Acceptance of Bid includes a statement of the total amount payable by the Buyer under this Agreement.
- 3.4. The Commonwealth will send to the Buyer a correctly rendered invoice (or invoices) which separately itemises:
  - i. the Value; and
  - ii. the Trade Approval Lodgement Costs which will be paid by the Buyer and not reimbursed by the Commonwealth; and
  - iii. any Usage Charges which will be paid by the Buyer and not reimbursed by the Commonwealth.

### **Payment**

- 3.5. Within 10 Business Days of receiving the Acceptance of Bid setting out the amount payable by the Buyer, the Buyer must pay the total of all amounts set

out in the Acceptance of Bid in accordance with the Commonwealth's directions.

- 3.6. Without limiting clause 3.5, the Buyer must pay any amounts which it is required to pay under this Agreement within 10 Business Days of written demand by the Commonwealth.

#### **Professional Fees**

- 3.7. Each party will bear their own legal and other professional fees in relation to the Agreement.

#### **4. Goods and Services Tax**

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- 4.1. The Price and Value are GST exclusive amounts.
- 4.2. The Commonwealth and the Buyer agree that the sale of the Water Allocation on these Terms is a supply of water that is GST exempt in accordance with the Australian Taxation Office Ruling GSTR 2000/25 (as amended from time to time).

#### **5. Provision and Lodgement of Trade Approval Form and Electronic Lodgement**

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##### **Trade Approval Form**

- 5.1. Within 3 Business Days of the Contract Date, the Buyer must provide to the Commonwealth (to the extent that the Buyer is required to provide them and has not already provided them):
- a. the Trade Approval Form which:
    - i. has been completed as far as the Buyer can reasonably complete it;
    - ii. without limiting any other information which must be completed, specifies that the Agreed Volume is to be transferred;
    - iii. (where required) has been validly signed on behalf of the Buyer; and
  - b. any other documents required in accordance with clause 5.2.

##### **Provision of Additional Information and Documents**

- 5.2. The Buyer will deliver to the Commonwealth within 3 Business Days of the Contract Date all additional documents (to the extent that the Buyer has not already provided them) which are required to facilitate the Trade which may include, but are not limited to:
- a. any form required to be submitted to the Buyer's private irrigation corporation or trust (as applicable);
  - b. any document required to be lodged to confirm the authority of the person(s) who have signed the Trade Approval Form and/or additional documents.

- 5.3. It is the Buyer's responsibility to ensure that all additional documents which are necessary to facilitate the Trade are provided to the Commonwealth.

#### **Lodgement of Trade Approval Form**

- 5.4. Subject to first receiving payment of all amounts payable under the Agreement, within 5 Business Days after receiving all Trade Approval Forms and additional documents in accordance with clauses 5.1 and 5.2, the Commonwealth will:
- a. complete any required details relating to the Commonwealth or the Commonwealth's Allocation Account;
  - b. amend or complete any of the details in the Trade Approval Forms so that they are consistent with the details provided in the Bid Form;
  - c. execute the Trade Approval Form; and
  - d. lodge the Trade Approval Form and all additional documents with the Authority.

#### **Electronic Lodgement**

- 5.5. If the Commonwealth submits an application to the Authority electronically:
- a. the Buyer is not required to provide a Trade Approval Form in accordance with clause 5.1; and
  - b. the Commonwealth will submit the application to the Authority within 5 Business Days after receiving payment of all amounts payable under the Agreement and additional documents in accordance with clauses 5.2.
- 5.6. The Buyer must comply with any other reasonable requirements of the Commonwealth in order to facilitate electronic lodgement of the Trade.

### **6. Trade Rejected**

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#### **Where Trade Rejected**

- 6.1. The parties agree that:
- a. where the Trade is rejected by the Authority; or
  - b. the Authority advises either party that the Trade Approval Form or additional documents require amendment in order for the Trade to be approved,
- then:
- c. the parties will work together in good faith and do all things reasonably required to (among other things) remedy any errors in the Trade Approval Form or additional documents (if applicable and necessary) and take such other steps as may be required to remove obstacles to the Trade being approved;

- d. if no change to the Agreed Volume is required, then the Commonwealth may resubmit a Trade Approval Form or may submit an application to the Authority electronically, along with any other relevant supporting material without first obtaining the Buyer's consent for resubmission;
  - e. if a reduction to the Agreed Volume is required for the Trade to potentially be approved by the Authority, then the Commonwealth may submit an amended Trade Approval Form or may submit an application to the Authority electronically, along with any other supporting material after first obtaining the Buyer's written consent to reduce the Agreed Volume; and
  - f. the Buyer may be required to provide a new Trade Approval Form for the Commonwealth to lodge or re-lodge (if necessary); and
  - g. the Commonwealth will bear the Trade Approval Lodgement Costs associated with and resubmission the Trade Approval Form or any application submitted electronically under clauses 6.1.d or 6.1.e.
- 6.2. Subject to clause 6.3, if the Trade is not approved within 5 Business Days of the initial rejection referred to in clause 6.1.a, or receipt of the advice from the Authority referred to in clause 6.1.b, the Commonwealth may immediately terminate the Agreement by giving written notice.
- 6.3. If the Trade is rejected because it is not permitted under the Trading Rules (except in circumstances where the Trade may be permitted if the Agreed Volume is changed) then:
- a. either party may immediately terminate the Agreement by giving written notice; and
  - b. neither party is required to comply with clause 6.1.
- 6.4. Where:
- a. the Trade is rejected; and
  - b. the rejection of the Trade has not been caused by:
    - i. the sole delay of the Commonwealth in lodging the Trade Approval Form or in an application submitted to the Authority electronically; or
    - ii. an error of the Commonwealth in completing the Commonwealth's information in the Trade Approval Form or in an application submitted to the Authority electronically,

the Buyer is responsible for the Trade Approval Lodgement Costs associated with the Trade which has been rejected, and no reimbursement of these costs will be available from the Commonwealth.

## **7. Indemnity**

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- 7.1. The Buyer indemnifies the Commonwealth against any liability, loss (including consequential loss and loss of opportunity), damage, costs or expenses for which the Commonwealth suffers or incurs arising from:

- a. the Buyer's Default;
- b. the Buyer's negligence;
- c. the Buyer's breach of any Law;
- d. the provision of false or misleading information by the Buyer; or
- e. any act or omission of the Buyer in connection with the Water Allocation or any Trade.

## **8. Default & Termination**

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- 8.1. If the Buyer Defaults, the Commonwealth may immediately serve a notice:
  - a. describing the Default;
  - b. stating that the Default must be remedied by a date which is not less than 3 Business Days after the date of the notice; and
  - c. stating that if the Default is not remedied by the date specified in the notice, the Commonwealth may immediately terminate the Agreement.
- 8.2. If the Buyer fails to comply with a notice served pursuant to clause 8.1, the Commonwealth may terminate this Agreement effective immediately by giving notice to the Buyer.
- 8.3. If the Commonwealth terminates the Agreement pursuant to clause 8.2 or pursuant to a right of termination arising under another agreement with the Buyer, then, without prejudice to any other rights which the Commonwealth may have:
  - a. the Commonwealth may demand all monies payable by the Buyer under the Agreement as a debt immediately due and payable to the Commonwealth; and
  - b. the Commonwealth may:
    - i. resell the Water Allocation and recover any loss from the Buyer by way of damages; or
    - ii. retain the Water Allocation and recover damages from the Buyer for breach of the Agreement.
- 8.4. If the Agreement is terminated pursuant to clause 8.2, the Commonwealth may also, at its absolute discretion, immediately terminate any or all other agreements with the Buyer and clause 8.3 will apply to any agreement that is terminated pursuant to this clause (amended as required).
- 8.5. If the Commonwealth by its sole actions or omissions Defaults under the Agreement prior to but not after the date on which the Trade is approved by the Authority, the Buyer may immediately serve a notice:
  - a. describing the Default;



- b. stating that the Default must be remedied by a date which is not less than 10 Business Days after the date of the notice; and
  - c. stating that if the Default is not remedied by the date specified in the notice, the Buyer may immediately terminate the Agreement.
- 8.6. If the Commonwealth fails to comply with a notice served pursuant to clause 8.5, and provided that the Trade is not approved by the Authority, the Buyer may terminate this Agreement effective immediately by giving notice to the Commonwealth.

## **9. Refund of monies**

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- 9.1. Where the Agreement is terminated under clauses 6.2 or 6.3, the Commonwealth will within a reasonable time refund to the Buyer the Value and any lodging or other fees which have been refunded to the Commonwealth by the Authority where such fees were originally paid by the Buyer.
- 9.2. If the Buyer terminates the Agreement pursuant to clause 8.6 then, without prejudice to any other rights which the Buyer may have, all monies which have been paid by the Buyer will be refunded by the Commonwealth to the Buyer as soon as practicably possible.
- 9.3. If a reduction to the Agreed Volume is made in accordance with any term of the Agreement after the Buyer has made payment in accordance with clause 3.5, then the Commonwealth will within a reasonable time refund to the Buyer any difference in the Value.

## **10. General Conditions**

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### **Time of the Essence**

- 10.1. The parties agree that time is of the essence in the Agreement.
- 10.2. Without limiting any other provision of the Agreement, the parties acknowledge that a failure to comply with a stipulation as to time in the Agreement will constitute a Default for the purposes of clause 8.

### **Good Faith & Co-operation**

- 10.3. The parties agree to act in good faith and to co-operate to facilitate the Trade.

### **Notices**

- 10.4. A notice will be validly served if it is:
- a. signed, or in the case of an email transmitted electronically, by a party or by an authorised representative or delegate of a party; and
  - b. delivered, posted, sent by facsimile or sent by email to the other party or the other party's representative.
- 10.5. A notice will be deemed to be served and received by a party:

- a. if delivered, at the time of delivery;
- b. if posted, 2 Business Days after the date of being posted;
- c. if sent by facsimile, when a transmission report indicating that the transmission was received without error is received by the sender; or
- d. if sent by email, at the time it is sent, unless the sender receives notification that the email has not been delivered.

### **Severance**

- 10.6. If any provision of these Terms does not comply with any applicable Law then:
- a. that provision will be read down so as to give it as much effect as possible;
  - b. where the provision cannot be given any effect, it is treated as severed from the rest of the Terms; and
  - c. the remainder of the Agreement remains in force.

### **No Merger**

- 10.7. Any of the parties' rights and obligations which are capable of taking effect after completion do not merge on completion of the Trade.

### **No Waiver**

- 10.8. No right, entitlement, power or remedy is waived by a party by virtue of that party failing to exercise or delaying its exercise of that right, entitlement, power or remedy.

### **Governing Law**

- 10.9. The Agreement is governed by the Law of the Australian Capital Territory.
- 10.10. The Commonwealth will comply with Laws only to the extent that it is bound by them of their own force.

### **Inconsistency**

- 10.11. In the event of any inconsistency or conflict between the documents comprising the Agreement, the following order of priority applies:
- a. the Acceptance of Bid;
  - b. these Terms; and
  - c. the Bid Form.

## **11. Definitions and Interpretation**

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- 11.1. In these Terms, unless otherwise stated:
- a. **Act** means the relevant legislation in the Source Jurisdiction applicable to the Water Allocation which is current at the Contract Date (and as updated, repealed or replaced from time to time);

- b. **Acceptance of Bid** means the written notice sent by email (or by another method at the Commonwealth's election) by the Commonwealth to the Buyer accepting the Buyer's Bid and confirming the agreed terms;
- c. **Agreed Volume** means the volume of the Water Allocation which the Commonwealth agrees to sell to the Buyer, as stated in the Acceptance of Bid;
- d. **Agreement** means the agreement between the Buyer and the Commonwealth which is formed when the Acceptance of Bid is sent to the Buyer, and which is comprised of the terms set out in the Acceptance of Bid, these Terms, the Bid Form and any further amendment agreed in writing by the parties;
- e. **Allocation Account** means an account in which a party's accumulated Water Allocations are recorded and from which that party can draw accumulated allocated water from time to time;
- f. **Authority** means the authority having responsibility for dealings (including without limitation assignment and transfers) of Water Allocations in the Source Jurisdiction (and where applicable the Destination Jurisdiction) including, without limitation and to the extent applicable, the relevant water corporation, the state office responsible for water management, and the private irrigation corporation (or any one or all of them as the situation requires);
- g. **Bid** means the unconditional offer to purchase a volume of Water Allocation from the Commonwealth at a stated price (\$/ML) submitted by the Buyer which is comprised of the Bid Form and any supporting documents.
- h. **Bid Form** means the application form submitted by the Buyer;
- i. **Business Day** means a day which is not a Saturday, Sunday or public holiday in the Source Jurisdiction or the Destination Jurisdiction or the Australian Capital Territory;
- j. **Buyer** means a party who has:
  - i. submitted a Bid to purchase a volume of Water Allocation offered for sale by the Commonwealth; and
  - ii. whose Bid has been accepted by the Commonwealth and who has received an Acceptance of Bid,  
and includes the Buyer's employees, agents, and successors in title;
- k. **Commonwealth** means the Commonwealth of Australia;
- l. **Contract Date** means the date of the Acceptance of Bid;
- m. **Default** means a breach of any term of the Agreement (including the breach of a warranty given under the Agreement);

- n. **Destination Jurisdiction** means the jurisdiction in which the Buyer's Allocation Account is located;
- o. **Destination Trading Zone** means the trading zone with which the Buyer's Allocation Account is associated;
- p. **Law** means a statute, regulation, rule, by law, ordinance, proclamation, enactment, statutory instrument or delegated or subordinate legislation (whether Federal, State or Territory, municipal or of any Authority) and the common law;
- q. **Price** means the price per megalitre set out in the **Acceptance of Bid**;
- r. **Sale Volume** means the total volume of Water Allocation offered for sale as part of this sale process.
- s. **Source Jurisdiction** means the jurisdiction in which the Commonwealth's Allocation Account is located;
- t. **Terms** means these Terms of Offer;
- u. **Trade** means the transfer or assignment of the Agreed Volume (or another volume as agreed by the parties);
- v. **Trade Approval Form** means all form(s) which are required to be executed by the Commonwealth (whether or not they must also be executed by the Buyer) together with all relevant information required by the Authority and submitted to the Authority to process the Trade (or any part of it), but excluding any forms or documents which do not require execution by the Commonwealth;
- w. **Trade Approval Lodgement Costs** means the trade approval application fees paid to the Authority but excluding Usage Charges;
- x. **Trading Rules** means the rules (including Laws) and processes governing the trading of water allocations in the Source Jurisdiction and the Destination Jurisdiction (including the specific rules applying to the Trading Zone, water source or water management area) as amended from time to time;
- y. **Trading Zone** means the trading zone of the water entitlement in respect of which the Water Allocation has been made or, if the Water Allocation has been traded to a different trading zone, that trading zone;
- z. **Usage Charges** means charges payable to the Authority for usage of the Agreed Volume of the Water Allocation which is payable as a direct consequence of the nature of the Buyer's water entitlement or Allocation Account (including where that water entitlement is not associated with water supply works or a usage licence, or where charges are payable to the Source Jurisdiction for the transfer of water into the Destination Jurisdiction) and which is payable as a condition of approval of the Trade;

- aa. **Value** means the value of the Water Allocation being the subject of the Trade determined by multiplying the Agreed Volume by the Price;
- bb. **Water Allocation** means the seasonal water allocation made to the Allocation Account nominated by the Commonwealth for this Trade, which includes the Agreed Volume.

11.2. Unless the context otherwise requires:

- a. words importing a gender include other genders;
- b. words in the singular include the plural and vice versa;
- c. a reference to a person or a party includes a reference to that person's or party's successors in law and permitted assigns;
- d. a reference to a person includes a reference to an incorporated body;
- e. the indemnities given under these Terms do not merge on, and will survive the, completion of the transfer of the Agreed Volume;
- f. a reference to any Laws includes all amendments and revisions made from time to time to those Laws;
- g. headings in these Terms are inserted for convenience and reference only and are not to affect the interpretation of these Terms;
- h. in the interpretation of these Terms no rules of construction apply to the disadvantage of any party on the basis that it put forward the Terms.