



ACT AUDITOR-GENERAL'S OFFICE



PA06/06

The Speaker
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr Speaker

I am pleased to forward to you a Performance Audit Report titled “Sale of Block 8 Section 48, Fyshwick”, conducted under the authority contained in the *Auditor-General Act 1996*.

I would appreciate if you could arrange for the tabling of the Report in the Legislative Assembly pursuant to Section 17(4) of the *Auditor-General Act 1996*.

Yours sincerely

Tu Pham
Auditor-General
12 December 2006

ACT Auditor-General's Office

Performance Audit Report

Sale of Block 8 Section 48, Fyshwick

Land Development Agency

and

ACT Planning and Land Authority

December 2006

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LIST OF ABBREVIATIONS

| | |
|------------------------------------|---|
| ACTPLA | ACT Planning and Land Authority |
| AGS | Australian Government Solicitor |
| ANAO | Australian National Audit Office |
| CEO | Chief Executive Officer |
| CPG | Capital Property Group |
| DA | Development Application |
| DCP | Development Control Plan (approved by National Capital Authority) |
| DFO | Direct Factory (retail) Outlet |
| DOFA | Department of Finance and Administration (Cth) |
| Draft Variation 175 | Draft Variation No. 175 of 2003 to the Territory Plan |
| DUS | Former ACT Department of Urban Services |
| EOI | Expression of Interest |
| Estimates Committee | Select Committee on Estimates 2006-2007 of the ACT Legislative Assembly |
| Executive documents | Documents issued for the sale of Block 8 Section 48, Fyshwick |
| GFA | Gross Floor Area |
| Government Procurement Act | <i>Government Procurement Act 2001 (ACT)</i> |
| Government Procurement Guideline | <i>Government Procurement (Principles) Guideline 2002 (No 2) (ACT)</i> |
| GSO | ACT Government Solicitor's Office |
| ING | ING Real Estate Development Pty Ltd |
| Land Act | <i>Land (Planning and Environment) Act 1991 (ACT)</i> |
| LDA | Land Development Agency (ACT) |
| NCA | National Capital Authority (Cth) |
| NCP | National Capital Plan |
| PA | Preliminary Assessment (of land development) |
| PALM | Planning and Land Management Group (of the former ACT Department of Urban Services) |
| Planning and Environment Committee | Standing Committee on Planning and Environment of the ACT Legislative Assembly |
| Planning and Land Act | <i>Planning and Land Act 2002 (ACT)</i> |
| Planning and Land Management Act | <i>Australian Capital Territory (Planning and Land Management) Act 1988 (Cth)</i> |
| Variation 175 | Variation No. 175 of 2003 to the Territory Plan |

1. REPORT SUMMARY AND AUDIT OPINION

INTRODUCTION

1.1 This report presents a summary of the results of a performance audit that reviewed the sale of Block 8 Section 48, Fyshwick in the Australian Capital Territory and associated issues.

1.2 There has been significant community interest and media reporting and commentary about the sale of the Fyshwick site. It has also received considerable attention in the ACT Legislative Assembly. The Auditor-General has received requests from a party to the sale and from Members of the Legislative Assembly to review the pre-sale and sale process. The Auditor-General decided to conduct a performance audit (under the provisions of section 10(d) of the *Auditor-General Act 1996*) of the sale of the Fyshwick site, to promote transparency and public accountability by relevant agencies on this issue.

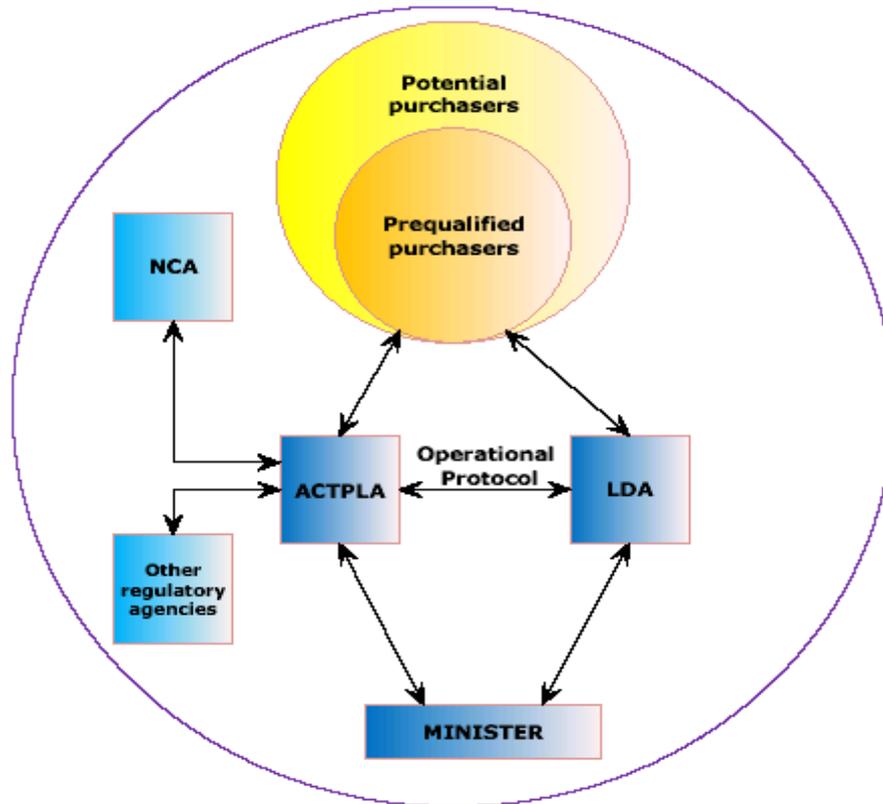
BACKGROUND

1.3 The Land Development Agency (LDA) is a statutory corporation established in the Territory on 1 July 2003 under the *Planning and Land Act 2002* to sell and develop land on behalf of the ACT Government. LDA has a strong commercial focus; the Agency is required to provide a financial return to the Government and to facilitate the Government's social and economic policy objectives through land development activities.

1.4 The ACT Planning and Land Authority (ACTPLA) was established on 1 July 2003 to provide 'high quality professional services in strategic and land planning, land release, lease administration, land information, development and building regulation with the overarching objective of promoting sustainable, attractive, safe and well-designed urban, residential and rural environments in the ACT'.

1.5 In September 2005, LDA advertised for Expressions of Interest from developers with appropriate capacity and expertise to undertake the development of Block 8 of Section 48 in Fyshwick (marketed as 'EpiCentre'). This was the first stage of a two-stage process in which LDA shortlisted a number of developers eligible to participate in a restricted auction of the site. According to LDA's Expressions of Interest documentation, Block 8 Section 48 is an area of approximately 6.9 hectares on the corner of Canberra Avenue and Newcastle Street, Fyshwick. It was intended to be the first release of land for the EpiCentre development. Figure 1.1 outlines the various parties' relationships in the sale.

Figure 1.1: Relationship map for sale of Block 8 Section 48, Fyshwick



Source: Audit

Legend: ACTPLA: ACT Planning and Land Authority; LDA: Land Development Agency; Minister: ACT Minister for Planning; NCA: National Capital Authority.

1.6 LDA advertised the site as a bulky goods development opportunity, which would ‘permit the display and retailing of a range of bulky goods and other homeware products, for example: home furnishings; floor coverings; home electrical products; and kitchen and bathroom fittings’. The gross floor area of all buildings constructed on the site should not be less than 50 000 square metres or more than 60 000 square metres. The Expressions of Interest documentation noted that ‘development controls [for the site] ... have been formulated to ensure that the development is consistent with the planning and urban objectives of the Territory Plan (Variation 175 of 2003) whilst responding to the functional planning requirements to be incorporated in the Crown lease to be developed for the Site’.¹

1.7 On 17 November 2005, following the consideration of Expressions of Interest (EOI) in the sale, LDA wrote to a number of selected developers, including Austexx Developments Pty Ltd (Austexx) and Capital Property Finance Pty Ltd, inviting them to participate in a restricted auction of the site on 16 December 2005. Eighteen EOIs had been received from around Australia, with 15 bidders shortlisted to participate in the auction. Austexx owns and operates a number of direct factory outlet (DFO) retailing centres around Australia. Capital Property Finance is part of

¹ Land Development Agency, *EpiCentre: Block 8 Section 48 Fyshwick: Bulky Goods Retailing Site* [booklet], Canberra, September 2005, p.2.

the Capital Property Group, which, among other interests, owns and operates the Canberra International Airport. (In September this year, the Capital Property Group opened the first stage of a substantial direct factory outlet retail development at the airport; a major expansion of the airport development was also approved).

1.8 LDA provided the registered participants with executive documents specifying requirements and restrictions for the development of the site, including Lease and Development Conditions, an indicative draft Crown lease, a planning Preliminary Assessment, draft sale contract and general sales information relating to Block 8 Section 48. The lease purpose clause in the Lease and Development Conditions for the site stated that, subject to certain size restrictions, it could be used for 'one or more of the following purposes: (i) Bulky Goods Retailing; (ii) Non Retail Commercial Use; (iii) Restaurant; and (iv) Shop.'

1.9 LDA responded directly to registered participants who made inquiries regarding the sale process. ACTPLA confirmed that in response to requests for advice at different stages leading up to the sale, a number of the selected bidders, at least including Austexx and Capital Property Finance, were provided with planning and development information relating to Block 8 Section 48 and the 'EpiCentre' proposal.

1.10 On 15 December 2005 (the day before the scheduled restricted auction), Capital Property Finance unsuccessfully applied to the ACT Supreme Court for an interim injunction restraining the sale of Block 8 Section 48. Grounds for the unsuccessful application included claims that the nature of the development permitted on the site was uncertain, that LDA should provide clarification of the nature of the development on the site, and that LDA's representations regarding the nature of development on the site were misleading or deceptive in contravention of the *Trade Practices Act 1974* (Cth).

1.11 On 16 December 2005, the site was sold at auction to Austexx for a winning bid of \$39 million.² The unsuccessful rival bidder was Capital Property Finance, which bid up to \$38 million. LDA advised that five registered bidders participated in the auction. Austexx subsequently announced that it intended to develop a \$100 million 'Homemaker Hub and ... DFO (Direct Factory Outlets) concept'.

1.12 On 21 September 2006, ACTPLA approved, under section 222 of the *Land (Planning and Environment) Act 1991*, a Development Application by Capital Planners Pty Ltd for and on behalf of Direct Factory Outlets Canberra Pty Ltd (a wholly owned subsidiary of Austexx) for the construction of 'a bulky goods and factory outlet retail centre with basement car parking' on Block 8 Section 48, Fyshwick. The development, totalling some 60 000 square metres gross floor area (GFA), features approximately 51% for bulky goods retailing, and 45% for shop use (that is, DFO retailing).

² The purchase price of \$39 million included Goods and Service Tax. According to a calculation by LDA, the GST component of the purchase price was approximately \$2.63 million.

AUDIT OBJECTIVES AND SCOPE

1.13 The objective of this Audit was to provide independent opinions to the Legislative Assembly on whether the sale of Block 8 Section 48, Fyshwick:

- was in accordance with relevant legislation, policy and accepted better practice;
- was conducted fairly with appropriate accountability; and
- achieved appropriate financial and planning outcomes for the ACT.

1.14 The scope of this Audit did not cover the process for approval of the Development Application for Block 8 Section 48 submitted on behalf of Austexx.

1.15 A summary of the audit criteria and approach is at Appendix A.

AUDIT OPINION

1.16 The independent opinions drawn against the audit objectives are below:

Was the sale of Block 8 Section 48, Fyshwick in accordance with relevant legislation, policy and accepted better practice?

LDA had appropriate policies and procedures in place for the sale of Block 8 Section 48, Fyshwick. The policies and procedures are in line with those used in other Australian jurisdictions.

Documentation relating to the sale was sufficient to enable bidders to conduct normal commercial due diligence. However, there was lack of clarity in the related planning controls in the Territory Plan that were applied to the Lease and Development Conditions for the site. The clarity of the sale documentation could have been improved with the inclusion of an appropriate interpretation of the Territory Plan as applied to the site.

Was the sale conducted fairly with appropriate accountability?

The sale of Block 8 Section 48, Fyshwick was in general conducted fairly and with appropriate accountability separately by LDA, as the vendor agency, and by ACTPLA, as the planning regulator.

However, there was a weakness in communications between LDA and ACTPLA and interested parties, which could be remedied to provide greater public confidence in the probity, fairness, and transparency of the sale process. In particular, key Government agencies should operate through a single point of contact in LDA for inquiries from and dissemination of information to interested parties during a major land sale process.

There was no evidence of any actual or perceived conflict of interest, nor of any intention by LDA to mislead or restrict potential bidders.

ACTPLA afforded no preferential treatment to Austexx, or to any other potential purchaser.

Did the sale achieve appropriate financial and planning outcomes for the ACT?

The sale of Block 8 Section 48, Fyshwick returned an appropriate financial outcome for the Territory based on the permissible uses for the site of bulky goods retail, non-retail commercial, restaurant and shop uses.

The auction price of \$39 million attained was well above that of an independent backcast valuation commissioned by this Audit, which took into account various scenarios of mixed uses, including direct factory outlet (DFO) use. Further, as it was not the Government's policy intention to allow a major town shopping centre on the site, it is unlikely that the said land would have achieved a value of as much as \$60 million, as suggested by some interested parties.

The sale of Block 8 Section 48, Fyshwick generally conformed to the Government's strategic planning policy intentions to the extent that it allowed increased diversity and flexibility of general retailing, and obtained a specific planning outcome intended for the EpiCentre development on Section 48, namely a significant bulky goods facility. The sale was also consistent with perceived consumer and industry demand for bulky goods and other retailing opportunities.

Audit did not examine and form a view on the impact of the approved Austexx development on ACT retail hierarchy.

KEY FINDINGS

1.17 The audit opinions are supported by the following key findings:

Sale process

- LDA has sound policies and procedures for the sale of land that are generally in accordance with good practice principles observed in other jurisdictions in Australia.
- Appropriate policies and procedures were in place during the sale of Block 8 Section 48, Fyshwick and appropriate practices were employed by LDA in the evaluation of Expressions of Interest.
- LDA's marketing strategy, which emphasised a bulky goods retailing opportunity, was consistent with market research information prevailing at that time.
- The sale documentation was sufficient to enable bidders to conduct normal commercial due diligence. However, there was a lack of clarity in the related planning controls in the Territory Plan applied to the Lease and Development Conditions for the site. The clarity of the sale documents could have been improved with the inclusion of an appropriate interpretation of the Territory Plan in its application to the site.
- The existing Operational Protocol between LDA and ACTPLA was intended to define at high-level the key responsibilities of each agency and administrative arrangements between the two agencies. It did not provide a

framework for dealing jointly with communications with potential and shortlisted bidders during the sale process. Agreed administrative arrangements in the Operational Protocol should be strengthened to ensure that important planning information bearing on the sale of land is passed between the two agencies and communicated as appropriate to all bidders. This should provide greater public confidence in the probity, fairness, and transparency of a sale process.

- In the absence of an agreed single point of contact for the sale, LDA did not feel bound to communicate to all registered bidders certain relevant planning information provided by ACTPLA. This led to a claim that some parties received preferential treatment.
- Notwithstanding the above, there was no evidence of any conflict of interest or unfairness that might have compromised the integrity of the sale process.
- LDA's current systems and practices in respect of land disposals could be improved by developing and implementing specific risk management and probity plans for all major land sales that it undertakes.

Planning issues

- Various inquiries to ACTPLA indicated that there was some level of uncertainty regarding the planning controls applied to the site. Better practice would have required ACTPLA and LDA jointly to clarify this issue before the auction.
- As the lack of clarity regarding the interpretation of aspects of the Territory Plan, particularly the permissible uses of industrial areas or land use restrictions, remained after the land sale, ACTPLA should consider the merit of further clarification of the industrial land use policies.
- Legal advice examined by Audit offered different interpretations of the relevant land use control in the Territory Plan. In addition, Audit did not find conclusive documents during the development of Variation 175 to the Territory Plan, to indicate a clear policy intention to relax the 3 000 square metres limit per lease for shops other than bulky goods retailing. Accordingly, Audit was unable to offer a conclusive interpretation of this aspect of the Territory Plan and thus of the particular permitted general retail use of Block 8 Section 48, Fyshwick (and other Precinct 'b' industrial land).
- ACTPLA afforded no preferential treatment to Austexx, or to any other potential purchaser. ACTPLA endeavoured to maintain an appropriate balance between ensuring consistent information was provided to all inquirers, and ensuring commercial-in-confidence information provided by one bidder was not advertently or inadvertently transmitted to commercial competitors. Audit notes that it is not always easy to achieve such a balance.

Outcomes for the Territory

- The sale of Block 8 Section 48, Fyshwick for \$39 million returned an appropriate financial outcome for the Territory on the basis of the permissible uses for the site of bulky goods retail, non-retail commercial, restaurant and shop uses.

- LDA's valuers based their valuations on an interpretation of the lease purpose clause in the Lease and Development Conditions for the EpiCentre site that considered bulky goods as the main use and gave lesser emphasis to other, higher uses such as general retailing. This approach represented a risk that the land might have been undervalued for the purpose of setting a reserve price. Despite this, Audit is of the opinion that interested bidders (at least Austexx and the Capital Property Group) were reasonably informed of the potential use of the land, and that market forces operated to ensure an appropriate financial return to the Territory for the sale of the lease.
- LDA's reserve price set for the land was \$13.5 million, compared to an indicative value of around \$21 million provided by an independent backcast valuation commissioned by this audit. Audit's expert valuer considered various scenarios of mixed uses for the site, and the \$21 million valuation represented a development scenario of equal uses of bulky goods and DFO.
- The auction price of \$39 million was well above that of the independent backcast valuation commissioned by Audit.
- Audit notes that it was not the Government's policy intention that the EpiCentre site should become a 'town centre' development like those in Woden, Belconnen or Tuggeranong. Accordingly, it is unlikely that a claim of a value for the site of \$60 million could have been achieved.
- The sale of Block 8 Section 48, Fyshwick generally conformed to the Government's strategic planning policy intentions to the extent that it allowed increased diversity and flexibility of general retailing, and obtained a specific planning outcome intended for the EpiCentre development on Section 48, namely a significant bulky goods facility. The sale was also consistent with perceived consumer and industry demand for bulky goods and other retailing opportunities.
- Audit did not examine and form an opinion on the impact of the approved Austexx development on the ACT retail hierarchy, or its consistency with the National Capital Plan. Audit understands that following ACTPLA's approval of the Austexx DA, the NCA is conducting an assessment of this matter.

RECOMMENDATIONS AND RESPONSES TO THE REPORT

1.18 Audit made three recommendations to address the audit findings detailed in this report.

1.19 In accordance with section 18 of the *Auditor-General Act 1996*, a copy of the Proposed Report was provided to the Chief Executives of the Land Development Agency and the ACT Planning and Land Authority for consideration and comments. The Chief Executives' responses are set out in the following paragraphs.

Response from the Chief Executive Officer of the Land Development Agency

Key points of the LDA response are summarised below. The full response is at Appendix E

- *‘The Land Development Agency (LDA) notes that [findings by the Auditor-General]... vindicate LDA’s often expressed position that the sale process was conducted with integrity and fairness.’*
- *‘There are however, some aspects of the Report to which LDA objects. LDA notes that five submissions were made to the Auditor-General, but none of these were made available to LDA beyond the extracts included in the Report. In consequence, LDA is not aware of the full details of any allegations and/or assertions and therefore the Agency has been unable to respond to them specifically.’*
- *‘LDA rejects the finding that “the clarity of the sale documentation could have been improved with the inclusion of an appropriate interpretation of the Territory Plan ...”. The issue of clarity was the basis of an unsuccessful application to the ACT Supreme Court to halt the auction made by an entity of the Capital Property Group on the day before the auction. In LDA’s view, Audit has given far too little weight to the judgement. ... In addition, the interpretation of the Territory Plan is not a matter of alternative or additional words to enable the meaning or intent to be more readily understood, as Audit seems to suggest. The Territory Plan is subordinate legislation and its interpretation is reserved to the courts.’*
- *‘LDA also rejects the assertion that “both LDA and ACTPLA were aware of uncertainty concerning industrial land use policies in the Territory Plan.” LDA was not aware of any reasonable lack of certainty that warranted intervention, a position also vindicated by the Court judgement.’*
- *‘The Agency disagrees strongly with the Audit opinion that there was not a single point of contact for the sale and that LDA did not communicate to all registered bidders certain planning information.’*
- *‘LDA already acts as a single point of contact for matters relating to the sale of its land. However, the Agency is not qualified (and nor is it its role) to interpret for prospective purchasers planning and regulatory matters; that is the role of the expert regulators.’*
- *‘LDA also rejects the finding that LDA did not communicate relevant planning information to all registered bidders as expected under better practice.’*
- *‘All relevant planning information that had been approved by ACT Planning and Land Authority (ACTPLA) was made available to all registered bidders. This supports the finding by Audit that there was no evidence to support any conflict of interest or unfairness in the sale process. Further, given the circumstances set out in the Report relating to correspondence with one registered bidder, LDA maintains that the claim of preferential treatment, if genuinely held, was not reasonably so held.’*

Response from the Chief Planning Executive of the ACT Planning and Land Authority

- *‘It is important that the Audit report clearly note that the ACT Planning and Land Authority (the Authority) interpreted the Territory Plan, as it is required to do, not Variation No. 175.’*

- *‘The Authority acted appropriately and sought legal advice in order that it could be confident in its interpretation of the Territory Plan. In addition, the Authority applied its interpretation consistently with the different parties involved in the sale. It is noted that the ACT Government Solicitor, Mr Tracey QC, Justice Connolly and the National Capital Authority all concur with the Authority’s interpretation of the Territory Plan.’*
- *‘The actions and advice of the Authority’s staff at all levels were clear, concise and timely with respect to its interpretation of a complex matter. The questions raised in respect to the Authority’s interpretation of the Territory Plan were not raised by any other party at the time of sale other than Austexx, at which point the Authority immediately sought an advice on the interpretation from the ACT Government Solicitor and advised the Land Development Agency.’*

1.20 The agencies also provided responses to each recommendation, as shown below.

Recommendation 1 (Chapter 2)

LDA should develop and implement specific probity plans and risk management plans covering all stages of all major land sales it undertakes.

LDA Response:

Disagreed

Risk management processes are already embodied in the Agency’s documented land sales procedures. The Auditor-General’s own finding was that “LDA has sound policies and procedures for the sale of land that are generally in accordance with good practice principles observed in other jurisdictions”.

LDA had a probity plan for the call for Expressions of Interest to select shortlist bidders and there was no requirement for a probity plan for the commercial auction, which was conducted in accordance with the Agency’s land sales policies and procedures.

Recommendation 2 (Chapter 2)

For major Government land sales:

- LDA, as the Government’s vendor, should act as a single point of contact to process all inquiries from, and dissemination of information to, interested parties about the sale, planning and other key regulatory matters.
- Alternatively, ACTPLA and other key regulatory agencies should take responsibility for formally advising LDA about matters important to the sale process to enable LDA to properly inform the market.

ACTPLA Response:

Agreed

The Authority agrees with the second dot point of the recommendation. The Authority will take responsibility for formally advising the LDA about matters important to the sale process to enable the LDA to properly inform the market once it has formally advised the Authority of the sale processes and identified its information needs.

LDA Response:

Disagreed

The Agency already acts as a single point of contact for matters relating to the sale of its land. In its sales documentation, the Agency makes it patently clear that prospective purchasers must carry out their own due diligence and must rely upon their own inquiries. The Agency believes it is best practice for it to continue to direct prospective purchasers to those who are best placed to provide required information.

In the Agency's view, the adoption of the Auditor-General's recommendation would place the Territory at unwarranted risk.

While LDA supports the 'good public policy' outcome proposed by Audit, good public policy does not extend to public agencies assuming functions beyond their statutory powers and/or expertise and thereby exposing themselves unnecessarily to the prospect of liability.

**Comment from the Executive Director, ACT Procurement Solutions,
Department of Treasury:**

I support the general thrust of your proposed recommendation that a single point of contact be established to manage all inquiries from interested parties about the sale, planning and other regulatory matters. As LDA is the agency managing the land sale, it appears to be the appropriate body to discharge this function.

I suggest that rather than being an alternative recommendation, the recommendation should advocate that ACTPLA and other key regulatory agencies refer interested parties, who may have specific questions about land that is on the Government's sale program, to the single contact point. In addition, the regulatory agencies should be required to provide responses to any questions that have been channelled through the single contact point within a set time frame, taking into account the timing of the particular sale process. All such questions and answers should be made available to all interested parties.

Recommendation 3 (Chapter 3)

ACTPLA should undertake further clarification of the Territory's industrial land use policies, particularly in respect of permissible uses and land use restrictions.

ACTPLA Response:

Agreed

In the context of the specific matters raised in the Audit report, the Authority believes that the current industrial land use policies are sufficiently clear in respect of permissible uses and land use restrictions.

The report should, however, note that the Government's current Planning System Reform Project includes the development of a new Territory Plan. This includes the development of zones, which will apply the test of permissible uses and land use restrictions to all land use policy areas.

On this basis, the recommendation is duly noted and as a result of the current planning system reform proposals, the Authority is able to agree with it.

FURTHER AUDIT COMMENTS

1.21 The Chief Executive of LDA states, in her response to this report, that *‘five submissions were made to the Auditor-General, but none of these were made available to LDA beyond the extracts included in the Report’* and *‘In consequence, LDA ... has been unable to respond to them specifically’*. LDA does not seem to appreciate the importance of protecting the confidentiality of information obtained during an Audit. Audit advised LDA that certain information obtained during the audit, including submissions, should be regarded as ‘protected information’ under section 33 of the *Auditor-General Act 1996*, and consequently could not be released. This is to maintain the integrity of the audit process. Relevant information from the submissions considered by Audit was included in draft reports that were forwarded to LDA for comment.

1.22 Audit disagrees with LDA’s view that *‘Audit has given far too little weight to the judgement [of Justice Connolly]’*. Audit notes that this judgement focuses on the activities permitted by the lease purpose clauses; the judgement does not consider the detailed land use controls underlying the Lease and Development Conditions and affecting the EpiCentre site. As discussed in detail in the audit report, there remains some question of whether the land use control over the maximum floor space is sufficiently clear to all interested parties (that is, whether the 3 000 square metre restriction applies ‘per shop’ or ‘per lease’).

1.23 LDA comments that *‘... interpretation of the Territory Plan is not a matter of alternative or additional words to enable the meaning or intent to be more readily understood, as Audit seems to suggest. The Territory Plan is subordinate legislation and its interpretation is reserved to the courts’*. This comment suggests that LDA fails to appreciate that a primary responsibility of ACTPLA is to interpret the Territory Plan in its day-to-day administration of its functions. The public is best served if the policy and administrative intent of the Territory Plan is clear and communicated to the community in an unambiguous manner. The courts need only be involved where there is dispute, such as may arise when the complex provisions of the Territory Plan are capable of different interpretations.

1.24 LDA disagrees with Recommendation 2 (concerning a single point of contact regarding land sales) on the basis that it does not wish to *‘[assume] functions beyond their statutory powers and/or expertise and thereby exposing [LDA] unnecessarily to the prospect of liability’*. LDA’s comment misrepresents the intention of the audit recommendation, which clearly proposes that LDA coordinate responses to inquiries referred, by LDA, to the relevant agency. At no time has Audit suggested that LDA should make decisions on behalf of the other agencies, such as ACTPLA. Nor has Audit suggested that prospective purchasers should not carry out their own due diligence processes. The intention of the recommendation was made clear to LDA during the audit.

2. THE SALE PROCESS

INTRODUCTION

2.1 This chapter describes key issues in the sale process relating to the auction of Block 8 Section 48, Fyshwick (the EpiCentre site), in particular the procedures and practices employed, the selection of bidders, and communications between government agencies and between government agencies and private sector commercial entities.

2.2 The Land Development Agency (LDA) is a statutory corporation that develops and sells land on behalf of the Territory.

KEY FINDINGS

- LDA has sound policies and procedures for the sale of land that are generally in accordance with good practice principles observed in other jurisdictions in Australia.
- Appropriate policies and procedures were in place during the sale of Block 8 Section 48, Fyshwick and appropriate practices were employed by LDA in the evaluation of Expressions of Interest.
- LDA's marketing strategy, which emphasised a bulky goods retailing opportunity, was consistent with market research information prevailing at that time.
- The sale documentation was sufficient to enable bidders to conduct normal commercial due diligence. However, there was a lack of clarity in the related planning controls in the Territory Plan applied to the Lease and Development Conditions for the site. The clarity of the sale documents could have been improved with the inclusion of an appropriate interpretation of the Territory Plan in its application to the site.
- The existing Operational Protocol between LDA and ACTPLA was intended to define at high-level the key responsibilities of each agency and administrative arrangements between the two agencies. It did not provide a framework for dealing jointly with communications with potential and shortlisted bidders during the sale process. Agreed administrative arrangements in the Operational Protocol should be strengthened to ensure that important planning information bearing on the sale of land is passed between the two agencies and communicated as appropriate to all bidders. This should provide greater public confidence in the probity, fairness, and transparency of a sale process.
- In the absence of an agreed single point of contact for the sale, LDA did not feel bound to communicate to all registered bidders certain relevant planning information provided by ACTPLA. This led to a claim that some parties received preferential treatment.
- Notwithstanding the above, there was no evidence of any conflict of interest or unfairness that might have compromised the integrity of the sale process.

- LDA's current systems and practices in respect of land disposals could be improved by developing and implementing specific risk management and probity plans for all major land sales that it undertakes.

LAND SALES AND MARKETING STRATEGY

Marketing strategy

2.3 Before the release of the EpiCentre site for bulky goods retailing in December 2005, the Territory did not have any major bulky goods centres. Most bulky goods traders were located on standalone sites across the service trades and industrial suburbs, with the greatest concentration in Fyshwick. In June 2004, LDA commissioned a background study, the *Cardno Young Market Research Report and Retail Impact Study* conducted by Colliers International, to investigate the impact of a bulky goods retail outlet at the Fyshwick site.

2.4 The report indicated that the greatest likely impact of the Section 48 development would be on property in Fyshwick if a number of current tenants relocated to the new site. However, it could be expected that the ACT would benefit from new traders who would seek to be involved in the development. The report formed part of the Expression of Interest (EOI) documentation for the sale of the Fyshwick site and was provided to all prospective bidders.

2.5 In addition to the abovementioned report, LDA's own market analysis identified 'bulky goods retailing' as an emerging development opportunity in the market. As such, the release of the Fyshwick site was seen as an opportunity to capitalise on perceived industry demand.

2.6 Audit noted that other market studies conducted in early 2005 by key industry analysts such as CB Richard Ellis (CBRE)³ and Jones Lang LaSalle⁴ indicated that the bulky goods retail sector had experienced exceptional growth over the past ten years, driven by a strong housing sector, aggressive expansion plans of major retailers and, more recently, increased affordability of household goods resulting from strong economic growth in Australia.

2.7 CBRE research also suggested that investment demand for bulky goods retail centres would remain strong over the next few years. The research indicated that Canberra had the lowest provision of bulky goods space compared to other major cities and, if forecasts proved correct, the bulky goods sector in Canberra should record the strongest rate of rental growth across Australia over the next few years.

³ CB Richard Ellis (CBRE) MarketView, *Australia & New Zealand Bulky Goods*, First Quarter 2005.

⁴ Jones Lang LaSalle, *Bulky Goods: Continued Aggressive Growth?*, May 2005.

2.8 Given the potential growth in the bulky goods retailing sector in Canberra and potential sound investment returns to the Territory, LDA put the EpiCentre site for sale with a marketing strategy targeting bulky goods developers and purchasers.

2.9 Various interested parties have expressed concerns that LDA deliberately marketed the site for ‘bulky goods retail’ only, and as a result restricted the range of potential purchasers. Audit found that based on its market research, LDA stressed the bulky goods retailing opportunity the site represented but disclosed in the sale documentation various other permitted uses, including non-retail commercial, restaurant and shop uses.

2.10 One interested party submitted that it is unaware of any argument, either by the winning bidder (Austexx) or by any ACT Government agency, that a retail outlet centre (or direct factory outlet) may be described as bulky goods retail. On the basis of discussions with senior managers in both agencies, Audit found that ACTPLA does not argue that a retail outlet centre is bulky goods retailing; the Authority states that both uses are among permissible uses for the site.

2.11 The approved Lease and Development Conditions for the EpiCentre site, which were circulated to all prequalified bidders, specified four permitted uses for the site. As Mr Justice Connolly stated in his ruling in the ACT Supreme Court (mentioned at paragraph 1.10 above), prequalified bidders would understand:

[t]he fact that [the site] ... has been promoted as a bulky good retailing opportunity cannot and does not limit what is being purchased ... for it will be [a] lease, subject to the purposes of the lease purpose clause and the conditions which cover a range of activities being bulky goods retailing, non retail commercial use, restaurants or shops.⁵

2.12 The ruling by Mr Justice Connolly served to emphasise to potential bidders that there was a range of permissible uses on the EpiCentre site.

2.13 It is possible that a different marketing strategy targeting the use of factory outlet or general retailing might have attracted more potential bidders. However, there is no evidence to suggest there was a lack of interest from suitable developers as a result of LDA’s advertisement and marketing strategy.

2.14 In accordance with LDA’s land sales procedures, the sale of the Fyshwick site was advertised in the press, on LDA’s website, and to all clients on LDA’s email database. Audit notes that the marketing strategy attracted expressions of interest from eighteen respondents, representing a wide range of development interests beyond bulky goods retailing and including a number of major interstate and national developers.

⁵ *Capital Property Finance v Land Development Agency* (2005) SC No. 940.

2.15 Given the planning controls for the EpiCentre site, as stated in the Territory Plan, which in effect prohibit the development of large department stores, Audit considers that it was unlikely that an alternative marketing strategy could have attracted significant interest from developers pursuing a traditional shopping centre-type development. (This is further discussed in Chapter 3).

Sale of Block 8 Section 48, Fyshwick

2.16 Table 2.1 outlines the timeline and major events that led to the sale of the EpiCentre site in December 2005.

Table 2.1: Timeline of sale of Block 8 Section 48, Fyshwick

| Months | Events and Audit Comments |
|-----------------------|--|
| January/February 2005 | The Preliminary Assessment (PA) is advertised by LDA in <i>The Canberra Times</i> . The PA describes a development proposal and includes consideration of issues such as the existing conditions on the site and surrounding area, and potential environment impacts. The PA describes the planning and development intention for the area. |
| July 2005 | The National Capital Authority (NCA) approves a Development Control Plan (DCP) for the site. A DCP is based on an Outline Plan (a planning tool which specifies notional land uses, broad infrastructure requirements, distributor roads, key features and overall planning principles) and specifies in detail an indicative or mandatory subdivision design, road hierarchy, and open space network for the estate. |
| July 2005 | ACTPLA issues a Notice of Decision to approve an application for the construction of infrastructure works including roads, stormwater, sewer, water, gas, telecommunications, and electricity services; the construction of a retardation basin; and associated street lighting, landscaping, and other site works. |
| September 2005 | A request for Expressions of Interest (EOIs) is advertised in <i>The Canberra Times</i> and <i>The Australian</i> on 7 September 2005. Advertisements refer to the Fyshwick site permitting 'the display and retailing of a range of bulky goods and other homeware products'. EOI packages in CD format and titled 'Block 8 Section 48, Fyshwick Bulky Goods Retailing Site' are sent to all inquirers. Applicants were required to submit their EOIs by 5 October 2005. |
| September 2005 | ACTPLA approve the Lease and Development Conditions (L&Ds) for the site on 15 September 2005. L&Ds are documents containing comprehensive information on individual blocks and specify the lease conditions. The lease purpose in the L&Ds states that the land should be used for: 'one or more of the following purposes: (i) bulky goods retailing; (ii) non commercial use; (iii) restaurant; and (iv) shop |

| Months | Events and Audit Comments |
|---------------|---|
| | <p>PROVIDED ALWAYS THAT the combined gross floor area of any non-retail commercial use shall not exceed 2 000 square metres AND FURTHER PROVIDED THAT the maximum gross floor area of any supermarket or shop selling food shall not exceed 200 square metres and for any other shop, except bulky goods retailing, shall not exceed 3 000 square metres.'</p> |
| November 2005 | <p>LDA conducts the evaluation of EOIs received from respondents interested in purchasing the Fyshwick site. Fifteen (15) of a total of eighteen (18) respondents were prequalified for the restricted auction to be held on 16 December 2005.</p> <p>An Information Pack was sent to each successful respondent on 17 November 2005. The Information Pack included:</p> <ul style="list-style-type: none"> • General Sales Information; • Preliminary Assessment; • Approved Lease and Development Conditions; • Approved Development Control Plan; • ACTPLA approved draft indicative Crown Lease; • Contract for Sale; • Development Application; and • Deposit Plan Survey. <p>LDA also responded to numerous direct inquiries from parties interested in lodging EOIs.</p> |
| December 2005 | <p>On 15 December 2005, Capital Property Finance Pty Ltd applies to the ACT Supreme Court for an injunction to prevent an auction of the Fyshwick site from proceeding. The application is reviewed by Justice Connolly and dismissed.</p> |
| December 2005 | <p>On 16 December 2005, a restricted auction of the Fyshwick site is conducted by an auctioneer (L J Hooker Commercial) on behalf of LDA. The auctioneer's opening statement, made before the start of bidding, includes the following references:</p> <p style="padding-left: 40px;">'The Conditions of Lease, Development Conditions, Planning Controls Plan, Locality and Site Plans that form part of the information available from LDA are provided without any warranty as to the accuracy or completeness of this material.'</p> <p style="padding-left: 40px;">'The successful bidder acknowledges that neither the execution of the Contract for Sale nor the offer of a grant of a Crown Lease imply that the relevant approvals, consents or licences regarding planning, design, siting and any other matters relating to the Successful Bidder's proposal will be granted without conditions.'</p> <p>The Fyshwick site is sold to Austexx for \$39 million, which is above the approved reserve price of \$13.5 million.</p> |

‘Bulky goods’

2.17 Bulky goods retailing, as defined in the Territory Plan, means:

[A] shop which includes a loading dock within the building, and where the goods or materials sold or displayed are of such a size, shape, or weight as to require:

- a large area for handling, storage or display; and/or
- direct vehicular access to the site by members of the public for the purpose of loading goods or materials into their vehicles after purchases, but does not include any shop used primarily for the sale of food or clothing.

2.18 In the development industry, bulky goods retailing is commonly used to describe the sale of high bulk goods such as furniture, electrical goods, hardware items and garden supplies. However, in recent years bulky goods retailers have started to offer customers a wider range of stock, leading to larger store sizes and higher sales, and increasing the appeal to a wider customer base.

2.19 LDA’s marketing research and analysis had identified that there would be market demand for a ‘bulky goods retailing’ site in Canberra. LDA therefore promoted the Fyshwick site as ‘the ACT region’s premier bulky goods retailing precinct’ to attract heightened interest in the EOI process from developers of high quality bulky goods retailing. Audit also identified documentary evidence in ACTPLA that indicated considerable local industry interest in bulky goods retail and DFO opportunities. Audit considers that LDA’s marketing strategy of targeting bulky goods retailing, a permitted use for the Fyshwick site, was consistent with the information available to LDA at the time. There was no evidence of any intention by LDA to mislead or restrict potential bidders.

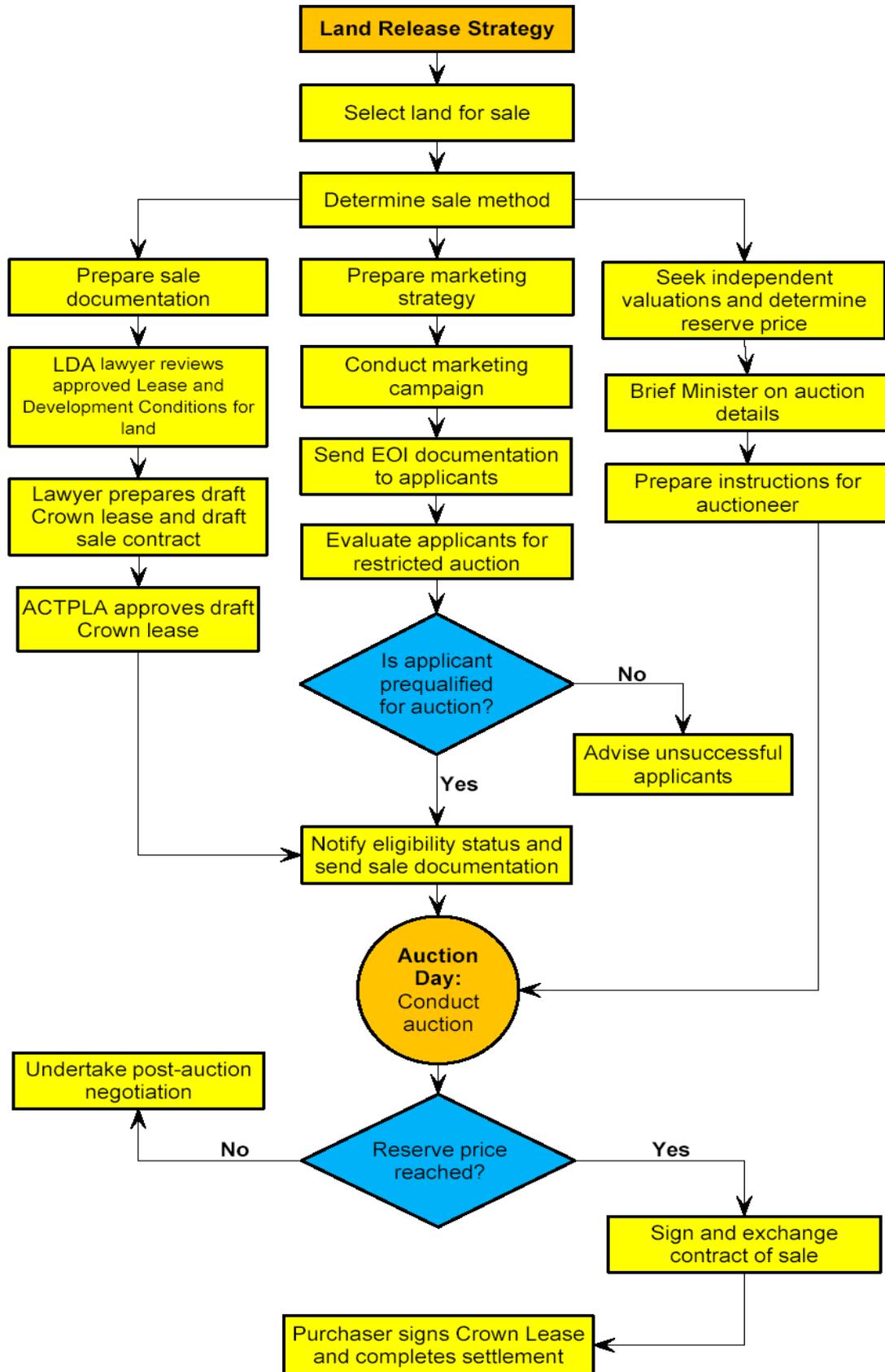
LAND SALE POLICY AND PROCEDURES

Review of LDA’s land sale policy and procedures

2.20 LDA’s Land Sales Policy and Procedures manual (revised July 2006) outlines the overarching policy framework under which land may be sold by LDA, as well as the detailed procedures for each mode of sale (that is, by auction, by ballot, counter sales, etc.). A previous version of this manual was in use at the time of the sale of the Fyshwick site but Audit finds that no substantive amendments were made to the procedures during the intervening period. The sale process can be tailored to meet the specific requirements of individual blocks of land sold.

2.21 Figure 2.1 summarises the process for a sale by restricted auction (for commercial and industrial sites), as used for the disposal of Block 8 Section 48, Fyshwick.

Figure 2.1: LDA process for sale by restricted auction



Source: Compiled by Audit using information from LDA Land Sales Policy and Procedures Manual.

Assessment against government procurement legislation and guidelines

2.22 The *Government Procurement (Principles) Guideline 2002 (No 2)*, made under the *Government Procurement Act 2001* (Government Procurement Act), specifies the principles that Territory entities (including LDA) should apply when undertaking a procurement activity (such as a tender process). Although the sale of Government land does not involve the procurement of a particular good or service, the Act and the Guidelines establish a sound framework for the sale (especially by tender or auction) of Government land. LDA states that its sale processes follow the requirements the Government Procurement Act and the applicable Government procurement principles. For land sales, LDA is also subject to requirements in the *Land (Planning and Environment) Act 1991*.

2.23 The following section considers the appropriateness of LDA's Land Sales Policy and Procedures and whether the procedures are in accordance with applicable Government procurement principles, including value for money, open and effective competition, probity and ethical behaviour, and management of risk.

Value for money

2.24 In accordance with the Procurement Principle Guideline, 'value for money' means the best available procurement outcome and is not based on price alone. Further, the Land (Planning and Environment) Act requires that LDA (subject to certain exceptions) must not grant a lease for an amount less than the market value of the lease.

2.25 LDA is able to control its sales and marketing strategy to ensure that open and effective competition is achieved and thereby to ensure that the best possible price is obtained for every block of land sold on behalf of the Territory.

2.26 Audit is of the opinion that LDA's land release strategy and auction processes provide adequate assurance that the market value of the lease (that is, value for money) will be achieved. Specifically, LDA's marketing strategy for the Fyshwick site was sound and based on appropriate marketing research and analysis prevailing at that time, and LDA's procedures and practices are generally in accordance with value for money principles: for example, a requirement to seek independent valuations and set a reserve price at or above the market valuation.

2.27 LDA valuations and specific financial outcome for the Territory in respect of the sale of the subject land are further discussed in Chapter 4.

Open and effective competition

2.28 Open and effective competition is a key element of the Government procurement framework. The Procurement Principle Guideline requires agencies to carry out their procurement activities in a transparent way. In undertaking a procurement activity, agencies should ensure effective competition, which requires non-discrimination in procurement and the use of competitive procurement processes.

2.29 Audit considers that LDA's procedures and practices ensure that its land sales activities are carried out in a transparent manner. For example: Request for EOI documentation is made available to its client database and the general public through its website and the press; the eligibility criteria are provided to prospective bidders; and, responses to questions to LDA are provided to all shortlisted bidders.

2.30 Audit considers that the restricted auction process provides a reasonable basis for effective competition among prospective bidders while mitigating the risk of an unsuccessful development project. Discussions with LDA indicate that the shortlisting process is intended to eliminate inappropriate or high-risk bidders, and ensure participants were appropriately experienced and qualified, rather than to reduce the number of bidders present at an auction.

2.31 Audit reviewed the shortlisting process for the sale of the Fyshwick site against LDA's land sales procedures. No significant issues were noted.

Probity and ethical behaviour

2.32 LDA engages a probity advisor for its commercial land sales. The probity advisor ensures that probity and ethical behaviour protocols are followed during the sale process.

2.33 The use of external advice, an evaluation committee and an evaluation plan for determining the eligibility of prospective bidders, provides additional assurance that LDA deals fairly, impartially and consistently with prospective bidders. Persons on the evaluation committee are required to disclose any real or perceived conflict of interest.

2.34 Audit reviewed the sale of the Fyshwick site against the procedures above. Audit noted that in April 2005, LDA engaged the Australian Government Solicitor (AGS) as its legal process adviser for the EOI stage of the sale of the Fyshwick site.

2.35 LDA confirmed that its approved evaluation plan for shortlisting bidders for the sale of Block 8 Section 48 included a probity section covering typical issues such as conflict of interest, communication with respondents, EOI confidentiality, document security and proper recording of evaluation committee meetings. However, Audit could find no evidence of a separate probity plan, or similar document, covering probity issues that might arise after the evaluation stage of the sale process.

2.36 LDA advised Audit that 'there was a probity plan for the call of Expressions of Interest and that there was no requirement for a probity plan for the commercial auction'.

2.37 Audit accepts that there is no requirement for a probity plan to be developed for the auction, but considers that better practice would have been for LDA to develop and implement a probity plan covering all stages of the land sale process, from the Request for EOIs through to the auction and its immediate aftermath, not just the evaluation stage.

Review of LDA's policy and procedures

2.38 Audit reviewed LDA's land sales procedures against the procedures and practices for property sales from other jurisdictions in Australia. Guidance that was considered by Audit included:

- the Commonwealth (Cth) Property Disposals Policy;⁶
- the Australian National Audit Office's (ANAO) performance audit report on Commonwealth Estate Property Sales;⁷
- the Victorian (VIC) Government's Policy and Instructions for the purchase, compulsory acquisition and sale of land;⁸
- the Northern Territory (NT) Department of Planning and Infrastructure's procedures and practices for the release and purchase of Crown land;⁹ and
- the Western Australia (WA) Department of Planning and Infrastructure's procedures and practices for State land sales.¹⁰

2.39 Audit considers that LDA's Land Sales Policy and Procedures are generally in accordance with good practice principles observed in other jurisdictions in Australia, including:

- the provision of permitted land use information;
- seeking two independent valuations to determine the reserve price;
- providing valuers with all necessary information; and
- making available sufficient information to prospective purchasers.

2.40 These procedures and practices ensure that LDA's land sale processes are in accordance with good practice principles such as value for money, open and effective competition, probity, accountability, transparency and risk management.

2.41 For a detailed comparison of LDA land sales procedures with those in certain other jurisdictions, refer to Appendix D.

Risk management

2.42 Risk management is the systematic process of identifying, analysing and responding to project risk.

⁶ Department of Finance and Administration (Cth), *Commonwealth Property Disposals Policy: Guidance for Departments and Agencies*, Canberra, 2006.

⁷ Australian National Audit Office, *Commonwealth Estate Property Sales*, Canberra, 2001.

⁸ Department of Infrastructure (Vic), *Government of Victoria – Policy and Instructions for the purchase, compulsory acquisition and sale of land*, Melbourne, 2000.

⁹ Department of Planning and Infrastructure (NT), *Release and purchase of Crown Land*, <http://www.ipe.nt.gov.au/whatwedo/landavailable/purchase.html> (accessed October 2006).

¹⁰ Department of Planning and Infrastructure (WA), *State land sales*, <http://dpi.wa.gov.au/crownland/1792.asp> (accessed October 2006).

2.43 LDA advised that LDA's risk management plan and procedures have been developed in close consultation with LDA's internal auditor, and that the Agency's governance processes and risk framework support a rigorous approach to the identification and management of strategic and project risks.

2.44 Audit notes that LDA has adopted a risk assessment approach for major land development projects. However, LDA does not prepare a specific risk management plan identifying, analysing and evaluating the likely risks and possible risk treatments in connection with a particular disposal. Audit recognises that many of the common risks for each sale process are mitigated by LDA's established procedures and practices. The most significant risk in the sale of a commercial site—of an unsuccessful development project—is likely to be mitigated as a result of the shortlisting process for identifying pre-qualified purchasers.

2.45 Audit considers that in view of the complexity of land sale projects, there is an opportunity for LDA to improve its land disposal process for major projects (with an estimated sale revenue of, say, above \$5 million) by developing specific risk management plans, which should be built into existing project management plans.

Recommendation 1

LDA should develop and implement specific probity plans and risk management plans covering all stages of all major land sales it undertakes.

EVALUATION OF EXPRESSIONS OF INTEREST

Review of evaluation process

2.46 The primary purpose of the restricted auction was to pre-qualify the respondents of the EOI for the right to bid to develop the Fyshwick site.

2.47 Upon receipt of the EOIs from the respondents, all submissions were assessed against the evaluation criteria as set out in the Request for EOI. The evaluation criteria were:

- compliance with requirements of the Request for EOI;
- development capability;
- financial capability; and
- experience of prospective respondents.

2.48 Audit reviewed the evaluation process and noted that:

- the Request for EOIs and the Evaluation Plan were reviewed by the Probity Adviser to ensure that a clearly defined methodology for the evaluation of the EOIs was included in the approved Evaluation Plan;
- all Requests for EOIs were opened and receipted by two LDA officers and the Probity Adviser independent of the Evaluation Committee;

- the Evaluation Committee comprised three members, chaired by a senior LDA officer and two independent members from the industry;
- the Evaluation Committee members individually and independently assessed each respondent against the criteria of development capability and experience and applied risk assessments in consideration of the evaluation criteria. The weighting and scoring methodology, which is in line with better practice, was applied in these EOI evaluations. Overall scores were given to each criteria for each respondent;
- the financial capability of the respondents was assessed independently by an accounting firm engaged as the Financial Adviser;
- the Probity Adviser was engaged to provide ad hoc advice in relation to some EOI issues; and
- all Evaluation Committee members and the Financial Adviser had provided Conflict of Interest Declarations.

2.49 The Evaluation Committee recommended that fifteen out of the total of eighteen EOI respondents be selected and invited to participate in the restricted auction of the Fyshwick site. The recommendation was approved by LDA's CEO on 16 November 2005. Audit has examined a confidential list of EOI respondents, and is satisfied that they represent a cross-section of some of the largest development interests in Australia.

2.50 Based on the review of the evaluation processes, Audit was satisfied that:

- the EOI evaluation processes of the Fyshwick site were conducted in accordance with the approved Evaluation Plan, which was reviewed by the Probity Adviser;
- the evaluation of the EOIs was undertaken in an accountable and transparent manner, which is in accordance with the Government Procurement Guidelines; and
- the decision to support the selection of the eligible bidders was sound, based on a risk assessment of the respondents' capabilities and experience to the objectives and outcomes sought by LDA.

2.51 Audit considers that the process to identify and select potential bidders was sound. The request for EOIs attracted considerable interest from local and interstate developers. The prequalification process was sound, and ensured a satisfactory field of qualified and capable potential bidders, who could deliver the desired financial and planning outcomes to the Territory.

COMMUNICATIONS

Communication between LDA and ACTPLA

2.52 Following the creation of LDA and ACTPLA in 2003, an Operational Protocol was established between the two agencies in 2004 to define the administrative arrangements between the two agencies, and to facilitate achieving the

ACT Government's desired planning and land development outcomes. The Operational Protocol also sets out the key responsibilities of each agency in the provision of a planning and land system in the ACT.

2.53 The Operational Protocol is a 'high-level' document and in its present form is not intended to provide specific guidance about interactions between LDA and ACTPLA in dealing with a land sales process. It provides that the two agencies should share information, seek to present a unified whole-of-government approach to issues, and work closely together to address any issues that need resolution.

2.54 Audit considers the high-level principles contained within the Operational Protocol have been complied with for the sale of the Fyshwick site. There was adequate communication between LDA and ACTPLA, particularly in the developing the Draft Crown Lease and the approved Lease and Development Conditions.

2.55 The Lease and Development Conditions were prepared and approved within an appropriate period that in turn allowed LDA to complete the sale within the required timeframe. (The Lease and Development Conditions were approved by ACTPLA on 15 September 2005 and provided to prospective bidders on 17 November 2005, one month before the auction.)

Communication with prospective bidders

2.56 Audit notes that LDA was consistent in providing the same information to all shortlisted bidders and not offering any interpretation of the documentation issued, in accordance with its land sales procedures. In particular, and in accordance with probity principles, LDA responses to questions to LDA from shortlisted bidders were provided to all shortlisted bidders.

2.57 Audit notes that ING Real Estate Development Pty Ltd (ING), which was an interested party in the sale process, wrote to ACTPLA regarding 'Discount Outlet Retailing ... [not being] nominated as a permitted use in the EOI documents'. As the matter related to the Request for EOI documentation, ACTPLA properly forwarded the letter to LDA. LDA's response to ING on 6 October 2005 was not provided to all shortlisted bidders as the EOI process had not concluded, and the Draft Crown Lease and the Lease and Development Conditions specifying the permissible uses had yet to be provided to pre-qualified bidders (who were unknown at that stage). LDA's response to ING advised that relevant documentation that would clearly identify the range of permissible uses would be supplied to shortlisted bidders.

2.58 Audit considers that LDA's response did not contravene probity principles as it merely advised ING to await the provision of the auction documentation should it be shortlisted for the auction. Audit notes that ING, after receiving the Draft Crown Lease and Lease and Development Conditions as a shortlisted bidder for the auction, did not make subsequent inquiries regarding permissible uses for the site. In subsequent correspondence before the auction, ING expressed a view that '[the] potential competing bulky goods and factory outlet land uses at the Canberra Airport ... impacts negatively on our investment decision.'

2.59 This supports the view that ING, as a potential bidder, understood that DFO retailing was a permissible use but decided not to participate in the auction on the basis of a commercial judgment.

2.60 Various interested parties expressed concerns to the Auditor-General that LDA's statements and information provided about the sale were inconsistent and misleading. Audit found that the sale information was comprehensive and consistent with LDA's understanding of market potential and of the Territory planning policy and controls as applied to the site.

2.61 Audit found that communications between LDA and ACTPLA and various interested parties about planning requirements could have been better to provide greater public confidence in the probity, fairness, and transparency of the sale process. In brief, communications between LDA and ACTPLA could be better coordinated to respond more effectively to inquiries from potential bidders about planning matters.

2.62 In particular, the existing Operational Protocol between LDA and ACTPLA was intended to define, at high level, the key responsibilities of each agency and administrative arrangements between the two agencies. It did not provide a framework for dealing jointly with communications with potential and shortlisted bidders about planning matters during the sale process. Indeed, the Operational Protocol is silent on this important issue, other than including a statement that the agencies will 'work closely together to coordinate the preparation of [lease and development conditions] and to address any issues that need resolution'. Working together to resolve issues should continue beyond the stage of preparation of auction documents.

2.63 In the sale documents, potential bidders were advised to contact ACTPLA for inquiries regarding planning matters. As ACTPLA was not the land vendor, its role in the sale process was not well defined, particularly with regard to the need to disseminate any critical or relevant information to all bidders. On at least one occasion, ACTPLA appropriately conveyed the issue under inquiry to LDA, as the vendor. LDA, however, treated the information as relevant to planning matters rather than to the sale process. Given the significance of this issue, better practice might have been to disseminate the information to all bidders. This may involve LDA disseminating the essence of the inquiry and response, without compromising commercial-in-confidence or legal privilege matters.

2.64 Under current ACT Government land disposal arrangements, various government agencies tend to regard their roles in a sale process as separate from each other, rather than presenting a co-ordinated government approach throughout the sale process. Audit's view is that the current approach may lead to claims of inconsistency in information dissemination.

2.65 A good public policy starting point should be that agencies actively work together to serve the public and that disciplines should be applied to agencies to ensure that efficient and effective service is provided during Government land sales.

2.66 A useful model is that employed by the Commonwealth Department of Finance and Administration (DOFA) for disposals of National land. DOFA has advised Audit that for all land sold under the Commonwealth Property Disposals Policy, DOFA establishes a single point of contact through which all queries from potential purchasers to various Commonwealth agencies, whether about the sale process or about planning or other regulatory matters, are processed. Potential bidders are advised that all queries must be in writing and responses to these queries will be distributed to all potential bidders. Any response to a query not made through the single contact point during the sale process could not be relied on. DOFA commonly appoints an external expert consultant to act as a 'sale agent' and the sole point of contact for the sale.

2.67 DOFA further advised Audit that for any land sale—some very considerable in size—while the sale method (open or restricted auction, tender, etc) might vary, the marketing period normally lasts at least six weeks and a cut-off point for inquiries is specified some days (usually five working days) before the sale date. If the sales agent receives an inquiry about, for instance, a planning or other regulatory matter, the agent obtains an answer from the relevant agency and then advises the inquirer or the market as a whole, as appropriate. DOFA advised Audit that this model operates well in ensuring probity, fairness, and transparency in a land disposal process.

2.68 Where all interested parties cannot be identified, relevant information can be provided through a single access point (for example, a dedicated website for the sale and through the national media), so that all interested parties to an auction or a land tender have the same access to the same information.

2.69 The NCA advised Audit that for disposals of Commonwealth land in the National Capital areas under its jurisdiction, DOFA consults and seeks advice from NCA in preparing the final sale documentation. Once a sale process is under way, however, the NCA expects that any planning inquiry from a potential purchaser will only be dealt with via the single contact point established by DOFA.

2.70 Audit noted that in the States, bidders for a land sale process would be required to seek clarification of any planning issues directly with local Councils as part of the bidders' own due diligence process. This approach may be necessary because of the large number of local planning Councils in the States, and because the sales involve decisions by, and information from different levels of Governments (State and Local). The ACT has uniquely combined State/Local Government responsibilities that offer opportunities for a coordinated information flow through LDA.

2.71 Given the complexity of planning regulations and controls in the Territory, and the significance of such information to potential purchasers, it is essential that LDA and ACTPLA, and other key ACT regulatory bodies, work interdependently to ensure public confidence in the sale process. Audit considers, therefore, that the existing Operational Protocol between LDA and ACTPLA should be strengthened. In addition, clearly defined administrative arrangements should be developed to apply to other key regulatory bodies for a major sale process.

2.72 There is merit in expanding the existing single point of contact in LDA to provide for the coordination and dissemination of important information to potential purchasers during a land sale process.

2.73 LDA commented that:

The model drawn from the Department of Finance and Administration (Finance) proposed by Audit (2.66) is not in accordance with Finance's own sales material. A contract for a land sale issued by Finance in May 2005 held by LDA states that the purchaser must acknowledge that they have made their own enquiries in relation to environmental reports, into when adjacent roads will be constructed and in respect of the Development Control Plan for the site. The purchaser must also acknowledge that it has examined key documentation ("the Search Report") and that the vendor does not warrant the accuracy of the responses from the various Authorities.

This approach is consistent with LDA's current process and with the better practice examples operating in other jurisdictions such as Brisbane City Council, and in government land sales agencies in other States. These better practice examples ensure the role of the government land vendor is separate from that of the regulator, even when both functions exist under the same governmental structure.

2.74 LDA further advised that the sale was conducted in accordance with the following policy framework:

- Clause 11 of the call for Expressions of Interest document nominates a single point of contact and a formal communication process;
- Clause 9 of the General Sales Information document issued to all registered bidders includes the requirement for prospective purchasers to make their own inquiries regarding the site;
- Planning information was provided to all registered bidders by including executive documents that had been approved by ACTPLA as the statutory planning regulator;
- LDA's Land Sales Policy and Procedures Manual states that "the Sales and Auction Manager is the central contact point for all auction inquiries."

2.75 Audit acknowledges that as LDA commonly deals with many regulatory agencies for any land sale process, being the conduit for inquiries to and from these agencies, particularly during complex land disposals, could at times be challenging. However, provided that sale documents are comprehensive, it is likely that the additional inquiries will be limited to a few key agencies. Audit considers this an unavoidable business cost to ensure public confidence in a consistent and coordinated Government approach and to achieve the desirable level of service to the public.

2.76 Audit also sought comments from ACT Procurement Solutions, Department of Treasury on this issue. ACT Procurement Solutions supports the establishment of a single point of contact to manage all inquiries from interested parties about the sale, planning and other regulatory matters and agreed that as LDA is the agency managing the land sale, it appears to be the appropriate body to discharge this function.

2.77 In addition, ACT Procurement Solutions suggested that:

ACTPLA and other key regulatory agencies refer interested parties, who may have specific questions about land that is on the Government's sale program, to the single contact point. In addition, the regulatory agencies should be required to provide responses to any questions that have been channelled through the single contact point within a set time frame, taking into account the timing of the particular sale process. All such questions and answers should be made available to all interested parties.

This approach implies that questions may only be asked up to a specified time during the sale process to ensure that answers are provided to all material questions, consistently and in sufficient time. Unfortunately, of course, it is impossible to prevent persons approaching government agencies to seek information other than by the specified process. To further protect the Territory's position, as a condition of sale, a provision could be adopted that interested parties may only rely on information from Government agencies that has been obtained through the single contact point, other than published Government material that is already in the public domain.

2.78 ACT Procurement Solutions also provided further information on procedures to protect the probity, transparency, and accountability of a procurement activity, which is included in Appendix D.

Recommendation 2

For major Government land sales:

- LDA, as the Government's vendor, should act as a single point of contact to process all inquiries from, and dissemination of information to, interested parties about the sale, planning and other key regulatory matters.
- Alternatively, ACTPLA and other key regulatory agencies should take responsibility for formally advising LDA about matters important to the sale process to enable LDA to properly inform the market.

2.79 Notwithstanding the weakness in communications between LDA and ACTPLA and interested parties, the sale was generally conducted fairly and with appropriate accountability by LDA, as the vendor agency. There was no evidence of any intent by LDA to mislead or restrict potential bidders.

2.80 Further, in reviewing the records of communications between LDA and ACTPLA, the prospective bidders, the Minister for Planning and the NCA, Audit did not observe any indication of a conflict of interest, actual or perceived, that might have compromised the integrity of the sale process.

CONCLUSION

2.81 Audit considers that LDA has sound policies and procedures for the sale of land and that those policies and procedures are generally in accordance with good practice principles observed in other jurisdictions in Australia.

2.82 In relation to the sale of Block 8 Section 48, Fyshwick, Audit concludes that appropriate policies and procedures were in place during the sale, and that appropriate practices were employed by LDA in the evaluation of Expressions of Interest.

2.83 Although the sale documentation was sufficient to satisfy normal commercial due diligence, there was a lack of clarity in the related planning controls in the Territory Plan that were applied to the Lease and Development Conditions for the site (discussed in Chapter 3).

2.84 The existing Operational Protocol between LDA and ACTPLA was intended to define at high-level the key responsibilities of each agency and administrative arrangements between the two agencies. It did not provide a framework for dealing jointly with communications with potential and shortlisted bidders during the sale process. There would be benefit in strengthening the agreed administrative arrangements in the Operational Protocol, particularly to ensure that planning information bearing on a land sale is passed between the two agencies and communicated as appropriate to industry. This should provide greater public confidence in the probity, fairness, and transparency of a sale process.

2.85 LDA did not communicate certain relevant planning information to all registered bidders, as expected under better practice. This led to a claim that some parties received preferential treatment.

2.86 Notwithstanding the above, there was no evidence to support any conflict of interest or unfairness that might have compromised the integrity of the sale process.

2.87 Audit also considers that LDA's current systems and practices in respect of land disposals could be improved by developing and implementing specific risk management and probity plans for all major land sales that it undertakes.

3. PLANNING ISSUES

INTRODUCTION

3.1 This chapter examines planning issues relevant to the sale of Block 8 Section 48, Fyshwick, (the EpiCentre site) with particular focus on transparency and consistency of documentation and advice relating to planning requirements.

KEY FINDINGS

- Various inquiries to ACTPLA indicated that there was some level of uncertainty regarding the planning controls applied to the site. Better practice would have required ACTPLA and LDA jointly to clarify this issue before the auction.
- As the lack of clarity regarding the interpretation of aspects of the Territory Plan, particularly the permissible uses of industrial areas or land use restrictions, remained after the land sale, ACTPLA should consider the merit of further clarification of the industrial land use policies.
- Legal advice examined by Audit offered different interpretations of the relevant land use control in the Territory Plan. In addition, Audit did not find conclusive documents during the development of Variation 175 to the Territory Plan, to indicate a clear policy intention to relax the 3 000 square metres limit per lease for shops other than bulky goods retailing. Accordingly, Audit was unable to offer a conclusive interpretation of this aspect of the Territory Plan and thus of the particular permitted general retail use of Block 8 Section 48, Fyshwick (and other Precinct ‘b’ industrial land).
- ACTPLA afforded no preferential treatment to Austexx, or to any other potential purchaser. ACTPLA endeavoured to maintain an appropriate balance between ensuring consistent information was provided to all inquirers, and ensuring commercial-in-confidence information provided by one bidder was not advertently or inadvertently transmitted to commercial competitors. Audit notes that it is not always easy to achieve such a balance.

3.2 For the sale and development of the EpiCentre site, ACTPLA was responsible for approving the infrastructure works (roads, stormwater, utilities, etc) and specific Lease and Development Conditions for the site, as well as providing planning regulation guidance to LDA and prospective purchasers.

INTERPRETATION OF THE TERRITORY PLAN

3.3 The key planning issue for this audit relates to the interpretation and application of Industrial Land Use Policies of the Territory Plan to Precinct ‘b’, Fyshwick, of which the EpiCentre site is a part.

3.4 The Territory Plan, promulgated under Part IV of the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth), is an important statutory

planning document in the ACT. It provides the policy framework for the administration of planning in the Territory and includes broad principles and policies that guide development by means of specific land use objectives and policies.

3.5 The Territory Plan may be, and is, varied from time to time following consultation with the Legislative Assembly Standing Committee on Planning and the Environment. Once approved, a variation is incorporated into the Territory Plan, effective from the date of approval (or some other specified date). Variation 175, approved on 16 June 2003, modified the land use controls for industrial areas in the ACT (Fyshwick, Hume, Mitchell and Symonston), significantly including floor space restrictions on land use for bulky goods retailing and shops.

Interpretation of certain aspects of the Territory Plan

3.6 Submissions to the audit have questioned whether the Territory Plan, as amended by Variation 175, has been appropriately interpreted and applied in marketing and selling the lease for the EpiCentre site, and the subsequent consideration of the Development Application submitted by the successful bidder.

3.7 Simply put, the central issue is whether the general and specific controls in the Territory Plan apply a gross floor area restriction of 3 000 square metres for shop use in Precinct 'b' Fyshwick, to the whole of the lease, or to individual shops.

3.8 ACTPLA's interpretation of the relevant provision of the Territory Plan is as follows:¹¹

1. The maximum gross floor area (GFA) of any shop in an industrial area, Precinct 'b' (other than shops used as bulky goods retailing or shops used as supermarkets or for the sale of food) is limited to 3 000 square metres per shop. There is no expressed limitation on the number of such shops that may be developed on an individual lease in this precinct.
2. The GFA of a supermarket or a shop selling food is limited to 200 square metres per supermarket or shop within this precinct.
3. There is no expressed limit on the size of shops that are used as bulky goods retailing. Note that bulky goods retailing excludes any shop used primarily for the sale of food or clothing.

3.9 It would appear that ACTPLA's interpretation is supported by a view that the general and specific land use controls in the Territory Plan (as amended by Variation 175) draw a distinction between the concept of a 'lease' (that is, a leasehold of a block of land) and a 'shop', which may comprise a single building of a certain maximum GFA, or which may be one of a number of shops, each of a certain maximum GFA, in a building. In other words, within the terms of the general and specific land use controls, it may be permissible for there to be one or more buildings on Section 48

¹¹ Letter from Chief Planning Executive, ACTPLA to Austexx in response to a request for clarification of land use policies, 16 February 2006.

Fyshwick, each with a GFA of more than 3 000 square metres, provided that each shop in the building or buildings does not individually have a GFA of more than 3 000 square metres.

3.10 In the period leading up to the auction of the EpiCentre site, on 16 December 2005, this issue was sufficiently problematical for several potential bidders to seek clarification. ING Real Estate Development Pty Ltd (ING) first raised this issue around October 2005 (prior to the sale process), asking ACTPLA whether a direct factory outlet (DFO) was a permitted use. Later, Austexx Developments Pty Ltd (Austexx), one of the prequalified bidders (and, as it transpired, the successful bidder), wrote to ACTPLA on 23 November 2005 to seek clarification. Austexx said that as a DFO centre could be classified for planning purposes as a 'shop', and while it could be argued that an outlet centre could not have a GFA greater than 3 000 square metres (such a DFO centre typically would occupy 20 000 - 30 000 square metres), then current controls in the Territory Plan 'could be read as prohibiting an outlet centre'.¹² The company also referred to its legal advice about the issue.

3.11 ACTPLA responded to Austexx by letter on 8 December 2005 that:

[o]ur interpretation of the aspects of the Territory Plan that we believe to be relevant to the matters you have raised and upon which we have acted ... for some time, does not accord with the company's legal advice, as we understand that advice. We are unaware of any factor that may lead us to alter our interpretation of those aspects of the plan.¹³

3.12 ACTPLA's letter to Austexx was drafted based on legal advice the Authority had sought from the ACT Government Solicitor's Office (GSO). The advice was transmitted by letter to the Authority on 30 November 2005. The GSO advised ACTPLA the preferred interpretation of the land use control, while not free from doubt, was that planning controls for the EpiCentre site:

are drafted to clearly draw a distinction between a lease and a shop ...[and that] [b]y reason of that distinction, it is ... not the whole of the lease that is subject to the [3 000 square metre GFA limit] but part of it being a shop that may be part of a building erected [on the site].¹⁴

3.13 ACTPLA advised Austexx that the Authority's interpretation of the relevant part of the Territory Plan did not accord with the company's apparent legal advice and that the company should be guided by the Lease and Development Conditions for the site and associated sale documentation, as well as the company's own legal advice.

3.14 ACTPLA apprised LDA of the contents of its response to the query from Austexx.

¹² Letter from Austexx to ACTPLA, 23 November 2005.

¹³ Letter from Chief Planning Executive, ACTPLA to Austexx, 8 December 2005.

¹⁴ Letter from Principal Solicitor, ACT Government Solicitor's Office, to ACTPLA, 30 November 2005.

3.15 About the same time, LDA management had also sought counsel's opinion on the legal construction of the relevant clause in the Territory Plan. This advice was that:

the ordinary and natural meaning [of the clause] is that the gross floor area of **any** shop in Precinct 'b' shall not exceed 3,000m². It follows, in my opinion, that, if none of the shops making up the proposed outlet would exceed that dimension, the development could proceed consistently with the Plan [counsel's emphasis].¹⁵

3.16 Submissions to the Auditor-General commented that the legal opinion obtained by Austexx and provided to ACTPLA before the auction raised a serious doubt that relevant controls under Territory Plan and lease conditions for the site meant 'it is arguable that the use of the land for [a retail] outlet is prohibited'.

3.17 In June 2006 after the sale of the site, Capital Property Group (CPG) also obtained counsel's opinion regarding permissible land use. This advice was used as grounds for an objection by the company to a Development Application for Block 8 Section 48 lodged by representatives of Austexx in April this year and subsequently approved by ACTPLA on 22 September 2006.

3.18 The legal advice to CPG distinguishes between what counsel term a 'Total Shop Area' as opposed to 'Particular Shop Area' interpretation of the relevant Territory Plan clause stipulating a GFA limit of 3 000 square metres, and favours the 'Total Shop Area' interpretation.¹⁶ This interpretation (contrary to advices obtained by the responsible Government agencies) would have the effect of limiting the construction of general retailing on the EpiCentre site to perhaps a maximum of 3 000 square metres.

3.19 In a submission to the audit, the Shopping Centre Council of Australia referred to legal advice obtained by one of its members (not CPG) to the effect that the 3 000 square metre limit applies to the gross floor area of all (non-bulky goods) shops on the block. Audit notes that this advice was obtained in June 2006, after the sale of the EpiCentre site, for the purpose of objecting to the DA submitted by Austexx.

3.20 Austexx subsequently advised Audit, on 30 November 2006, that its initial legal opinion was provided without the benefit of the 'design scheme' intended for the site. Austexx has since received a revised opinion based on its approved DA design. This revised opinion states that there is a strong argument that the proposed development is consistent with the land use controls for the site.

3.21 In July 2006, the Estimates Committee also heard evidence (in camera, later publicly released) about Variation 175 from the Minister for Planning and senior

¹⁵ Legal advice from Mr R S S Tracey QC, Owen Dixon Chambers West, Melbourne, 28 November 2005.

¹⁶ Advice from Mr Stephen Austin QC and Mr Stefan Balafoutis, Selborne Chambers, Sydney, 29 June 2006.

officers of ACTPLA. The Estimates Committee was informed that it was always the Government's policy intention that the EpiCentre development at Section 48 Fyshwick should not become a 'town centre' development like those in Woden, Belconnen, or Tuggeranong, which are typically anchored by large department stores and supermarkets. The Minister further advised that it was also always the Government's policy intention to enable, by means of Variation 175, a range of bulky goods retailing outlets of unlimited GFA and a range of general retailing outlets with a maximum 3 000 square metres GFA per shop (except for food retailing, which was limited to 200 square metres per shop) at the EpiCentre development.

Audit review of the development and approval of Variation 175

3.22 Given the differing legal interpretations of the Territory Plan, Audit found it necessary to go back to earlier Departmental documents supporting the development and approval of Variation 175, to ascertain the Government policy intention behind the apparent relaxation of controls applied to 'shops', or general retailing, in this industrial area. Audit's examination is discussed below.

3.23 In 1997-98, the Planning and Land Management Group (PALM) of the former Department of Urban Services reviewed industrial land trends in the *ACT Industrial Land Study* and in 2001 carried out an analysis of industrial land supply and demand in the ACT, together with an inventory of industrial area floor space.

3.24 Subsequently, in May 2002, PALM released Draft Variation No. 175 (Draft Variation 175) to the Territory Plan, dealing with certain industrial land use policies, for public comment.

3.25 A written statement accompanying Draft Variation 175 outlined the role of industrial areas in the Territory, discussed the implication of sustainable development principles (in particular the impact of development on Canberra's commercial centres) and divided industrial land use areas into four 'precincts', including various mixes of: general industry; retail warehouse and commercial services for businesses oriented toward home construction and furnishing, vehicle sales and service; food enterprises and compatible industries; and science and technology.

3.26 An explanatory statement contained within the Draft Variation noted that an 'existing Land Use Restriction which limits the scale of retailing (shops and bulky goods) is proposed to be amended'. The explanatory statement continued:

In particular, it is proposed to remove the existing 3,000m² limit on bulky goods retailing in Fyshwick. This change recognises the metropolitan catchment served by Fyshwick and the trend towards very large bulky goods retailing outlets.

3.27 Under Draft Variation 175, Section 48 Fyshwick (what is now the EpiCentre development site) was placed in Precinct 'b'—that is, for retail warehouse and commercial services. According to an attachment to the Draft Variation, the primary purposes of Precinct 'b' were to:

- provide an accessible location for commercial and service activities with a metropolitan or regional catchment;

- meet the need for a mix of lower rent bulky goods retailing, specialised industrial, commercial and service activities alongside general industry;
- protect the hierarchy of commercial centres (that is, town centres like Woden, Tuggeranong and Belconnen) and accessibility for consumers;
- encourage redevelopment of older industrial sites, particularly those with a high visibility to major roads;
- provide opportunities for industries and bulky goods retailing requiring a visible location to be located near main transport routes;
- preserve a viable industrial base which could coexist with more commercially oriented uses; and
- make provision for small-scale industrial services, which support surrounding industrial activities.

3.28 As required, PALM notified Draft Variation 175 in the ACT Legislation Register and called for public comments and submissions. PALM provided a final version of Draft Variation 175 to the Legislative Assembly Standing Committee on Planning and Environment (Planning and Environment Committee) at the end of 2002, having regard to the submissions received, consultations with the National Capital Authority (NCA) and reports from the Conservator of Flora and Fauna and the ACT Heritage Council. The Planning and Environment Committee also called for public submissions on the Draft Variation. The Committee's report, in April 2003, recommended that Draft Variation 175 should be implemented subject to consideration of several recommendations by the Committee.

3.29 In response to the Committee's report, PALM made further revisions to the Draft Variation and, in June 2003, Variation No. 175 to the Territory Plan was promulgated.

3.30 Schedule 1 to the approved Variation 175 lists 'Permissible Uses' for the four Industrial Areas, which are subject to 'General Controls' specified in Section 3 of the Variation, and 'Area Specific Controls' specified in Section 4. Relevant uses of Precinct 'b' include:

- bulky goods retailing; and
- shop.

3.31 The 'General Controls' specified in Clause 3.1 of Variation 175, include:

SHOP

In Precinct 'b', the maximum gross floor area for any supermarket or shop selling food shall be 200 m² and for other shops except bulky goods retailing shall be 3,000 m² except as provided for in Section 4.

3.32 There are no 'Area Specific Controls' specified in Section 4 that affect Precinct 'b' in Fyshwick.

Amendment to Variation 175

3.33 Some debate arose in the Legislative Assembly Select Committee on Estimates (Estimates Committee) in July 2006 concerning an apparent amendment to Variation 175. A comparison between the approved and draft versions of Variation 175 shows land use restrictions in Precinct ‘b’ (a limit to the size of shops except for bulky goods retailing) that were not included in the draft variation. The change in land use restrictions is summarised below:

Table 3.1: Land use restrictions – ‘Shop’ (other than bulky goods retailing)

| Policy | Land use restrictions |
|---------------------------------------|--|
| Policy prior to Variation 175 | 3 000m ² in Fyshwick per lease 200m ² in Mitchell per lease |
| Proposed policy (Draft Variation 175) | No limit in Fyshwick 200m ² per lease in Mitchell |
| Approved policy (Variation 175) | 3 000m ² in Fyshwick 200m ² per lease in Mitchell |

3.34 The change in land use restrictions was specifically raised in an explanatory statement attached to a proposed final Variation:

[t]he existing control that limited the floor area of a shop (other than food shops) in Fyshwick to a maximum of 3 000m² per block was inadvertently amended along with the proposal to remove the 3 000m² limit on bulky goods retailing. The Land Use Restriction for ‘Shop’ has been amended accordingly. NB: The existing land use restriction that limits food shops in Precinct ‘b’ (Mitchell and Fyshwick) to 200m² per lease has been retained.

3.35 Research and analysis by PALM had shown the need to amend land use restrictions in the industrial areas to provide increased flexibility and cater for emerging trends in retailing, particularly bulky goods retailing. Nevertheless, amendments were to ‘take into account the potential ... social and economic impacts of the proposed use on the local area and on the hierarchy of commercial centres’.

3.36 According to evidence presented to the Estimates Committee in July this year, the Fyshwick industrial area accounts for more than 20% of retail turnover in the ACT and Variation 175 has the potential to increase this proportion. The Estimates Committee was informed that while previously the land use policies applying to Section 48 Fyshwick restricted general retailing and bulky goods retailing to a maximum of 3 000 square metres per lease, ‘as a result of Variation No. 175 ... the restriction on bulky goods retailing was removed altogether and the restriction relating to general retailing was changed to ... 3,000 square metres per shop rather than per lease’ (except for food retailing, for which tighter restrictions continue to apply).

3.37 On examination of internal papers, correspondence and drafts leading to the final Variation 175, Audit formed the view that it has been the general intention of the Government to provide increased flexibility for development and retailing in the Territory while protecting the hierarchy of established commercial centres. It was, however, less clear to Audit whether the specific changes in restrictions for shops

other than bulky goods, from 3 000 square metres per lease to 3 000 square metres per shop, was the intention of the Government at the time. If this was the case, then this intended change in existing restrictions was not clearly communicated to all stakeholders during the consultation process.

3.38 The Property Council of Australia (ACT) submitted that

[d]uring a long and comprehensive public consultation and hearing process there was never a suggestion of any relaxation of the 3 000m² limit on non bulky goods retail per site. Rather the Variation was concerned with freeing up limits on bulky good retail.

3.39 The NCA advised Audit that based on an examination of NCA documentation during the consultation process for Variation 175, it was 'the NCA officers' understanding that the 3 000m² gross floor area restriction for shop use was to be applied per lease and not per shop'.

3.40 An Explanatory Statement for Variation 175 to the Territory Plan tabled by the Minister for Planning in October 2002, which sought to explain the changes to the planning controls, was not in itself clear regarding exactly what had been amended.

3.41 Dr Deb Foskey MLA raised concerns with Audit that:

[i]t is unclear at what point in time the Minister determined to affect a permanent change to the land use regime pertaining to Fyshwick. There was certainly no formal announcement of such a major and far-reaching initiative.

3.42 ACTPLA advised that the Authority was entitled to interpret the Territory Plan as it stood, and not Variation 175 in isolation at the time the issue arose, and that Variation 175, for all intent and purposes, does not exist in its own right - it was an input to the Territory Plan (as passed by the Assembly).

3.43 Audit formed the view that the current interpretation by ACTPLA of the Territory Plan (now incorporating Variation 175) as applied to Section 48 Fyshwick reflected the Authority's understanding of the Government's policy to increase diversity and flexibility in retailing. Unfortunately, this issue is not clear to key stakeholders, including the key industry body, who strongly believed that the focus of the Variation was to encourage industrial use and lower rent bulky goods retailing, but not general retail use.

3.44 In the absence of conclusive policy information supporting the final Variation 175, and given the differing legal advice from various sources about the possible interpretation of specific controls under the Territory Plan applied to 'shops', Audit is not in a position to determine the correct interpretation.

Recommendation 3

ACTPLA should undertake further clarification of the Territory's industrial land use policies, particularly in respect of permissible uses and land use restrictions.

COMMUNICATIONS ON PLANNING ISSUES

Commercial due diligence

3.45 The principle of *caveat emptor* ('let the buyer beware') applies to auction sales in that the buyer has no recourse to the usual implied conditions and warranties attaching to a contract of sale—which is why property to be sold at auction is commonly made available for inspection by prospective buyers.¹⁷

3.46 The term 'due diligence'—that is, the process of making inquiries to allow a potential purchaser to assess the true value of a prospective acquisition—has been used as a defence for claims that there was an untrue statement of a material fact in, or omission of a material fact from, a prospectus.¹⁸ *Black's Law Dictionary*, the definitive law dictionary for the law of the United States, defines commercial due diligence as:

Such a measure of prudence, activity, or assiduity, as is proper to be expected from, and ordinarily exercised by, a reasonable and prudent [person] under the circumstances; not measured by an absolute standard, but depending upon the relevant facts of the case.¹⁹

3.47 In Australia, the principle of 'due diligence' appears in the *Trade Practices Act 1974 (Cth)* as a defence to breaches of the Act. To establish a due diligence defence, an assurance provider would need to prove that it: took reasonable precautions and exercised due diligence specifically to avoid the contravention; or, if no precautions were taken, then to prove that there were none that could reasonably be taken.²⁰ For the Australian Accounting Standards Board, 'determining the fair value of [a purchased entity is] ... part of [a purchaser's] due diligence'²¹ and costs incurred in undertaking due diligence 'are an unavoidable cost of the investment in a business'.²²

3.48 For the purposes of this Audit it is possible, on the basis of the references above, to suggest a series of questions that might reasonably be posed while conducting acquisition due diligence, as in the case of a potential purchaser of Block 8 Section 48, Fyshwick. Due diligence questions about the property to be acquired would at least include: What does the potential purchaser believe it is acquiring? What is the purchaser's planned use for the property? Does the property allow the use as planned? Are there any legal restrictions as to the planned use? How much does the purchaser expect to pay for the property?; and so on.

¹⁷ Dowler, M and Miles, C, *A Guide to Business Law* (16th ed.), Lawbook Company, Sydney, 2006, p.491.

¹⁸ Gay, G and Simnett, R, *Auditing and Assurances in Australia* (3rd ed.), McGraw Hill Irwin, Sydney, 2005, p.664.

¹⁹ Garner, B (ed.), *Black's Law Dictionary* (8th ed.), WestGroup [US], 2004.

²⁰ *Trade Practices Act 1974*, section 85.

²¹ Australian Accounting Standards Board, *Exposure Draft: Proposed Amendments to AASB 3 Business Combinations*, ED 139, July 2005, p.22.

²² Australian Accounting Standards Board, p.28.

3.49 As Mr Justice Connolly ruled in his ACT Supreme Court judgment on the unsuccessful injunction proceedings mentioned at paragraphs 1.10 and 2.11 above,

[p]ersons, including corporate entities, who have achieved qualification for this sale will presumably be experienced individuals or commercial entities who have some understanding of the way land is made available in the Australian Capital Territory. And they will understand that they are purchasing not freehold property subject to local council planning controls, but an ACT commercial lease. They will understand that an ACT commercial lease means that you can only conduct the activity contained or approved in the lease.²³

3.50 While due diligence inquiries will allow a potential purchaser to assess the value and perhaps uses of a prospective acquisition, there remain sound commercial reasons for both vendors and purchasers to exercise caution in revealing confidential business information. This latter consideration—that is, the need to exercise a precautionary duty of care to avoid publicly revealing, or otherwise transmitting inappropriately to other persons, confidential commercial information provided by potential purchasers—has influenced the pre- and post-sale behaviour of both ACTPLA and LDA.

Procedures for ACTPLA staff providing advice to the public

3.51 As part of their normal duties, most officers in ACTPLA provide advice to members of the public, including commercial entities, who request such advice, including advice about the interpretation of lease conditions or other provisions of the Territory Plan. ACTPLA (and its predecessor, PALM) has maintained a comprehensive internal operational manual intended to guide staff on standards and procedures for receiving, processing and determining development applications and associated inquiries. The manual incorporates the ACT Public Service Customer Service Standards, which include best practice telephone and counter service standards and best practice complaints handling standards.

3.52 It appears that before and immediately after the sale of the Fyshwick site, ACTPLA did not have a specific written policy regarding procedures for its staff providing advice to members of the public. Rather, it relied on an application of various diverse parts of the existing operational manual. Audit was advised that ACTPLA has since developed such a specific policy in recognition of the importance of specific procedures for dealing with members of the public, including commercial entities, who may seek advice from ACTPLA in order to make a decision on a financial investment or some other commitment.

3.53 Audit acknowledges ACTPLA's efforts in consolidating the new procedures, which stipulate that 'it is essential that staff are clearly aware of the circumstances when they can provide advice, how (or whether) to provide it, or when to defer to more senior or experienced officers'. General principles in the consolidated procedures include:

²³ *Capital Property Finance v Land Development Agency* (2005), SC No. 940, 3.

- care to be taken in giving advice;
- officers to ensure they understand questions being asked and if not then to request further information;
- all requests to be put in writing;
- officers should not respond to any request that might be beyond their level of expertise and/or authorisation;
- written records should be created and maintained in connection with any advice provided; and
- if necessary, legal advice should be obtained through ACTPLA's in-house legal counsel.

3.54 Audit found no evidence to suggest that ACTPLA staff had not adhered to the above principles during the period leading up to the sale of the Fyshwick site, or since. ACTPLA advised Audit that the Authority's staff would receive an appropriate level of training in the consolidated procedures for dealing with the public.

Communications between ACTPLA and potential bidders

3.55 As noted in preceding chapters of this report, before the auction of the Fyshwick site all pre-qualified bidders were provided with comprehensive sale documentation. The documentation included a draft contract of sale and draft Crown lease, and an information package including the Development Control Plan (approved by the NCA) and Lease and Development Conditions (approved by ACTPLA) specific to Block 8 Section 48.

3.56 The conditions of auction detailed in the information package advised that prospective bidders should rely on their own investigations to determine whether the planning and development requirements described in the accompanying documents accorded with their individual aspirations for the site. Other than that, inquiries on specific matters were to be directed to the relevant authorities, with ACTPLA being responsible for planning-related matters.

3.57 The Chief Planning Executive advised that in his view:

Documentation relating to the planning requirements and Government policy intentions for Block 8 Section 48, Fyshwick was sufficiently clear in intent, as confirmed by Justice Connolly of the Supreme Court, to satisfy the conduct of normal commercial due diligence by an informed and willing potential purchaser. This is reflected in the documented decisions by the three parties who made inquiries of the Authority who subsequently acted in a manner consistent with having a clear understanding of what could occur on the site, resulting in one party withdrawing from the process and the other two being prepared to pay above what could have been considered a reasonable price for the site.

3.58 Audit found that in the period leading up to the auction, several prospective bidders approached ACTPLA for either advice or clarification about a number of matters relating to the subject land.

Inquiry by ING

3.59 The earliest relevant inquiry of ACTPLA was by ING on 23 September 2005. ING wrote to ‘formally request whether or not Discount Outlet Retailing is to be a permitted use under the Territory Plan and Amendment 175’. The company wrote that it was also concerned that a stipulated minimum GFA requirement of 50 000 square metres for any development on the site was in the company’s opinion not commercially feasible, and asked that ACTPLA indicate whether the ‘minimum’ guidelines could be replaced with a ‘maximum’ guideline and/or a phased development timetable.²⁴ On the grounds that the inquiry was made before the formal release of the sale documentation, ACTPLA redirected the inquiry to LDA for a response.

3.60 Various interested parties raised concerns that while ACTPLA referred the inquiry from ING to LDA, the Authority chose to deal directly with Austexx.

3.61 ACTPLA advised Audit that the query from ING referred to a development control stipulated by LDA, as the vendor agency for the sale process, so the Authority referred the company to the Agency. ACTPLA maintains that, in general, all inquirers were referred to the sale documentation in order to carry out their normal commercial due diligence.

3.62 As stated earlier, Audit found no evidence of any intention by either agency to mislead or restrict potential bidders but the agencies’ lack of an effective communications protocol, to ensure the communication of all relevant planning information to all registered bidders, led to a claim of preferential treatment.

Inquiries by Austexx

3.63 On 4 October 2005 and 8 November 2005, ACTPLA responded to specific pre-development application inquiries by representatives of Austexx about Section 48 planning matters. The documentary record of the inquiry of 4 October indicates that Austexx raised with ACTPLA whether the Fyshwick site could be developed with a number of shops each with a maximum GFA of 3 000 square metres. Austexx was advised that the Lease and Development Conditions and Development Control Plan would apply to the site.²⁵

3.64 The inquiry of 8 November 2005 is documented in an emailed response to Austexx, which had sought clarification about whether the size restriction quoted in the Lease and Development Conditions applied ‘per establishment’ or ‘by Crown lease’. The responding ACTPLA officer confirmed that the size limitation per lease applied to Precinct ‘b’ only for Mitchell. The ACTPLA officer also confirmed that a

²⁴ Letter from ING Real Estate to ACTPLA, 23 September 2005.

²⁵ ACTPLA Record of Discussion, “Pre-App Meeting: Proposal No. 200504369”, 4 October 2005.

lease could accommodate a number of establishments provided each complied with the size restrictions in the Lease and Development Conditions.²⁶

3.65 These inquiries were made before the Expressions of Interest process had been finalised (that is, before the shortlisted prospective bidders had been selected and advised of their success). Shortlisted prospective bidders were advised on 17 November 2005. ACTPLA considers the inquiries to be part of the 'due diligence' process adopted by interested parties.

3.66 As noted above, Austexx wrote to ACTPLA on 23 November 2005 (that is, after the 17 November close-off date) to seek clarification about 'whether the current controls in the Territory Plan, the lease conditions and the Development Control Plan could potentially affect the use of the land for an outlet centre'.²⁷ Referring to its legal advice about this matter, Austexx said it was concerned that 'the current control could be read as prohibiting an outlet centre'.

3.67 In its reply to Austexx on 8 December 2005, ACTPLA wrote that as the Authority's interpretation of the Territory Plan did not accord with the company's advice, the Authority saw no reason to alter its interpretation. This ACTPLA response also stressed that:

our interpretation should not be taken to constitute any form of advice to you or the company and it should not be taken, necessarily, to be our interpretation in the future. Any proposal for development, from any successful bidder at the auction, will be considered on its merits, having regard to our interpretation at that time.

3.68 Austexx had also sent ACTPLA a reminder letter on 2 December 2005 (that is, before receiving the Authority's 8 December response), to which ACTPLA replied the same day that the Authority had been awaiting independent legal advice before formally responding to Austexx. On 8 December 2005 (the day ACTPLA sent its written response to Austexx), a senior representative of the company telephoned the Chief Planning Executive to seek further clarification. According to the Chief Planning Executive's notes of the exchange, he advised the company that ACTPLA '...felt a Brands outlet could be considered on merit, but our interpretation was open to challenge'. At a subsequent meeting with the Chief Planning Executive on 14 December 2005 (two days before the sale), Austexx was referred back to the lease documents and Development Control Plan for Block 8 Section 48 and the Chief Planning Executive 'reinforced our caveats about the meeting'.

3.69 Some parties asserted to the Auditor-General that ACTPLA dealt inconsistently with inquiries; Capital Property Finance and ING were told that the onus was on them to interpret the Territory Plan, while Austexx was clearly told what the ruling was.

²⁶ Email from Manager Territory Plan, ACTPLA to Austexx, 8 November 2005.

²⁷ Letter from Austexx to ACTPLA, 23 November 2005.

3.70 Audit notes that based on legal advice from the GSO, ACTPLA advised Austexx that ACTPLA's interpretation did not conform with the company's apparent legal advice and that it should rely on its own judgment. This ACTPLA advice was accompanied by a disclaimer that no warranty was necessarily attached to the interpretation.

3.71 Audit considers that ACTPLA was in a difficult position, as it had to deal appropriately with this particular correspondence, which contained confidential legal advice from an external commercial entity.

3.72 ACTPLA's advice, in this instance, is consistent with the fact that all parties were previously advised to carry out their own commercial due diligence. Nevertheless, it could be argued that ACTPLA's advice to Austexx indirectly and unknowingly constituted additional information not previously provided to other parties. In Audit's opinion, ACTPLA afforded no preferential treatment to Austexx, or to any other potential purchaser, but rather endeavoured to maintain an appropriate balance between ensuring consistent information was provided to all inquirers, and ensuring commercial-in-confidence information provided by one bidder was not advertently or inadvertently transmitted to commercial competitors. However, the agencies' lack of an effective communications protocol to ensure the communication of all relevant planning information to all registered bidders, led to a claim of preferential treatment.

Inquiry by CPG

3.73 During the period leading up to the auction, CPG also contacted ACTPLA for clarification about a number of issues relating to the site. On 21 November 2005, in an email on the subject of 'ACT Parking and Vehicle Guidelines,' CPG asked whether its interpretation that, under the ACT Parking and Vehicular Guidelines, a factory outlet centre would require four car parking spaces per 100 square metres GFA was correct and whether this requirement would apply to a factory outlet centre built on Block 8 Section 48.

3.74 CPG raised the car parking ratio issue again in a meeting with ACTPLA on 1 December 2005. According to the written agenda for the meeting, other matters also discussed included the feasibility of reducing the minimum total GFA for a building on the site to 30 000 square metres and whether the company could build a conventional shopping centre. The Chief Planning Executive's handwritten notes of the meeting read:

I conveyed a concern [to the CPG representatives] that [ACTPLA] would not want to advise one bidder on matters that might be appropriately shared with others. I was not comfortable in commenting on any position we might take with a DA for lease variation ... Question of retail versus bulky goods. Of the view that this promotes a retail centre. Told them to look carefully clause on shops ...

3.75 Four days after this meeting, in response to the email that CPG had sent on 21 November 2005, ACTPLA wrote to the company with information that the:

- lease purpose clause in the Lease and Development Conditions for Block 8 Section 48 identified a number of permissible uses for the site, including bulky goods retailing and shop uses;
- Lease and Development Conditions required car parking to be accommodated on site in accordance with the ACT Parking and Vehicular Access Guidelines (Parking Guidelines); and
- Parking Guidelines identified that car parking for bulky goods retailing was three spaces per 100 square metres GFA and for shop use was four spaces per 100 square metres GFA, and that ‘bulky goods retailing’ and ‘shop’ were defined in the part of the Territory Plan dealing with definitions of terms.²⁸

3.76 Capital Property Finance (part of CPG) has raised a concern with the Auditor-General that the company was not given any formal advice by ACTPLA, simply verbally referred to Variation 175 to the Territory Plan.

3.77 ACTPLA advised Audit that ‘[CPG] neither asked the question and/nor did it appear from the question it was asking, that it was in any doubt as to what could occur on the site. In fact ACTPLA’s responses were cautioning that they may be over-interpreting the extent of retail that could be put on the site.’

3.78 ACTPLA further commented that ‘the various CPG inquiries were very particular about what that Group might like to do. The Group was respectively cautioned about some of its assumptions or was provided with information to help it make a decision in relation to other matters’ and that ‘where advice was sought in writing, they were responded to in writing’.

3.79 Audit accepts that ACTPLA responded as it was generally asked, but better practice would be to ensure that all responses were provided in writing.

Claims of ‘preferential’ treatment

3.80 The question has been raised with this Office, and elsewhere, whether ACTPLA afforded preferential treatment to Austexx by providing that prospective bidder an implied interpretation of Variation 175, while other prospective bidders were told the onus was on them to interpret this variation to the Territory Plan. This matter is partly dealt with above but Audit makes the following further comments about this allegation.

3.81 It is clear that ACTPLA received several inquiries about planning issues relevant to the Fyshwick site from potential purchasers that were undertaking typical commercial due diligence processes. Examination of correspondence and other communications demonstrates that the various inquiries sought answers to different

²⁸ Letter from Acting Principal Planner, ACTPLA, to Capital Property Group, 5 December 2005.

questions. Under these circumstances, it is unreasonable to expect that the Authority would have provided exactly the same answer to every inquirer.

3.82 It is the view of Audit that in responding to the various inquiries put to it, ACTPLA endeavoured to maintain a fair and consistent approach. Where advice was requested about commercially sensitive issues, the Authority consistently advised inquirers to read the Territory Plan carefully and to make up their own minds as a result of carrying out their normal commercial due diligence.

3.83 On the matter of ACTPLA's response to Austexx on 8 December 2005, Austexx was told that ACTPLA's interpretation did not conform to the company's advice and that the company should rely on its own judgment. In Audit's view, this led to a claim that an interpretation of the Territory Plan, not previously advised to others, was provided to Austexx. However, it is important to note that Austexx was also advised in the same letter that 'our interpretation should not be taken to constitute any form of advice to you or the company and it should not be taken, necessarily, to be our interpretation in the future'.

3.84 Audit notes that on 3 February 2006, after its acquisition of the Fyshwick site, Austexx requested ACTPLA to provide clarification about the Territory Plan interpretation with respect to the site in a meeting with ACTPLA.²⁹ Audit is of the opinion, therefore, that ACTPLA acted in good faith and had no intention of providing preferential treatment to Austexx during the process leading up to the sale of the EpiCentre site.

3.85 Another issue raised with Audit by several parties is that ACTPLA failed to make public its legal advice that differed from Austexx's legal advice and, although conveyed to LDA, was not disclosed to any prospective bidder other than Austexx. Audit notes that ACTPLA's legal advice was not conveyed to Austexx nor, in Audit's opinion, should it have been. ACTPLA (in common with most Government agencies and commercial bodies) does not make public documents that attract legal professional privilege.

3.86 Further, Audit notes that ACTPLA's response to Austexx was in relation to a specific 'due diligence' inquiry. ACTPLA had a responsibility to provide information relating to planning aspects of the sale when required to do so. However, it also had the responsibility to exercise a precautionary duty of care to avoid publicly revealing, or otherwise transmitting inappropriately to other persons, confidential commercial information provided by potential purchasers.

3.87 As mentioned earlier, Audit is of the view that during the process of the sale of the Block 8 Section 48, ACTPLA tried to maintain an appropriate balance between ensuring consistent information was provided to all inquirers and ensuring commercial-in-confidence information provided by one bidder was not advertently or

²⁹ Letter from Chief Planning Executive, ACTPLA to Austexx, 16 February 2006.

inadvertently transmitted to commercial competitors. It is not always easy to achieve such a balance.

3.88 ACTPLA has a responsibility to provide clear and unambiguous advice to the community about planning matters. However, Audit observed that in dealing with inquiries during the sale process, ACTPLA did not always provide a clear and responsive reply to legitimate and straightforward inquiries about specific planning controls, such as whether the land use controls apply to the whole of a lease or individual shops within the lease. This is not consistent with good public administration or with a goal included in the ACTPLA 'Code of Service', which advises ACTPLA's customers that ACTPLA will:

... Listen to you and look for practical ways of helping to resolve any issues you may have in dealing with us; ...

Provide information that is accurate, complete and easy to understand; ...

3.89 For example, inquirers were typically advised to carry out their own commercial due diligence and to rely on their own judgement. A more responsive approach might have identified a general theme among the inquiries and sought to deal effectively with that matter in a manner that was 'accurate, complete and easy to understand'. Both ACTPLA and LDA would serve the public better if they have provided as, an addendum to the sale documents, an appropriate and clear interpretation of the specific planning controls of the Territory Plan as applied to the site.

3.90 In response, ACTPLA said the Authority 'adopted an approach that was appropriate to the matter at hand, that it sought legal advice when appropriate and took necessary care in its dealings with all parties'. Further, 'there was nothing straightforward about this particular exercise, which is best illustrated by the environment in which the Authority and the Land Development Agency knew was operating and has continued to do so post the sale process, where two commercial rivals were involved. ... In these circumstances the actions of the Authority required diligence, care and caution to be exercised in the interests of the Territory and the ACT community'.

3.91 LDA advised that 'the issue of clarity was the basis of an unsuccessful application to the ACT Supreme Court to halt the auction made by an entity of the Capital Property Group on the day before the auction'. LDA noted that 'Justice Connolly dismissed the application, stating:

It seems to me that it is abundantly clear that what kind of purchase at the auction is the right to acquire an ACT crown lease, which could be used for the purposes of the lease purpose clause. And the lease purpose clause is four, bulky goods, non-retail commercial use, restaurant and shop. And the ambiguity about that would be clarified when one reads further which indicates certain size restrictions as to shops selling food.

...

It seems to me that there is no basis for the grant of an injunction to prevent an ordinary market process from continuing. Persons, including corporate entities, who

have achieved qualification for this sale will presumably be experienced individuals or commercial entities who have some understanding of the way land is made available in the Australian Capital Territory. And they will understand that they are purchasing not free hold property subject to local council planning controls, but an ACT commercial lease. They will understand that an ACT commercial lease means that you can only conduct the activity contained or approved in the lease. The activities in this lease, it seems to me, are clear.... the lease conditions are clear on their face.'

3.92 To the extent that there was (or remains) any lack of clarity regarding the Government's interpretation of the Territory Plan, particularly concerning the permissible uses of industrial areas or land use restrictions, Audit suggests that ACTPLA consider the merits of further amendments to the industrial land use policies (see Recommendation 3).

3.93 Further, as implied in Recommendation 2 of this report, the Operational Protocol between the two agencies should be strengthened to provide a framework to ensure important information bearing on the sale of land is passed from ACTPLA to LDA and communicated as appropriate to all bidders.

Communication with the NCA

3.94 The release of Section 48 Fyshwick was the subject of liaison with the NCA, and included the preparation and approval by the NCA of the Development Control Plan (DCP) for the site. The approved DCP was incorporated into the Lease and Development conditions for the site.

3.95 Audit was provided with documentary evidence of communications between ACTPLA and the NCA regarding Section 48 Fyshwick and the approval of a Development Control Plan (DCP) for Block 8 by the Chief Executive of the NCA on 12 July 2005.

3.96 During the development of the DCP, concerns expressed by the NCA related mainly to the visual aspects of any development on the site along the Canberra Avenue/Newcastle Street frontages (for example, high quality buildings and signage, no visible car parking) and road access. Audit notes that these concerns were reflected in the NCA-approved DCP, which stated that ACTPLA was responsible for assessing development applications relating to the subject site and in doing so was required to ensure consistency with the DCP and the National Capital Plan.

3.97 In relation to Draft Variation 175, on 2 August 2002 during the consultation process the NCA provided comments to PALM about the potential loss of available large sites for future industrial uses and specific concerns regarding Section 48. PALM addressed these concerns in a written response to the NCA. Relevant to the issue under Audit was PALM's response that:

the changes made to the retailing aspects are about introducing more flexibility for existing uses rather than introducing a change from industrial to commercial activity. The use of the land remains predominantly industrial. The existing land

use restrictions of maximum 3 000m² gross floor area (GFA) for shop use in Fyshwick has been reinstated in the recommend final.

3.98 Audit sought advice from the NCA about its understanding and interpretation of the above land use restriction—that is, whether the maximum 3 000 square metres GFA for shop use applied to a lease or to individual shops within a lease—as communicated by PALM to the NCA during the consultation process. NCA advised Audit that after reviewing all documentation, and on the basis of PALM’s advice that it had inadvertently amended Draft Variation 175:

... the NCA interpreted this response ... that the gross floor area restriction for shop use in Precinct B was to be reinstated completely. That is, it was the NCA officers’ understanding that the 3 000m² gross floor area restriction for shop use was to be applied per lease and not per shop.

3.99 The NCA noted, however, that the final Variation 175 to the Territory Plan, ‘as approved, applies the GFA restriction per shop and not per lease’.

3.100 The NCA further advised Audit that it was undertaking a peer review of the ACTPLA delegate’s approval of the development to assess whether the approved development is inconsistent with the National Capital Plan. The result of this assessment was not available to Audit at the time of finalising this report.

DEVELOPMENT APPLICATION BY AUSTEXX

3.101 The scope of this audit does not include examination of the process for approval of the Austexx DA. However, the following information is provided in the interests of completeness of the matters considered by Audit

3.102 On 21 September 2006, ACTPLA announced that it had approved, subject to certain conditions, a DA by an Austexx subsidiary company for Block 8 Section 48, Fyshwick (the EpiCentre site). In the announcement, the Authority’s Chief Planning Executive said the development application sought approval to construct a building with a GFA of 60 000 square metres of bulky goods retailing and shops, with a basement car park and associated works such as paving and landscaping. The mix of uses approved was approximately 51% bulky goods and 45% other retailing.

3.103 The Chief Planning Executive said that ACTPLA, as the statutory decision maker under the Land (Planning and Environment) Act, had undertaken a detailed assessment of the proposal against land use policies and lease conditions, as well as submissions received as a result of public notification of the DA. Conditions placed on the approval of the development application required Austexx to provide: revised drawings with details of floor levels, façade treatment and road intersection works; details addressing a planning policy concerning *Crime Prevention Through Environmental Design*; and, details of a spoil management plan and on-site stormwater works. ACTPLA advised Audit that it approved the Austexx DA, subject to minor conditions, as consistent with the Development Control Plan and Lease and Development Conditions for the site.

3.104 Various interested parties have submitted to the Auditor-General that the winning bidder's intentions for the site are not consistent with the intended use of the site as documented by the LDA through, for example, the Lease and Development Conditions and Preliminary Assessment for the project.

3.105 Audit notes that this matter is subject to separate legal proceedings.

CONCLUSION

3.106 Audit is of the opinion that the planning and associated sales documents, including the ACTPLA-approved Lease and Development Conditions for the site and the NCA-approved Development Control Plan, were comprehensive and sufficiently clear in intent to satisfy the conduct of normal commercial due diligence by an informed and willing potential purchaser. However, there is a lack of clarity regarding the interpretation of the Territory Plan, as amended by Variation 175, particularly concerning the permissible uses of industrial areas or land use restrictions. ACTPLA should consider the merits of further clarification of the industrial land use policies.

3.107 Audit did not find conclusive documents to ascertain the Government policy intention regarding the specific change in land use restrictions for shops other than bulky goods, during the development of Variation 175. Further, because of differing legal advice examined by Audit, Audit was unable to offer a conclusive interpretation of the Territory Plan, as amended by Variation 175, and thus of the particular permitted general retail use of Block 8 Section 48, Fyshwick (and other Precinct 'b' industrial land).

3.108 ACTPLA afforded no preferential treatment to Austexx, or to any other potential purchaser. Audit is of the opinion that ACTPLA endeavoured to maintain an appropriate balance between ensuring the inquirer received the relevant information and ensuring commercial-in-confidence information provided by one bidder was not advertently or inadvertently transmitted to commercial competitors.

3.109 Audit is of the opinion that the existing Operational Protocol between ACTPLA and LDA should be strengthened to ensure that important information bearing on the sale of land is passed between the two agencies, and communicated to all potential bidders.

4. OUTCOMES FOR THE TERRITORY

INTRODUCTION

4.1 This chapter assesses financial and planning outcomes for the Territory in the sale process relating to the auction of Block 8 Section 48, Fyshwick.

KEY FINDINGS

- The sale of Block 8 Section 48, Fyshwick for \$39 million returned an appropriate financial outcome for the Territory on the basis of the permissible uses for the site of bulky goods retail, non-retail commercial, restaurant and shop uses.
- LDA's valuers based their valuations on an interpretation of the lease purpose clause in the Lease and Development Conditions for the EpiCentre site that considered bulky goods as the main use and gave lesser emphasis to other, higher uses such as general retailing. This approach represented a risk that the land might have been undervalued for the purpose of setting a reserve price. Despite this, Audit is of the opinion that interested bidders were reasonably informed of the potential use of the land and that market forces operated to ensure an appropriate financial return to the Territory for the sale of the lease.
- LDA's reserve price set for the land was \$13.5 million, compared to an indicative value of around \$21 million provided by an independent backcast valuation commissioned by this audit. Audit's expert valuer considered various scenarios of mixed uses for the site, and the \$21 million valuation represented a development scenario of equal uses of bulky goods and DFO.
- The auction price of \$39 million was well above that of the independent backcast valuation commissioned by Audit.
- Audit notes that it was not the Government's policy intention that the EpiCentre site should become a 'town centre' development like those in Woden, Belconnen or Tuggeranong. Accordingly, it is unlikely that an industry claim of a value for the site of \$60 million could have been achieved.
- The sale of Block 8 Section 48, Fyshwick generally conformed to the Government's strategic planning policy intentions to the extent that it allows increased diversity and flexibility in general retailing, as well as the specific planning outcomes intended for the EpiCentre development on Section 48, and was consistent with perceived consumer and industry demand for bulky goods and other retailing opportunities.
- Audit did not examine and form an opinion on the impact of the approved Austexx development on the ACT retail hierarchy. Audit understands that following ACTPLA's approval of the Austexx DA, the NCA is conducting an assessment of this matter.

FINANCIAL OUTCOMES

4.2 This section of the report considers whether the sale of Block 8 Section 48, Fyshwick for \$39 million achieved appropriate financial outcomes for the Territory, and whether appropriate valuation information was obtained and used by LDA.

4.3 LDA is established under the *Planning and Land Act 2002* to develop land, carry out works for developing and enhancing land and to carry out strategic or complex urban development projects. Proceeds of Territory-owned land sold by LDA are required to be paid to the Treasury. In 2005-06, LDA paid dividends totalling \$80 million to the Government.

LDA assessment of market value

4.4 The lease over Block 8 Section 48, Fyshwick was sold by restricted auction on 16 December 2005. It is normal industry practice before auctions to set a reserve price—that is, the minimum price the seller will accept. Any bid at the auction over and above the reserve price means, in effect, that the seller has obtained a better than estimated price for the property.

4.5 Commonly, a reserve price is determined by expert opinion on the value of the property. LDA, in accordance with its own procedures for land sales and prudent development practice, sought two valuations of the land from recognised firms expert in property valuation. The valuations obtained by LDA were dated 16 August 2005³⁰ and 25 October 2005³¹.

4.6 LDA asked the valuers to assess the market value of the lease over the land. Each valuer defined market value as the ‘estimated amount for which an asset (in this case, the lease over Block 8 Section 48, Fyshwick) should exchange on the date of valuation between a willing buyer and a willing seller in an arm’s length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion’.

Contextual information in the LDA valuations

4.7 Land valuation methodologies commonly require context—that is, consideration of factors that might bear on the value of the property. The expert valuers of the Fyshwick site considered the following information provided by LDA:

- details of the lease and development conditions, including the lease purpose;
- information about town planning, location, land description and services; and
- property search details.

³⁰ JLLRLD Pty Ltd, *Valuation report prepared for the Land Development Agency of the proposed bulky goods site block 2 section 48 (part) division of Fyshwick Australian Capital Territory*, 16 August 2005.

³¹ Knight Frank Canberra Pty Ltd, *Valuation report block 8 section 48 division of Fyshwick Australian Capital Territory corner of Canberra Avenue & Newcastle Street*, 25 October 2005.

Components of the valuations

- 4.8 There were two parts to each of the valuations provided to LDA:
- *Analyses of past sales of comparable properties*—The reports analysed recent sales of comparable properties in the ACT and elsewhere. A difficulty with this approach is that no similar retail complex of the proposed magnitude of the Fyshwick site existed in the ACT. The requirement of the site to provide undercover parking also distinguished it from other sales in the ACT.
 - *A hypothetical development study*—The valuers built a hypothetical model of a bulky goods retailing centre according to town planning guidelines and the lease and development conditions. Their objective was to determine the value of the land and the viability of the development project. Such hypothetical studies rely on assumptions and estimates for a number of factors such as financing costs and various mixes of permitted uses, variations in both of which may cause fluctuations in the estimate.

Results of the LDA valuations

- 4.9 The two valuations provided to LDA in September 2005 returned similar results:
- \$12 million (GST exclusive), less the cost of any associated works; and
 - \$13.5 million (GST exclusive), allowing for \$0.5 million in off-site works.

Valuation independently obtained by Audit

4.10 Audit commissioned a further independent valuation of the site as at 30 September 2005 to inform an independent opinion of the market value of the Fyshwick site before the December 2005 sale by restricted auction.

4.11 Audit's valuer adopted a series of estimates and assumptions to derive hypothetical development values for the EpiCentre site. These estimates and assumptions covered:

- a development scenario;
- car parking;
- construction costings;
- professional fees;
- landholding fees;
- rentals derived from the development;
- lease incentives;
- vacancy rates;
- a capitalisation rate, including a postulated value for the land; and
- an equity contribution.

4.12 Audit also obtained several hypothetical valuations covering a range of possible uses for the site.

4.13 Against the background of the valuation assumptions and the IBECON retail sensitivity study, Audit's valuer found that larger amounts of space dedicated to DFO retailing at the Epicentre site (relative to bulky goods) probably would not increase the hypothetical value of the site because of the potential oversupply of general retailing. The range of values attributed under the scenarios was \$15.94 million to \$21.54 million.

4.14 Audit noted and accepted the independent valuer's analysis that indicated a diminishing value of land after reaching a certain threshold use of general retailing. The reasons for a diminishing value included an oversupply of retail space (leading to falls in rents, higher and longer vacancy rates and larger lease incentives) and higher construction and financing costs. Audit used a valuation of \$21 million, which reflected roughly equal uses for bulky goods and other retailing.

Assessment of valuation information

4.15 LDA obtained and used valuation information for the sale of Block 8 Section 48, Fyshwick that depended on a number of variables, including:

- that LDA's expert valuers considered all factors relevant to the market valuations;
- their interpretation of the Lease and Development Conditions for the site; and
- the efficacy of the valuation methodologies employed by LDA's expert valuers.

4.16 LDA's valuers did not explicitly interpret the lease and development conditions as they might apply to any one type of activity. For instance, the valuers did not consider whether a direct factory outlet fell within the four permissible uses in the Lease and Development Conditions specific to the Fyshwick site. The valuers observed that the lease purpose clause allows for a range of commercial retail activity on the site, and it is clear the valuers had regard to the Territory Plan, which contains definitions for each lease purpose, and that they satisfactorily considered the lease purpose clause of the Lease and Development Conditions. One LDA valuation specified approximately 35% non-bulky goods retailing.

4.17 Various interested parties expressed concerns to the Auditor-General that LDA's valuations for the site were inadequate because the valuations were based on the site being developed predominantly for bulky goods retailing.

4.18 Audit noted that the Fyshwick site allows for diverse retailing activity including a mixed use of bulky goods retailing, non-commercial uses, restaurant, and shop uses. The hypothetical outcome of any valuation depends on the assumption of the composition of mixed uses, ranging from a large proportion of the site being used for bulky good retailing, to the other end of the scale with a large proportion for

general retailing. General retailing can attract significantly higher rental yields than bulky goods, but this premium will diminish considerably as an unduly high proportion of general retailing becomes uneconomic. LDA's valuations appear to reflect the assumption that the site will be developed predominantly for bulky goods retailing. Valuations on this basis will derive a lower value for the site than valuations that considered a greater proportion of the site being used for general retailing (that is, if the 'shop' component of the mixed use was dominant) and represented a risk that the land might have been undervalued for the purpose of setting a reserve price.

4.19 LDA reserve price set for the land was \$13.5 million, lower than a value of around \$21 million provided by an independent backcast valuation commissioned by this Audit. The auction price of \$39 million was, however, well above Audit's valuation.

4.20 Certain industry sources have asserted that a more appropriate value for the site was around \$60 million. This figure may be based on an assumption of a development similar to a major traditional town shopping centre, a use that would not be permitted on this site under the Territory Plan. Audit notes that it was not the Government's policy intention that the EpiCentre development at Section 48 Fyshwick become a 'town centre' development like those in Woden, Belconnen or Tuggeranong, which are typically anchored by large department stores and supermarkets. Accordingly, it is not reasonable to assume that the land should be valued under this type of proposal.

4.21 Audit considered the concerns raised by submissions that potential bidders such as QIC, Westfield, Lend Lease, AMP, Brandsmart or Jen Retail Properties were absent, and that had these companies participated, a much higher price could have been obtained. The assessment of whether better financial outcomes could have been achieved under such circumstances would require the Auditor-General to compare the auction-winning bid (\$39 million) with speculative bids that may or may not have been made by other potential bidders. Such an assessment would necessarily involve Audit in speculation regarding aspirations of various bidders and would go beyond the recognised scope of a performance audit. As mentioned in Chapter 2, Audit has examined a confidential list of EOI respondents, and is satisfied that they represent a cross-section of some of the largest development interests in Australia.

4.22 In a letter to Audit, Austexx said the value of retail land generally could be gauged according to a three-tiered hierarchy based on allowable uses, as follows:

- a bulky goods only site has the lowest value;
- a mixed bulky goods and DFO site has a higher value; and
- a full retail site (that is, one on which a traditional shopping centre was allowed) has the highest value.

4.23 However, as the planning and lease controls for the EpiCentre site specifically precluded a large department store or a large supermarket, it followed that the site could not be developed as a traditional shopping centre and thus would not

attract the value of a full general retail site. Austexx was of the view that this explained the lack of interest in the sale by traditional shopping centre owners and developers.

4.24 On the basis of evidence and information available to Audit, Audit considers that the auction price of \$39 million obtained for the site appropriately reflected the market conditions and aspirations of qualified bidders for a reasonable (and most likely to be approved) combination of the permissible uses of the site, that is, a combination of bulky good and factory outlet retailing.

PLANNING OUTCOMES

4.25 This section of the report considers whether the sale of the Fyshwick site achieved appropriate planning outcomes for the Territory.

4.26 The ACT Government's strategic policy intentions for land planning may be discerned from sources such as *The Canberra Plan*, *The Canberra Spatial Plan* and *The Economic White Paper* (the second and third documents are sub-sets of the first), as well as from other sources already cited, in particular the *ACT Industrial Land Study*.

4.27 *The Canberra Plan* expresses the Government's vision for the future of the Territory by means of a range of 'strategic themes,' importantly including progress towards sustainability. The *Spatial Plan* and the *Economic White Paper* provide more precise strategic directions for land development and economic development respectively over the next few decades. The Fyshwick industrial area that includes the EpiCentre project on Section 48, for instance, is clearly identified in the *Spatial Plan* as a future urban development area designed to accommodate a range of commercial uses.

4.28 The *Economic White Paper*, on the other hand, while acknowledging the ACT's 'array of unique attributes and assets' such as its 'international status as a model of urban development,' nevertheless cautions that the Territory's restricted economic structure and narrow revenue base means that 'the ACT's own-source revenue is heavily dependent on housing and land-related transactions ...'. One essential solution to this difficulty, the White Paper notes, is supportive planning and infrastructure that helps to attract 'new economy' firms and industries to the ACT.

4.29 Successive ACT Governments have relied on changes to the Territory Plan to foster a wider range of uses, particularly retailing, in industrial areas to supplement existing traditional uses. Such uses include bulky goods retailing and—a more recent development 'product'—direct factory outlet (DFO) retailing. The Territory Plan defines 'bulky goods retailing'³² but not 'direct factory outlet'.³³

³² 'Bulky goods retailing means a shop which includes a loading dock within the building, and where the goods or materials sold or displayed are of such a size, shape or weight as to require: (a) a large

4.30 Variation 175 to the Territory Plan was to provide increased flexibility for retailing activities, while having regard to retail hierarchy. Notwithstanding the lack of clarity in certain documents, evidence examined by Audit tends to support the view that it has been the Government's general planning policy to enable a wide range of retailing activities in Fyshwick.

4.31 There is considerable industry and consumer demand for the kind of shopping experience offered by DFO developments. Industry confidence is indicated by the fact that the two main local DFO market entrants—that is, Austexx and Canberra Property Group—were prepared to bid up to \$39 million and \$38 million respectively for the first release of the EpiCentre development blocks at Fyshwick.

4.32 Various interested parties have submitted to the Auditor-General that ACTPLA's interpretation of the Territory Plan and the Lease and Development Conditions for the site was inconsistent with desired planning outcomes for the ACT and would have undesirable flow-on effects.

4.33 ACTPLA responded that its actions were consistent with the Government policy intentions to achieve optimal planning outcomes for the Territory. However, while the Government's policy intentions were likely to enable more flexible and diverse retailing, including DFO retailing, there inevitably would be varying effects on established retail businesses elsewhere in the ACT and surrounding region.

4.34 Audit notes that both LDA and ACTPLA commissioned research on this issue. This research indicated that likely adverse effects would be relatively minor. In particular, a report commissioned by LDA in January 2005 found that a DFO development at the EpiCentre site would have 'some impact' but that 'it is the proposed expansions in Civic and at the Woden and Belconnen Town Centres' that would cause the greatest impact on the traditional retailing hierarchy in the ACT.³⁴

4.35 Audit examined other studies carried out on behalf of non-government parties, as well as the National Capital Authority (NCA), that indicated the flow-on effects would be considerable. For instance, a report commissioned in February 2006 by the NCA to provide an independent analysis of the impact of the retail development proposed by the Canberra International Airport on the retail hierarchy of Canberra (the Dimasi report)³⁵ found that the 'addition of another factory outlet centre

area for handling, storage or display; and/or (b) ... but does not include any shop used primarily for the sale of food or clothing.'—ACT Planning and Land Authority, *Territory Plan* (as amended June 2002), Canberra, 2002, p.3 of Part D.

³³ 'Bulk retail facilities ... generally offer a part of the retail spectrum which mostly comprises bulky goods such as furniture and electrical, usually from large floorspace units, and more recently Discount Fashion Outlets (DFOs) which specialise in discounted offers of seconds, bankrupt stocks, end of season or end of line clearances, etc.'—Ian Booth, *ACT Retail Model Sensitivity Tests*, IBECON Pty Ltd, Sydney, January 2005, p.4.

³⁴ Land Development Agency, *ACT Retail Model Sensitivity Tests*, IBECON Pty Ltd, Sydney, January 2005, p.8.

³⁵ The NCA commissioned the report as part of their consideration of the application by the Canberra International Airport for a direct factory outlet on the airport site.

at Fyshwick ... is likely to have impacts on the hierarchy of [town and local shopping] centres throughout Canberra'.³⁶ The Dimasi report commented:

It is our view that two factory outlet centres of the size proposed in the Canberra urban market are unsustainable. The most likely outcome is that one centre will be successful, with the other having to revert to operating as a more traditional retail centre for survival, and therefore competing more strongly with the Town Centres. If this is the case, it will impact on the hierarchy of centres outlined in the National Capital Plan.

4.36 In its formal submission to ACTPLA about the Austexx DA for the EpiCentre site, the NCA reminded the Authority that

... the Territory shall not do any act that is inconsistent with the National Capital Plan (the Plan). In particular, ... [the part] of the Plan that applies to the site, among others ... includes principles for urban areas, with one of these principles being the maintenance of the hierarchy of [ACT commercial] centres.³⁷

4.37 The NCA informed ACTPLA that it understood the Authority was 'aware of the potential impacts of the proposed development at Block 8 Section 48 Fyshwick on the hierarchy of centres' and that this would be 'an integral part of [the Authority's] planning assessment for the site'.

4.38 In its formal approval of the Austexx DA, ACTPLA stated in response to an objection that 'Canberra is not large enough to sustain both Brand Depot Centre at the airport and the DFO Centre at Fyshwick':

The ongoing relative attractiveness of the Brand Depot and DFO centres to each other and to the town centres will determine where the trade impacts are most felt. In this context, the Airport has poorer metropolitan accessibility than the town centres or Fyshwick. It was never intended to be the location of major retailing activity, whereas over time the role of Fyshwick has changed from purely an industrial centre, to a mixed use centre.³⁸

4.39 Further, in response to an objection that the revised Territory planning laws for industrial areas were 'intended to free up limits on the size of bulky goods businesses ... [not] to remove constraints on non-bulky goods retail', ACTPLA stated:

The development of a DFO is consistent with the Precinct 'b' (Retail, Warehouse and Commercial Services) objectives to "provide an accessible location for commercial and service activities with a metropolitan or regional catchment". It is not inconsistent with the other Precinct 'b' objectives. It is considered that the development is consistent with the Territory Plan.

³⁶ National Capital Authority, *Canberra International Airport Factory Outlet Centre Extension*, Dimasi, Canberra, February 2006, p.17.

³⁷ Letter from Managing Director, Planning and Urban Design, NCA to ACTPLA, 16 June 2006.

³⁸ ACT Planning and Land Authority, *Notice of Decision: Application No.200504369—Block 8 Section 48 Fyshwick*, Canberra, 21 September 2006, p.21.

4.40 On balance, it is the opinion of Audit that the sale of Block 8 Section 48, Fyshwick generally conforms to the Government's strategic planning policy intentions, as it allowed increased diversity and flexibility of general retailing, and obtained a specific planning outcome intended for the EpiCentre development on Section 48, namely a significant bulky goods facility. The sale was also consistent with perceived consumer and industry demand for bulky goods and other retailing opportunities.

4.41 It is outside the scope of this Audit to examine in detail the ACT retail industry. Accordingly, Audit did not form any opinion on the impact of the approved development for the EpiCentre site on the ACT retail hierarchy. Audit notes that ACTPLA has had regard for this matter in the process of the formal approval of the Austexx DA.

4.42 Audit notes that on 19 October 2006, the NCA further requested ACTPLA to 'provide conclusive advice as to the reasoning for the decision to approve the Epicentre development at Fyshwick, particularly the reasoning relating to National Capital Plan issues'. As previously mentioned, the NCA advised Audit it was undertaking a peer review of the ACTPLA delegate's approval of the development to assess whether the approved development is inconsistent with the National Capital Plan.

CONCLUSION

4.43 Concerns have been expressed in the Legislative Assembly, media and elsewhere about whether the sale of Block 8 Section 48, Fyshwick has achieved appropriate financial outcomes for the Territory. Views have been submitted to Audit that, for example, had LDA marketed the site as capable of being used for 'retail purposes' of up to 30 000 square metres, then a greater field of developers would have entered the bidding and that the final price could have been closer to \$60 million.

4.44 The value of a lease of land to any particular prospective buyer will depend on a range of matters, including the location, planning controls and land use restrictions, the lease conditions, environmental issues and, importantly, the prospective buyer's assessment of the prevailing market conditions. The prospective buyer will consider these various matters and form a view whether their intentions for the site can be accommodated within the lease purpose conditions, and how much they are prepared to commit to gain the lease and undertake the intended development.

4.45 In the previous chapter, Audit concluded that documentation relating to the sale allowed for a range of commercial retail activity on the site but, significantly, neither they nor the Government's explicitly stated policy intentions permit a development on the site akin to the town centres in Woden, Belconnen or Tuggeranong. As such a development is most unlikely to be approved, it is not reasonable to assess the value of the land on that basis, as suggested by some industry sources.

4.46 On balance, despite a weakness in communications between LDA and ACTPLA and interested parties, Audit is of the opinion that interested bidders were reasonably informed of the potential use of the land and that, for this particular sale, market forces operated to ensure a reasonable financial return to the Territory. That the successful bidder committed a sum well in excess of the valuations obtained by LDA, and subsequently confirmed by Audit's independent valuation (including an appropriate interpretation of the permissible uses for the site), supports Audit's view that the sale returned an appropriate financial outcome for the Territory.

4.47 The sale of Block 8 Section 48, Fyshwick generally conformed to the Government's strategic planning policy intentions to the extent that it allowed increased diversity and flexibility of general retailing. The sale also obtained a specific planning outcome intended for the EpiCentre development on Section 48, namely a significant bulky goods facility, and was consistent with perceived consumer and industry demand for bulky goods and other retailing opportunities.

APPENDIX A – AUDIT CRITERIA AND APPROACH

AUDIT CRITERIA

Key issues determined by this Audit included:

Sale process

Procedures and practices

- Were appropriate procedures and practices observed and applied during the sale process applying to Block 8, Section 48 Fyshwick, particularly in respect of auction documentation and dissemination of information to prospective bidders?

Selection of bidders

- Was the process to identify and select potential bidders effective in that it ensured the maximum number of potential bidders in order to achieve maximum financial results and desirable planning outcomes?

Communications

- Were appropriate procedures and practices in place to ensure that the roles of the two key government agencies involved in the sale—that is, LDA and ACTPLA—were well defined and effective, particularly in respect of communications between the two agencies, between the two agencies and prospective bidders, and with the Minister for Planning?
- Did the communications protocols ensure probity, fairness, and transparency?
- Were there any conflicts of interest, actual or perceived, which might have compromised the integrity of the sale process?

Planning issues

- Was the documentation relating to planning requirements and policy intentions for Block 8, Section 48 Fyshwick unambiguous and transparent?
- Was Variation No. 175 to the Territory Plan (2003) correctly interpreted and properly communicated in respect of the subject land, including its consistency with the Territory Plan and the National Capital Plan?
- Was there appropriate communication with the National Capital Authority to ensure consistency with the National Capital Plan?

Outcomes for the Territory

Financial outcomes

- Did the sale of Block 8, Section 48 Fyshwick achieve appropriate financial outcomes for the Territory—that is, did the Government receive optimum

value for the land or could the sale price have been higher if, for instance, lease conditions had been differently specified?

- Was appropriate valuation information obtained and used by LDA?

Planning outcomes

- Did the sale of Block 8, Section 48 Fyshwick achieve appropriate planning outcomes for the Territory?

Related issues

- Were there transparency and accountability in government administrative processes in dealing with the public in general and interested parties in particular?

AUDIT APPROACH

The Audit approach included the following steps:

- interviewing and corresponding with management and relevant staff of LDA and ACTPLA to identify specific policies and practices associated with the sale and planning processes;
- examining all relevant files, meeting notes, electronic and other communications, and other relevant materials;
- seeking comments from the National Capital Authority regarding the National Capital Plan and its relevance to the permitted uses of the subject land;
- analysing documentary and other evidence regarding compliance with relevant legislation and policies;
- considering whether the sale and planning processes were consistent with sound practices;
- analysing documentary and other evidence regarding the respective roles of LDA and ACTPLA in the sale and the planning and development processes;
- commissioning an independent valuation of the subject land; and
- seeking submissions from interested parties.

Under the powers vested in the Auditor-General by section 14 of the *Auditor-General Act 1996* (ACT), Audit gained access to legal advices that ordinarily would attract legal professional privilege, and other commercial-in-confidence material, which were exempted from public release under section 42 of the *Freedom of Information Act 1989* (ACT). Parties were advised that extracts from these documents would be referred to as necessary for the purposes of this Audit Report.

APPENDIX B – LIST OF SUBMISSIONS

Submissions relating to this Audit were received from the following organisations, Members of the Legislative Assembly, and individuals:

- Austexx Pty Ltd
- Capital Property Finance Pty Ltd
- Dr Deb Foskey MLA
- Mr Tony Powell, AO
- Property Council of Australia
- Mr Zed Seselja MLA
- Shopping Centre Council of Australia Ltd

In addition to the above submissions, information was also provided by the National Capital Authority.

APPENDIX C – COMPARISON OF LDA PROCEDURES AND PRACTICES

Table C.1 below summarises the procedures and practices observed in other jurisdictions and considers the extent to which LDA’s land sales procedures in respect of the sale of the Section 48 Fyshwick site are in accordance with those practices and LDA’s approved Policy and Procedures.

Table C.1: Comparison of LDA’s procedures and practices with other jurisdictions

| Procedures/practices of other jurisdictions | LDA procedures in accordance with other jurisdictions? | Audit comments on application of LDA procedures |
|---|--|--|
| <i>Value for money / Open and effective competition</i> | | |
| Inclusion of security of purpose conditions to ‘lock in’ the purpose to which the land subject to the disposal is put (Cth). | Yes | The Lease and Development Conditions and the Crown Lease include a purpose clause. In the sale of Block 8 Section 48, there was a lack of clarity in the planning controls as applied to permitted uses. |
| Obtain draft terms and legal advice on security of purpose conditions on the disposal (Cth). | Yes | The Lease and Development conditions are reviewed by LDA’s solicitor and approved by ACTPLA. |
| Property is to be sold on the open market at full market value or at the highest price possible given the intended end use (Cth, VIC, NT). | Yes | The restricted auction process does not inhibit open and effective competition. Two independent valuations are obtained to determine the reserve price. Valuers are provided with necessary information, including the Lease and Development conditions. However, in the case of Block 8 Section 48, LDA’s valuers did not emphasise higher uses than bulky goods. |
| Obtain a current market valuation for properties valued in excess of \$1 million (ANAO). Obtain two current valuations where the market value of the land is greater than \$500 000 (VIC). | Yes | LDA’s land sales procedures require two independent valuations to be sought. |

Appendix C – Comparison of LDA Procedures and Practices

| Procedures/practices of other jurisdictions | LDA procedures in accordance with other jurisdictions? | Audit comments on application of LDA procedures |
|---|---|---|
| Sell properties at prices at or above the market valuation (Cth, ANAO, VIC). | Yes | The CEO or the Chief Finance Officer (CFO) sets the reserve price at or above the valuation. |
| Market valuation is to reflect the lease terms and conditions (ANAO) and all information that may affect the valuation of the land. Valuers must each be given identical instructions (VIC). | Yes | Valuers are provided with the same information, including the Lease and Development conditions. Audit noted that the information provided to valuers had an emphasis on bulky good retailing opportunities. |
| If the land fails to sell at auction, it is to be passed in for negotiation with the highest bidder and offered for sale at not less than the reserve price (VIC). | Yes | This is included in LDA's land sales procedures. |
| <i>Probity, Accountability and Transparency</i> | | |
| Make available to prospective purchasers sufficient information on which to base conforming bids (e.g. by commissioning and making available a range of property information reports during the sale process) (ANAO). | Yes | A range of property information is made available to prospective bidders during the sale process, including (where applicable): <ul style="list-style-type: none"> • market research reports and impact studies; • the Preliminary Assessment; • the NCA approved Development Control Plan; • the ACTPLA approved Draft Crown Lease and Lease and Development Conditions; and • general sales information. |
| Request valuers to provide draft valuation reports prior to submitting a final market valuation (ANAO). | Yes | This is standard commercial practice. |
| Determine and communicate to potential tenderers the basis for selection and the evaluation criteria before the tender documentation is issued (ANAO). | Yes | The evaluation criteria are included in the Request for EOI documentation. |
| Require written declarations regarding conflicts of interest (VIC). | Yes | LDA requires written declarations regarding conflicts of interest. |

Appendix C – Comparison of LDA Procedures and Practices

| Procedures/practices of other jurisdictions | LDA procedures in accordance with other jurisdictions? | Audit comments on application of LDA procedures |
|--|---|---|
| Develop a probity plan articulating the probity principles to be considered and audit work to be undertaken (ANAO). | Partly | LDA engaged the Australian Government Solicitor (AGS) as a legal process advisor in connection with the sale process of the Fyshwick site. An 'evaluation plan' for short-listing participants in the restricted auction for the EpiCentre site was approved that included a probity section covering issues such as conflict of interest, communication with respondents, EOI confidentiality, document security and proper recording of evaluation committee meetings. Better practice would have been for LDA to develop and implement a probity plan covering all stages of the land sale process, from the Request for EOIs through to the auction and its immediate aftermath, not just the evaluation stage. |
| Do not create any expectation with prospective purchasers that they will be able to utilise the land for a purpose other than that which is permitted (VIC). | Yes | LDA does not offer any interpretation of the documentation issued. Interested parties are responsible for obtaining their own independent legal advice when requiring interpretation of any documentation issued by LDA. |
| Provide a formal written briefing to the Minister on the outcome (ANAO). | Yes | This is included in LDA's land sales procedures. |
| <i>Risk Management</i> | | |
| Require successful bidders to lodge a security (deposit or guarantee) (ANAO, WA). | Yes | Successful bidders are required to lodge a 10 percent deposit 'at the fall of the hammer'. |
| Conduct financial capability assessments on shortlisted bidders (ANAO). | Yes | This is part of the restricted auction process. Refer 'Evaluation of EOI' section for further details. |
| Sale should be conducted through a licensed real estate agent (VIC). | Yes | Auctions are conducted through licensed real estate agents. |
| Valuers to provide valuations at least two to three weeks before the auction date (VIC). | Yes | This is included in LDA's land sales procedures. |

Appendix C – Comparison of LDA Procedures and Practices

| Procedures/practices of other jurisdictions | LDA procedures in accordance with other jurisdictions? | Audit comments on application of LDA procedures |
|--|---|---|
| Reserve price should not be disclosed to the selling agent before the auction (VIC). | No | The auctioneer is advised of the reserve price prior to the auction. Audit considers that the disclosure of the reserve price may not necessarily have an adverse impact on the auction, as the risks associated with such disclosure are very low. |

APPENDIX D - PROCEDURES TO PROTECT THE PROBITY, TRANSPARENCY, AND ACCOUNTABILITY OF A PROCUREMENT ACTIVITY

In the conduct of procurement and disposal processes under the *Government Procurement Act 2001*, a range of measures (outlined below) have been adopted to help protect the probity, transparency and accountability of the individual procurement activities. A number of specific elements are detailed in Procurement Circulars that have been issued by the Government Procurement Board, including in the circular on Industry Briefings and Site Inspections. Some other elements are incorporated in the practices detailed in the ACT Procurement Solutions Business Management System and provide best practice guidance to relevant staff of my Division.

The specific measures that are adopted in the pre-tender closing period include:

- Establishment of a single contact officer for each procurement, to act as a single point of contact for potential tenderers. The identity of the contact officer is specified in the tender documents and any associated industry briefings. Potential tenderers are advised that all contact should be through the nominated officer;
- Taking transcripts or detailed notes of industry briefings and site visits and subsequent publication of these records, either generally or to all participating parties.
- The documentation of any specific questions from individual firms and the notification of all potential tenderers of the questions and answers;
- Where required, the provision of specific answers as an Addendum to the individual tender, with a requirement for potential tenderers to acknowledge receipt of the Addendum;
- The publication of the tender notifications and any Addenda through **basis** (www.basis.act.gov.au), with automatic electronic notification of any Addenda, or associated questions and answer material, to any firms that have downloaded the initial tender information;
- Use of staff with relevant experience and understanding of best practice approaches and probity advisors and auditors where necessary; and
- Limiting ad-hoc contact in relation to the subject matter of the tender with potential tenderers, other than through the single contact officer, in the period between the decision to proceed with a procurement and the close of tenders.

Examples of significant procurements where this approach has been used include:

- the 2003/04 Expression of Interest process relating to the provision of convention and exhibition facilities in Canberra;

- the ACT prison project; and
- various school construction projects.

In addition to the above measures, consideration is being given to incorporating in tenders, as a condition of tender, that tenderers may only rely on information from Government agencies (other than published information that is already widely available) that has been obtained through the central contact point.

Discussions have been held with the Government Procurement Board with a view to the Board issuing a Circular to provide best practice guidance to agencies on the above matters. This would also be of assistance to agencies in their broader commercial dealings with the private sector, particularly in relation to competitive processes that do not fall within the definition of matters explicitly covered by the GPA, including grants schemes. In this regard, our general advice to agencies is that whilst they may not be required to follow processes specified by the Procurement Guidelines, there is merit in them having regard to any of the procurement principles that may be relevant.

ACT Procurement Solutions
ACT Department of Treasury

APPENDIX E – RESPONSE FROM THE LAND DEVELOPMENT AGENCY

ACT Auditor-General's Office

Performance Audit Report Proposed Report

Sale of Block 8 Section 48, Fyshwick

Response from the Chief Executive Officer, Land Development Agency

Summary

The Land Development Agency (LDA) notes that the Auditor-General has found that:

- The sale of Block 8 Section 48, Fyshwick was in accordance with the relevant legislation, policy and better practice and that LDA conformed with better practice standards in other jurisdictions (1.15*)
- The sale was conducted fairly, that there was no preferential treatment extended to any party and that there was appropriate accountability (1.15 & 3.99);
- The sale achieved appropriate financial outcomes for the Territory. In fact the outcome was "well above the Audit valuation." (4.19) – 81 per cent higher. This was an outstanding financial result for the Territory by any measurement.

These findings vindicate LDA's often expressed position that the sale process was conducted with integrity and fairness.

There are however, some aspects of the Report to which LDA objects. In making the following comments, LDA notes that five submissions were made to the Auditor-General, but none of these were made available to LDA beyond the extracts included in the Report. In consequence, LDA is not aware of the full details of any allegations and/or assertions and therefore the Agency has been unable to respond to them specifically.

Audit Opinion - Documentation

LDA rejects the finding that "the clarity of the sale documentation could have been improved with the inclusion of an appropriate interpretation of the Territory Plan..." (1.15). The issue of clarity was the basis of an unsuccessful application to the ACT Supreme Court to halt the auction made by an entity of the Capital Property Group on the day before the auction. Justice Connolly dismissed the application, stating:

"It seems to me that it is abundantly clear that what kind of purchase at the auction is the right to acquire an ACT crown lease, which could be used for the purposes of the lease purpose clause. And the lease purpose clause is four, bulky goods, non-retail commercial use, restaurant and shop. And the ambiguity about that would be clarified when one reads further which indicates certain size restrictions as to shops selling food."

* Numbers refer to paragraph numbers of the Report

In LDA's view, Audit has given far too little weight to the judgement. Audit seems also to have failed to appreciate the sale conditions under which the Agency deliberately restricted participation in the auction to experienced and qualified developers.

Here again, the judgement of the Supreme Court recognises the importance of this:

"It seems to me that there is no basis for the grant of an injunction to prevent an ordinary market process from continuing. Persons, including corporate entities, who have achieved qualification for this sale will presumably be experienced individuals or commercial entities who have some understanding of the way land is made available in the Australian Capital Territory. And they will understand that they are purchasing not free hold property subject to local council planning controls, but an ACT commercial lease. They will understand that an ACT commercial lease means that you can only conduct the activity contained or approved in the lease. The activities in this lease, it seems to me, are clear.... the lease conditions are clear on their face."

In addition, interpretation of the Territory Plan is not a matter of alternative or additional words to enable the meaning or intent to be more readily understood, as Audit seems to suggest. The Territory Plan is subordinate legislation and its interpretation is reserved to the courts.

Audit's own inability to offer a conclusive interpretation of the Territory Plan (3.98) should have demonstrated the unworkability of its proposal.

LDA also rejects the assertion that "both LDA and ACTPLA were aware of uncertainty concerning industrial land use policies in the Territory Plan." (1.26). LDA was not aware of any reasonable lack of certainty that warranted intervention, a position also vindicated by the Court judgement.

Audit Opinion - Communications

The Agency disagrees strongly with the Audit opinion that there was not a single point of contact for the sale and that LDA did not communicate to all registered bidders certain planning information (1.16). The Report fails to acknowledge that the sale was conducted in accordance with the following policy framework:

- Clause 11 of the call for Expressions of Interest document nominates a single point of contact and a formal communication process;
- Clause 9 of the General Sales Information document issued to all registered bidders includes the requirement for prospective purchasers to make their own inquiries regarding the site;
- Planning information was provided to all registered bidders by including executive documents that had been approved by ACTPLA as the statutory planning regulator;
- LDA's Land Sales Policy and Procedures Manual (the provisions of which the Auditor-General found to be generally in accordance with good practice principles

– 2.36 & 2.37) states that "the Sales and Auction Manager is the central contact point for all auction inquiries."

It is clear therefore, that LDA already acts as a single point of contact for matters relating to the sale of its land. However, the Agency is not qualified (and nor is it its role) to interpret for prospective purchasers planning and regulatory matters; that is the role of the expert regulators. Further comments on this point are made under Recommendation 2.

LDA also rejects the finding that LDA did not communicate relevant planning information to all registered bidders as expected under better practice (2.78).

All relevant planning information that had been approved by ACT Planning and Land Authority (ACTPLA) was made available to all registered bidders. This supports the finding by Audit that there was no evidence to support any conflict of interest or unfairness in the sale process (2.79). Further, given the circumstances set out in the Report relating to correspondence with one registered bidder, LDA maintains that the claim of preferential treatment, if genuinely held, was not reasonably so held.

LDA notes that Audit formed the opinion that "ACTPLA endeavoured to maintain an appropriate balance between ensuring the inquirer received the relevant information and ensuring commercial-in-confidence information provided by one bidder was not advertently or inadvertently transmitted to commercial competitors." Audit also notes that ACTPLA's legal advice was not conveyed to a bidder nor, in Audit's opinion, should it have been; Audit comments that ACTPLA (in common with most government agencies and commercial bodies) does not make public documents that attract legal professional privilege (3.77).

LDA, too, was bound by precisely the same constraints and considerations as those mentioned by Audit.

Report Summary and Audit Opinion

Recommendation 1 (Chapter 2)

LDA should develop and implement specific probity plans and risk management plans covering all major land sales it undertakes.

Agency Response:

Disagreed.

Risk management processes are already embodied in the Agency's documented land sales procedures. The Auditor-General's own finding was that "LDA has sound policies and procedures for the sale of land that are generally in accordance with good practice principles observed in other jurisdictions" (1.16).

LDA had a probity plan for the call for Expressions of Interest to select shortlist bidders and there was no requirement for a probity plan for the commercial auction, which was conducted in accordance with the Agency's land sales policies and procedures (the provisions of which Audit found to be generally in accordance with good practice principles - 2.36 & 2.37).

Reference to LDA's risk management plan and procedures is omitted from the Report. These have been developed in close consultation with LDA's internal auditor. The Agency's governance processes and risk framework support a rigorous approach to the identification and management of strategic and project risks.

The clear evidence of the Report is that LDA acted with the utmost probity – that is with integrity and honesty.

Recommendation 2 (Chapter 2)

For major Government land sales:

- LDA, as the Government's vendor, should act as a single point of contact to process all inquiries from, and dissemination of information to, interested parties about the sale, planning and other key regulatory matters.
- Alternatively, ACTPLA and other key regulatory agencies should take responsibility for formally advising LDA to properly inform the market.

Agency Response:

Disagreed

The Agency already acts as a single point of contact for matters relating to the sale of its land. In its sales documentation, the Agency makes it patently clear that prospective purchasers must carry out their own due diligence and must rely upon their own inquiries. The Agency believes it is best practice for it to continue to direct prospective purchasers to those who are best placed to provide required information.

In the Agency's view, the adoption of the Auditor General's recommendation would place the Territory at unwarranted risk.

The model drawn from the Department of Finance and Administration (Finance) proposed by Audit (2.65) is not in accordance with Finance's own sales material. A contract for a land sale issued by Finance in May 2005 held by LDA states that the purchaser must acknowledge that they have made their own enquiries in relation to environmental reports, into when adjacent roads will be constructed and in respect of the Development Control Plan for the site. The purchaser must also acknowledge that it has examined key documentation ("the Search Report") and that the vendor does not warrant the accuracy of the responses from the various Authorities.

This approach is consistent with LDA's current process and with the better practice examples operating in other jurisdictions such as Brisbane City Council, and in government land sales agencies in other States. These better practice examples ensure the role of the government land vendor is separate from that of the regulator, even when both functions exist under the same governmental structure.

While LDA supports the "good public policy" outcome proposed by Audit (2.64), good public policy does not extend to public agencies assuming functions beyond their statutory powers and/or expertise and thereby exposing themselves unnecessarily to the prospect of liability.

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